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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of :
:
ACME ASBESTOS COVERING AND : Docket No. 4613
FLOORING COMPANY, et al. :

ANSWER OF

THE PHILIP CAREY MANUFACTURING COMPANY

The Philip Carey Manufacturing Company, hereinafter referred to as Manufacturing Company, appearing herein by its attorneys Cadwalader, Wickersham & Taft, answers the complaint and states:

1. Answering PARAGRAPH ONE, Respondent admits the intention of the Commission to attach to the words "licensed materials" and "non-licensed materials" the meaning set forth in PARAGRAPH ONE, but denies the correctness of the meanings attributed to said words.

Denies that respondents classified the materials forming part of the United States patent No. 1,972,500 in the sub-license agreements which the respondent Donald Tulloch, Jr. had with other respondents, and states that said materials were classified by the Licensor.

Denies that all materials described by the wording of paragraphs (1) to (11) were licensed materials and states that the terms of said license agreements clearly disclose that the agreements apply only to materials embodying the invention of the said patent.

Denies that all flexible range boiler jackets were non-licensed materials and states that the materials of many flexible range boiler jackets embody the invention of said patent.

States that The Philip Carey Company is not a corporation and is non-existent, and therefore should not be designated as a respondent corporation.

2. PARAGRAPH TWO, admits the allegations therein except that Manufacturing Company denies that The Philip Carey Company is a corporation.

3. PARAGRAPH THREE, admits that both licensed and unlicensed materials were embodied, involved and employed in the manufacture, use and sale of low pressure asbestos pipe covering, and Manufacturing Company is without knowledge of the percentage of said covering manufactured or sold by the respondents and is without knowledge of the percentage of said covering manufactured or sold by the "respondents Johns-Manville Corporation and The Philip Carey Company".

Admits that some of respondent corporations manufacture some or all of their licensed and unlicensed materials and convert some of the same into low pressure asbestos pipe covering, but denies that said respondents, or any of them, convert all of said licensed and unlicensed materials into such covering. Admits that other respondent corporations known in the trade as "winders" purchase some or all of said licensed and unlicensed materials from those respondent corporations which manufacture same and then convert some of said materials into low pressure asbestos pipe covering, but denies that said "winders", or any of them, convert all of said materials into low pressure asbestos pipe covering.

Denies that the respondent corporations act collusively or collectively in the pricing or sale of said materials or covering and denies that they are in a position to dominate and control the prices at which the same must be purchased by the purchasers and users thereof throughout the United States.

4. PARAGRAPH FOUR, admits that the respondent corporations engaged in interstate commerce and denies the other facts alleged in said paragraph.

5. PARAGRAPH FIVE, denies each and every fact alleged in said paragraph.

6. PARAGRAPH SIX, admits that respondent corporations have been and some still are in competition with one or more of the other respondent corporations in making and seeking to make sales in interstate commerce of low pressure asbestos pipe covering and of licensed and unlicensed materials and, except as herein specifically admitted, denies each and every fact alleged in PARAGRAPH SIX, and specif-

ically denies that competition between the respondent corpo- ations has been hindered, lessened, restricted or forestall by any understanding, agreement, combination, conspiracy, method, policy or practice as set forth in the complaint or otherwise.

7. PARAGRAPH SEVEN, admits that during the year 1931 application was made for respondent Johns-Manville Corporation for the Toohey patent which contained claims embodying the licensed materials and for an asbestos air cell insulation which by the insertion of a wax sizer would make the asbestos covering both water repellent and moistur proof, and that such asbestos covering is used primarily fo low pressure asbestos pipe covering and that the patent was granted on September 4, 1934, but denies that the foregoing fully states the claims embodied in said patent or correctl describes the scope of same, and denies that the patent was granted as part of or incident to the agreement, understand ing, combination or conspiracy set forth in the complaint.

Manufacturing Company admits that Johns-Manville Corporation did on September 11, 1935, grant to respondent Tulloch an exclusive license to make, use and sell, and exclusive right to issue non-exclusive licenses to others to use and sell materials and products covered by the Toohey patent.

8. Denies each and every fact alleged in the

paragraphs of the complaint numbered EIGHT, NINE, TEN, ELEVEN and TWELVE.

AS A FIRST SEPARATE AND COMPLETE DEFENSE AND EXPLANATION OF ALLEGED FACTS IN THE COMPLAINT, MANUFACTURING COMPANY FURTHER STATES:

9. Some of the respondent corporations and others engaged in the low pressure asbestos pipe covering industry during a period commencing many years prior to the year 1934, and in the development of the industry, trade practices became established through competitive and other economic forces. These trade practices included the general use of a so-called "list" price from which discounts were allowed for the purpose of determining the actual price charged a customer, the use of delivered prices in zones, the granting of freight allowances calculated from the nearest competing factory point, and the use of common definitions of various classes of purchasers.

