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Complaint

corporations, partnerships, associations and other legal entities as well as natural persons.

VIII

Permanente Cement Company shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order and fulfilling its objectives.

It is further ordered, That the initial decision be, and it hereby is, vacated and set aside with respect to Count II of the complaint.

It is further ordered, That with respect to Count II of the complaint this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the directions contained in the accompanying opinion.

It is further ordered, That, upon conclusion of such further proceedings, the hearing examiner shall make and file a new initial decision determining all issues of law and fact raised by the record as then constituted.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

 IN THE MATTER OF

 DAVID MANN ET AL. TRADING AS
 NAME BRAND DISTRIBUTORS

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

Docket 8533. Complaint, Oct. 10, 1962—Decision, Apr. 24, 1964

Order requiring a mail order catalog house in Woodside, N.Y., to cease representing that the products they sold—including typewriters, electrical shavers, vacuum cleaners, electric mixers, and rotisserie broilers—were guaranteed without disclosing the limitations on the guarantees, and dismissing charges that it was selling at wholesale 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 David Mann and Morris Appleblatt, individually and as copartners trading as Name Brand Distributors, hereinafter referred to as respondents, have vio-

Complaint

65 F.T.C.

lated 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. Respondents David Mann and Morris Appleblatt are individuals trading as a copartnership under the name of Name Brand Distributors. Their office and place of business is located at 37-42 58th Street, Woodside, Queens, New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of articles of general merchandise, including typewriters, electric shavers, vacuum cleaners, electric mixers and rotisserie broilers, to the purchasing public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said articles of merchandise, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain, and at all times mentioned herein 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 course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their merchandise, respondents have advertised the same by means of circulars and catalogues circulated and disseminated by and through the use of the U.S. mails to prospective purchasers located in various States other than the State of New York.

PAR. 5. By statements appearing in their catalogues, circulars and other printed advertising matter, respondents have represented and do represent, directly and by implication, that they are wholesalers and that they sell their merchandise at wholesale prices. In explanation of the method to be used by the customer in order to identify what respondents represent as the wholesale cost of their articles of merchandise, respondents have imprinted the following instruction in said catalogue:

HOW TO FIND YOUR WHOLESALE COST

Your Cost is Part of Our Coded Stock Number

Here is a Typical Price Example

| | | |
|--------------|-------|--------------------------|
| No 1014W1285 | ----- | \$26.95 |
| 1014 | X | 1285 |
| Stock Number | | Your Cost is \$12.85 |
| | | Just point off 2 decimal |
| | | places from the last |
| | | number on right. |

Typical and illustrative, but not all inclusive, of the statements and representations appearing in respondents' catalogues and letters of solicitation are the following:

All list prices shown are either the suggested or retail prices set by the manufacturer.

We are wholesale distributors of nationally advertised NAME BRAND MERCHANDISE.

ADDED NOTE: Once again we wish to impress on you that we will sell you NAME BRAND NATIONALLY ADVERTISED MERCHANDISE at WHOLESALE PRICES—not merely at discount prices.

| | |
|---|----------|
| Smith-Corona Skyriter, No 733M5970..... | \$79.10 |
| Remington "Quiet-Riter Eleven" Portable, No 3000M11995..... | \$145.21 |
| Remington "Travel-Riter" Portable, No 3565M6995..... | \$89.79 |
| Royal "Royalite" Portable, No 808M4995..... | \$79.75 |
| Royal "Futura" Portable, No 800M10995..... | \$142.13 |
| New Norelco "Speedshaver", No 7900B1497..... | \$24.95 |
| New Remington Roll-A-Matic, No 695M1715..... | \$26.95 |
| Lady Sunbeam, No 431M978..... | \$13.95 |
| The Convertible 67 by Hoover, No 67M7995..... | \$109.95 |
| Regina Elektrikbroom, No 3911M2997..... | \$49.95 |
| 2-Speed Deluxe Chrome Osterizer, No 403M3442..... | \$52.95 |
| Black Angus Monte Carlo King-Size Rotisserie Broiler, No 700M5497.. | \$89.95 |
| Waring Blender, No 702M3069..... | \$47.95 |

PAR. 6. Respondents in referring to various articles of merchandise, set forth in their catalogues mailed to prospective purchasers who buy for their own use, set out two prices; one, a so-called coded price, is represented to be the wholesale price of the merchandise, and the other, the higher price, is designated as manufacturer's list price or retail price. By means of such pricing methods, the aforesaid quoted statements, and others of like import not specifically set out herein, respondents represent, directly or indirectly, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, as set out in their catalogues at which the merchandise referred to is offered for sale, are wholesale prices; that the prices designated as manufacturer's list or suggested prices or retail prices in their catalogues are the prices at which the merchandise is usually and customarily sold at retail in the trade areas where the representations are made; and that the difference between their coded price and the manufacturer's list price or retail price represents savings from the usual and customary retail prices in the trade areas where the representations are made.

