

Complaint

63 F.T.C.

IN THE MATTER OF

GRAYSON-ROBINSON STORES, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8482. Complaint, May 1, 1962—Decision, Nov. 6, 1963*

Order dismissing, for insufficiency of the record to prove the allegations, complaint charging a New York City retailer of cameras and its former parent corporation with making deceptive pricing and savings claims, misrepresenting the quality of certain camera lenses, and failing to disclose clearly the country of origin of cameras made in U.S.S.R., Occupied Germany.

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 Grayson-Robinson Stores, Inc., a corporation, and Maxwell H. Gluck, Stanley Roth, C. Louis Wood and Eugene F. Roth, individually and as officers of said corporation; and Peerless Camera Stores Corp., a corporation, and Maxwell H. Gluck, Stanley Roth, Herbert Ochshorn, Sidney Rosen, C. Louis Wood and Stanley Dorman, 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 respect thereof as follows:

PARAGRAPH 1. Respondent Grayson-Robinson Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 550 West 59th Street, New York, New York.

Respondents Maxwell H. Gluck, Stanley Roth, C. Louis Wood and Eugene F. Roth are individuals and officers of said corporate respondent Grayson-Robinson Stores, Inc. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondent Peerless Camera Stores Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 415 Lexington Avenue, New York, New York.

Respondents Maxwell H. Gluck, Stanley Roth, Herbert Ochshorn, Sidney Rosen, C. Louis Wood and Stanley Dorman are individuals

1208

Complaint

and officers of said corporate respondent Peerless Camera Stores Corp. They formulate, direct and control the acts and practices of said 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 advertising, offering for sale, sale and distribution of cameras at retail to the public.

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 New York to purchasers thereof located in various other states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said cameras in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the sale of their cameras, respondents have made certain statements and representations, of which the following are typical but not all inclusive:

Save \$22.50 off List Price
 Bolex 8 mm Movie Outfit
 List \$172 (when bought separately) \$149.50
 Revere Automatic 8 mm Movie Camera
 * * * * *
 Comparable List \$89.50 Special \$49.95
 Bonus Tag Item
 Imported 35 mm
 Canon L-I
 Original List \$379.50—\$119.95

PAR. 5. Through the use of the amounts in connection with the word and terms "List", "Comparable List" and "Original List" respondents represented that said amounts were the prices at which the merchandise referred to was usually and customarily sold at retail in their trade area, and through the use of said amounts and the lesser amounts that the difference between said amounts represented a saving to the purchaser from the price at which said merchandise was usually and customarily sold in said trade area.

Through the use of the term "Canon L-I" respondents represented that the camera so designated contained a "Canon lens" or the lens with which Canon cameras were regularly and usually equipped.

PAR. 6. In truth and in fact, the amounts set out in connection with the words and terms "List", "Comparable List" and "Original List" were not the prices at which the merchandise referred to was usually

and customarily sold at retail in respondents' trade area, but were in excess of the price or prices at which the merchandise was generally sold in said trade area, and purchasers of respondents' merchandise would not realize a saving of the difference between the said higher and lower price amounts.

In truth and in fact, the "Canon L-I" camera was not equipped with a Canon lens but was equipped with a lens that was inferior to the Canon lens. The aforesaid representations were therefore false, misleading and deceptive.

PAR. 7. Among the cameras offered for sale and sold by respondents are cameras made in that part of Germany occupied by the U.S.S.R. and imported into the United States. While these cameras are marked to show the country of origin, said marking is so small and indistinct and so placed that it does not give or constitute adequate notice of the country of origin.

The containers in which the cameras are enclosed are not marked to show the country of origin, nor is the fact that the cameras are manufactured in that part of Germany occupied by the U.S.S.R. disclosed in respondents' advertisements offering said cameras for sale.

PAR. 8. When merchandise, including cameras, is offered for sale to the purchasing public and such merchandise is not marked or is not adequately marked showing that it is of foreign origin, such purchasing public understands and believes that such merchandise is of domestic origin, a fact of which the Commission takes official notice.

PAR. 9. A substantial portion of the purchasing public prefers merchandise, including cameras, that is manufactured in the United States over such merchandise that is manufactured in territory occupied by the U.S.S.R., of which fact the Commission also takes official notice.

PAR. 10. 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 cameras of the same general kind and nature as those sold by respondents.

PAR. 11. 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 are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

1208

Initial Decision

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the 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. Frederick J. McManus and *Mr. Charles J. Connolly* of Washington, D.C., for the Commission.

Dammann, Blank, Hirsch & Heming, of New York, N.Y., by *Mr. Allen Blank*, of counsel, for respondents *Grayson-Robinson Stores, Inc.*, *Gluck, Stanley* and *Mr. Eugene Roth, Wood and Dorman*.

Parker, Chapin & Flattau, of New York, N.Y., by *Mr. Alvin Stein*, of counsel, for respondents *Peerless Camera Stores Corp.*, *Mr. Herbert Ochshorn* and *Mr. Sidney Rosen*.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

This proceeding is concerned with alleged violations of the Federal Trade Commission Act. It is charged that the respondents engaged in unfair methods of competition and unfair or deceptive acts or practices in commerce. These were deceptive advertising of prices at which cameras were offered for sale, deceptive claims as to savings to be had, deception as to the brand and composition of a camera offered for sale, and a failure to show adequately the East German origin of cameras imported from and manufactured there and offered for sale in commerce.

Preliminary Note as to the Respondents

Two corporate entities and a number of individuals have been charged in this proceeding. One of the entities is Grayson-Robinson Stores, Inc. (hereafter Grayson), which, for the purpose of this proceeding, may be regarded as having been a holding company. The other entity is Peerless Camera Stores Corp. (hereafter Peerless), all the stock of which had been owned by Grayson. The practices with which we are concerned were those of Peerless in the advertising of cameras which it had for sale in its retail store in New York City. Grayson was not engaged in the retail sale and distribution of cameras. Its only connection with the facts involved in this proceeding arose from its stock ownership of Peerless. The individuals, Maxwell H. Gluck, Stanley Roth, C. Louis Wood and Eugene F.

Initial Decision

63 F.T.C.

Roth are or were officers of Grayson. As a corollary to their holding such offices, they became officers or directors of Peerless. The two remaining individual respondents, Herbert Ochshorn and Sidney Rosen, were connected directly with Peerless and engaged directly in the operations of its business. This involved a large volume of distribution, at retail, of cameras, camera supplies, film, motion picture projectors, lenses, exposure meters, a myriad of camera accessories of all types, dark-room accessories and paper and chemicals (Tr. pp. 140, 141). Although its store was located in New York City, at 415 Lexington Avenue, it solicited its customers nationally by advertising in various photo magazines, such business being handled mainly by mail (Tr. pp. 8, 123-124; CX 12, CX 13, CX 14). Over-the-counter business was solicited by advertising in the New York City daily newspapers. These circulated not only in New York, but also in New Jersey and Connecticut. Some customers came from these adjoining states (Tr. pp. 7, 19-22).

Dismissal of Complaint as to Certain Respondents

At pretrial, a motion was made to dismiss the complaint as to all the respondents except Peerless and Herbert Ochshorn. That motion was "denied on the ground that if, in fact, the complaint should be dismissed as to any one or all of such respondents, that cannot be determined until after a hearing of the evidence to be offered herein." (Pretrial Order of July 27, 1962).

Thereafter, on August 14, 1962, Grayson filed a petition in the United States District Court for the Southern District of New York proposing an arrangement under Chapter XI of the Bankruptcy Act. To this day it has operated its business as a debtor in possession. Because of events which transpired in that proceeding, by motion dated January 21, 1963, counsel representing Grayson, Gluck, Stanley and Eugene Roth, Wood, Dorman (and also Sidney Rosen, with whom this division of the decision is not concerned) moved that the complaint against them be dismissed. One of the grounds was that none of those respondents (with the exception of Sidney Rosen) at any time participated in the acts set forth in the complaint. Other grounds were that the individuals had become connected with Peerless only because of their connection with Grayson, and that all the shares of Peerless stock and all other Grayson camera properties had been sold by Grayson to Berkey Photo, Inc. pursuant to order of the United States District Court, duly entered in the arrangement proceeding. It appeared from affidavits then and subsequently filed in

1208

Initial Decision

support of the motion that the individuals (except Rosen) had had no actual operating connection with Peerless, but held their offices in that company by reason of their positions in the parent corporation, Grayson. It was also made to appear that neither the parent corporation, Grayson, nor any of those individuals since has been engaged in the camera business. Counsel supporting the complaint, in a document dated and filed January 28, 1963, formally consented to the granting of the motion to dismiss the complaint as to the respondents named in this division of this decision, except Sidney Rosen, saying, "The grounds cited by the motion as the basis for dismissal of the complaint insofar as it relates to these respondents appear to be sufficient for the granting thereof." In ruling on the motion, the Hearing Examiner, in a paper dated and filed February 20, 1963, said:

In view of the Commission's final order in The Borden Company and its opinion issued therewith, Docket No. 7129, January 30, 1963, the broad form products order procedure must be given consideration, even though Peerless was a wholly owned but separate corporation. It is the Hearing Examiner's opinion that whatever bearing this procedure might have on orders to be issued in cases involving wholly owned subsidiaries or divisions, it is not applicable to this particular case because of the Chapter XI arrangement proceeding, the sale of Peerless, the apparent complete separation of functions, the manner in which the various individuals became involved with Peerless, the completely autonomous nature of Peerless and the present divorcement of all the named individuals and of Grayson-Robinson from any activities in the camera business. In reciting these various factors, the Hearing Examiner does not mean to imply that any one of them, standing alone, might justify a departure from the rule in Borden but that all considered together, under the peculiar circumstances of this case, justify a disregard of the rule in this case. Moreover, the express consent by counsel supporting the complaint that the motion be granted also is an important factor which cannot be overlooked.

Because of Section 4.6(e), Rules of Practice, the Hearing Examiner deferred entering an order of dismissal, but this decision will provide for the dismissal of the complaint, without prejudice, as to the respondents Grayson, Gluck, Dorman, Wood, Stanley Roth and Eugene F. Roth.

The Complaint

The case is concerned with alleged deceptive price and commodity advertising, and with alleged deception as to country of origin because of insufficient, indistinct or obscure marking of cameras offered for sale and failure to disclose origin in the advertising of such cameras.

Three illustrative advertisements are quoted in the complaint for the purpose of supporting the deceptive pricing charge. One is cited

Initial Decision

63 F.T.C.

also for the purpose of supporting the charge of commodity deception.

First, we find the following:

Save \$22.50 off List Price
Bolex 8 mm Movie Outfit
List \$172 (when bought separately)
\$149.50

It is alleged that the \$172 claimed "list price" was not, in fact, the price at which the Bolex outfit usually and customarily was sold at retail in respondents' trade areas and that, consequently, the representation that there would be a saving of \$22.50 off the "list price" was deceptive. This conclusion is based on the allegation that, by using the word "list", Peerless represented that the price so designated was the usual and customary price of the article at retail in its trade area.

The next advertisement cited was:

Revere Automatic 8 mm Movie Camera
* * * * *
Comparable List \$89.50 Special \$49.95

Upon the same reasoning, and referring to the figure of "\$89.50", which had been designated by Peerless as "Comparable List", the complaint charged that it had deceived prospective customers because, in fact, the Revere Automatic 8 mm Movie Camera was not comparable to cameras sold in its trade area at \$89.50.

The third advertisement cited in the complaint was:

Bonus Tag Item
Imported 35 mm
Canon L-I
Original List \$379.50—\$119.95

As before, it was claimed, for the same reasons, that the represented "Original List \$379.50" was a deceptive representation as to the usual and customary price at which the Canon L-1 was sold in respondents' trade area. It was alleged, in addition, as to this Canon L-1 advertisement, that it constituted a false representation that the camera being sold for \$119.95 was equipped with a Canon lens when, in fact, it was not so equipped, but was equipped with an inferior lens.

These three advertisements were the only ones cited in the complaint. Commission counsel offered in evidence and there were received a number of advertisements which had been placed in the New York Times and in the New York Post, both well known to have large circulation in New York and elsewhere (CX 3-10, incl.)

1208

Initial Decision

Finally, it was charged that cameras which had been manufactured in East Germany, U.S.S.R. occupied, though "marked to show the country of origin, (had marking which was) so small and indistinct and so placed that it does not give or constitute adequate notice of the country or origin." It was alleged also that the containers in which the cameras were packed and the advertisements did not disclose that the cameras had been manufactured in East Germany, occupied by the U.S.S.R. This was claimed to be deceptive in that "A substantial portion of the purchasing public prefers merchandise, including cameras, that is manufactured in countries other than those countries or territory occupied by U.S.S.R. over such merchandise that is manufactured in the territory occupied by the U.S.S.R., of which fact the Commission * * * takes official notice" (Tr. pp. 132, 133).

The respondents answered in due course, admitted some allegations of the complaint but put in issue the essential allegations of deceptive or unfair practices as well as the allegations with respect to interstate commerce. Following the second ruling on the motion to dismiss, Peerless, Ochshorn and Rosen retained as counsel, and were represented by, the attorneys noted as appearing for them among the appearances at the beginning of this decision.

In writing this decision, I shall concern myself initially with the alleged unlawful practices. Following that, I shall take up separately the special contentions on behalf of Ochshorn and Rosen with respect to their alleged individual or personal responsibility for the practices which are the subject matter of this proceeding. For this reason, I shall not refer to the respondents collectively as "respondents", but shall use only the name "Peerless".

Jurisdiction

At the threshold, we are confronted with the contention that the Federal Trade Commission has no jurisdiction because (a) of an alleged lack of evidence that Peerless ever made shipments from New York to purchasers in other states, and (b) a failure to show a substantial course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act. In addition, it is contended that even if Peerless is engaged in interstate commerce, there is no evidence of relationship between the practices which are the subject matter of this complaint and any interstate activity in which it may have engaged.

It is conceded that Peerless does a credit business and that about 12 to 15 percent of \$7,000,000 total sales are time-payment sales. It

Initial Decision

63 F.T.C.

is conceded, also, that the mails are used to handle this credit business and that a mail-order business had been conducted. (In fact, one of the magazine advertisements (CX 12, p. 111) says, "get the BIG PLUS in MAIL ORDER from the BIG STORE * * * PEERLESS!") It is conceded, also, that Peerless advertised in photographic magazines and in New York City newspapers, all of which circulate in interstate commerce. The concession as to mail-order business is qualified by the claim that it "has since been discontinued". (I do not find any satisfactory evidence as to discontinuance of mail-order business or as to the time when such discontinuance may have become effective.)

Essentially, the case involves advertising because a large proportion of Peerless business is over-the-counter in a retail store in New York City. In support of its contention that the conceded advertising is not sufficient to subject it to the jurisdictional requirements of the Federal Trade Commission Act, reliance is mainly on *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33; *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U. S. 349; *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103; *American Hospital and Life Insurance Co. v. Federal Trade Commission*, 243 F. 2d 719 and also 357 U.S. 560; a 1936 order of the Federal Trade Commission dismissing the complaint in *Crisafulli*, Docket 2290, 22 F.T.C. 906; and the Commission's recent decision dismissing the complaint in *S. Klein Department Stores, Inc.*, Docket No. 7891, CCH Part 29,222 [60 F.T.C. 388].

I find nothing in these authorities to support the claim of lack of jurisdiction. They are, in fact, authorities *contra*.

In *General Motors*, the court said that although the finance company "was primarily acting as a local finance company, it * * * acted as an agent of *General Motors* in a unified plan of selling and financing cars shipped in interstate commerce." (Page 287.) Peerless concedes that it advertised and made sales of cameras in interstate commerce.

In *Bunte*, the unfair practice involved a method of sale dependent upon chance. After a buyer purchased a package, he might get more than he had paid for because *Bunte* packaged its goods in similar appearing packages containing varying amounts of merchandise. The element of chance arose from the fact that when the purchaser bought the package, he did not know whether he would get a quantity of merchandise equivalent to that which he would get normally for the price paid or a greater quantity. This was known in the trade as "break and take" packages and the Fed-

1208

Initial Decision

eral Trade Commission had barred "break and take" packages as an unfair method of competition. *Bunte*, however, made *all its sales within the State of Illinois*. Jurisdiction had been asserted because it was claimed that by indulging in the "break and take" package scheme, *Bunte* was competing unfairly with manufacturers outside of Illinois who shipped their goods into Illinois but who could not indulge in the scheme because of the Federal Trade Commission's rulings. This was claimed to have an effect on interstate commerce and therefore was cited as justification for the Federal Trade Commission taking jurisdiction. The court in *Bunte* held merely that although the wholly intrastate sale of candy had an indirect effect on the sales of candy imported from other states and thus might have "affected" interstate commerce, the statute could not be extended to practices merely *affecting* interstate commerce, since it is concerned only with unfair methods of competition *in* interstate commerce. I do not read the complaint in this proceeding nor do I consider the facts here as being comparable to those in *Bunte* because the acts or practices involved in this case actually were in interstate commerce. The advertising was circulated out of New York to other states of the United States. It invited purchases and transactions from persons in those other states. Assuming that the advertising in the New York Times and the New York Post was beamed primarily at the retail business in New York City, it cannot have failed to have attracted customers from the other states in which the Times and Post circulated. That is the premise upon which widely circulated newspapers justify advertising rates higher than those charged by local media. The evidence also shows (Exhibits CX 12, CX 13 and CX 14) that Peerless aggressively solicited mail-order business nationally. The advertisements were full-page ads (which do not come cheap in national magazines), each contained specific reference to dozens of cameras and accessories offered for sale, each contained a cut-out coupon in the lower right-hand corner to facilitate the purchase by mail, and each said, "Rush your mail order in today! 10-day free trial! Year of service! Add estimated shipping costs. We'll refund every cent not used! If you prefer c.o.d., send 10 percent deposit." The trier of the facts has the right to assume or infer that the large expenditures for these non-institutional advertisements did result in substantial interstate sales. A business does not spend on advertising such as this if it is not productive.

Progress Tailoring pointed out that the respondents there placed "advertisements in magazines, newspapers, and periodicals which have an interstate circulation." After referring to the point that the

Act "authorizes the Commission to proceed only against business practices employed in interstate commerce", the court distinguished *Bunte* and said, "We are of the opinion that under the circumstances here appearing, the advertisements are a part of the preliminary negotiations leading up to a sale in interstate commerce. They cannot be separated from the final sale, and are themselves a part of interstate commerce." Then it said, "Every negotiation and dealing between citizens of different States which contemplates and causes such importation, whether it be goods or information, is a transaction of interstate commerce".

American Hospital and Life Insurance Co. has no bearing upon the issues involved in this case. It was concerned only with the fact that the McCarran-Ferguson Act, 15 U.S.C., Sections 1011-1015 prohibits the Federal Trade Commission from regulating advertising practices of insurance companies within states which have their own statutes prohibiting unfair and deceptive insurance practices.

Crisafulli, as Peerless says, was dismissed (but without prejudice) "for the reason that the record fails to disclose interstate sales of respondent's products alleged to be falsely labeled, advertised or misbranded". It does not appear from the report of that case that the Commission there was concerned with or ever decided the issue of deceptive advertising practices in interstate commerce. To the contrary, the Commission expressly has ruled, more recently, in *S. Klein Department Stores, Inc.*, interlocutory order of November 18, 1960, Docket No. 7891, that "interstate disseminations of advertisements for inducing purchases of merchandise constitute 'methods of competition in commerce' and 'acts or practices in commerce' within the purview or coverage of Section 5(a)(1) of the Federal Trade Commission Act". It added, "The jurisdiction alleged thus rests solely on the interstate disseminations alleged. Conclusions that the statute's coverage so extends have sound basis in law and public policy. The Act's specified targets are unfair or deceptive activities which are in commerce * * * The respondent's contentions that the charges of the complaint are not adequately related to interstate commerce are accordingly rejected". It is true, as stated by Peerless, that Klein had its main offices in New York and only operated four department stores there for the sale of merchandise to the public in competition with others. It is true, also, that Klein was a retail store. But, there is no basis for the argument that the ultimate dismissal by the Commission of the complaint in *Klein*, Docket No. 7891, CCH, Part 29,222, was because of a lack of jurisdiction over advertising in interstate commerce. That decision was without

1208

Initial Decision

opinion. There is no reason to assume that the Commission intended to overrule (by silence) its prior interlocutory order in the same case.

To the extent, therefore, that Peerless contends that the complaint ought to be dismissed for lack of jurisdiction, that contention is overruled and any motions based thereon are denied.