10. On November 1, 1933, the President of the United States approved a Code of Fair Competition for the Asbestos Industry pursuant to the authority vested in him by Title I of the National Industrial Recovery Act approved June 16, 1933. Pursuant to the provisions of the Code, a Code Authority was set up to cooperate with the Administrator in the administration of the Code, and for purposes of adminis-

tering the Code the Asbestos Industry was divided into five divisions, of which the first was the Asbestos Paper and Allied Products Division, which included all asbestos papers, asbestos and wool felt pipe covering, air cell pipe covering, asbestos laminated pipe covering, and pipe covering accessories; that is to say, said Division included the products of the Low Pressure Asbestos Pipe Covering Industry.

Article VI of the Asbestos Code provided, among other things, that the Code Authority should adopt its own rules of procedure and appoint such officers or agencies as it might deem necessary properly to administer the Code, subject to review by the Administrator, and directed the Code Authority to delegate to a sub-code authority of each member division the administration of all matters other than labor provisions. Each Division was directed to adopt its own rules of procedure with respect to administering the Code, and the members of each Division were authorized to prepare a merchandising plan for the Division, incorporating the merchandising policies best calculated to promote fair competition in such Division. It was also provided that such merchandising plan, when approved as provided in the Code, should be binding upon all members of the Industry who were members of the Division.

Article III of the Asbestos Code provided that for the purpose of insuring complete publicity of prices, terms and conditions of sale to manufacturers and to the trade concerned, and thus to promote fair competition, every member of the Division should file a schedule of his prices, terms and conditions of sale in the office designated for such division, and there were regulations with respect to publishing any changes in prices, terms and conditions of sale.

In accordance with the foregoing provisions of the Asbestos Code, a merchandising plan incorporating many trade practices long established in the Industry, was approved for the Low Pressure Asbestos Pipe Covering Division of the Industry, and compliance therewith became obligatory upon all members of said Division, according to the laws of the United States then in effect.

Compliance with the price-filing provisions of the Code was obligatory upon all members of the Division, and a violation of any provision of the Asbestos Code was an unfair trade practice.

Section 3 (b) of the National Industrial Recovery Act provided:

> "(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

and subsection (f) of the Act provided:

> "(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense."

Overwhelming sentiment in the country required business executives to conform to the provisions of codes of fair competition. Having in mind the terms of the National Industrial Recovery Act, the public policy declared by the executive and administrative branches of the Government and the decisions of inferior tribunals, Manufacturing Company asserts that compliance with the provisions of the Asbestos Code prior to the decision in the Schechter case by the Supreme Court of the United States in May 1935 was not an unfair method of competition in commerce, within the meaning of Section 5 of the Federal Trade Commission Act.

11. Following the decision in the Schechter case in May 1935 and for approximately the remainder of the year 1935, members of the Low Pressure Asbestos Pipe Covering Industry continued by individual decision to carry on business operations in much the same way as under the Code, but at no time did they agree upon prices or terms of sale of

their products or otherwise engage in unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

12. A study of open price filing was made by the National Industrial Recovery Board appointed for the purpose by the President and a report was made by the Board under date of April 29, 1935, stating:

> "E. Price Filing not Price Fixing.- It is hardly necessary to say that open-price filing is not price fixing. Nor should evidence of collusion in their making be inferred from a uniformity in the prices which are filed. Competition is supposed to effect uniformity of prices through an open market; and an approximation to uniformity is almost certain to result from the proper maintenance of open-price filing. It is when the prices quoted by the members of an industry move in concert faster than competitors can easily accommodate themselves to each other's activities or when prices move uniformly and sharply upward in contrast to trends in related industries that evidence of collusion is present. Open price filing is a device; price fixing is a business policy in operation."

Open price filing was continued by a number of members of the Low Pressure Asbestos Pipe Covering Industry until about the end of the year 1935, but price uniformity did not exist in the Industry and no price fixing agreement or understanding was entered into by members of the Industry.

13. The decision of the Supreme Court in the Schechter case did not invalidate the National Industrial Recovery Act. The National Recovery Administration func-

tioned actively through the remainder of the year 1935. By a joint resolution of Congress of June 14, 1935 the National Industrial Recovery Act in modified form was extended to April 1, 1936, and by the terms of the extended Act the President was authorized to approve voluntary agreements entered into between members of an industry. Proposed voluntary agreements for more than twenty industries were submitted to the National Recovery Administration for approval by the President subsequent to May 1935, and on or about June 17, 1935, a proposed voluntary agreement for the Asbestos Industry including many of the principles of the Asbestos Code was filed for such approval with the National Recovery Administration. Before the said agreement was approved an executive order was promulgated December 21, 1935, terminating the National Recovery Administration as of January 1, 1936.