PAR. 7. In truth and in fact, respondents are not wholesalers with respect to many of the articles offered for sale and sold by them, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles of merchandise are in excess of wholesale prices. In many

instances the coded prices of many articles of merchandise set out in respondent's catalogues are not wholesale prices but are in excess thereof, and the prices designated as manufacturer's list prices or retail prices for many of their articles of merchandise are in excess of the prices at which said merchandise is usually and customarily sold at retail in the trade areas where such representations are made. The difference between respondents' coded prices and manufacturer's list prices or retail prices do not represent savings from the generally prevailing retail price or prices in the trade areas where the representations are made. Therefore, respondents' aforesaid statements and representations referred to in Paragraphs Five and Six are false, misleading and deceptive.

PAR. 8. Respondents, in their catalogues distributed as hereinabove set forth, made the following representations, among others:

GUARANTEE

Every article we sell is brand new and guaranteed to be exactly as illustrated and described. Each item is guaranteed by both the manufacturer and Name Brand Distributors.

PAR. 9. Through the use of the aforesaid statements, respondents represent that their said merchandise is unconditionally and completely guaranteed by respondents and the manufacturers of every article of merchandise in the catalogue.

PAR. 10. In truth and in fact the guarantee provided is and was subject to certain conditions and limitations not disclosed in the advertisements in which such guarantee representation was made, and the terms, conditions and extent to which such guarantee applies and the manner in which the guarantors will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee. Therefore, respondents' aforesaid representations referred to in Paragraphs Eight and Nine are false, misleading and deceptive.

PAR. 11. In the course and conduct of their business and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of articles of general merchandise, including typewriters, electric shavers, vacuum cleaners, electric mixers and rotisserie broilers and other articles of merchandise of the same general kind and nature as that sold by respondents.

PAR. 12. 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 were and are true and into the purchase of substantial quantities of

respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of the 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 (a) (1) of the Federal Trade Commission Act.

Mr. Marvin G. Rosenbaum and *Mr. Anthony J. Kennedy, Jr.*, supporting the complaint.

Mr. Alexander J. Lekus, New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

NOVEMBER 5, 1963

The complaint in this proceeding charges respondents, David Mann and Morris Appleblatt, individually, and as copartners trading as Name Brand Distributors, a mail catalogue house, with violating Section 5 of the Federal Trade Commission Act by false, misleading and deceptive pricing representations and practices, and deceptive guarantees, in circulars and catalogues disseminated to prospective purchasers of respondents' products through the United States mails.

The complaint avers that, "by statements appearing in their catalogues, circulars and other printed advertising matter, respondents have represented and do represent, directly and by implication, that they are wholesalers and that they sell their merchandise at wholesale prices * * *", whereas,

PARAGRAPH SEVEN: In truth and in fact, respondents are not wholesalers with respect to many of the articles offered for sale and sold by them, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles of merchandise are in excess of wholesale prices. In many instances the coded prices of many articles of merchandise set out in respondents' catalogues are not wholesale prices but are in excess thereof, and the prices designated as manufacturer's list prices or retail prices for many of their articles of merchandise are in excess of the prices at which said merchandise is usually and customarily sold at retail in the trade areas where such representations are made. The difference between respondents' coded prices and manufacturer's list prices or retail prices do not represent savings from the generally prevailing retail price or prices in the trade areas where the representations are made * * *.

The complaint further avers that respondents, in their catalogues, represent

GUARANTEE

Every article we sell is brand new and guaranteed to be exactly as illustrated and described. Each item is guaranteed by both the manufacturer and Name Brand Distributors.

Thereby respondents represent that their merchandise is unconditionally guaranteed by respondents and the manufacturers when, in fact, the guarantee is and was subject to certain undisclosed conditions and limitations, "and the terms, conditions and extent to which such guarantee applies and the manner in which the guarantors will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee."

The complaint asserts these allegedly deceptive practices: (1) respondents' representation of their coded prices as wholesale prices when they in fact are not wholesale prices, (2) respondents' use of a list price in close proximity to these coded prices in order to convey the impression that respondents' customers save the difference between the coded price and the list price, when such savings are in fact not afforded, and (3) respondents' failure to set forth in a nondeceptive manner a complete statement of the limitations in the guarantees which they and the manufacturers make as to their products.

In their answer respondents admitted the allegations of the first four paragraphs of the complaint. As a result of a prehearing conference convened immediately prior to the beginning of the hearings, respondents admitted the allegations of paragraphs eight, nine and ten of the complaint.

Respondents' admission of the first four paragraphs of the complaint establishes the jurisdictional prerequisites, and their admission of paragraphs eight, nine and ten of the complaint, as a matter of law and of fact, supports a cease and desist order as to the false guarantee charges. Respondents assert, however, that the issuance of a cease and desist order as to the false guarantee is not required at this time because that practice has been abandoned. Respondents have not offered any evidence from which the hearing examiner can make findings which would establish the defense of abandonment. The guarantee is omitted from respondents' 1962-1963 catalogue in evidence (RX 13).

At the hearings respondents did not prove nor attempt to prove that they are in fact wholesalers, even though their entire sales pitch in CX 1, the 1960-1961 catalogue; RX 12, the 1961-1962 catalogue, and in their sales flyer, CX 2A-D, is based upon the unequivocal representation to prospective customers that such customers do purchase at "wholesale" prices. Respondents' counsel admitted at the prehearing conference and respondent Mann testified in the hearings that 99% of respondents' sales are made directly to the consumers, to the public (Tr. 13).

Moreover, pursuant to written request of counsel supporting the complaint, the hearing examiner took official notice of the meaning of