The Bolex Advertisement

As quoted in the complaint, this advertisement read:

Save \$22.50 off List Price
Bolex 8 mm Movie Outfit
List \$172 (when bought separately) \$149.50

This is not a complete quotation of the advertisement. The *entire* advertisement must be considered for the purpose of determining whether it is, in fact, deceptive. It is in the record as Commission Exhibit 3, Commission Exhibit 9, and Commission Exhibit 10. In addition to the material quoted in the complaint, each of the actual advertisements has specific references to component elements of or contained in the camera offered for sale. It is only after listing these component elements separately that the advertisement refers to the list at \$172. It is important, also, to read the qualification, "*when bought separately*", which is clearly and with equal conspicuousness set out in connection with the reference to the list price. CX 10 says, "Brand new! List price \$172 (when purchased separately)". CX 9 says, "List \$172 (when bought separately)". Only one of the ads (CX 3) fails to have the qualifying remark after the reference to "List \$172". The Commission has not held in any case that a reference to a list price in and of itself is unlawful or deceptive. Consistently, it has justified a proscription of the practice only where evidence appeared in the record that the advertised goods "usually and customarily" were sold at prices lower than the claimed "List" in trade areas in which the advertising was circulated. Indeed, the complaint here is predicated on that principle and so alleges. In an attempt to supply this proof, Commission counsel offered the testimony of the operator of a retail camera store in New York City who, in addition, is editor of a publication, "X Camera", which circulates throughout the country. This witness testified that he was in constant touch with dealers not only in New York City but "of the whole country". His sole testimony as to selling prices of this Bolex outfit was to the effect that he had priced it at The Bronx Camera Exchange in the latter half of 1960 and that he had telephoned Willoughby's Camera Store between June and September of 1960. He priced the

Initial Decision

63 F.T.C.

cameras in no other camera store in New York City. He testified, "I think it was \$124.50, or something like that" at Willoughby's and that "I believe it was being offered there (The Bronx Camera Exchange) for about \$120" (Tr. pp. 108-110, emphasis added). However, he testified also that Bolex products, in general, were supplied only to franchised dealers and that they were subject to fair trade law price restrictions. He identified the manufacturer's advertisement in a national magazine offering the Bolex Special as "a \$172 combination for only \$149.50!" [Tr. pp. 110-115, RX 6 (a)]. While the Commission's witness, very generally and indefinitely testified as to the lower prices and fixed the dates of his inquiries in parts of the latter half of 1960 and, with generosity, such a fixing of dates could be regarded as reasonably close to the time that the advertisements were placed (July 1959 and December 1960), the sum total of the pricing cited by him is connected with only two stores in New York City, one in the Bronx and one in Manhattan. These two isolated pricings, even without regard to the indefinite manner in which he testified about them, are not sufficient (or "substantial evidence") to establish that the Bolex Special was "usually and customarily" sold for less than \$149.50 in New York City. On the other hand, his testimony and the Bolex Company's advertisement do show that the offer was made up of a combination of elements which were fair traded to sell at the \$172 figure. Consequently, there is nothing deceptive about the statement in the advertisement to the effect that if the elements were bought separately, the list would be \$172.

This does not, however, dispose completely of the representations in this advertisement. The advertisement still represents that, if the reader bought this combination from Peerless, he would save \$22.50 off list price. This presents a question as to what is list price. Is list price the \$172 which is the aggregate of the list prices of all the individual elements (as to which I have ruled already is not a deception), or is list price the price at which the manufacturer had made up the combination as a special? (Tr. pp. 106-107, 118-119). By the respondents' own evidence (the manufacturer's advertising above mentioned), it was the manufacturer who made up this package deal to sell at the \$149.50 price. Bolex advertised it at \$149.50. Since Bolex advertised it at \$149.50, *qua* combination, the list price was \$149.50 and not \$172. It may appear at first that this is an extremely narrow view to take of the advertisement and of the circumstances. However, when one analyzes the entire situation, it is not so at all. After all, Peerless advertised that there would be a saving of \$22.50 if the purchaser came to Peerless and bought this combination for

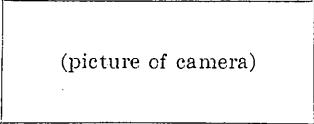
1208

Initial Decision

\$149.50. In truth and in fact, however, the purchaser did not and would not save \$22.50 by buying it at Peerless because (regardless of the Commission witness's testimony of the lower price sales at Willoughby's and The Bronx Camera Exchange) the purchaser could get the combination anywhere in New York and probably anywhere in the United States for the \$149.50, the price placed upon it by the manufacturer in making up the special. To this extent the advertisement was deceptive.

The Revere Advertisement

The complete Revere advertisement (CX 6) was:

PEERLESS FACTORY PURCHASE REVERE 8mm MOVIE CAMERA	
 <p>(picture of camera)</p>	BRAND NEW! WITH FULLY AUTOMATIC Electric-Eye!
COMPARABLE LIST \$89.50!	49⁹⁵
CHECK THESE LUXURY FEATURES . . .	
<ul style="list-style-type: none"> • Self-Adjusting f.8 Coated Lens • Automatic Back-Light Compensation • Parallax-Corrected Tri-Field Finder • Insufficient-Light Signal in Finder • Low-cost Spool Loading Model 186. 	

In somewhat different form, but substantially the same, it is found also in CX 7. The issue with respect to this advertisement is whether, in fact, this Revere camera was comparable to another camera listed or sold at \$89.50. There is no evidence whatsoever in the entire record that a camera comparable to the camera advertised sold anywhere at less than \$89.50. On the contrary, there is affirmative evidence that the comparable, in fact, the identical, camera did sell at \$89.50 (Tr. p. 80). It appears from the testimony that the Revere camera was a specialty put out by the Revere Company for sale to the armed forces under the name "Revere." The camera itself was identical to a camera manufactured by the Revere Company and marketed by it under the name "Wollensak," to be sold at \$89.50. Peerless bought the entire surplus stock of the Revere camera and sold it at its own advertised price. All it did in the advertisement was

Initial Decision

63 F.T.C.

to say that the camera was comparable to another camera (disclosed at the hearing to be the Wollensak) listed at the higher price (Tr. pp. 79-81; 87-95). All testimony to this effect was given by respondent Ochshorn. Its reasonableness and consistency with "common" business practice was affirmed by the Commission's expert witness (Tr. pp. 121-122). It stands uncontradicted.

This advertisement was not deceptive. *Nash, Inc.*, FTC Docket No. 8201, September 18, 1962 [61 F.T.C. 596] FTC Guides Against Deceptive Pricing, October 2, 1958, Part III.

The Canon L-1 Advertisement

The following is a complete copy of the Canon L-1 ad as it appears in the record (CX 8):

<div data-bbox="516 867 797 1052" style="border: 1px solid black; width: 150px; height: 80px; margin: 0 auto;"> <p style="text-align: center;">(picture of camera)</p> </div>	<p>BONUS TAG ITEM IMPORTED 35mm CANON L-1</p>
<p>Fast f2 THC Lens. Cpld Rangefinder. Speeds to 1/1000. New! Discontinued Orig. List \$379.50!</p>	<p>119⁹⁵</p>

The charge with respect to this advertisement is twofold—first, that it was deceptive in representing that the list price, that is to say, the price at which the Canon L-1, *as advertised*, customarily and usually was sold in the Peerless trade area, was \$379.50 and was being sold by it at \$119.95, resulting in a saving of \$259.55 to the purchaser; and second, that the camera offered for sale was not actually a Canon camera because the lens which came with it was not a Canon lens. Thus we have a charge of price or savings deception and a charge of commodity deception.

In justice to Commission counsel, it should be noted that a witness from the Canon Camera Company, whom he had hoped to call and to whom he had directed a subpoena, did not appear at the hearing because of his absence abroad. It is unlikely, however, that this witness could have established more than was actually admitted at the hearing or that he could have established that the price claim was de-

1208

Initial Decision

ceptive. Certainly, as to the claimed deceptive nature of the price claim, in a city like New York, if, in fact, the representation was false the falsity could have been established by any number of expert witnesses readily there available.

In the consideration of this advertisement, it is important to note that although it advertised a Canon L-1 camera, it stated clearly and conspicuously that the commodity being sold was equipped with a "Fast f2 THC Lens". The testimony is that a THC lens is not a Canon lens, is a lens manufactured in England, and was not a part of the original Canon camera in that Canon did not manufacture it, it having been manufactured by a company known as "Tailor, Hops and Cook" (Tr. pp. 128-129). But the uncontradicted testimony also is that "Canon L-1" is a designation placed by the Canon Company on the box without the lens and that a feature of that camera, as it is a feature also of other advanced or sophisticated cameras, is its ability to accept and receive lenses interchangeably, its compatibility for lenses manufactured not only by the manufacturer of the camera box, but by other manufacturers as well.¹ While the testimony is not particularly clear as to what the aggregate would be of the list prices of the camera box, plus the lens, plus the coupled range finder, there is no testimony in the record that the camera with the THC lens and the range finder, as advertised, was usually and customarily sold anywhere else in the City of New York for less than \$379.50, the price advertised as the list (Tr. pp. 51-59; 127-133).

There being no evidence that a Canon L-1 camera equipped with the f2 THC lens and the coupled range finder was sold anywhere else in New York for less than \$379.50, and there being no substantial evidence that the individual components, if added up, would not list at \$379.50, the charge as to deceptive pricing with respect to this advertisement must be dismissed.

Next we have the question whether there was deception in advertising as a Canon camera a camera which was not sold with a Canon lens. The uncontradicted testimony is to the effect that the Canon L-1 is a designation given by the company to the box which will accommodate various types of lenses. The advertisement clearly disclosed that the Canon L-1 was being offered with a THC lens. That

¹ In another connection (the stated reason for supporting his requested Eighth Proposed Finding), Commission counsel cites CX 12, p. 23, which is a two-thirds page advertisement in the magazine Modern Photography, of an EXAKTA camera equipped with a Carl Zeiss lens. A Zeiss lens is not an EXAKTA product and an EXAKTA camera is not a Zeiss camera. See also discussion, *infra*, of the PRAKTICA camera, which comes equipped with an Isco-Gottingen Westanar lens, page 19 of this decision.

Initial Decision

63 F.T.C.

this is normal and usual is discussed elsewhere and in Footnote 1, p. 15. An advertisement exploiting the Canon name, but *not referring* to the fact that the camera was equipped with a THC lens, could be regarded as deceptive under the rule of *Charles of the Ritz v. FTC*, 143 F. 2d 676. However, in view of the affirmative disclosure that the camera contained a THC lens, the feature of lens interchangeability, the uncontradicted testimony of Ochshorn and the lack of evidence that anyone was deceived, it is my ruling that this advertisement was not deceptive.

Failure to Disclose Foreign Origin

It is now well known that we take official notice of the fact that consumers and purchasers have prejudices against or preferences for products or commodities manufactured or produced in particular countries or areas of the world. While we take official notice of the fact that if a commodity or product is not marked to show foreign origin, there will be a presumption that it is of domestic origin, the fact that an article is of foreign origin, in and of itself, is not a mark of undesirability. It has been observed frequently that perfumes from France, cameras from Germany (East or West), cameras from Japan, cultured pearls from Japan, ladies' attire from Paris, china and dinnerware from England, Germany or Italy, steel from Sheffield or Germany, tableware from Denmark, and a myriad of other products from many foreign countries, all can be wanted and sought after items. The fact that they are wanted and sought after or the fact that a purchaser may have a pet hate or peeve against any particular country of origin are elements of the concept that a failure to disclose the country of origin is a deceptive practice. When there is a failure to disclose, the purchaser may be deceived and he or she has the right not to be deceived. He or she has the right to know whether the article being purchased is from the country from which he or she hopes it is or whether the article being offered is from a country the economy of which he or she does not want to aid. This is the reason and background, in capsule form, for requiring disclosure and for the evolution and development of official notice with respect thereto.² The mere fact that it may

²The Commission has given specific public notice of its concept of official notice. *Manco Watch Strap Co., Inc.*, Docket No. 7785, March 13, 1962 [60 F.T.C. 495]. With the greatest respect and not intending to be perverse, this Examiner would go further and hold (but may not because the Commission has ruled it is a matter for official notice) that personal preferences and prejudices as to country of origin are an everyday fact of life and do not require notice of intention to take official notice. Where the contrary is claimed, a respondent should be required to allege and prove it as an affirmative defense without prior warning of intention to take "official notice". Davis, *Administrative Law Treatise*, 1958, Sections 15.03 and 15.04.

1208

Initial Decision

not be customary or usual in the advertising of cameras and camera accessories to advertise country of origin, or the mere fact that it is customary and usual not so to advertise the camera and camera accessories does not justify disregarding the Federal Trade Commission's view, universally supported by the courts, that a failure to disclose country of origin is a deceptive practice (subject, of course, only to the slight qualification that if the imported element within an article is of such a minor or inconsequential nature as not to materially constitute or contribute to the constituency or main function of the article, there need be no disclosure).³

Nor is it a defense that a camera, particularly an advanced camera such as the Praktica, which is the article involved in this charge, is purchased only by sophisticated users who are well informed of the place of origin. This argument does not meet the issue. A camera does not come within the rule of *Industrial Engineering Associates*, 50 F.T.C. 300 at 315, or *Waltham Precision Instrument Co.*, FTC Docket No. 6914, July 20, 1962, (Slip opinion, p. 9). An effort was made to present evidence to the effect that only advanced amateurs and professionals would purchase a Praktica camera, but this was not developed completely because of a frustrated attempt to introduce testimony about the knowledge possessed by possible purchasers (Tr. p. 86). In any event, we know as a common fact of life⁴ that even expensive cameras are bought not only by sophisticated camera fans, but are bought as well by the general populace. Only the availability of spending money stands in the way of their universal sale. Moreover, they are particularly of a gift nature and are bought by doting spouses, parents, friends and sweethearts who, even if the objects of their affections may be sophisticated, are not themselves informed as to place of origin. The Hearing Examiner shudders to contemplate what might happen to the economy of this country if, to cite only two striking examples, advanced cameras were sold only to the experts and sophisticates or yachts were sold only to trained mariners.

The Praktica camera involved in this proceeding, when viewed from the front, which is the first view which anybody picking it up will have, has a $1\frac{7}{8}$ inches by $\frac{1}{4}$ inch area of grayish metal both to the left and to the right of a quadrangular center plate set into a symmetric larger quadrangular section, $1\frac{3}{4}$ inches by $\frac{3}{4}$ of an inch.

³ As to customs and their relation to the law, see Cardozo, *The Nature of the Judicial Process*, Tenth Printing, Yale University Press, 1939, pp. 63-65. "Finally, when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in pursuit of other and larger ends." (*Ibid.* p. 65).

⁴ *McCarthy v. Industrial Commission*, 104 Wisc. 198. 215 N.W. 824.

Initial Decision

63 F.T.C.

On the metal plate, there is emblazoned, black on gray, so that it is the first thing which strikes the eye, the legend "Praktica F. X 3". Although there is ample room on the metal portions, one to each side of this plate, to show that the Praktica camera came from U.S.S.R. Occupied Germany, this is not shown at either of these places nor anywhere on the large areas all over the camera's face and back. On the contrary, it is shown only in small, etched printing, without color distinction, on the upper rim of one of the knurled metal knobs set into the top of the camera. The knob on which this etching appears is at the left side and there are two additional knobs at the right side of the reflex viewing device. I have noted already that the first thing at which one looks when picking up the camera is the face of the camera, where there is no indication of country of origin. This being a reflex camera, the next thing at which one looks is the window of the reflex device. To look at this, one does grasp the camera and look down at its top, but one's attention is now directed exclusively to the reflex device and not to the barely discernible etching of country of origin on the rim of one of the knobs.

As has been noted elsewhere in this decision, some cameras accommodate interchangeable lenses. This Praktica camera seems to be of that type. It is equipped with an Isco-Gottingen Westanar lens, clearly so marked on its face and also marked, fairly legibly, in white on a black strip or band running around the lens at its side, "Germany". (This is quite interesting because, although we have an admittedly "U.S.S.R. Occupied Germany" camera before us, we find that the lens comes from Gottingen, which is in West Germany.) The unqualified use of the word "Germany" could lead the reasonable person to believe that the place of origin of the entire camera is West Germany. (That marking may not be deceptive as to the lens alone, but no ruling is made thereon because that is not an issue in this case.) The clear showing of the Gottingen lens, together with the probably acceptable showing of "Germany", tend to obscure further the "U.S.S.R. Occupied Germany" origin of the Praktica camera.

In view of the foregoing, I find, as did Hearing Examiner Joseph Kaufman in *Standard Camera Corporation*, FTC Docket No. 8469, January 29, 1963 p. 1240 herein, that the marking on the Praktica camera is an inadequate marking of country of origin and thus deceptive. The same may be said of the box or package in which the camera is sold. Nowhere on that box is it disclosed that the

1208

Initial Decision

camera therein offered for sale comes from U.S.S.R. occupied Germany. This likewise is deceptive.

The main thrust of this charge, as it has been developed in the evidence of record, is the advertising practices of Peerless. The charge is that, in its advertising, Peerless does not disclose country of origin of articles offered for sale and that this failure to disclose is a deceptive practice. (Paragraph 7, part 2 of the Complaint, alleges, "The containers in which the cameras are enclosed are not marked to show the country of origin, nor is the fact that the cameras are manufactured in that part of Germany occupied by the U.S.S.R. disclosed in respondents' advertisements offering said cameras for sale.")

The mere fact that an order has been entered or may be entered against *Standard Camera Corporation*, the importer of the Praktica camera, is not dispositive of the deceptive advertising by Peerless which is related to country of origin. It must not be overlooked that, apart from its over-the-counter business in New York City, Peerless aggressively seeks and maintains a large mail-order business and its advertising to procure this business goes to all parts of the United States (CX 12, CX 13, CX 14). The Examiner is unable to distinguish which of the many cameras and lenses advertised in the cited exhibits come from Germany (East or West) or from Japan, or which are of domestic manufacture.⁵

It does not appear to be the practice of the camera retailers to designate country of origin in their advertisements of cameras offered for mail-order sale. This does not make it right. (See Footnote 3, page 6, above.) The purchaser of a camera by mail order, if he or she is not sufficiently informed or not sufficiently sophisticated to know the country of origin of a particular camera, may not know that the Praktica or the Exakta comes from East Germany. Such a purchaser, despite deep-rooted prejudices and preferences, could very well be led to purchase this camera which, had he or she known came from Soviet-occupied Germany, or even Germany for that matter, would not have made the purchase. Such a person thus would be deceived. A glance at the advertisements in evidence (CX 12, 13 and 14) shows that Peerless finds no difficulty in classifying the cameras offered as 35mm, reflex, miniature, movie,

⁵ How many of us could? In the ads we find names like Miranda, Exakta, Kodak, Bell & Howell, Leica, Canon, Tower, Nieca, Ultrablitz, Konica, Soligor, Aires V, Exa, Astronar Monocular, Minolta, Praktica, Edixa, Olympus, Kalimar, Keystone, Elite, Pentacoon, Yashica, Rikohflex, Minox, Tandberg, Ansromatic, Retina, Mamiya, Robin, Agfa Optima, Polaroid, B & H-TDC, Olympus, Beau Lightomatic, Auto Tera, Konaflex, Zeiss, Nikon, Argus Asahi, Rolleicord, Rolleiflex, Dejur, Revere and Heiland (CX 12, 13, 14)

Initial Decision

63 F.T.C.

etc. There would be no difficulty whatsoever in further classifying or subclassifying these groups into U.S.S.R. Germany, West Germany, Japan, America, etc. Its failure to make these disclosures constitutes a deceptive advertising practice. As a matter of fact, because so many camera faddists have distinct preferences (not prejudices) for Japanese or German cameras, disclosure could be profitable.⁶

The Responsibility of Peerless Ochshorn and Rosen

Such practices as have been found deceptive herein were the practices of Peerless, and so Peerless properly may be subjected to a Federal Trade Commission cease and desist order. Rosen appears to have been fully responsible for the preparation, composition and placing of all the advertisements, and, therefore, he properly is subject to a Federal Trade Commission restraining order (Tr. pp. 27-48). He is no longer employed by Peerless but is in the sales organization of an importer of photographic merchandise (Tr. p. 27). There is no evidence that he does not now participate in the preparation of advertisements nor that he will not do so in the future. Consequently, the fact that he is no longer a Peerless employee is not reason for not entering an order against him.

Ochshorn was concerned mainly, if not entirely, with purchasing for Peerless. He continues in the employ of Peerless in that same capacity. While there is some conclusory testimony that he "assisted in the formulation, direction and control of" the practices involved in this proceeding, the bulk of the testimony in that connection is equivocal and inconclusive (Tr. pp. 31-32, 35-50) and is not sufficiently definite or substantial to justify making him personally subject to a Federal Trade Commission cease and desist order. He will be subject to such an order in his capacity as an officer or employee of Peerless.

Should an Order Be Entered Against Rosen and Peerless?