14. During the period between May and December 1935 Congress, the President and the National Recovery Administration encouraged industry members to cooperate in maintaining the standards of fair competition which had been written into codes and efforts were made by government agencies to develop a procedure by which the cooperative efforts existing under the codes could be continued. Public hearings were held by the National Recovery Administration and by the Federal Trade Commission upon proposed voluntary agreements

which had been submitted by certain industries for the approval of the President. During this period members of the Low Pressure Asbestos Pipe Covering Industry met from time to time to discuss ways and means of adopting policies approved by the Government, through the terms of a voluntary agreement or otherwise. These meetings ceased with the promulgation of the Executive Order terminating the existence of the National Recovery Administration and were not resumed after January 1, 1936.

15. Long prior to the enactment of the National Industrial Recovery Act the members of the Low Pressure Asbestos Pipe Covering Industry recognized the existence of a serious defect in industry material, in that a substantial shrinkage frequently occurred in the asbestos covering after its application to low pressure piping. This defect caused complaints from customers, expense to members of the Industry for repairs, and discredited to some extent the products of the Industry. Numerous efforts were made to find a remedy for this defect, and after prolonged investigation respondent Johns-Manville Corporation filed an application for the so-called Toohey patent on September 26, 1931. Ten claims were allowed and Letters Patent issued September 4, 1934. Materials for low pressure pipe covering embodying the invention of the patent were subject to only slight shrinkage and through the means of this patent it be-

came possible to do away with substantially all of the said shrinkage in pipe covering. Materials embodying the invention of the patent were also superior in other respects to the unpatented materials.

16. In order to increase the popularity of asbestos pipe covering with the public by removing the element of shrinkage and thereby extending the market for such product, the respondent Johns-Manville Corporation decided it would be in said respondent's interest for the members of the Low Pressure Asbestos Pipe Covering Industry to be licensed generally to use the invention of the Toohey patent for a small royalty, so that the better product would be generally used in the country and the defective material eliminated.

Serious resistance to the acceptance of a patent license frequently develops in an industry when the licensor is a strongly competing member of the Industry, because members of an industry assume that a competitor when acting as licensor will establish prices and terms of sale for the patented material which benefit the licensor at the expense of competitors, and because members of an industry are generally unwilling to have their sales records open to inspection by a competitor for the purpose of checking royalties. Said respondent therefore decided to grant an exclusive license to an impartial individual, with the right to grant non-exclusive licenses to members of the Industry. For this purpose the respondent Donald Tulloch, Jr. was selected for the reason that he had been Secretary and Manager of the Sub-Code Authority of the Asbestos Paper and Allied Products Division of the Asbestos Code and had acquired the confidence and respect of substantially all members of the Low Pressure Asbestos Pipe Covering Industry.

Negotiations between the Johns-Manville Corporation and the said Donald Tulloch, Jr. with respect to granting said license were conducted over a long period of time and certain members of the Industry including The Philip Carey Company were consulted as to whether the terms of proposed license agreements would be acceptable to them. The benefits to be derived by the Johns-Manville Corporation from the license agreement depended upon the number of licensees and the extent to which the licensees popularized the use of the patented product. The negotiations culminated in the signing of a license agreement between the Johns-Manville Corporation and the respondent Donald Tulloch, Jr. on September 11, 1935. By the terms of said license said Tulloch agreed to issue a sub-license to the Johns-Manville Corporation in a form attached to the said exclusive license, and agreed to issue sub-licenses to other members of the Industry in the same form and upon terms and conditions no more favorable to such sub-licensees than those contained in the sub-license to the Johns-Manville Corporation.

17. The respondent Donald Tulloch, Jr. proceeded to issue sub-licenses to twenty-five members of the Low Pressure Asbestos Pipe Covering Industry between September 11, 1935 and November 23, 1936. The sub-licensees did not include all members of the Industry. The sub-licensor fixed minimum prices effective January 1, 1936, at which the patented products might be sold by licensees and fixed numerous ter and conditions of sale for the licensed products. For this purpose the merchandising plan approved for the Industry by the Sub-Code Authority of the Asbestos Paper and Allied Products Division was used in substance for the marketing of the patented products. After the effective date of said minimum prices sub-licenses were granted by respondent Tulloch to ten members of the Industry. Royalties were payable by sub-licensees to the respondent Tulloch and the right to inspect the books of the sub-licensees to determine the amount of royalty payments was reserved to the sub-licensor.