It is argued that even if unfair and deceptive practices are established (and, as already noted, some have been), an order should not issue because it would not result in specific and substantial benefit to the public (a lack of public interest) and that the practices in-

⁶ *E.g.* we recall that a long time ago advertisers capitalized on what some might have regarded as detrimental features of a commodity. Examples are, "The candy mint with the hole." and the vacuum carpet cleaner that "beats as it sweeps as it cleans."

volved in this proceeding transpired prior to the time that Peerless was acquired by Berkey Photo, Inc. The nature of the advertising, which appears to be a common practice in the camera and photographic supply business (Tr. p. 23 and see also CX 12, 13 and 14), does, in the opinion of the Examiner, require the entry of a cease and desist order. This advertising is not at all what might be characterized as the "soft sell". Camera and photographic supply houses engage in a particularly aggressive type of advertising, which is about as subtle as a sledge hammer. While some of the practices with which Peerless has been charged in this proceeding have not been sustained by the evidence, the practices which have been found deceptive should be stopped. An FTC restraining order is the remedy provided by statute and the objectives of the legislation will be effectuated by the utilization of that remedy. As far as the transfer of Peerless assets and stock from Grayson to Berkey Photo, Inc., may be concerned, the Examiner does not regard it as a determining factor in this particular case requiring the withholding of the entry of an order. (As a matter of fact, the decision as to whether an order ought to be entered may more properly be the subject of the Commission's discretion. *Mason, Au & Magenheimer*, Docket No. 7733, Feb. 26, 1963 [62 F.T.C. 1515].) Nor is the Examiner of the opinion that in this particular case, a sufficient case in defense on the part of Berkey has been made. He is further of the opinion that, if the argument of transferral of ownership were accepted as justification for withholding the order, such an acceptance would result in a decision in advance that if, in a future proceeding, any one of Berkey's numerous subsidiaries and affiliates were found to have violated, an all-products, all-stores order against Berkey ought to be entered. The Examiner doubts that Berkey would care to have such an important issue decided prematurely and upon the record of this case.

In making my findings of fact and conclusions of law, I do not repeat any findings or conclusions already made with respect to those charges which I have stated are not supported by substantial evidence (Rule 52 F.R.C.P.; *Capital Transit Co. v. United States*, 97 F. Supp. 614 at 821). I have given careful consideration to all the proposed findings and conclusions submitted by counsel supporting the complaint and by counsel for the respondents. They have been well prepared and show careful study of the record. Many of them are substantially the same as findings stated in the narrative text above or ultimately to be made herein. To the extent that any

Initial Decision

63 F.T.C.

proposed finding or conclusion is not adopted, either directly or in substance, the same has been rejected because of irrelevancy, immateriality, repetitiousness, lack of support in the evidence or as contrary to law or as unnecessary. All motions, the granting of which would be inconsistent with anything herein contained, are hereby denied, and all motions consistent with this decision and any rulings herein made, are hereby granted.

Without in any manner restricting anything heretofore narrated, after careful consideration of the entire record, and to the extent that unlawful practices are concerned, I make the following ultimate

FINDINGS OF FACT

1. Respondent Peerless Camera Stores Corp. (hereafter "Peerless") is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. At all times involved in this proceeding, Sidney Rosen was one of its vice presidents and he formulated, directed and controlled the advertising acts and practices involved herein.

2. The Peerless store is and was located at 415 Lexington Avenue, New York, New York, and Rosen is now employed in the sales organization of a camera importer not involved herein.

3. Peerless is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of cameras to the public at retail.

4. Such advertising is waged in newspapers and photographic magazines having wide circulation in many, if not all, the states of the United States.

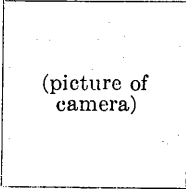
5. In the course and conduct of its business, Peerless now causes, and for some time last past has caused, its products, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other states of the United States. Its annual business is about \$7,000,000 and a substantial portion thereof results from advertising such as is involved in this proceeding. It maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. It has conducted a mail-order business in cameras, and is and has been engaged in commercial intercourse with persons who purchase cameras for cash or on time and transmit payments (for goods purchased) from their residences outside the State of New York to the respondent's place of business in the State of New York.

1208

Initial Decision

7. Peerless, in the course and conduct of its business and for the purpose of inducing the sale of its cameras, has advertised in New York newspapers, as follows:

<p>SAVE \$22.50 OFF LIST PRICE! BOLEX B.SSL 8mm OUTFIT With New Bolex "Compumatic" Turret Camera!</p>	
 <p>(picture of camera)</p>	<p>YOU GET ALL THIS:</p>
	<ul style="list-style-type: none"> • Lytar f1.9 Normal Lens
	<ul style="list-style-type: none"> • Yvar f2.8 Telephoto
	<ul style="list-style-type: none"> • Auto Exposure Control
	<ul style="list-style-type: none"> • Brand New! List Price \$172.00
<p>(When Purchased Separately)</p>	
<p>149⁵⁰</p>	

8. The Bolex 8 mm Movie Outfit had been assembled as a "Manufacturer's Special" and as such never sold for \$172, as stated in the advertisements. It carried a manufacturer's suggested list price of \$149.50 which was the price at which it actually was sold by Peerless. Thus the purchaser of this item at a price of \$149.50 did not save \$22.50 off the list price, as Peerless stated in its advertisements.

9. Through the use of amounts in connection with the word and terms "List" and "Off List", Peerless represented that said "List" amounts were the prices at which the merchandise referred to usually and customarily was sold at retail in its trade areas, or that the amount "Off List" represented a saving to the purchaser from the price at which said merchandise usually and customarily was sold in said trade areas.

10. The amounts set out in connection with the word and term "List", were not the prices at which the merchandise referred to usually and customarily was sold at retail in the Peerless trade areas but were in excess of the price or prices at which it generally was sold in said trade areas.

11. Purchasers of this commodity would not realize a saving of the amount characterized as "Off List" because the commodity advertised was not generally sold in the Peerless trade areas for a price higher than the price at which Peerless advertised it for sale.

12. Peerless regularly has solicited interstate mail-order purchases and has advertised for sale in newspapers and magazines circulated in many, if not all, the states of the United States cameras such as the Praktica and the Exakta manufactured in East Germany, occupied by the U.S.S.R., and imported into the United States. It does not disclose in such soliciting and advertising that such cameras are, in fact, made in and imported from U.S.S.R. occupied Germany.

13. The marking on these cameras showing the country of origin is small and indistinct and is so placed that it does not give or constitute adequate notice of the country of origin. The containers in which they are enclosed are not marked to show the country of origin. However, these markings and failures to mark have not been shown in this proceeding as affecting any sales in interstate commerce.

14. A substantial segment of the purchasing public prefers merchandise, including cameras, that is manufactured in countries other than those countries or territories occupied by the U.S.S.R. over similar merchandise manufactured in territory occupied by the U.S.S.R.

15. The failure to disclose in its soliciting and advertising that cameras therein offered for sale by mail order in interstate commerce are imported from and are manufactured in U.S.S.R. Occupied Germany is deceptive and misleading because persons may be induced by such advertising to make purchases of such cameras when they would not have purchased them had they been informed of the country of origin.

16. In the course and conduct of its business, Peerless is and has been in substantial competition in commerce with other corporations, firms and individuals engaged in the sale and distribution of cameras.

From all of which and upon the whole record, I have made the following

CONCLUSIONS

A. The use by Peerless of the aforesaid false, misleading and deceptive statements and representations as to "list price" and "savings" and its failure to disclose in its advertising for mail orders the country of origin from which U.S.S.R. Occupied Germany cameras offered by it for sale are imported have had and now have the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken beliefs that the representations are true or that the cameras which were manufactured in and imported from U.S.S.R. Occupied Germany and offered for sale are imported from countries of exportation or are manufactured in countries against which the purchasers have no prejudice. They, therefore, have the capacity and tendency to induce members of the purchasing public to make purchases by mail of substantial numbers of cameras offered for sale by Peerless in consequence of such erroneous and mistaken beliefs. Substantial trade in commerce has been and may

1208

Initial Decision

be diverted unfairly thereby from competitors and substantial injury has been and may be done to competition in commerce.

B. Peerless Camera Stores Corp. and Sidney Rosen are responsible for the acts and practices set forth in the "Findings of Fact" and in these "Conclusions".

C. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

D. This proceeding is in the interest of the public.

E. The activities of the respondents, as more particularly set forth in the Findings of Fact, constitute unfair and deceptive acts or practices in commerce in violation of the Federal Trade Commission Act.

F. The order hereinafter set forth is necessary and reasonable to effectuate the purposes and policy of that Act.

In the drafting of the order to be entered herein, I have given careful consideration to both the order submitted by counsel supporting the complaint and the draft of order submitted by counsel for the respondents. The latter was submitted only in compliance with my request and with the express understanding that by so doing they did not concede in any manner that anything but a dismissal was an appropriate disposition of this case. Because of my disposition of various of the charges set forth in the complaint, obviously, much of what counsel supporting the complaint proposes cannot be accepted. Similarly, since the order submitted by counsel for the respondents was submitted only as an indication of what they believed to be *maximal* relief, appropriate only in the event that the entire decision went against them, I have not adopted the form submitted by them. Nevertheless, I have given careful consideration to the ideas sought to be conveyed thereby. I have given consideration as well to respondents' objections to Commission counsel's proposed order, as set forth in the reply brief.

I have been concerned also with whether the foreign origin proscription should be limited to U.S.S.R. because the evidence (other than that to be inferred from the miscellany of cameras offered in the magazine advertisements) justifying the proscription involved only U.S.S.R. cameras. After giving this much thought, I have concluded that the vice we seek to eradicate is the practice of not disclosing country of origin in advertising as opposed to the mere failure to disclose that a particular camera came from U.S.S.R. For this reason, the remedial objectives of the legislation will best be served by not limiting the order to U.S.S.R. cameras. *Taylor v. United States*, 3 How. 197 at 210. *F.T.C. v. Mandel Brothers, Inc.*, 359 U.S. 385 at 392; *Hunter Mills Corp'n v. F.T.C.*, 284 F. 2d 70, *Cert. den'd*,

Initial Decision

63 F.T.C.

366 U.S. 903. *Niresk Industries, Inc. v. F.T.C.*, 278 F. 2d 337, *Cert. den'd.*, 364 U.S. 883. Also, I considered at first the desirability of including in Part 2 of the order an exception for over-the-counter sales in New York because of the insufficiency of proof, but I have concluded that this is covered adequately by the "commerce" limitations contained in the introductory portion of the order.

It is my belief that, for the purpose of effectuating the objectives and intention of the legislation with which we are here concerned, it is proper and necessary otherwise to tailor the order to the limited facts of this case and to enter the following

ORDER

It is ordered, That respondents Peerless Camera Stores Corp., a corporation, and its officers, and Sidney Rosen as an individual, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Any amount is the usual and customary price of merchandise in respondents' trade area when it is in excess of the generally prevailing price or prices at which said merchandise is sold in said trade area.

(b) Any saving is afforded in the purchase of merchandise unless the price at which it is offered is lower than the generally prevailing price or prices at which said merchandise is sold in the trade area in which the representation is made.

2. Advertising for sale or selling by mail or other means of communication cameras which are in whole, or in substantial part, manufactured in foreign countries without clearly and conspicuously disclosing in such advertising that the products are manufactured in whole or in substantial part in the country or countries of actual manufacture.

And it is further ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, without prejudice, as to the respondents Grayson-Robinson Stores, Inc., Maxwell H. Gluck, Stanley Roth, C. Louis Wood, Eugene F. Roth, Herbert Ochshorn, and Stanley Dorman.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This case has been heard by the Commission upon the appeal of respondents from the initial decision of the hearing examiner. The Commission, while satisfied that it has jurisdiction of the practices alleged in the complaint to be in violation of law, has determined that the evidence of record is insufficient to prove the allegations of the complaint. Accordingly,

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated.

It is further ordered, That the complaint be, and it hereby is, dismissed for failure of proof.

IN THE MATTER OF

MCCRORY CORPORATION

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

Docket C-618. Complaint, Nov. 6, 1963—Decision, Nov. 6, 1963

Consent order requiring a New York City operator of numerous stores under the name "Gulf Mills Discount Department Stores" in various States, to cease using the word "Mills" in the stores' name since it owned no mill or factory but bought from manufacturers and others the clothing and other merchandise it offered for resale.

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 McCrory Corporation, a corporation, hereinafter referred to as respondent, has 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 McCrory Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 711 5th Avenue, New York 22, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the operation, in various States of the United States, of

Complaint

63 F.T.C.

numerous department stores using "Gulf Mills" as part of their name.

Said stores are operated under the name of "Gulf Mills Discount Department Stores" as a division of the McCrory Corporation. Through the said stores respondent sells clothing and other merchandise to the purchasing public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said merchandise to be shipped from its headquarters in New York and warehouses in other states to its several stores in various other states of the United States, for sale to the purchasing public. In such instances shipments are made to respondent's stores in States other than that in which such shipments have originated, and respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent also causes advertisements and other promotional material to be shipped from its place of business in the State of New York to its stores in various other states and maintains a substantial commercial intercourse between its headquarters in New York and its stores in other states, consisting of the transmission and receipt of numerous commercial documents, reports and information.

PAR. 4. In the course and conduct of its business, as aforesaid, and for the purpose of inducing the purchase of its merchandise which has been shipped and received in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has used the name "Gulf Mills" in advertisements of its merchandise in newspapers having general circulation in various States of the United States.

PAR. 5. Through the use of the word "Mills" as part of the respondent's trade name, respondent represents that it owns or operates a mill or factory in which the clothing and other merchandise sold by it are manufactured.

PAR. 6. Said representation is false, misleading and deceptive. In truth and in fact, respondent does not own or operate the mill or factory in which the clothing or other merchandise sold by it is manufactured but buys from manufacturers and others for resale to the purchasing public.

PAR. 7. There is a preference on the part of many members of the purchasing public to buy merchandise, including clothing, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them, a fact of which the Commission takes official notice.

PAR. 8. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing and other merchandise of the same general kind and nature as that sold by respondent.

PAR. 9. The use by respondent 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 respondent's products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, McCrory Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 711 5th Avenue, in the City of New York, State of New York.

Complaint

63 F.T.C.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent McCrory Corporation, a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of clothing or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the word "Mills" or any other word of similar import or meaning in or as a part of respondent's corporate or trade name, or representing in any other manner, that respondent is the manufacturer of the clothing and the other merchandise sold by it unless and until respondent owns and operates, or directly and absolutely controls, the manufacturing plant wherein such clothing or other merchandise is made.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

STANDARD CAMERA CORPORATION ET AL.

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

Docket 8469. Complaint, Feb. 21, 1962—Decision, Nov. 7, 1963*

COMPLAINT

Order vacating initial decision which amended the complaint by substitution of a word altering the original theory behind the complaint and was therefore beyond the power of the hearing examiner to authorize, and dismissing complaint charging importers of cameras manufactured in Soviet-occupied Germany for distribution to retailers, with failing to disclose the country of origin of the cameras.

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 Standard Camera

* Reported as amended by order of hearing examiner dated April 20, 1962.

Corporation, a corporation, and Mark S. Lulinsky and Jerome H. Adler, 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 Standard Camera Corporation 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 500 Fifth Avenue, New York, New York.

Respondents Mark S. Lulinsky and Jerome H. Adler are individuals and 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 advertising, offering for sale, sale and distribution of cameras to retailers for sale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said cameras, 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 in 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. When merchandise, including cameras is offered for sale to the purchasing public and such merchandise is not marked, or is not adequately marked showing that it is of foreign origin, such purchasing public understands and believes that such merchandise is of domestic origin.

PAR. 5. Certain of the cameras sold by respondents are imported into the United States from that part of Germany occupied by the U.S.S.R. Respondents have failed to so mark these said cameras, or the containers in which they are sold, as to adequately and clearly disclose the country of origin of said cameras.

PAR. 6. A substantial portion of the purchasing public prefers merchandise that is not manufactured in territory occupied by U.S.S.R., including the said cameras sold by the respondents.

PAR. 7. By the aforesaid practice, respondents place in the hands of retailers a means and instrumentality by and through which the retailers may mislead the public as to the origin of said cameras.

Initial Decision

63 F.T.C.

PAR. 8. 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 cameras of the same kind and general nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory occupied by U.S.S.R. are of other origin and into the purchase of substantial numbers of said cameras by reason of such erroneous and mistaken belief.*

PAR. 10. The aforesaid practice, as herein alleged, was, and is, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitutes, unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5(a) (1) of the Federal Trade Commission Act.

Mr. Frederick McManus and Mr. Charles J. Connolly, counsel supporting the complaint.

Kaye, Scholer, Fierman, Hays & Handler, by *Mr. Sidney A. Diamond*, of New York, N.Y., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JANUARY 29, 1963

The complaint herein charges failure to mark "adequately and clearly" the country of origin (that part of Germany occupied by the U.S.S.R.) of cameras imported for resale in the United States—in violation of Section 5 of the Federal Trade Commission Act, which relates generally to unfair trade practices and unfair methods of competition. A main defense is that the specific country of origin marking, GERMANY USSR OCCUPIED, on the cameras was, according to stipulation herein, approved by the Bureau of Customs, as complying with the Tariff Act provision 19 U.S.C. § 1304, which relates expressly to country of origin markings on imports. The present decision sustains the complaint, in general. It is expressly found that the Praktica camera offered as proof was and is not marked "adequately and clearly" to reveal country of origin. However, as to Praktica, the other type of camera offered in proof, bearing the same specific marking, this decision does not find the marking insufficient—due to larger lettering and other relevant considerations—although it does find that the marking as stamped in small letters on the bottom of the box container is insufficient.

* Reported as amended by order of hearing examiner dated April 20, 1962.

1238

Initial Decision

A cease and desist order issues even though respondent corporation prior to issuance of the complaint herein ceased importing the camera or reselling to consumers, and contracted them away to another company, and even though the latter has consented to a cease and desist order as to markings.

However, the cease and desist order issued herein is not directed against either of the individual respondents as such.

Pleadings and Procedures

The complaint herein alleges a preference for goods not manufactured in U.S.S.R. occupied territory, as follows:

PARAGRAPH SIX: A substantial portion of the purchasing public prefers merchandise that is not manufactured in territories occupied by U.S.S.R., including the said cameras sold by the respondents.

By order of April 20, 1962, after pre-hearing conference, the hearing examiner took "official or judicial notice of this allegation of the complaint" with leave to respondents to prove the contrary of the allegations, and leave to complaint counsel to introduce rebuttal evidence. Respondents offered no such contrary proof, nor did complaint counsel offer supporting evidence, so that the facts as to preference for non-U.S.S.R. cameras rest solely on the notice taken by this examiner.

In addition, the complaint was amended by said pre-hearing order (and a separate order) to change one word in Paragraph Nine, so as to allege that the markings on the cameras have the capacity to mislead consumers into the belief that the cameras, although manufactured in territory occupied by the U.S.S.R., are of "other" origin, *i.e.*, instead of "domestic" origin, as pleaded in the complaint as originally worded.

The complaint also alleges, Paragraph Four, that when merchandise, including cameras, is unmarked or inadequately marked to show foreign origin, the consuming public believes it to be of domestic origin. Complaint counsel's motion to take official notice of this allegation was denied by the hearing examiner in the aforementioned pre-hearing order of April 20, 1962, as follows:

ORDERED, that the said motion is denied, *i.e.*, insofar as the allegations apply to the cameras involved in this case, as identified in the stipulation of facts and the camera exhibits, disclosing fairly complicated cameras definitely not in the low price bracket, and conspicuously marked with trade names indicating a foreign origin.

No proof was offered in support of said allegation, and, of course, none in opposition thereto. Said allegation accordingly is unproved, as relating to the cameras here, which, as the examiner also finds,

Initial Decision

63 F.T.C.

even disclose themselves as of German origin, by the German names around the lens and in other ways. The amendment of Paragraph Nine, above noted, so as to refer to misrepresentation that the cameras are "other" origin instead of "domestic" origin, evidences complaint counsels' abandonment of the legal theory of the domestic origin representation embodied in Paragraph Four. At the pre-hearing conference the examiner stated that he considered Paragraph Four as "dead" (Tr. 65). Respondents seem to regard it that way (Tr. 235).

The cameras are not identified in the complaint except as coming from that part of Germany occupied by U.S.S.R., *i.e.*, East Germany.

It was at the pre-hearing and the hearing proper that the cameras were identified as of two kinds, the Praktica and the Praktina, already referred to. Prior to the hearing a formal motion to dismiss was made on the ground of discontinuance of the alleged practices. The examiner denied the motion, and respondents' petition for review was disallowed.

The hearing was held in New York City on October 1, 1962, and October 2, 1962. There were no consumer nor expert witnesses called for either side.

At the close of the hearing the examiner dismissed the complaint as against respondent Jerome H. Adler, who had been counsel for respondent corporation in the conduct of its business, although he withdrew at a fairly early period. A motion to dismiss as to respondent Mark S. Lulinsky, the corporation's president, was denied at the hearing.

Leave was given to both sides to submit proposed findings and a legal memorandum. There were submissions of five pages from complaint counsel, and 76 pages from respondents' counsel.

Insufficiency of Mark GERMANY USSR OCCUPIED

The Praktica camera (CX 1) was and is manufactured near Dresden, traditionally a well-known center of good cameras, now located in that part of Germany occupied by the U.S.S.R. Praktica is a 35-millimeter single-lens reflex camera, which is a fairly complicated camera and of a specific and unique nature, although there are a number of manufacturers making such a single-lens reflex camera. The 35-millimeter single-lens reflex camera originated prior to World War II in the Dresden area of Germany. However, since the end of World War II such reflex cameras, comparable at least to Praktica, have been manufactured in West Germany. Praktica retails in the United States for about \$75, without accessories or additional lenses.

Praktica has a chrome or chrome-like metallic top, with plenty of free space for markings on this metallic top. On this metallic top, using part of the free space, are three horizontal moveable knobs, presumably of the same material as the top—two of them bearing numbers for camera adjustments, and one of them being merely the unnumbered rewinding knob used in winding the film.

The country of origin marking GERMANY USSR OCCUPIED appears somewhere on this chrome-like ensemble if you can find it. But it does not appear on any of the silvery free space of the top, perhaps even stamped black to be readable by contrast. Nor does it appear on either of the two numbered knobs, readings from the numbering of which might disclose to the user any country of origin marking if it were placed thereon.

Where does the marking GERMANY USSR OCCUPIED appear? After most careful scrutiny and repeated examination one finds that it appears on the rewinding knob, and then merely on the outer circular rim of the knob's flat top. The marking is simply cut into the metal of this top, without any coloring being added. Moreover, the marking is in letters less than $\frac{1}{16}$ " high, going much less than half way around the circle of the rim.

This squeezed-in country-of-origin lettering is for all practical purposes silver on silver, evanescent if not invisible, and obscured even by light. This is so on casual observation. It is also so on much more than casual observation, so that even non-casual purchasers can be deceived, despite respondents' contention to the contrary.

The hearing examiner has no hesitation whatever in holding that by ordinary Federal Trade Commission standards this disclosure of foreign origin is and was inadequate, and that the specific marking in question does not "adequately and clearly" disclose the country of origin of Praktica.

It is true, as respondents point out, that there were no consumer witnesses in this case. But the Commission, and the examiner, may properly formulate conclusions on questioned markings predicated on personal observation and an assessment of the probability of their being seen by consumers who are supposed to see them.* The examiner rules as a matter of law that the specific country of origin marking as it appears on Praktica is inadequate by reason of its small lettering, its position, and the other considerations pointed out above.

*See *Charles of Ritz Distributors Corporation v. F.T.C.*, 143 F. 2d 676, 680 (CCA 2, 1944), *Zenith Radio Corporation v. F.T.C.* 143 F. 2d 29, 31 (CCA 7, 1944).

Initial Decision

63 F.T.C.

Customs Approval Uncontrolling

However, respondents as their main point urge that the Federal Trade Commission is foreclosed, or virtually foreclosed, from holding the country of origin marking inadequate in this case, by reason of the fact that this GERMANY USSR OCCUPIED marking was approved, according to stipulation herein, by the United States Bureau of Customs as complying with the marking provision of the Tariff Act, 19 U.S.C. § 1304.

The cases are to the contrary of what respondents contend. *Heller & Son, Inc. v. F.T.C.*, 191 F. 2d 954 (CA 7, 1951), quoted with approval *In the Matter of Baldwin Bracelet Corp.*, Federal Trade Commission Docket No. 8316, decided December 18, 1962 [61 F.T.C. 1345]. The law is merely that as a matter of quasi-comity, and of orderly government procedure, the Commission will consider with respect such an approval by the Bureau of Customs, even though the approval is not a judicial or semi-judicial determination. *Matter of Standard Sewing Equipment Corporation*, 51 F.T.C. 1012 (1955).

Moreover, the statute under which Customs approves country of origin markings is fairly narrowly worded, as contrasted with the broad sweep of Section 5 of the Federal Trade Commission Act.

* * * * *

What has been stated above, first on the insufficiency of the marking by Commission standards, and then on the non-binding effect of Customs approval of the marking, may without more be sufficient to dispose of this case, at least so far as the allegations as to deception are concerned. However, in view of the extensive brief of respondents the matter will be pursued further. A further possibility of deception will be pointed out, arising out of an additional, and larger, GERMANY marking on the Praktica. Toward the close of this discussion there will also be found a *Note on Customs Approval*, analyzing the statutory language and direction thereunder, as well as the cases. Part of the discussion, also, will be devoted to the defense of discontinuance and lack of likelihood of resumption, as well as non-liability of respondents individually.

Additional GERMANY Marking Misleading

Respondents emphatically assert in their post-hearing law memorandum, that in those cases where the Commission in the past has refused to be bound by Bureau of Customs approval or action in connection with the country of origin markings, the Commission's refusal has been based on some element additional to or other than

1238

Initial Decision

merely its disagreement with the Bureau's approval of a particular country of origin marking. For example, respondents point out, there were some additional marking or words tending to misrepresent origin, or some other misleading feature. (See Note on Customs Approval, *infra*, referring to these cases.)

Even assuming that such an additional element is necessary, or persuasive, there actually is such an additional element in this case. The examiner notes that there is a further and additional marking on the Praktica, large and bold, white lettering on black background, consisting of the single word GERMANY. This additional marking, in the examiner's opinion, is reasonably a representation that the camera comes from West Germany, not East Germany—in other words, that it comes from the Germany recognized by the United States and would be so understood by a substantial segment of retail purchasers. This additional white marking GERMANY is cut into the bottom of a black circular ring in front of the camera, the depth of field scale ring. The GERMANY on this ring can easily be seen by tilting the camera about 25°, or just handling it. The examiner believes that even a curious shopper would be more likely to see this additional GERMANY on the numbered or scaled circular ring than the GERMANY USSR OCCUPIED on the otherwise blank rewinding knob. The examiner believes that a shopper seeing the GERMANY, particularly a non-sophisticated shopper, satisfied thereby that he would be getting a German camera—Germans having a known lead in cameras—might thus be lulled into not looking any further for a country of origin marking and thereby kept from seeing the tiny GERMANY USSR OCCUPIED on the rewinding knob.

Moreover, a retailer overanxious to sell might deliberately tilt or turn the camera so as to show the GERMANY marking, distracting attention from the GERMANY USSR OCCUPIED, and thus utilize the instrumentality of deception placed in his hands by respondent corporation.

There is nothing in this case to show that the Bureau of Customs gave any consideration to this separate GERMANY marking nor, of course, is there any evidence that it was on the camera when the GERMANY USSR OCCUPIED marking was approved. Moreover, the Tariff Act, 19 U.S.C. § 1304, and orders issued thereunder, under which approval was given, seem directed at one affirmative country of origin marking, irrespective of any additional marking or of any instrumentality of deception theory. (See Note on Customs Approval, *infra*.)

History of the Marking

In addition, respondents point to their past adherence to Custom's directions, when they used even a different GERMANY USSR OCCUPIED marking, giving them a compliance record which might possibly bear on the claimed unreasonableness of the present Commission challenge or of the actual issuance of a cease and desist order. However, the pertinent facts are not in respondents' favor.

Originally the Bureau of Customs did not require of importers the present type of marking, cut into the metal of cameras, but was satisfied in the country of origin marking was stamped in white indelible ink on the non-metal body of the camera. This is the way GERMANY USSR OCCUPIED originally appeared on the Praktica, as shown by RX 1, to wit, on the black non-metal back of the camera. However, the Bureau of Customs itself decided that it was wrong in permitting this type of marking under the Tariff Act, 19 U.S.C. § 1304. It so stated in a memorandum dated December 1, 1959 (RX 31), which declares that this type of marking

does not result in a marking which is as legible and conspicuous as required under section 1304 * * *.

Interestingly enough, this former Praktica (RX 1) with the ink-stamped marking on the back also carried the additional marking GERMANY prominently on the lower part of the depth of field scale ring in front, much as the present Praktica carries it. In addition, this former Praktica carried the mark GERMANY a second time, to wit, very prominently right on the chrome-like flat top. Of course, again there is no evidence as to whether the GERMANY marking, either of them, was placed on this former Praktica before or after clearance by Customs.

As to the new form of marking, the one now followed by Praktica, the said memorandum of December 1959 simply provides that

an acceptable form of marking of the name of the country of origin is by means of diesinking or etching on a conspicuous metal surface of the camera in a legible and conspicuous manner.

Now what would be the most obvious "conspicuous metal surface" on which to place the country of origin wording? It would be, of course, right on the flat chrome-like top, indeed, by adding to the GERMANY already there the words USSR OCCUPIED—black on silver. But apparently respondent corporation was not interested in such simplicity and such obvious conspicuousness.

Even with other chrome-like metallic surface available it chose for the required marking one of the unnumbered knobs on top of the camera, the one least likely to invite attention to the marking. The

1238

Initial Decision

GERMANY USSR OCCUPIED, as already pointed out, was squeezed into the rim on top of the rewinding knob, appearing in tiny letters, silver on silver. (As to that GERMANY which originally appeared on the metal top proper of the camera, it is no longer to be found on the present Praktica.)

In the examiner's opinion this marking on the present Praktica was merely pro forma conformance, at the best, with the literal wording of the § 1304, Tariff Act, and the Custom's memorandum of December 1, 1959, and represents a willingness on the part of respondent corporation to make the most minimum disclosure as to which approval could be obtained from Custom's personnel interpreting the same as applied to various types of cameras. It indicates a complete disregard of the salutary and older provisions of the Federal Trade Commission Act and the principles of fair dealings as between retailers, as well as between retailers and consumers, which underlie them.

Unsophisticated Consumers

Respondents also argue that ultimate purchasers of Praktica are sophisticated people who would carefully examine every mark and word on the camera, including the GERMANY USSR OCCUPIED mark in particular, and indeed would probably know in advance, from having read camera manuals or otherwise, that Praktica comes from the Dresden area and therefore from that part of Germany occupied by the U.S.S.R. In support of their argument, respondents state that Praktica is an expensive camera and that, as a 35-millimeter single-lens reflex, it is a complicated one of a specific and unique kind.

Actually, Praktica, with its retail price of about \$75, not including accessories or additional lenses, is expensive only in a very relative sense and complicated only in a less relative sense. On the one hand, like all the single-lens cameras, it is not sold in drug stores or the usual department stores. On the other hand, it seems to be at the beginning or lower end of 35-millimeter single-lens cameras, in price and even in complexity. Its price of substantially less than \$100 would give it a definite appeal to that always large class of dilettantes who, with little actual knowledge, dote on doing what the true lovers of art are supposed to be doing, and to non-sophisticates who simply have a little more money to spend than average persons.

Material Preference for Non-U.S.S.R. Cameras

As already stated, the hearing examiner, in his Order After Pre-Conference, took official notice of Paragraph 6 of the complaint, with

Initial Decision

63 F.T.C.

leave to respondents to submit evidence to the contrary (Rules, §4.12(c)), which they did not do. The notice taken by the examiner indicates that there is a material preference among consumers for cameras not manufactured in territory occupied by the U.S.S.R.

The taking of this notice seems particularly justified in respect to Praktica. As already noted, this camera selling at \$75 or so, is in the lower level of these single-lens reflex cameras, and can be assumed to have a definite appeal to dilettantes and non-sophisticates, among other consumers. Furthermore, cameras comparable to Praktica are made in West Germany.

That there is a general prejudice in this country against goods coming from the U.S.S.R. or territory dominated by it is beyond doubt. Indeed in some substantial segment of our American society the prejudice, even apart from patriotic reasons, is very strong due to the anti-religious regime controlling the U.S.S.R. In *Standard Sewing Equipment Corporation*, 51 F.T.C. 1012, 1024 (1955), this Commission said in its opinion:

Further, a vast majority of people in the United States have a general preference for products made in the United States over those made in the many nations behind the iron curtain.

That such a prejudice might not exist, or that it might be suppressed, among ultra-sophisticated camera users, intent only upon getting what they regard as the best cameras, is quite true. But such a prejudice does and must of necessity exist in a substantial segment of purchasing consumers when non-ultra-sophisticates are well represented among them.

Praktina

Respondent corporation also imported another 35-millimeter single-lens reflex camera from the Dresden area of East Germany. This is the Praktina, which very roughly has the same general appearance as Praktica, although it is definitely a more advanced camera and has additional features, including an electric motor. It sells at retail, without accessories or additional lenses, from \$150 to \$200, depending upon the lens.

Complaint counsel contends that the country of origin markings on Praktina are inadequate in the same way as on Praktica. However, there are differences to be considered:

First, Praktina is more expensive and more complicated, thus appealing more definitely or exclusively to sophisticated consumers. A 30-millimeter single-lens reflex camera comparable to Praktina is

1238

Initial Decision

not made in West Germany, according to the evidence in this case, presented by respondents.

Secondly, although GERMANY USSR OCCUPIED appears on the rim of the rewinding knob, as in Praktica, the letters are much larger. This is because there is a considerably larger rim on which the letters are placed. The letters are actually about $\frac{1}{8}$ " high, and they are well spread so that the marking occupies over half of the circular rim. Thus, from whatever angle the knob is likely to be viewed, at least a large part of the marking stands out clearly, inviting attention to the remainder.

Thirdly, the remaining half of the circular rim of the knob contains a prominent black arrow which, although designed to indicate the direction in which to wind the knob, also serves to point effectively to the marking GERMANY USSR OCCUPIED.

Fourthly, the knob containing GERMANY USSR OCCUPIED is placed on top of a separately moving knob, which is numbered and the use of which, therefore, directly calls attention to GERMANY USSR OCCUPIED.

Fifthly, there is no additional mark of GERMANY, standing by itself, either on the circular numbered ring or anywhere else. Thus there is no direct or explicit representation of a West German origin.

Accordingly, it is difficult to hold that Praktina fails to disclose country of origin. The pertinent facts as to Praktina are different from those as to Praktica. Applied to Praktina, and Praktina alone, respondents' brief is persuasive.

However, the proof in this case is sufficient based only as to Praktica. The complaint, as already noted, mentions only cameras generally.

The result reached here eliminating Praktina could possibly be reached considering only the different size and degree of conspicuousness of GERMANY USSR OCCUPIED, i.e., without considering the other differences noted above. One is caused to wonder whether the Customs officials had only Praktina before them in approving Praktica as well, although this is pure speculation.

The exoneration here of Praktina may seem awkward in result inasmuch as both Praktina and Praktica are, according to the record, subject to a Commission consent order signed by another company, which now handles the cameras instead of respondent corporation. However, facts must be faced as they are. Reasonable enforcement may still possibly include identical new markings on both cameras.

Moreover, Praktina is not completely exonerated. It should be noted that the attractive blue paper box in which Praktina is packed

Initial Decision

63 F.T.C.

(CX 2A), and presumably sold to the consumer, contains the Praktina name prominently and elaborately printed on the top but contains no country of origin marking except that on the outside bottom of the box there is stamped in small letters GERMANY USSR OCCUPIED.

In the hearing examiner's opinion, this marking on the Praktina container does not "adequately and clearly" disclose the country of origin, and the allegation of Paragraph Five of the complaint is to this extent proved. Although one would guess that a similar situation as to containers prevails in connection with the Praktica, there is no proof in the record of this.

As to consumer preference it should be also noted that the examiner still adheres to the official notice taken by him prior to the hearing, i.e., applying to Praktina as well as Praktica, that a substantial segment of camera consumers prefer cameras manufactured in countries not occupied by the U.S.S.R.

Discontinuance and Similar Defenses

Even if a violation of the Federal Trade Commission Act is definitely regarded as proved, respondents contend that the facts show that public interest does not warrant the issuance of a cease and desist order. This is based mainly on the fact that respondent corporation has signed an agreement to sell all of the cameras in question to another company, that it is engaged in the liquidation of these cameras by deliveries to this other company, and that this company has signed a Commission cease and desist order pursuant to which the cameras are now being marked. Respondents admit that the contract provides for the recapture by respondent corporation of cameras not delivered by September 30, 1964, but contend that the possibility is remote.

Respondents claim not only that the corporation has given up this business, but that it has done so because it was unprofitable, and not because of Commission investigation of its camera markings or the issuance of the Commission complaint.

Respondents also seem to stress a lack of intent to violate or flout the law, as well as a general unlikelihood of the resumption of the camera business. See *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 435 (1941), and *Matter of Transogram Company, Inc.*, F.T.C. Docket No. 7978 (September 19, 1962) [61 F.T.C. 629].

The salient facts may be summarized as follows:

Respondent corporation is a wholly owned subsidiary which was set up by Standard Tobacco Company, Incorporated, a large organi-

1238

Initial Decision

zation, which got into the East Germany camera business through selling American tobacco to East Germany. Respondent corporation eventually took over this camera business, and imported and sold the Praktica and Praktina. It engaged a licensed customs broker, who had handled such cameras before, to look after such markings as might be required by the Bureau of Customs. The directions of the Bureau of Customs as to markings were followed as heretofore described, namely, by minimal compliance at least in respect to Praktica.

The Commission's investigator began talks with respondent corporation's representatives in December 1960. In May 1961 the corporation ceased importing cameras from East Germany because, or largely because, it was unprofitable, and contracted to sell its Praktica and Praktina cameras to another company, as stated above, subject to the right of recapture of cameras undisposed of by September 30, 1964. Except for a few sales to fulfill orders on hand, the corporation has made no deliveries of Praktica and Praktina cameras, other than to this company, since September 1961.

Commencing June 1961 respondent corporation began the process of giving up its offices, including show rooms, a camera vault, and other facilities, and letting go of its personnel. It actually gave up its offices in March 1962, and now simply has offices of a limited kind with the parent corporation.

In December 1961, apparently, respondent corporation was advised by the Commission that a complaint might be filed against it. The complaint herein was actually served about the end of February 1962.

On May 29, 1962, the company to which the corporation contracted to sell the cameras signed a Commission consent order under which the Praktica and Praktina camera, along with others, are being marked in accordance with clearance from the Commission's Compliance Division.

The president of respondent corporation, respondent Lulinsky, has testified that as far as "the cameras" are concerned "we are out of business" (Tr. 339). He was asked, "Do you intend to resume the camera business at any time, Mr. Lulinsky?" He answered, "None in my life" (Tr. 145).

First of all, the examiner is not too much impressed by the fact that the corporation, new in the business, entrusted the question of Customs country of origin markings to a supposed expert or quasi-expert as to Customs requirements. In the examiner's opinion, this completely ignored the equally important question of complying with the broader provision of the law enforced by the Federal Trade Commission.

It is true that a business concern may possibly be forgiven for believing that Customs approval of country of origin marking is general government approval. But such forgiveness cannot extend where, as here, the compliance seems to have been the ultra-minimum required by the Customs memorandum purporting to enforce the Tariff Act, and where it was clearly deficient, as found here, under the Federal Trade Commission Act. On the issue, therefore, of public interest in issuing an order, the examiner believes that there was more or less flagrant disregard of the law, rather than innocent violation thereof. Moreover, this seems to be absolutely clear if due weight is given to the use by respondent corporation of the additional marking GERMANY.

Secondly, respondent corporation's alleged abandonment of these camera imports in May 1961, when it signed the contract with the other company, came after the Commission initiated its investigation in December 1960, in other words, after the hand of the Commission was already on its shoulder. The Commission in its discretion, and in determining public interest, may issue a cease and desist order although the acts complained of are abandoned after it starts investigation, or even before. *Spencer Gifts, Inc. v. F.T.C.*, 302 F. 2d 267 (CA 3, 1962). *Gimbel Brothers, Inc.*, F.T.C. Docket No. 7834 (October 17, 1962) [61 F.T.C. 1051, 1066]. Moreover, respondent corporation did not actually move over into the parent company's offices until a month after the complaint herein was issued, and three months after it was advised that a complaint might issue. The fact that the record shows that the business in these cameras was discontinued because it was unprofitable does not necessarily mean that the decision to discontinue might not also have been at least partially predicated on other factors, such as difficulties with the Commission over markings.

Thirdly, apart from the recapture clause in the contract there are possibilities that the corporation will again be immersed in the camera business. Under the contract the purchasing company "guaranteed" a payment of \$500,000 for the cameras, and delivered notes of \$15,000 each aggregating that amount, payable monthly, with the entire unpaid amount due on any default. Thus, on a default respondent corporation would presumably be in a position to take judgment and perhaps even have to take over the company's business, including the cameras and the selling organization, to effectuate its judgment. This provision as to the notes came out quite incidentally in some testimony (Tr. 146-8). Only excerpts of the contracts are in evidence. Respondents' counsel did not produce the contract, and seemed most reluctant about having it in evidence (Tr. 103-105).

Fourthly, it is altogether possible that U.S.S.R. credits for tobacco sales may still figure in some future deal whereby respondent corporation will import East German cameras—even if it does not itself distribute them, requiring setting up a new organization, an obstacle to resumption stressed by respondents. Or it might import other East German articles.

Fifthly, and most important, is the recapture clause in the contract (CX 4). If by September 30, 1964, the buyer has not taken delivery of all the merchandise it has the option of immediately accepting the balance or of paying “an aggregate principal amount equal to twelve and one-half percent (12½%) of such remainder of such Praktica-Praktina open account indebtedness” and relinquishing the undelivered merchandise to respondent corporation.

As already stated, respondents admit that there is thus a possibility that respondent corporation may recapture a portion of these cameras, although they contend that the possibility is slight. However, it is not to the public interest that the Commission should gamble on this possibility, one way or the other. Moreover, there is nothing to prevent the respondent corporation and the buyer from modifying the agreement to provide for further recapture rights, say, in lieu of default procedures if a monthly note is not paid.