18. The sale of the said patented products was not promoted sufficiently by the licensees to establish a general acceptance of the patented products by the public because of the price competition of lower cost unpatented products. As early as March 1936 a licensee ceased marketing the patented product. In 1936 three licensees withdrew from operations under the sub-license agreement; two licensees withdrew in 1937, six licensees withdrew in 1938, seven li-

censees withdrew in 1939, and three in 1940. Two licensees withdrew in March and April 1941, so that on the date of the filing of the complaint in this proceeding the only remaining licensees were Manufacturing Company and the Johns-Manville Corporation.

All minimum prices and terms and conditions of sale fixed for the sub-licensees in marketing the patented products were fixed by the individual and uncontrolled action of the respondent Tulloch as licensor. In the normal course of licensing operations said licensor consulted some of the licensees from time to time to determine their views and desires as to marketing conditions, but there were always conflicting views and interests, and the ultimate decision was always made by said licensor.

19. At all times subsequent to September 11, 1935 there has been active price competition in the Low Pressure Asbestos Pipe Covering Industry between products embodying the invention of the Toohey patent and unpatented products and generally between all members of the Industry. At the time of the filing of the complaint herein the current prices for patented products were above the minimum prices fixed by the licensor, and there is and has been competition in patented products between the two remaining sub-licensees. The Johns-Manville Corporation manufactures and sells only the patented product for low pressure asbestos pipe covering,

and Manufacturing Company manufactures and sells both patented and unpatented products for use as such pipe covering.

20. Throughout the period covered by the complaint in the proceeding there has at all times been active competition in the Low Pressure Asbestos Pipe Covering Industry between the members of said Industry with respect to prices, quality and other competitive factors in the marketing of the Industry products, and at no time has Manufacturing Company violated the provisions of Section 5 of the Federal Trade Commission Act.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE
MANUFACTURING COMPANY FURTHER STATES:

21. The Philip Carey Company named as a respondent in this proceeding was a corporation organized under the laws of the State of New Jersey on or about June 10, 1907. For many years it engaged in business throughout the United States and was duly qualified to do business in most if not all of the forty-eight states.

The Philip Carey Manufacturing Company was organized under the laws of the State of Ohio on or about February 14, 1888. Said Manufacturing Company engaged in business only in the States of Ohio and Pennsylvania. In the month of June 1941 The Philip Carey Company decided for tax purposes to discontinue business and dissolve. In that month a contract was entered into by said company with The Philip Carey Manufacturing Company whereby The Philip Carey Company agreed to transfer all its assets to The Philip Carey Manufacturing Company and said Manufacturing Company agreed to pay all the lawful debts of The Philip Carey Company and to assume and carry out all its valid and lawful contracts. Thereupon all said assets were transferred to the Manufacturing Company and The Philip Carey Company was duly dissolved. A copy of the certificate of dissolution is attached to this answer marked Exhibit 1.

Manufacturing Company denies that The Philip Carey Company engaged in any of the unlawful acts set forth in the complaint or violated in any respect the provisions of Section 5 of the Federal Trade Commission Act, but in the event of any liability for unlawful acts being found against The Philip Carey Company, The Philip Carey Manufacturing Company assumes no responsibility for the same and denies any liability therefor.

WHEREFORE, The Philip Carey Manufacturing Company respectfully requests that the complaint in this proceeding be dismissed in so far as it relates, if at all, to said

Company.

THE PHILIP CAREY MANUFACTURING
COMPANY

By W. L. Steffens
Vice-President.

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Form C 108—3-26-38—MS

State of New Jersey

EXHIBIT 1

DEPARTMENT OF STATE

CERTIFICATE OF DISSOLUTION

To all to whom these presents may come, Greeting:

Whereas, It appears to my satisfaction, by duly authenticated record of the proceedings for the voluntary dissolution thereof by the unanimous consent of all the stockholders, deposited in my office, that The Philip Carey Company, a corporation of this State, whose principal office is situated at No. 15 Exchange Place, in the City of Jersey City, County of Hudson, State of New Jersey (The Corporation Trust Company, being the agent therein and in charge thereof, upon whom process may be served), has complied with the requirements of Title 14, Corporations, General, of Revised Statutes of New Jersey, preliminary to the issuing of this Certificate of Dissolution.

Now, Therefore, I, Thomas A. Mathis, Secretary of State of the State of New Jersey, Do Hereby Certify that the said corporation did, on the Thirtieth day of June, 1941, file in my office a duly executed and attested consent in writing to the dissolution of said corporation, executed by all the stockholders thereof, which said consent and the record of the proceedings aforesaid are now on file in my said office as provided by law.

In Testimony Whereof, I have hereto set my hand and affixed my official seal, at Trenton, this Thirtieth day of June, A. D. one thousand nine hundred and forty-one.

Thomas A. Mathis,
Secretary of State.

205