After all, the respondent corporation is still a corporation and is still admittedly active, at least on the limited basis of liquidating the cameras through the other company. The very fact that respondent corporation opposes the cease and desist order so vigorously argues against regarding the corporation merely as dormant, as against which the issuance of a cease and desist order would not be indicated.

Respondent corporation doth protest too much. Moreover, the strong position it takes as a matter of law against the controlling effect of Commission determination over Bureau approval, in respect to country of origin marking, is another reason for issuing a cease and desist order herein, if only for the educational effect on respondent and importers generally. See *Spencer Gifts, Inc. v. F.T.C.*, *supra*.

Individual Respondents

Respondent Mark S. Lulinsky was, and is, an officer of respondent corporation, and without doubt has in general controlled its acts and practices, subject, of course, to the desires of the parent corporation, of which he has also been an officer.

However, despite general control and direction by him, the record is clear that he turned over the matter of Customs markings to the employee brought in by him who knew Customs marking practices in regard to cameras manufactured in U.S.S.R. occupied territory.

Initial Decision

Moreover, this is not a case very much like that of the one-man corporation, as generally understood, in which one man owns all the stock, is the officer in control, has few employees, if any, and in general language is the corporation.

Furthermore, there are no special circumstances warranting the necessity for an order herein directed against this officer in his individual capacity, as distinguished from his official capacity.

True, as the examiner notes, Mr. Lulinsky's directions to the employee or employees brought in to take care of markings seem to have been limited to Customs instructions (Tr. 252), without any reference to Federal Trade Commission requirements. However, this blind spot is more excusable in respect to the officer of the corporation than the corporation itself.

As to respondent Jerome H. Adler, also named individually in the complaint, a motion to dismiss was granted toward the close of the hearing. Mr. Adler was general counsel and vice president of respondent corporation, but resigned on December 22, 1960. The facts were developed exhaustively by his counsel, and there is no evidence that he had anything to do with the markings involved in this proceeding, nor even enough to justify his having been named individually in the complaint herein.

Note on Customs Approval

The Tariff Act, 19 U.S.C. §1304, quoted below, provides for a country of origin marking in a "conspicuous place" and also provides that the Secretary of the Treasury shall have power to make regulations described therein in connection with such markings.

Pursuant thereto there was issued a regulation stressing that the marking be "legible and conspicuous" (19 CFR, § 11.8(d)).

There have also been issued so-called Treasury Decisions, published in the Federal Register, relating to the wording of markings on German products so as to comply with § 1304. In 1946, for instance, it was directed that all parts of the German area (except East Prussia and a Polish-administered area) might be designated in the marking as Germany (T.D. 51527). In 1953, it was directed that the marking for Soviet Zone products should read "Germany Soviet Occupied", or "U.S.S.R." substituted for "Soviet" (T.D. 53281(3)). The same thing was directed in 1960 (T.D. 55104).

As we have already seen, respondents, with Custom approval, originally stamped their cameras, in white ink on the non metallic back, with the GERMANY USSR OCCUPIED.

1238

Initial Decision

However, there is a memorandum, dated December 1, 1959 (RX 31), signed by the Acting Commissioner of Customs, and partially quoted above, which reads more fully as follows:

Blind marking by diesinking on other than a metal surface of an imported camera does not result in a marking which is as legible and conspicuous as is required under section 1304 of the Tariff Act of 1930, as amended, and is not acceptable.

Effective immediately as to entries for consumption and warehouse, an acceptable form of marking of the name of the country of origin is by means of *diesinking or etching on a conspicuous metal surface of the camera in a legible and conspicuous manner.*

Please notify importers concerned immediately.

Respondents refer to this memorandum as a "mandate." Obviously, it is not a regulation like 19 CFR § 11.8(d) referred to above. So far as appears herein, or the examiner knows, it is not a Treasury Decision nor published in the Federal Register.

The testimony in this case is that upon the receipt of a copy of this memorandum respondent changed its marking procedure so that GERMANY USSR OCCUPIED was cut into the top of the metal rewinding knob, as appears in the cameras in evidence, and the result was approved by Customs, as already noted in this decision. The procedure was described by Mr. Lulinsky, the president of respondent corporation, as follows (Tr. 325):

When goods arrives, the Customs House gives notice that the goods have to be marked properly. We mark the goods according to what the Customs House has told us. Then they send an inspector who examines the goods that have been marked and if he finds that they are correct gives a report to the Customs House and we get the release. It's only after that time that we are permitted to distribute the goods.

He added that this was the procedure followed as to the cameras here in question.

Mr. Lulinsky's testimony is the evidence as to the nature of the determination process constituting the approval by Customs which is claimed by respondents to be binding on this Commission. In other words, Customs told them that the marking should be on the metal, they put the marking on the metal, and the inspector so reported to his superior in Customs. So far as the evidence in this case shows with any clarity the inspector, or other Customs official, may have seen the larger marking on the Praktina, not the smaller one on the Praktica. Moreover, there is nothing in this record to show that the additional marking GERMANY was considered by the Customs officials nor that it was on the cameras when they inspected them.

Initial Decision

63 F.T.C.

Complaint counsel herein has stipulated (CX 3) that the markings herein "were made pursuant to prior consultation with officials of the United States Bureau of Customs and according to their directions" (par. 9), that they were "approved by the United States Bureau of Customs" (par. 11), and are "in accordance with 19 U.S.C. §1304" (par. 12). However, the stipulation seems to be limited to the specific marking GERMANY USSR OCCUPIED, the only marking actually mentioned in the stipulation (par. 8) to wit, as follows:

8. All of the 35-millimeter single-lens reflex cameras imported by respondent Standard Camera Corporation have been marked as follows: "GERMANY USSR OCCUPIED." This does not blind counsel in support of the complaint in the event contrary information is developed under cross-examination.

The Tariff Act, 19 U.S.C. §1304(a), provides that every article of foreign origin * * * imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article * * * will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether it be printing, stenciling, stamping, branding, labeling, or by any other reasonable method in a conspicuous place on the article (or container) where the marking shall appear;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article or as to the origin of any other article with which such imported article is usually combined subsequent to importation but before delivery to an ultimate purchaser; and

(3) Authorizing the exception of any article from the requirements of marking if—

* * * * *

Section 1304(b) applies to the marking of containers, but it will be noted that by its express wording, marking of containers is prescribed only when the article itself need not be marked, *i.e.*:

(b) Whenever an article is excepted under subdivision (3) of subsection (a) of this section from the requirements of marking, the immediate container, if any, of such article * * * shall be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of such article, subject to all provisions of this section * * *.

19 U.S.C. §1304 seems to impose a narrower standard than markings which "adequately and clearly" disclose the country of origin as alleged in the complaint herein, or which can be used by a retailer as an "instrumentality" of deception, as alleged in the complaint.

First of all, § 1304 seems to be preoccupied with the existence of just one adequate marking, irrespective of other perhaps confusing,

1238

Initial Decision

if not contradictory, markings. § 1304 provides that the article "shall be marked * * * to indicate * * * country of origin * * *" It provides that the Secretary of the Treasury may determine the "character" of acceptable words to indicate country of origin, and that he may require the "addition of any other words" (subtraction is not mentioned) "to prevent deception or mistake as to the origin of the article." Moreover, there is nothing in this Section to indicate any deference to the Commission "instrumentality" theory, the requirement stated therein being merely to "indicate to an ultimate purchaser", which is a far cry from the truly broad language of Section 5 of the Federal Trade Commission Act sweepingly referring to unfair trade practices and unfair methods of competition.

Secondly, there is no requirement in the Section that the wording or marking on the article will be as *clear and adequate* "as the nature of the article will permit", but merely that the article will be marked "in a conspicuous place as legibly, indelibly, and permanently as the nature of the article or container will permit." However, it would seem that this Commission, in its wide discretion, may determine that the size of the lettering should be sufficiently large and conspicuous, reasonably, "as the nature of the article will permit", and that it is under a duty to determine here that lettering should not be shunted to a limited space on a little knob.

Possibly corroborative of this interpretation of § 1304 as somewhat narrow in scope, is the regulation issued thereunder referred to above, to wit, 19 CFR § 11.8(d), stressing that the markings be "legible and conspicuous" and emphasizing "permanency."

Finally, as noted above, there is nothing in § 1304 prescribing markings on containers of articles unless the articles themselves are exempt from markings—a limitation which, of course, does not exist under the Federal Trade Commission Act.

Heller & Son, Inc. v. F.T.C., 191 F. 2d 954 (CA 7, 1951)* is a case in point on the general principle that this Commission is not bound by Bureau of Customs approval of country of origin markings. There the argument was made that Congress, by enacting the marking provision of § 1304 "withdrew regulatory jurisdiction over this subject from the Commission" (p. 956). The opinion states that an examination of the Tariff Act

discloses no language expressing an intention on the part of Congress to repeal § 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices * * *

Accordingly, the Commission's order to cease and desist was upheld.

* This case is quoted with approval in a recent Commission case. *In the Matter of Baldwin Bracelet Corp.*, F.T.C. Docket No. 8816 (December 18, 1962) [61 F.T.C. 1345].

Initial Decision

63 F.T.C.

The opinion in *Heller* also states that Congress in enacting § 1304 "was concerned solely with the extent to which the Treasury Department, incidentally to its collection of customs duties, should regulate the labeling of imported goods." (p. 957.) Respondents here attempt to impair the soundness of *Heller* (as well as *Standard Sewing, infra*), by referring to *U.S. v. Mersky*, 361 U.S. 431 (1960) which in effect refers to § 1304 as being for "the protection of the ultimate consumer in the United States" (p. 440), and "the protection of the public from deceit" (p. 440).

However, the examiner here holds that this public purpose of § 1304 is quite clear and could not have been lost on the Court of Appeals in *Heller*. The Section expressly refers to a marking "in such manner as to indicate to an ultimate purchaser in the United States" the country of origin. The opinion in *Heller* merely indicates that, in respect to § 1304 and its undoubted interest in the ultimate purchaser, Treasury should regulate the labeling of imported goods "incidentally to its collection of customs duties."

In the matter of *Standard Sewing Equipment Corporation*, 51 F.T.C. 1012 (1955), the facts are sufficiently close to the facts in the present case. There the importer had marked its sewing machines "Made in Occupied Jajan" or "Japan", but in letters so tiny and otherwise not readily seen (as testified to, there, by consumer witnesses) that the markings were held by the Commission to be deceptive.

Respondents here point out that there were also other markings on the sewing machines, in that case, indicating an American origin, such as conspicuous metal labels on the motors reading "Made in the U.S.A." and conspicuous use of a trademark suggesting manufacture in the United States. However, in the opinion of this examiner, these additional markings have a comparable counterpart in the additional GERMANY marking in the present case.

In *Standard Sewing Equipment*, too, the Bureau of Customs had approved the specific markings, to wit, Made in Japan, or Japan. The Commission in its opinion held that it was not bound by this approval by Customs, although also holding that the approval was entitled to weight in considering the adequacy of the markings.

Respondents here challenge *Standard Sewing Equipment* on the ground that the Commission opinion was signed by only two members of the Commission. A third member concurred in the result but protested the action of the Commission, contrary to Customs, as being unfair to business, which should not be compelled to shop around the government to find out what is a proper marking. Two other mem-

1238

Initial Decision

bers dissented on the sufficiency of the evidence to prove misbranding, their opinion being mostly a revaluation of the consumer testimony, but also holding that Customs approval of a country of origin marking is entitled to much weight. It will be noted that all three opinions in the case agree that an opinion by Customs is entitled to some weight, or measure of respect.

The hearing examiner holds as follows:

First, there is no rule of law prohibiting the Federal Trade Commission from arriving at a different conclusion on a matter, assuming that there is an identical question upon which both it and another government agency such as the Bureau of Customs may have jurisdiction. At the most, only a principle of comity is involved, pursuant to which the Commission in its wise discretion may elect not to announce a conclusion different from that of a more or less coordinate agency. The principle of comity is not too easily invoked in the present case since the Federal Trade Commission is preeminently an agency dealing in unfair trade practices, even to an extent greater, unfortunately perhaps, than monopoly practices, its other great area of activity. The Bureau of Customs, more basically the Secretary of the Treasury, obviously has an area of activity of which unfair trade practices, as exhibited in inadequate country of origin markings, are a small part, but only a very small part.

Secondly, the approval here by the Bureau of Customs does not even represent a semi-judicial determination, such as a Federal Trade Commission determination fully circumscribed by the Administrative Procedure Act. Customs approval represents only an *ad hoc* clearance by inspectors or other personnel, and this is definitely true on the facts shown in this case. Certainly the Commission cannot permit itself, in the name of comity, to be bound by every clearance or approval which may have been wangled out of Bureau subordinates in the hurly-burly of all products coming into the United States requiring country of origin identification.

Thirdly, the hearing examiner grants that adequate consideration and respect should be paid to the approval of the Bureau of Customs and to the need of importers for consistent determinations from different agencies. However, the actual facts of approval herein hardly compel the rubber-stamping of the approval by Customs but definitely indicate contrary action. Even if the approval by Customs is to be regarded in the nature of evidence, as respondents contend, it need not control in the absence of other evidence, as they also contend, since the Commission under all the circumstances may deem it insufficient in weight or for other legal reasons, or may counter it with its own expertise regarded as equivalent evidence.

Initial Decision

63 F.T.C.

Fourthly, it is hardly clear on this record, and as to this respondents would seem to have the burden of proof, that the Bureau of Customs had the same question before it as the Commission does now. There is no proof as to what cameras the Customs inspector had before him in clearing the marking, *i.e.*, both the Praktica and Praktina cameras or just the Praktina. Furthermore, the Bureau seems to have passed solely on the adequacy of the marking GERMANY USSR OCCUPIED without considering the larger and separate GERMANY marking. This would be consistent with a clearance given by a subordinate as to conformity with a Customs memorandum pursuant to statute—or with the absence of the GERMANY marking at the time of clearance.

Fifthly, there is an additional legal question which the Commission has before it, considering applicable Commission case law, as to which there is no proof or indication that the Bureau gave any consideration at all—namely, whether, as charged in the complaint, the inadequate markings (which in their generality as alleged would include the GERMANY marking) resulted in putting into the hands of retailers a means and instrumentality of deception.

Sixthly, there is the question of the insufficient marking of the containers of the camera, a question before the Bureau of Customs only when the imported article itself is excepted from marking under § 1304(a)(3).

FINDINGS OF FACT

The following are the Findings of Fact herein, constituting the essential facts in this case.

All proposed findings not found herein, or not hereinabove found, are disallowed, although disallowance of a proposed finding does not necessarily mean that proof has been insufficient.

1. (a) Respondent Standard Camera Corporation 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 500 Fifth Avenue, New York, New York.

(b) Respondent Mark S. Lulinsky, whose address is also 500 Fifth Avenue, New York, New York, is and has been an officer of said corporation, to wit, president, in general charge and control, but he did not and has not formulated, directed, and controlled the below described acts and practices of respondent corporation in connection with the marking of cameras from U.S.S.R. Occupied Germany, but entrusted the matter of country of origin markings to a special employee having familiarity and actual experience with such requirements, at least as enforced by the Bureau of Customs. There

are no special circumstances to charge him with individual responsibility for any deceptive markings made by respondent corporation, and the fact that he did not instruct the employee as to Federal Trade Commission requirements is not found to be a sufficient special circumstance.

(c) Respondent Jerome H. Adler was general counsel and vice president of said corporation, but he resigned in December 1960, and he was not in general charge and control of said corporation, nor did he formulate, direct and control the below described acts and practices of the respondent corporation in marking cameras from U.S.S.R. Occupied Germany.

2. Respondent corporation was, up to about October 1961, and going back some years, engaged in the importing, advertising, offering for sale, sale and distribution of cameras to retailers for sale to the public. These cameras are known as Praktica and Praktina. They are 35-millimeter single-lens reflex cameras, and therefore may be regarded as complex cameras of a unique kind. However, Praktica retails in the United States for as little as \$75, and is not as complex as Praktina, so that Praktica, at least, has popular, rather than only a limited, sophisticated appeal. Praktina retails at \$150 to \$200.

3. In the course and conduct of its business, at least up to about June 1961, respondent corporation caused the said cameras when sold to be shipped from its place of business in the State of New York to purchasers thereof located in various other states of the United States and in the District of Columbia, and maintained a substantial course of business in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Said Praktica and Praktina cameras sold by respondent corporation were imported into the United States by it from that part of Germany occupied by the U.S.S.R. A camera comparable to Praktica, but no camera comparable to Praktina, has also been manufactured in West Germany.

5. (a) Respondent corporation failed to mark the Praktica cameras so as to disclose adequately and clearly the country of origin thereof. This is due primarily to the smallness of the lettering of the marking GERMANY USSR OCCUPIED and the inconspicuous place in which the marking appears. Moreover, there is also a confusing and larger GERMANY marking on said Praktica, implying a West German origin.

(b) The Praktina was adequately and clearly marked by respondent corporation, due to the larger lettering of GERMANY USSR

Initial Decision

63 F.T.C.

OCCUPIED, the absence of the separate GERMANY marking, as well as to other factors, including perhaps the presumably greater sophistication of ultimate purchasers of this camera. However, respondent corporation failed to mark the paper box container in which Praktina is sold so as to adequately and clearly disclose the country of origin thereof. (There is no proof in this case as to any container of the Praktica.)

6. A substantial portion of the purchasing public prefers merchandise that is not manufactured in territory occupied by the U.S.S.R., including the said cameras Praktica and Praktina sold by respondent corporation.

7. By the aforescribed practices respondent corporation placed in the hands of retailers means and instrumentalities by which retailers may mislead and have misled the public as to the origin of said cameras particularly of Praktica, but also of Praktina due to the inadequate marking on its container.

8. In the conduct of its business and at all relevant times herein respondent corporation was and has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of cameras of the same kind and general nature as those sold by said respondent.

9. The use by respondent corporation of the afore-described practices had and has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory of the U.S.S.R. were of other origin, presumably of West German origin, and into the purchase of substantial numbers of said cameras by such erroneous and mistaken belief.

Customs Approval

10. The specific marking GERMANY USSR OCCUPIED, on both the Praktica and Praktina was approved by the Bureau of Customs as complying with the Tariff Act 19 U.S.C. § 1304, i.e., the marking was cleared by an inspector as being in compliance with that Section and instructions or directives issued thereunder, although § 1304 is much more narrowly worded than Section 5 of the Federal Trade Commission Act.

11. This Customs approval was not a judicial or quasi-judicial determination. Nor did it extend to, or comprehend, the additional larger marking GERMANY on the Praktica. Nor did it extend to the marking on any container of either Praktica or Praktina.

12. Conformity by respondent corporation with Customs requirements was of a most minimal nature at the best, and it represented a reckless disregard of general principles of fairness such as are embodied in the Federal Trade Commission Act.

Alleged Discontinuance

13. An investigator of the Federal Trade Commission interviewed officials of respondent corporation as early as December 1960 in respect to the camera markings.

14. In May 1961, after deciding to go out of the camera business as formerly conducted by it, on the ground that it was unprofitable, as publicly announced, respondent corporation entered into a written contract to sell substantially all of its Praktica and Praktina cameras to another company, with deliveries and payments from time to time.

15. However, the contract provides that if by September 30, 1964, the inventory is not exhausted, the purchasing company may relinquish the balance to respondent corporation, upon a certain percentage payment, so that, as the examiner finds, there is a substantial possibility that respondent corporation will be in this camera business again.

16. The contract also provides for a "guarantee" by the purchasing company of \$500,000, with monthly notes of \$15,000 each, the entire unpaid balance due on any default, so that in case of default respondent corporation will presumably be in a position to take judgment and execute on the purchasing company's inventory of Praktica, Praktina, and other East Germany cameras handled by it—again bring about a substantial possibility of respondent corporation's being back in its former camera business, perhaps even with the sales organization of the purchasing company.

17. Furthermore, respondent corporation got into the East Germany camera business through credits established in East Germany by its parent tobacco company as the result of sales of tobacco to East Germany, so that the recurrence of any such credits could again bring it into the importation of these cameras, if not other East German products requiring marking.

18. Thus the fact, as here found, that the purchasing company has signed a Federal Trade Commission consent cease and desist order, under which it is marking these and other cameras of U.S.S.R. origin, is not too material on the issue of whether or not it is to the public interest to issue a cease and desist order against respondent corporation as to these cameras or other East German products.

Initial Decision

63 F.T.C.

CONCLUSIONS OF LAW

1. The aforescribed practices, of failing adequately to disclose the country of origin of cameras imported and sold by respondent corporation were and are all to the prejudice of the purchasing public and of respondent corporation's competitors, and constitute unfair and deceptive acts and practices in violation of Section 5(a)(1) of the Federal Trade Commission Act.

2. Approval by the Bureau of Customs of the country of origin markings herein, under the pertinent provision of the Tariff Act, 19 U.S.C. § 1304, is not binding on the Federal Trade Commission in respect to requirements under Section 5 of the Federal Trade Commission Act.

3. There is sufficient likelihood of resumption of the unlawful and inadequate marking practices herein to warrant issuance of a cease and desist order based on public interest, and the public interest is also invoked by the mere pro forma conformity with customs requirements in clear violation of Federal Trade Commission requirements by the markings involved herein.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents herein.

ORDER

It is ordered, That respondent Standard Camera Corporation, a corporation, as well as its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cameras and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling products which are, in whole or in substantial part, manufactured in territory occupied by the U.S.S.R. without clearly and conspicuously disclosing on such products, and, if the products are enclosed in a package or container, also disclosing on such package or container, in such manner that it will not be obliterated, that such products are manufactured in whole or in part in territory occupied by the U.S.S.R.

2. Furnishing or otherwise placing in the hands of retailers and dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner hereinabove inhibited.

1238

Opinion

It is further ordered, That the complaint herein is dismissed as to respondents Mark S. Lulinsky and Jerome H. Adler, individually.

OPINION OF THE COMMISSION

By DIXON, *Commissioner* :

This case is before us on respondent corporation's appeal from the hearing examiner's initial decision finding it to have violated Section 5(a)(1) of the Federal Trade Commission Act, 66 Stat. 631 (1952), 15 U.S.C. 45(a)(1) (1958). The examiner's dismissal of the complaint as to respondents Mark S. Lulinsky and Jerome H. Adler, individually, was not appealed by counsel in support of the complaint.

The respondent corporation imports cameras manufactured in Soviet-occupied Germany for distribution to retailers. The complaint, issued on February 21, 1962, alleged in essence that Standard Camera failed to mark its imported cameras so as to adequately disclose their country of origin, and that as a result of said inadequate marking, the purchasing public was misled into believing that they were of domestic origin. Insofar as the language of the complaint is pertinent to the issues to be discussed, it is reproduced here :

PARAGRAPH FOUR: When merchandise, including cameras is offered for sale to the purchasing public and such merchandise is not marked, or is not adequately marked showing that it is of foreign origin, such purchasing public understands and believes that such merchandise is of domestic origin.

* * * * *

PARAGRAPH NINE: The use by respondents of the aforesaid practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory occupied by U.S.S.R. are of domestic origin and into the purchase of substantial numbers of said cameras by reason of such erroneous and mistaken belief.

At the prehearing conference, the hearing examiner noted that the cameras to be used as exhibits appeared to be of foreign origin. On that basis, he refused to take official notice of the truth of the allegation embodied in Paragraph Four of the complaint, as applied to such cameras. Counsel supporting the complaint thereupon formally moved that Paragraph Nine of the complaint be amended by striking out the word "domestic" and substituting in its place the word "other." The examiner granted this motion. The allegation in Paragraph Four of the complaint, although not stricken, was regarded as "dead" by the examiner.¹ Subsequent proceedings

¹ Initial Decision, p. 1242.

Opinion

63 F.T.C.

were predicated upon Paragraph Nine of the complaint, as amended. In his initial decision, the examiner found that the labeling practices of the respondent corporation " * * * had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory of the U.S.S.R. were of other origin, presumably of West German origin * * *"² The respondent corporation now asserts, *inter alia*, that the examiner was in error in permitting the above amendment, because it was not reasonably within the scope of the proceeding initiated by the original complaint. For the reasons hereinafter stated, we agree. In view of our disposition of the case, respondent's remaining assignments of error will not be discussed.

Our Rules of Practice empower a hearing examiner to allow appropriate amendments to the pleadings.³ Such power is limited, however, by the caveat that the amendments must be "reasonably within the scope of the proceeding initiated by the original complaint."⁴ Where the effect of the amendment is an alteration of the underlying theory behind the complaint, or where it alleges substantially different acts or practices on the part of the respondent, or where it requires different determinations with respect to the belief that a violation has occurred and that the public interest is jeopardized, the hearing examiner is without power to authorize it. *Food Fair Stores, Inc.*, Order Disposing of Interlocutory Appeal and Directing Issuance of Amended and Supplemental Complaint, 53 F.T.C. 1274 (1957); *Giant Food Shopping Center, Inc.*, Docket No. 6459, Order Disposing of Interlocutory Appeal and Directing Issuance of Amended and Supplemental Complaint, May 8, 1957; *Waltham Watch Company*, Docket No. 6914, Order in Disposition of Motion Certified by Hearing Examiner, March 26, 1958; *Hoving Corporation*, Order Disposing of Motion Certified by Hearing Examiner and Directing Issuance of Amended and Supplemental Complaint, 55 F.T.C. 2067 (1959); see *Capitol Records Distributing Corporation*, Order Remanding Record to Hearing Examiner and accompanying opinion, 58 F.T.C. 1170 (1961). Thus, where an amendment impinges upon powers exercised exclusively by the Commission, it is incumbent upon the hearing examiner to certify the matter to us for determination.

In the instant case, the complaint originally issued by the Commission was premised upon that line of cases holding that the purchasing public has a preference for domestic products and that where

² Initial Decision, Findings of Fact, par. 9, p. 1262.

³ Rules of Practice, § 3.7(a)(1), 28 Fed. Reg. 7080, 7087 (July 11, 1963); Rules of Practice, § 4.7(a)(1), 27 Fed. Reg. 4609, 4617 (May 16, 1962); Rules of Practice, § 4.7(a)(1), 26 Fed. Reg. 6015, 6017 (July 6, 1961).

⁴ *Ibid.*

merchandise manufactured abroad is not adequately marked showing that it is of foreign origin, the American consumer believes it to be of domestic origin.⁵ This theory was dropped from the case at the prehearing conference when the examiner observed that respondent's cameras were obviously of foreign origin and declined to take official notice of Paragraph Four of the complaint as it pertained to these cameras. The subsequent amendment of the complaint charged the respondent with duping the purchasing public into believing that the cameras were manufactured in some unspecified foreign place not occupied by the Union of Soviet Socialist Republics. The complaint as amended was thus predicated upon a preference by the purchasing public for goods manufactured in countries and places other than those occupied by the Soviet Union. In that instance, the issue to be decided was whether unlawful deception resulted from the respondent's alleged failure to adequately indicate that its obviously foreign cameras emanated from a country occupied by the Soviet regime. This was in sharp contrast to the question posed by the complaint as originally issued—whether actionable deception resulted from a failure to show that cameras which the public might assume were of domestic origin were actually manufactured abroad. Such an amendment altered the underlying theory behind the complaint, and thus necessitated different determinations with respect to the belief that a violation of law had occurred and with respect to the nature and degree of the public interest involved. Decisions on factors such as these are reserved for the Commission. See *Capitol Records Distributing Corporation, supra*. Accordingly, we hold that the above amendment was not reasonably within the scope of the proceeding initiated by the original complaint and therefore was beyond the power of the hearing examiner to authorize.

Evidence adduced at the hearing indicated that the respondent found the importation of cameras unprofitable and abandoned the business after our investigation was initiated, but prior to the issuance of the complaint.⁶ Respondent's only business activity at present is the liquidation of its inventory, and we are assured that there are no plans to resume the camera business. The purchaser of respondent's inventory is currently marking the cameras in accord with a consent order.⁷ In certain circumstances specified in the con-

⁵ *E.g.*, *L. Heller and Son, Inc. v. Federal Trade Commission*, 191 F. 2d 954 (7th Cir. 1951); *American Trade Co., Inc. v. Federal Trade Commission*, 211 F. 2d 239 (2d Cir. 1954); *Lifetime Cutlery Corp.*, 57 F.T.C. 1265 (1960); *Oxwall Tool Co., Ltd.*, Docket No. 7491, 59 F.T.C. 1408, December 26, 1961; *Manco Watch Strap Co., Inc.*, Docket No. 7785, 60 F.T.C. 495, March 13, 1962; *Baldwin Bracelet Corp.*, Docket No. 8316, 61 F.T.C. 1345, December 18, 1962.

⁶ Initial Decision, Findings of Fact, pars. 13, 14, p. 1263.

⁷ *In the Matter of Camera Specialty Co., Inc.*, Docket No. C-143 (May 29, 1962) [60 F.T.C. 1652].

Complaint

63 F.T.C.

tract for sale, respondent would be entitled to repossess portions of its inventory and, in this manner, re-enter the field. However, on the basis of the entire record and in the light of attending circumstances, the Commission does not feel that the degree of public interest is sufficient to warrant the issuance of an amended or supplemental complaint.

For the aforementioned reasons, an order will issue setting aside the initial decision and dismissing the complaint. Rules of Practice, § 3.24(b), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

ORDER DISMISSING THE COMPLAINT

This matter having been heard by the Commission upon the appeal of respondent, and upon briefs and oral argument in support thereof and in opposition to said appeal; and

The Commission having considered said appeal and the record herein, and having determined, for the reasons stated in the accompanying opinion, that the initial decision should be vacated and set aside and the complaint dismissed, subsequent Commission action, if required, not being barred by the dismissal of the complaint herein:

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

IN THE MATTER OF

ALL-LUMINUM PRODUCTS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT

Docket 8485. Complaint, May 8, 1962—Decision, Nov. 7, 1963

Order requiring a Philadelphia manufacturer of aluminum outdoor casual furniture and folding tables and its affiliated sales company, to cease discriminating among their customers in violation of Sec. 2(d) of the Clayton Act by giving catalog and trade-show allowances to certain of their wholesalers, mail-order distributors, and catalog houses, but not to all the favored customers' competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter

1268

Complaint

more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents All-Luminum Products, Inc., Windsor Metal Products, Inc., and All-Luminum Sales Corp., Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, all with offices and principal place of business located at 3600 Reed Street, Philadelphia, Pennsylvania. The individual respondents, George Cohen and Boris Cohen, are president and treasurer, respectively, of respondent All-Luminum Products, Inc., and treasurer and president, respectively, of Windsor Metal Products, Inc., and All-Luminum Sales Corp., Inc.

The individual respondents, George Cohen and Boris Cohen, dominate, direct and control all acts, practices and policies of the corporate respondents.

PAR. 2. Respondents are now and have been for some time engaged in the manufacture, distribution and sale of various types of furniture. In the course and conduct of their business in commerce, respondents have engaged and are now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and cause their products to be transported from their principal place of business in the State of Pennsylvania to customers located in other states of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 3. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products.

PAR. 4. For example, for some time since 1959 respondents have made available and continue to make available to certain of their customers cash contributions for the purpose of contributing for advertising of their products in the various catalogs used by such customers to sell said customers merchandise to the trade at large; have given certain customers valuable merchandise to be used as

Initial Decision

63 F.T.C.

prizes at various sales shows; and have made cash contributions to such customers to help defray the expenses of such sales shows.

Such allowances or compensation has not and is not made available on proportionally equal terms to all other customers competing with the said favored recipient customers in the sale and distribution of the aforesaid products purchased from respondents.

PAR. 5. The acts and practices of respondents, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Alvin D. Edelson supporting the complaint.

Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., by *Mr. Kimber E. Vought*, for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

APRIL 5, 1963

The Federal Trade Commission issued its complaint against the respondents on May 8, 1962, charging them with violations of subsection (d) of Section 2 of the Clayton Act, as amended, for failure to make certain promotional advertising monies available on proportionally equal terms to competing customers. The respondents answered admitting a number of the allegations in the complaint, but denying generally the illegality of the practices charged in the complaint. In a stipulation (CX 1), respondents withdrew their denial of interstate commerce and admitted that they are engaged in commerce as alleged in the complaint.

This matter is before the hearing examiner for final consideration upon the complaint, answer, testimony, and other evidence and proposed findings of fact and conclusions filed by counsel for respondent and counsel supporting the complaint.¹ Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. All-Luminum Products, Inc. (hereinafter referred to as All-Luminum Products) is a Pennsylvania corporation and is engaged

¹ The record in this matter is brief, consisting of a stipulation between counsel and the testimony of the two individual respondents named in the complaint.

in the business of manufacturing aluminum outdoor casual furniture and folding tables.

2. All-Luminum Sales Corp., Inc. (hereinafter referred to as All-Luminum Sales) is a Pennsylvania corporation which sells certain products manufactured by All-Luminum Products to jobber accounts (sometimes called distributor accounts).

3. Windsor Metal Products, Inc. (hereinafter referred to as Windsor) is a Pennsylvania corporation which sells products manufactured by All-Luminum Products directly to retail or department store accounts.

4. Boris Cohen, an individual, is Treasurer of All-Luminum Products and President of both All-Luminum Sales and Windsor. Boris Cohen and his brother George Cohen own between them ninety-six (96) per cent of the capital stock of All-Luminum Products, All-Luminum Sales and Windsor.

5. George Cohen, an individual, is President of All-Luminum Products and is Secretary-Treasurer of both All-Luminum Sales and Windsor.

6. Boris Cohen is responsible for the sales policy of All-Luminum Sales and Windsor, establishes respondents' policies concerning the payment of allowances to all customers who purchase from All-Luminum Sales and Windsor, and instructs salesmen in regard thereto. He is directly responsible for the acts and practices charged in the complaint and found herein.

7. George Cohen is responsible for manufacturing and production of the products sold and has no responsibility for sales or policies concerning cooperative advertising.

8. In 1959, total sales by All-Luminum Sales and Windsor of products manufactured by All-Luminum Products were about \$6,000,000 and in 1960, about \$5,000,000.

9. The offices and principal place of business of all respondents described above, both corporate and individual, are located at 3600 Reed Street, Philadelphia, Pennsylvania.

10. In the course and conduct of their business in commerce, respondents have engaged in, and are now engaging in, commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and cause their products to be transported from their principal place of business in the State of Pennsylvania to customers located in other states of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

11. All-Luminum Products and All-Luminum Sales, in the years 1959 and 1960, sold to a class of customers called "stocking dis-

Initial Decision

63 F.T.C.

tributors" (or sometimes called "stocking jobbers"). A "stocking distributor" is a distributor who maintains storage and warehouse space enabling him to maintain a constant inventory of hardware, houseware and traffic merchandise and who resells to dealers or retailers.

12. All-Luminum Products and All-Luminum Sales, in the years 1959 and 1960, sold to another class of customers called "non-stocking distributors" (or sometimes called "non-stocking jobbers"). A "non-stocking distributor" does not stock merchandise in a warehouse or in a store. Orders placed with respondents are usually filled by drop shipment direct to the non-stocking jobber's customer.

13. The only exhibit in the record (CX 1) is a stipulation between counsel. Except for an admission of interstate commerce, this entire stipulation is as follows:

PARAGRAPH TWO: With regard to the following witnesses herein listed below by geographical area the following facts are stipulated.

The following distributors made purchases of goods of like grade and quality from respondents All-Luminum Products, Inc. and All-Luminum Sales Corporation during the periods and in the amounts as columnized below, and received promotional allowances as shown, and were during the period set out, and are now, in competition in the resale and distribution of respondents' goods of like grade and quality.

Distributor	1959 purchases	1960 purchases	Advertising and/or promotional allowances	
			1959	1960
NEW JERSEY DISTRIBUTORS				
Newark Specialty Company.	\$10,486.45	\$15,001.31	Catalog Allowance.. \$75.00	Special prizes for furniture show. \$48.00 Door prize for show.. 14.75 Catalog Allowance.. 60.00
I. Lehrhoff.....	32,224.00	20,316.20	-----	Catalog Allowance.. 400.00
Eagle Sales Co.....	13,473.40	11,661.76	-----	Dealer show space.. 75.00 Door prize..... 12.70 Catalog Allowance.. 25.00
Beller Electric Company.	12,016.02	2,243.52	-----	-----
H. Schultz & Sons.	5,050.30	4,555.60	-----	Catalog Allowance.. 100.00
NEW YORK DISTRIBUTORS				
Masback, Inc.....	8,158.83	9,820.46	Catalog Allowance.. 129.25 Catalog Allowance.. 9.62	Catalog Allowance.. 130.46 Catalog Allowance.. 17.00
Beacon.....	10,930.95	5,754.00	Dealer show space.. 60.00 Door prize—table... 7.50 Dealer show space.. 60.00	Dealer show space.. 60.00 -----
Kornahrens, Inc....	11,698.20	13,154.35	-----	Show prize—table... 11.15
U.S. Electrical Supply.	25,031.93	27,967.80	Catalog Allowance.. 200.00	Catalog Allowance.. 200.00
Lafayette Electrical Co.	58,510.95	56,316.66	Catalog Allowance.. 100.00	Catalog Allowance.. 100.00
Central Queens....	9,067.45	10,283.70	-----	Catalog Allowance.. 100.00

The above distributors for New Jersey and New York are stocking distributors (who maintain storage and warehouse space enabling them to maintain a constant inventory of hardware, houseware and traffic appliance merchandise) who resell to dealers. The following distributors to whom respondents, All-Luminum Products, Inc. and All-Luminum Products Sales Corp., sell are not stocking distributors as defined above, but do purchase and resell the same goods of like grade and quality as the distributors listed above.

1268

Initial Decision

NEW YORK CITY AREA

Distributor	1959 purchases	1960 purchases	Advertising and/or promotional allowances	
			1959	1960
L. Gastman		\$2,243.72		
Manhattan Mfg. & Jobbing	\$4,963.80	6,459.80		
Horn Brothers	8,219.90	8,037.25		
Admiral		544.71		
L. Thaler	4,430.49	1,882.90		
Kenwood	744.52	786.45		
Westra-Wigod	3,012.50	4,628.65		
Travellers Premium	3,304.03	4,901.03		
B. M. Luloff	890.70	4,872.36		
Wildermuth	5,436.35	1,815.00		
H. Isaacson	2,896.30	4,011.60		
Good Wear Mop	1,215.90	1,357.00		
Akorn	11,536.84	135.10		
A. Jacoby		811.00		
Herflo	1,023.47	1,041.64		
Fralieb	2,559.80	2,053.20		
Keenlan	44.09	78.85		
Connelle	4,317.10	4,029.60		
Welch-Cook-Beals		137.13		
Leonard Haimes	301.55	193.40		
Lothar Seewald	153.10	78.95		
Harry Cohon	2,217.30	2,218.15		

* * * With regard to all of the distributors herein before set out it is stipulated that the only offers made to all of such distributors are those figures appearing under the column "Advertising and/or Promotional Allowances". Further, that where nothing was shown to have been given under the aforesaid column no offer was made for any type of allowance. It is further stipulated that all of the distributors here and before named did take promotional allowances if offered.

14. The testimony of Boris Cohen (Tr. 8, et seq.) is that all the distributors who are stocking distributors are in competition with one another in their respective areas. The stocking distributors resell to retail outlets who resell to the public. Non-stocking distributors sell to door-to-door peddlers, operate as mail order houses, or sell to companies who use the products as gifts or incentives for salesmen. Mr. Cohen did, however, testify that four of the distributors described in the stipulation as non-stocking distributors did compete with stocking distributors. These were Manhattan Manufacturing, Horn Brothers, Wildermuth and Akorn (Tr. 29). While there appear to be some inconsistencies between the stipulation between counsel and the testimony of Boris Cohen, counsel for respondent asserted that this was not true (Tr. 37), and the examiner accepts the stipulation as the better evidence if any inconsistency exists.²

15. During 1959 and 1960, respondents paid substantial amounts of money or gave merchandise for prizes to a number of its stocking distributors. The money payments and the gifts were given in connection with gift shows put on by the distributor. The payments were either for space at the gift show to display respondents' prod-

² See *Phelps Dodge Mfg. Corp. v. F.T.C.*, 139 F. 2d 393, 397, (2nd Cir. 1943); 3 S.&D. 621.

Initial Decision

63 F.T.C.

ucts or for space in catalogs which the distributors used to sell respondents' and others' products to their customers. The stipulation also shows that minimal amounts of money were credited to distributors for prizes at trade shows. There is no question but that these payments and gifts were given in connection with the promotion of the resale of respondents' products at these shows and in the catalogues.

During these same periods of time, there were other stocking distributors to whom no similar payments were made, offered or made available. It was stipulated that these distributors were in competition in reselling respondents' products with the ones who received monies or gifts. In addition, the record shows that four non-stocking distributors were in competition with the stocking distributors who received the payments or gifts in reselling respondents' products. These four non-stocking distributors received no payments or credits from the respondents, nor were any offered or made available to them.

16. The explanation given for these quite obvious discriminations was that the distributors who were paid nothing had no gift shows or catalogues in the years no payments were made to them (Tr. 10, 15, 18, 29). Boris Cohen also testified that respondents' policy and his instructions to his sales force were to pay distributors for participation in trade shows and distributor catalogues up to 2 per cent of the distributors' anticipated purchases (Tr. 11, 17). He further testified that it was a regular trade practice for his competitors to participate in such shows and catalogues, and that he might well lose a customer if he did not also participate (Tr. 27-28). Mr. Cohen also testified as follows:

Let me ask you, is the way these payments are generally arrived at, the customer comes to you and says, "I am putting out a catalog. A page will cost you fifty or sixty dollars. Do you want in? It's a good deal." Is this the way it is customarily done?

THE WITNESS: That's the way it is customarily done, that's correct. (Tr. 39)

He further testified that the amounts involved were of such a minimal nature that no records of them were even kept (Tr. 32-33).

17. The respondent has therefore defended on three grounds. First, that its policy was to offer 2 per cent to all stocking distributors, but that no payment was made where the distributor had no show or catalogue. This must be rejected. The stipulation between counsel unequivocally states, "Further, that where nothing was shown to have been given under the aforesaid column *no offer was made for any type of allowance.*" (Emphasis supplied.) The

crucial issue is not whether a payment was made, but whether similar payments were offered or made available to all competing customers. It has been stipulated that they were not, the examiner must take this at face value.

Second, while the payments actually made by respondent may not be of earth-shaking proportions, they range from \$11.15 to \$400, and number twenty-three (23) in the two years involved. They cannot be said to be *de minimis*.

Third, the testimony that respondents' competitors are making similar payments and that a customer might be lost if no payment was made is too vague and general to constitute a proper defense under 2(b) of the Clayton Act, as amended. The record contains no information as to what competitors of respondents paid to the distributors or even what competitors are involved. The respondents' payments appear to the examiner to be merely general promotion of respondents' products in an attempt to increase sales. *J. A. Folger & Co.* FTC Docket No. 8094, Nov. 14, 1962 [61 F.T.C. 1166].

18. As to respondent Windsor Metal Products, Inc., no evidence was adduced by counsel supporting the complaint to establish a violation of Section 2(d) by it. There was some general testimony from Boris Cohen that Windsor granted advertising allowances to its department store customers in the amount of \$50,000 in 1952 (Tr. 21-22). However, there was no evidence offered as to the identity of the department store accounts, the allowances paid to any of them, or that proportionally equal payments were not offered to other customers in competition with them in reselling Windsor products.

As to George Cohen, no evidence was adduced to show that he violated Section 2(d). The limited amount of evidence concerning him shows that his principal duties with respondent companies were to supervise manufacturing and production. He never had any responsibility for sales, nor did he approve the payment of any advertising allowances (Tr. 40-41). There is no evidence that he played any part in the formulation or carrying out of any of respondents' cooperative advertising practices or policies involved in this proceeding.

CONCLUSIONS

1. Respondents, All-Luminum Products, Inc., All-Luminum Sales Corp., Inc., corporations, and Boris Cohen, an individual, as found above have violated subsection (d) of Section 2 of the Clayton Act, as amended, by paying advertising allowances to certain of their distributors in the form of payments for advertising of respondents'

Initial Decision

63 F.T.C.

products in such distributors' catalogues and giving gifts or granting credits for promotional activities in connection with trade shows conducted by such distributors. Like or similar payments, credits or gifts were not offered or made available on proportionally equal terms to other of respondents' distributors, stocking and non-stocking, who competed with the favored distributors in the resale of respondents' products.

2. The record contains no evidence that Windsor Metal Products, Inc., who sells respondents' products directly to retail outlets, violated subsection (d) of Section 2 of the Clayton Act, as amended, by the cooperative advertising payments which it made to such retail outlets.

3. There is no evidence in the record that individual respondent, George Cohen, participated in or can be held responsible for any of the acts or practices charged in the complaint.

ORDER TO CEASE AND DESIST

Counsel in support of the complaint in his proposed findings urges that all five of the respondents be placed under the broadest possible order covering both the respondents' sales through All-Luminum Sales, Corp., Inc., to distributors and Windsor Metal Products, Inc., direct to retailers. Counsel for respondent, on the other hand, urges no order should be entered, but that if one is, it should be in line with the Supreme Court *dicta* in the *Broch* case,³ and that the legitimate needs in this case can be best met by limiting the applicability of any order to the two All-Luminum companies in granting trade show and catalogue allowances to stocking distributor customers. The examiner is of the opinion that the order can neither be as broad as counsel in support of the complaint urge, nor as narrow as counsel for the respondent suggests.

The order cannot be properly limited to allowances paid to respondents' stocking distributors since the record establishes that at least four of respondents' non-stocking distributors who received or were offered nothing, were in competition with stocking distributors receiving allowances. Consequently, the order must be broad enough to include all of respondents' competing distributors both stocking and non-stocking.

While there is no evidence that respondents violated 2(d) in their dealings through the Windsor Company direct with retailers, nevertheless, the examiner is of the opinion that the order should run

³ *Henry Broch & Co. v. F.T.C.*, 368, U.S. 360 (1962).

against Windsor and cover its cooperative advertising practices with retail and department store customers. Boris Cohen is directly responsible both individually and as President of All-Luminum Sales for the 2(d) violations established in the record. He is also the President and the co-owner with his brother, George Cohen, of Windsor. He is in charge of sales by Windsor and formulates and is responsible for the cooperative advertising policies of Windsor. Since he must be held responsible for the violations by All-Luminum Sales in dealing with distributors, there is sufficient basis for making both him and Windsor subject to the order to cease and desist. Windsor is simply another corporation with the same ownership and officers as the other two corporate respondents. It merely sells the same products as All-Luminum Sales to a different class of customers. All are in reality a closely owned and controlled group subject to the policies established by Boris Cohen.⁴ Consequently, the examiner feels that the following order to cease and desist is appropriate.

It is ordered, That respondents, All-Luminum Products, Inc., a corporation, All-Luminum Sales Corp., Inc., a corporation, Windsor Metal Products, Inc., a corporation, their officers and directors, and Boris Cohen, individually, and as an officer of each such corporation, and their employees, agents and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of any of respondents' products, including aluminum outdoor casual furniture and folding tables, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer of such respondents as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the processing, handling, sale or offering for sale of such products manufactured, sold or offered for sale by such respondents, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That the charges in the complaint pertaining to George Cohen individually be dismissed.

⁴ See *F.T.C. v. Standard Education Society, et al.*, 302 U.S. 112, 120 (1937), 2 S.&D. 429.

Opinion

63 F.T.C.

OPINION OF THE COMMISSION

NOVEMBER 7, 1963

By ELMAN, *Commissioner*:

The complaint in this matter charges respondents with violation of Section 2(d) of the Clayton Act, as amended. Respondents are All-Luminum Products, a corporation which manufactures aluminum outdoor casual furniture and folding tables; All-Luminum Sales Corp., another corporation, which sells the goods manufactured by All-Luminum Products to wholesalers, comprising "stocking jobbers", who maintain an inventory of such goods, and "non-stocking jobbers", who do not; Windsor Metal Products, a third corporation, which sells such goods to department stores and other retailers; and Boris Cohen and George Cohen, who own and control the three corporations. The hearing examiner found that George Cohen (the "inside", *i.e.*, manufacturing partner) had not participated in the formulation of respondents' sales policies and, accordingly, dismissed the complaint as to him. That aspect of the initial decision has not been appealed.

The hearing examiner in the initial decision also found that respondents had violated Section 2(d) by giving certain of their "stocking jobbers" catalogue and trade-show promotional allowances which were not made available by respondents to competing distributors on proportionally equal terms. At the same time, the examiner found that the evidence did not show that allowances furnished by respondent through Windsor Metal Products to retailers were violative of Section 2(d). These findings have not been appealed.

The order to cease and desist contained in the initial decision forbids respondents, including Windsor Metal Products, to make non-proportional allowances of any kind to any customer. Respondents have appealed the scope of this order, and have submitted a proposed form of order excluding Windsor and including only catalogue and trade-show allowances made to wholesale customers of respondents who maintain inventories of respondents' products. Since there is no evidence that suggests either that respondents have violated or are likely in the future to violate Section 2(d) in their transactions with retailers, or otherwise through Windsor, or that respondents have furnished or will furnish promotional allowances to wholesalers save in connection with catalogues and trade shows, the Commission finds insufficient justification for an order coextensive in breadth with the statute. On the other hand, the Commission finds no basis for distinguishing in the order between wholesale customers of respondents who maintain inventories, and those who do not.

Accordingly, the findings of fact and conclusions of law contained in the initial decision are adopted by the Commission, and the order to cease and desist has been modified in accordance with the views stated in this opinion.

In formulating the terms of an order to cease and desist, the Commission is not concerned with whether the order should be "broad" or "narrow" as such. The significant question, rather, is what kind of order will be most *effective* to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States v. United States Gypsum Co.*, 340 U.S. 76, 88). The Commission's objective is to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past" (*N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 435). If an order coextensive in breadth with the statutory prohibition appears to be required for effective relief, it is the Commission's duty to enter such an order. That might be appropriate where, for example, the respondent's conduct was such as to support an inference that his violation of law might be repeated in a variety of ways, difficult to anticipate precisely, in the future. On the other hand, where the record in a particular case does not show a danger that the specific illegal act or practice found will recur in some other or difficult-to-define forms, a relatively narrow and specific order may suffice. In every case, the Commission possesses a "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 611). This discretion will be exercised with an eye toward achieving practical results. Whether a "broad" or "narrow" order will be most effective depends, therefore, on the particular circumstances and needs of the case. For these reasons, the order entered in the instant case is not to be regarded as a general model or precedent for orders in other cases involving different circumstances and needs.

Commissioner MacIntyre dissented.

DISSENTING OPINION

NOVEMBER 7, 1963

By MACINTYRE, *Commissioner*:

The order entered by the majority is unduly narrow, limited as it is to advertising or other publicity services furnished in catalogues or other publications serving the purpose of a buying guide as well as in trade shows by those of respondents' customers who happen to be wholesalers, mail order distributors or catalogue houses.

Here, without citing *Transogram Company, Inc.*, Federal Trade Commission Docket No. 7978 (1962) [61 F.T.C. 629], the majority has in effect extended the holding in that case to a factual situation where it is not applicable. The holding in *Transogram* should be limited to the facts of that case; its dicta should be confined to those proceedings which in fact are characterized by a "slender 'bare bones' record", permitting little or no analysis of a respondent's past promotional activities. Although the violation of Section 2(d) documented here has been confined to catalogues and promotional payments for trade shows, the record suggests that the affiliated respondent corporations did not necessarily confine their advertising and promotional payments to these media. It is furthermore clear that the affiliated, closely held respondent corporations' promotional and advertising payments were not limited to those customers coming within the scope of the majority's order.

In effect, the majority of the Commission has ruled here that if a record does not affirmatively suggest that violations of Section 2(d) may be expected in connection with other categories of customers or media than those involved in past violations, then the order should proscribe only the precise acts previously undertaken in connection with the same classes of customers. In *Transogram*, however, we specifically disavowed the contention that limitation of the order's provisions to certain classes of customers was required by the need for specificity. This need we held is satisfied if the practices proscribed are defined with sufficient clarity.

The order here limited to catalogues or other publications serving as buying guides and trade shows does not adequately proscribe possible "variations on the basic theme." See *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962). Furthermore, it is inconsistent with the Commission's opinion in that case¹ holding since Section 2(d) covers a limited area in which the forms of violation are like and related, that an order under the statute should not, in most instances, be confined to the exact violations found. The proper order, in my opinion, would embrace "advertising or promotional display services or facilities and like or related practices," without limitation as to the media involved. That definition has only recently won judicial approval; indeed, it was promulgated by the Second Circuit in *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, *supra*, a case involving issues similar in many respects to those with which we are confronted here.

¹ *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (1962), [60 F.T.C. 568], modified 311 F. 2d 480 (2d Cir. 1962).

1268

Final Order

FINAL ORDER

This matter has been heard by the Commission on respondents' appeal from the initial decision of the hearing examiner. The Commission has rendered its decision, granting the appeal in part but denying it in all other respects. The Commission has determined, for the reasons stated in the accompanying opinion, that the order to cease and desist contained in the initial decision should be modified and, as modified, issued as the Commission's final order. Accordingly,

It is ordered, That respondents, All-Luminum Products, Inc., a corporation, All-Luminum Sales Corp., Inc., a corporation, their officers and directors, and Boris Cohen, individually and as an officer of each such corporation, and their employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution in commerce (as "commerce" is defined in the Clayton Act, as amended) of aluminum outdoor casual furniture and folding tables, and any other products manufactured, sold or offered for sale by respondents, do forthwith cease and desist from:

Paying, or contracting for the payment of, anything of value to or for the benefit of

(1) any wholesale customer of respondents whether or not such customer maintains an inventory of respondents' products, or

(2) any mail-order distributor or catalogue house that is a customer of respondents,

as compensation for or in consideration of any services or facilities consisting of advertising or other publicity, furnished by or through such customer,

(1) in a catalogue or other publication serving the purpose of a buying guide, or

(2) in a trade show,

in connection with the processing, handling, sale or offering for sale of any products manufactured, sold or offered for sale by respondents, unless such payment or consideration is made available on proportionally equal terms to all other such customers competing in the distribution of such products.

It is further ordered, That the complaint be dismissed as to George Cohen individually and Windsor Metal Products, Inc., a corporation.

It is further ordered, That respondents named in the order to cease and desist shall, within sixty (60) days after service upon them of

Complaint

63 F.T.C.

this order, 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.

By the Commission, Commissioner MacIntyre dissenting.

IN THE MATTER OF

HEINZ W. KIRCHNER TRADING AS
UNIVERSE COMPANY

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

Docket 8538. Complaint, Oct. 16, 1962—Decision, Nov. 7, 1963

Order requiring the Pasadena, Calif., manufacturer of an inflatable swimming-aid device designated "Swim-Ezy" to cease representing falsely through statements and depictions in advertising in magazines of national circulation that the device would prevent any user from sinking, enable a non-swimmer to swim, protect him from the dangers associated with swimming, and enable him to perform like a skilled or champion swimmer; and that it was guaranteed.

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 Heinz W. Kirchner, an individual trading as Universe Company, hereinafter referred to as the respondent, has violated the provisions of the 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 Heinz W. Kirchner is an individual trading as Universe Company, with his office and place of business located at 959 North Lake, Pasadena, California.

PAR. 2. Respondent is now, and for some time last past has been, engaged in manufacturing, and in the advertising, offering for sale, sale and distribution of a swimming-aid device designated "Swim-Ezy" to the purchasing public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of California to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein

1282

Complaint

has 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 his business and for the purpose of inducing the sale of said devices, respondent has made certain statements with respect thereto in magazines of national circulation, of which the following are typical:

SWIM EZY

(Depiction of a young lady in a bathing suit)

INVISIBLE SWIM AID

NON-SWIMMERS SWIM INSTANTLY

Yes, now you too can swim like a fish the easy, safe way * * * new, unique 4-oz. device, $\frac{1}{25}$ " thin, worn INVISIBLE under bathing suit or swim trunks, floats you at ease, without effort * * * it makes anyone unsinkable. Poor swimmers look like champions * * * money back guarantee * * *.

PAR. 5. By and through the use of the aforesaid statements and depictions, and others of similar import not specifically set out herein, the respondent represented that when said device is used as directed while swimming or bathing:

- (a) It will, of itself, prevent any user from sinking;
- (b) Its use will instantly enable non-swimmers to swim;
- (c) Other persons will not know, or will not be able to notice, that a swimming aid is being worn;
- (d) The use of the device by poor or unskilled swimmers will enable them to perform or look like champion swimmers.

PAR. 6. In truth and in fact, when respondent's said device is inflated and used as directed while swimming or bathing:

- (a) It will not, of itself, prevent all users from sinking. To the contrary, the extent to which said device may help a person from sinking depends to a considerable extent upon the inherent buoyancy of the user, which varies considerably from person to person. Many prospective users of respondent's device, as a consequence, would need to exert considerable effort to keep from sinking;
- (b) Its use is limited to aiding flotation and it will not instantly enable the user to swim;
- (c) It will bring about a visible alteration in the bodily configuration of the user which in many instances and contrary to respondent's representations, would be known to, or noticed by other persons;
- (d) The use of the device will not make unskilled or poor swimmers perform or look like champions or skilled swimmers.

Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were and are false, misleading and deceptive.

Initial Decision

63 F.T.C.

PAR. 7. In his various advertisements as aforesaid, respondent has used such statements as "money back guarantee".

PAR. 8. In truth and in fact the advertised guarantee for such devices is limited by respondent to a specified period following the purchase of said device, which limitation was not disclosed in respondent's advertisements. Therefore, the quoted statement in Paragraph 7 hereof is false, misleading and deceptive.

PAR. 9. In the conduct of his business at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of swimming aids and other products of the same general kind and nature as those sold by respondent.

PAR. 10. The use by respondent 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 respondent's product by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's 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. John J. McNally supporting the complaint.

Christie, Parker & Hale, Pasadena, Calif., by *Mr. Robert R. Thornton*, for the respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

MAY 8, 1963

The Federal Trade Commission issued its complaint against the respondent on October 16, 1962, charging him with falsely advertising the merits of a swimming-aid device designated as "Swim-Ezy" and advertising this product as being guaranteed, without disclosing that the guarantee is limited to a specified period of time. Respondent's answer denied that his advertising was false, misleading, or deceptive and denied that he had violated the statute as alleged in the complaint.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and

proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Testimony of two swimming coaches and of the respondent and fourteen exhibits were received in evidence. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

Respondent Heinz W. Kirchner is an individual trading as Universe Company, with his office and place of business located at 959 North Lake, Pasadena, California.

Respondent is now, and for some time last past has been, engaged in manufacturing a swimming-aid device designated as "Swim-Ezy". He advertises this product in magazines and sells it to the public primarily by means of orders received by mail.

In the conduct of his business, and at all times found herein, respondent has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of swimming aids and other products of the same general kind and nature as those sold by respondent.

Respondent now causes and for some time last past has caused his said products, when sold, to be shipped from his place of business in the State of California to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein has maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The facts found hereinabove were admitted by respondent's answer.

For the purpose of inducing the sale of said device, respondent has made certain statements with respect thereto in magazines of national circulation (Tr. 93-97) of which the following are typical:

SWIM EZY

(Depiction of a young lady in bathing suit)

INVISIBLE SWIM AID

NON-SWIMMERS SWIM INSTANTLY

Yes, now you too can swim like a fish the easy, safe way * * * New, unique 4-oz. device, 1/25" thin, worn INVISIBLE under bathing suit or swim trunks, floats you at ease, without effort, * * * it makes anyone unsinkable. Poor swimmers look like champions, * * * Money back guarantee * * *. (CXs 3-4)

By and through the use of the aforesaid statements and others of similar import not specifically set out herein, the respondent represented that when said device is used as directed while swimming or bathing:

- (a) It will prevent all users from sinking;
- (b) It will instantly enable non-swimmers to swim;
- (c) Other persons will not know, or will not be able to notice, that a swimming aid is being worn;
- (d) The use of the device by poor swimmers will enable them to perform or look like champion swimmers.

Respondent's device is not a life-saving device and will not prevent users from sinking under all circumstances. It will add to the buoyancy of an individual and assist him in staying afloat; although, it will not literally prevent all users from sinking. It is not advertised as a life preserver, but in view of this representation it might be so used or relied upon and there is some danger attached to the use of this representation. Respondent contends that the swimmer referred to in the testimony (Tr. 31) was necessarily floating before he exhaled the air from his lungs, but it is not clear whether he was being kept afloat by the device or whether he was aided by his own movements.

Respondent represents that the device will instantly enable non-swimmers to swim, and it appears from the evidence that with the added buoyancy of the device a non-swimmer can devote his attention to propelling himself by arm and leg movements and begin to learn to swim. It would seem that although the representation "Instantly enables non-swimmers to swim" is exaggerated, the device is of some value as an aid in learning to swim, and this representation may be considered to be harmless puffing and should not be prohibited.

Respondent's representations that the device permits the users to perform and look like champion swimmers are such exaggerations that they are false and misleading. Even a competent swimmer does not have the form and speed of a winner of swimming contests, and a novice would not perform or appear to perform as a champion swimmer while wearing respondent's swimming aid.

Respondent also represents that the device is invisible when worn. It is designed to be worn under a bathing suit and normally the color would not be seen, but when inflated sufficiently to be valuable for the purpose of aiding the wearer to remain afloat to learn to swim, it would be obvious to others that something was being worn under the bathing suit. If the portion of the body about which the device is worn is submerged it would not be noticeable, but when the body is

a float, as it would be when the device is properly used and when it is effective, its outline is apparent to observers. To the extent that noticeability is important, buyers who rely on the representation that the device is invisible would be deceived.

Respondent has included in his advertising a statement that his product carries a money-back guarantee, but the directions enclosed with the product when delivered disclose to the purchaser that the product must be returned in seven days, which time was recently extended to ten days. In practice, respondent has returned the purchaser's purchase price after much longer periods of time when the product was returned in merchantable condition, but the purchaser is not advised that this is the practice. Respondent has acted in a reasonable and generous manner in returning purchase money to dissatisfied customers, but the advertising fails to reveal any limitation on the money-back guarantee and the purchaser is advised of this limitation only after the product is delivered. It is concluded that seven or ten days is too short a period of time to benefit many purchasers who may rely on an unlimited guarantee at the time of purchase. The buyer would, as respondent contends, expect to be required to return the product within a reasonable time, but not within a week or ten days which might expire before opportunity for use of the product. Since respondent has advertised his product as having a money-back guarantee, and has imposed or has purported to impose a limitation of this guarantee at the time of delivery, it is found that there is a degree of deception inherent in the practice, although there is no testimony that deception has occurred.

The use by respondent 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 respondent's product by reason of said erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's 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.

Opinion

63 F.T.C.

ORDER

It is ordered, That respondent, Heinz W. Kirchner, an individual trading as Universe Company, or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of swimming aids designated "Swim-Ezy", or any other device of substantially similar design, properties, or construction, do forthwith cease and desist from representing, directly or by implication, that:

1. Said device will prevent the users thereof from sinking;
2. Persons other than the users thereof will not know or could not notice that a swimming aid is being used;
3. That the use of the device will enable poor or unskilled swimmers to perform or look like champions or skilled swimmers;
4. Said device is guaranteed, unless the nature and extent of the guarantee are clearly and conspicuously disclosed in conjunction with such representations.

OPINION OF THE COMMISSION

NOVEMBER 7, 1963

By *ELMAN Commissioner:*

The complaint in this matter charged respondent, who is engaged in the manufacture and sale of a swimming-aid device known as "Swim-Ezy", with having falsely and deceptively advertised this device, in violation of Section 5 of the Federal Trade Commission Act. Hearings were held and the hearing examiner filed an initial decision. In it, he dismissed the complaint insofar as it challenged the representation that "Swim-Ezy" instantly enables non-swimmers to swim, on the ground that such representation was merely harmless "puffing". Complaint counsel has not appealed from this ruling. At the same time, respondent has not appealed from that part of the initial decision in which the examiner held deceptive and unlawful the representation that the purchaser of "Swim-Ezy" receives there-with a money-back guarantee. However, respondent does appeal from the part of the initial decision in which the following representations were found to be deceptive and unlawful: that the use of "Swim-Ezy" will render a person unsinkable; that the device is invisible; and that use of the device will enable a poor or unskilled swimmer to perform or look like a champion or skilled swimmer.

"Swim-Ezy" consists, essentially, of a flat, inflatable rubber bladder connected to a plastic tube. The device is designed to be wrapped around the lower part of the trunk of the body, in the area of the hips and lower abdomen, in such a way as to be concealed by a bathing suit or swim trunks. After the wearer has entered the water (or before, if he wishes), he blows into the plastic tube and thereby inflates the bladder; he then plugs the tube and folds it beneath the bathing suit or trunks for concealment. When the wearer leaves the water, he releases the plug and the bladder deflates. The purpose of "Swim-Ezy", as stated by respondent, is to assist the wearer to achieve buoyancy (i.e., to float), thereby enabling him to devote his attention and energies to propulsion (i.e., swimming)—without anyone else being aware that he is using a swimming aid.

There is no question that respondent in fact made the representations alleged in the complaint. A typical advertisement for "Swim-Ezy", of record in the instant case, reads in part:

New, unique 4 oz. device, $\frac{1}{25}$ " thin, worn INVISIBLE under bathing suit or swim trunks, floats you at ease, without effort, is comfortable all day. No more fear of deep water, it makes anyone unsinkable. Poor swimmers look like champions, new swimmers use less strain.

Another advertisement of record reads in part:

"SWIM-EZY" turns non-swimmers into swimmers quickly and easily * * * makes poor and timid swimmers fun-loving water champs * * * guarantees swimmers and non-swimmers alike more *safe* fun in the water. All this * * * and it's invisible!

* * * * *

"SWIM-EZY" changes your bathing suit into a fully safe, floating swim suit that easily supports your whole body—lets you swim as long as you want—swim as far as you please—become a better swimmer. Use "SWIM-EZY" for any water sport—boating, fishing, water games. Play Safe—Be Safe * * * with "SWIM-EZY"!

* * * * *

Many people are afraid of the water. But now "SWIM-EZY" ends all your worries and fears * * * makes a non-swimmer as light and safe in the water as a fish. And, there's no danger of sudden cramps, or any disabling pain while in the water. Because "SWIM-EZY" *floats you right to safety.*

Respondent's principal contention on this appeal is that complaint counsel failed to prove such representations as the foregoing to be false and deceptive. In part, we accept this contention; we agree that, insofar as the representation that "Swim-Ezy" is "invisible" is concerned, there has been a failure of proof.

To be sure, "Swim-Ezy" is not invisible or impalpable or dimensionless, and to anyone who so understood the representation, it would be false. It is not likely, however, that many prospective pur-

chasers would take the representation thus in its literal sense. True, as has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable (see e.g., *Charles of the Ritz Dist. Corp. v. F.T.C.*, 143 F. 2d 676 (2d Cir. 1944)). This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme. An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it, therefore, an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. If, however, advertising is aimed at a specially susceptible group of people (e.g., children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.

The essence of the representation of "invisibility" is, simply, that "Swim-Ezy" may be worn without other swimmers or bystanders realizing that the wearer is using a swimming aid. In advertising an "invisible" swimming aid, respondent is obviously catering to the feeling of embarrassment which many people feel in publicly revealing that they cannot swim. All the representation was intended to convey, and all that it would be understood by most prospective purchasers to mean, is that "Swim-Ezy" may be worn inconspicuously. The possibility that some persons might believe that "Swim-Ezy" is, not merely inconspicuous, but wholly invisible or bodiless, seems to us too far-fetched to warrant this Commission's intervention in the public interest. And, there is a dearth of substantial, probative evidence to demonstrate the falsity of the claim that "Swim-Ezy" can be worn in an inconspicuous manner. We attach little weight to the evidence on conspicuousness offered by complaint counsel's expert witness, who directed two of his swimming students to put on and, when they entered the water, inflate "Swim-Ezy" devices. He testified that students appeared to him to be bulgy and distended. However, this "test" of the device's "invisibility" was not conducted in such a way as to impress one with its reliability. The expert's testimony was not sufficiently concrete and detailed to permit an inference that the test conditions fairly reflected normal swimming

experience or demonstrated the performance of the product under ordinary conditions of use. We have also concluded that the other evidence introduced in support of the complaint on this issue was inconclusive. Accordingly, this part of the complaint must be dismissed.

The other two representations with which respondent's appeal is concerned, namely, that "Swim-Ezy" renders the wearer unsinkable and that it enables him to perform like a champion swimmer, have this common, and in the circumstances, potentially dangerous element: they assure the wearer that even if he cannot swim and strays into deep water, he is safe from sinking, drowning or otherwise getting into trouble either because of his lack of proficiency in, or the natural dangers associated with, swimming or other aquatic activities. The wearer is assured that he need not even take the ordinary precautions against trouble in the water—that with "Swim-Ezy", there is no danger from sudden cramps or other disabling pain—and that he will be endowed with the skill, not of the non-swimmer or novice swimmer, but of the champion. These representations are calculated to lull the wearer into a sense of security. If they are untrue, if the sense of security induced by the "Swim-Ezy" advertisements is false, the deception is most serious, affecting, as it may, not merely the pocketbook of the consumer, but, at least if he is a non-swimmer or poor swimmer, his personal safety as well. It might be added, too, that the instructions enclosed with each "Swim-Ezy" device do not attempt to qualify the sweeping claims made in the advertisements.

Two college swimming instructors were called by complaint counsel as expert witnesses. Respondent vigorously contests the probative value of evidence offered by these witnesses on the basis of tests conducted by them with "Swim-Ezy". While we find no material points of resemblance between the problems of testing involved in this case and those involved in *Evis Mfg. Co. v. F.T.C.*, 287 F. 2d 831 (9th Cir. 1961), upon which respondent principally relies, we are inclined to agree that the evidence furnished by the tests regarding the properties of "Swim-Ezy", like the test evidence on "invisibility", is inconclusive.

However, we think that the falsity of respondent's representations is amply established by the expert witnesses' general testimony regarding the nature of buoyancy and the techniques of swimming, testimony based not on the tests they conducted with "Swim-Ezy" but on their general experience in, and knowledge of, the field. Respondent does not, and could not reasonably, contend that these two witnesses were not eminently qualified to give such testimony.

The expert testimony establishes the following facts. Buoyancy—ability to float—varies greatly from individual to individual. At one extreme are people who are “floaters”; they can remain afloat with little effort. At the other extreme are the “sinkers”; even with their lungs full of air, they will sink immediately if they cannot swim. Buoyancy is a function not only of innate body structure, but also, and perhaps more importantly, of the psychological state of the individual—his relaxation and self-confidence in the water. The non-swimmer or person who fears the water may often be a “sinker” until he gains some skill and confidence.

What happens when a person of negative buoyancy, a sinker, enters the water wearing an inflated device, like “Swim-Ezy”, around his midsection? The device may render him sufficiently buoyant to keep the middle part of his body afloat, though no evidence was adduced to show just how buoyant, in fact, “Swim-Ezy” will render a person; but, at the same time, the upper part of the body, including the head, will be depressed. The position of a skilled swimmer in the water is a sloping one: the center of gravity is in the area of the lungs; the head is above this area; the hips and legs, below it. In contrast, a device such as “Swim-Ezy” causes elevation of the hip region and depression of the other areas of the body. Consider the case of a non-swimmer who relies upon the assurance of safety and unsinkability in respondent’s advertisements and steps into water over his head: he may find that while his hips are floating, his face is being forced under water. The danger to the individual if this happens is obvious. Similarly, a person attacked suddenly by disabling cramps or other pain while wearing “Swim-Ezy” in the water may find that his head is submerged under water, though his hips may continue to float. “Swim-Ezy”, in short, is not an effective life preserver. It does not assure the wearer safety from the dangers of swimming or from the wearer’s ineptness in swimming.

Swimming, it should be noted, is not floating. Swimming is a purposeful self-propulsion through the water. A device such as “Swim-Ezy” may help the novice swimmer to overcome a certain initial fear or hesitancy in attempting to swim, and so may indirectly assist in the teaching of swimming or in the acquisition of the skills of a proficient swimmer. In no sense, however, can a device such as “Swim-Ezy” impart to the novice or poor swimmer the security in deep water that comes to the expert or champion swimmer through long training in breathing, muscular coordination, and other attributes of the good swimmer.

Thus, we agree with the examiner that respondent’s representations of unsinkability and of champion performance are false and

deceptive. Nor do we accept respondent's contention that the representation that "Swim-Ezy" will enable the wearer to perform like, or become, a champion or skilled swimmer, even if it is false, should be disregarded as mere harmless "puffing". See, e.g., *Kidder Oil Co. v. F.T.C.*, 117 F. 2d 892 (7th Cir. 1941). This hyperbolic representation contains at least a kernel of dangerously misleading matter. Even if most people would discount the claim that, wearing "Swim-Ezy", they will forthwith become expert swimmers, they will not necessarily discount the implied representations that "Swim-Ezy" will enable them to take the kind of risks that only proficient swimmers should take. The ordinary person may well understand, from the advertisements for "Swim-Ezy", that, wearing this device, he can with complete impunity swim in as deep water, for as long a period of time, and as far out from shore, as an expert swimmer. Included in the representation that "Swim-Ezy" enables the wearer to perform as an expert or champion swimmer is, we find, a representation that extraordinary safety and security are to be obtained by wearing "Swim-Ezy"—the safety and security ordinarily enjoyed only by the champion or expert swimmer. The representations of unsinkability and of expert performance in respondent's advertisements are, thus, intertwined, and constitute, contrary to fact, a claim that "Swim-Ezy" will protect the non-swimmer or inexperienced swimmer from all danger in any and all aquatic circumstances.

We are, however, disposed to eliminate the prohibition in the cease and desist order of the representation that "Swim-Ezy" enables the wearer to "look like" a champion swimmer. That representation seems to us, standing alone, harmless puffing.

In addition to its substantive attack on the examiner's findings, respondent on this appeal challenges the examiner's refusal to allow a continuance, or, alternatively, to permit the record to remain open after completion of the hearings, in order that respondent might have more time to obtain the services of a testing company to substantiate the truth of the challenged representations.

Under our Rules of Practice, responsibility for the orderly and expeditious conduct of adjudicative hearings is committed very largely to the sound discretion of the hearing examiners. Rule 3.15(c). The reason for so allocating responsibility in matters such as continuances is plain. Whether to grant a continuance depends on an on-the-spot assessment of a wide variety of factors: the good faith of the moving and opposing parties, the relative hardship to the parties should the motion be granted or denied, the balance of convenience in terms of witnesses and evidence, the examiner's own commitments, and so on. The Commission is ordinarily

ill-equipped to make an evaluation of such factors sufficiently responsive to the particular circumstances of the individual case. Our review of the examiner's ruling on such questions should properly be limited to determining whether there has been an abuse of discretion.

Although we find no indication of bad faith or dilatoriness on the part of respondent's counsel in requesting the continuance or, in the alternative, opportunity to offer evidence after the closing of the record, neither do we find that the examiner abused his discretion in denying such relief. It was open to the examiner to find that respondent was unjustified in so delaying the initiation of correspondence with the testing company that, in the event the testing company was not prepared to act promptly, it would in all likelihood be impossible for respondent to meet the hearing schedule—as, indeed, happened. In this connection, we regard as significant the fact that, although respondent was apprised of the Commission's investigation into his representations regarding "Swim-Ezy" long before the issuance of the formal complaint in this matter, he made no move to obtain the services of a testing company until more than a month after he filed an answer to the complaint. In the circumstances, there is a hollow ring to the claim that the hearings were held so promptly as to deny respondent a fair opportunity to prepare his defense.

In any event, for the Commission to overrule the examiner on this point would ill accord with the spirit of Section 6(a) of the Administrative Procedure Act, which requires agencies subject to the Act, such as the Commission, to proceed in all matters before it "with reasonable dispatch", and of our Rule 3.15(c), which imposes on hearing examiners the duty "to take all necessary action to avoid delay in the disposition of proceedings". Effectuation of these two provisions requires broad delegation to the examiners of the power to rule on motions for continuances and similar relief.

While we are not deciding the instant case on such a ground, we are inclined to think that an advertiser is under a duty, *before* he makes any representation which, if false, could cause injury to the health or personal safety of the user of the advertised product, to make reasonable inquiry into the truth or falsity of the representation. He should have in his possession such information as would satisfy a reasonable and prudent businessman, acting in good faith, that such representation was true. To make a representation of this sort, without such minimum substantiation, is to demonstrate a reckless disregard for human health and safety, and is clearly an unfair and deceptive practice.

That this is so is evident from basic principles governing the law of false and misleading representations. One who affirmatively advertises a product to be safe, in a context in which the prospective user's health or safety may be adversely affected if the claim is false, implicitly represents that he has a reasonable and substantial foundation in fact for making the claim. Consider the case of an advertisement for a sunburn oil which states that the product will absolutely prevent painful sunburn, no matter how prolonged the user's exposure to the sun. The purchaser of this product would certainly be surprised and dismayed to find that the advertiser had made such a claim without having solid reason to believe it to be true. Purchasers believe that where such a claim is made, it has been substantiated in advance; the belief is reasonable and, we think, widespread. It is entitled to the Commission's protection.

Respondent's testimony in this case makes abundantly clear that he predicated his belief in the absolute safety and unsinkability obtainable by wearing "Swim-Ezy" on utterly unreliable, subjective impressions derived from the use of the device by himself and members of his immediate family. Thus, he put on the market a potentially dangerous device—dangerous not in itself, but in that it might lure a non-swimmer or unskilled swimmer into, literally, deep water, lulled by respondent's representations of absolute safety and unsinkability—without first attempting to ascertain, with reasonable care and diligence, that the device actually possessed the qualities he was claiming for it.

Against this background, respondent's contention that the hearing examiner acted inequitably in refusing to delay the hearings in order to give respondent still more time to attempt to substantiate his claims for "Swim-Ezy" is indeed unpersuasive. Respondent had been engaged in the manufacture and sale of "Swim-Ezy" for several years prior to the issuance of the formal complaint in this matter. He thus had ample time to test the truthfulness of his claims for the device without requiring that the proceeding herein be delayed. In fact, his failure promptly to ascertain the truthfulness *vel non* of those claims was itself, as has been noted, in disregard of the health and safety of the consuming public.

To the extent consistent with this opinion, the findings of fact and conclusions of law contained in the initial decision are adopted by the Commission. We have modified the order to cease and desist contained therein in accordance with our decision on this appeal. In addition, certain changes have been made in the language of the order in order to make it clearer and more effective.

Commissioner Anderson dissented in part.

Final Order

63 F.T.C.

OPINION, DISSENTING IN PART

NOVEMBER 7, 1963

By ANDERSON, *Commissioner*:

I concur in all views expressed by the majority, with the exception of the holding that respondent should be permitted to represent that his device enables the user to "look like" a champion swimmer. Since a champion swimmer looks like any other swimmer, or even a non-swimmer, when he is not actually swimming, such a claim certainly conveys the impression that the user will be able to perform like a champion swimmer. And it is obvious that a device which "causes elevation of the hip region and depression of the other areas of the body" will not enable the user to "look like" a champion. Aside from the fact that the purchaser may be deceived as to the safety of the device by the claim in question, he is also entitled to protection from deceptive advertising even though he is motivated solely by vanity in making his purchase. *Federal Trade Commission v. Algoma Lumber Company*, 291 U.S. 67; *Ward Laboratories, Inc., et al. v. Federal Trade Commission*, 276 F. 2d 952.

FINAL ORDER

NOVEMBER 7, 1963

This matter has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner. Upon consideration of the record and briefs submitted by the parties—oral argument having been cancelled by the Commission, in accordance with Section 3.22(f) of the Rules of Practice, at the request of both parties—the Commission has rendered its decision, granting the appeal in part but denying it in all other respects. The Commission has determined, for the reasons stated in the accompanying opinion, that the order to cease and desist contained in the initial decision should be modified and, as modified, adopted and issued as the Commission's final order. Therefore,

It is ordered, That respondent, Heinz W. Kirchner, an individual trading as Universe Company, and respondent's agents, representatives and employees, directly or under any name or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce, of the device known as "Swim-Ezy", or any other swimming aid or device of similar design, construction, or intended use, do forthwith cease and desist

from representing, stating or implying, by words or pictorially or otherwise, that such device:

(1) can or will prevent the user thereof from sinking, or render him unsinkable;

(2) can or will assist the user thereof to float, or increase his buoyancy, unless respondent shall state, clearly and conspicuously and in immediate conjunction with any such representation, that such device is not a life preserver, and will not render the user thereof unsinkable, and should not be used in deep water by persons who cannot swim;

(3) can or will protect the user thereof from the dangers associated with swimming or bathing, such as (but not limited to) the danger of sudden cramps or other disabling pain;

(4) can or will enable the user thereof to become or perform like a skilled, expert or champion swimmer; or

(5) is guaranteed, unless all the terms and conditions of the guarantee are fully, accurately, clearly and conspicuously disclosed in immediate conjunction with any such representation.

It is further ordered, That respondent shall file with the Commission, within sixty (60) days after service of the order herein upon him, a report in writing setting forth in detail the manner and form of respondent's compliance with the order.

By the Commission, Commissioner Anderson dissenting in part.

IN THE MATTER OF

LUDWIG C. GRAF TRADING AS GRAF'S FURS ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-619. Complaint, Nov. 8, 1963—Decision, Nov. 8, 1963

Consent order requiring a San Diego, Calif., retail furrier to cease violating the Fur Products Labeling Act by representing falsely, on labels and in newspaper advertising, that sale prices were reduced from stated "regular" prices which were, in fact, fictitious; failing in invoicing and advertising, to show the true animal name of fur used in a fur product; failing, on invoices, to show the country of origin of imported furs, and invoicing falsely with respect to the country of origin—for example, showing Canada as the source of Russian furs; invoicing furs deceptively as "Broadtail" and artificially colored furs as natural, and failing in other respects to comply with invoicing requirements; and failing to maintain adequate records as a basis for pricing claims.

Complaint

63 F.T.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Ludwig C. Graf, also known as Ludi Carl Graf, an individual trading as Graf's Furs, and Ludi H. Graf, and Fred J. Graf, individually and as employees who cooperate with the said Ludwig C. Graf in the management and operation of said Graf's Furs, hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Ludwig C. Graf, also known as Ludi Carl Graf, is an individual trading as Graf's Furs.

Respondents Ludi H. Graf and Fred J. Graf are individuals who cooperate in the management and operation of said Graf's Furs.

Respondents are retailers of fur products with their office and principal place of business located at 1200 Fifth Avenue, in the City of San Diego, State of California.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that labels affixed thereto represented prices of fur products as having been reduced from regular or usual prices when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show the country of origin of imported furs used in fur products.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that respondents set forth on invoices pertaining to fur products the name of an animal other than the name of the animal that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designations.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs used in such fur products, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products invoiced to show the name of the country of origin of furs contained in such fur products as Canada when the country of origin of such furs was, in fact, Russia.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

- (a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated

Complaint

63 F.T.C.

thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 10. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in issues of the San Diego Union, a newspaper published in the City of San Diego, State of California.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show the true animal name of the fur used in the fur product.

PAR. 11. By means of the aforesaid advertisements and other advertisements of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements represented that the prices of fur products were reduced from regular or usual retail prices and that the amount of such price reductions afforded savings to the purchasers of respondents' products, when the so-called regular or usual retail prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the said fur products were not reduced in price as represented and the represented savings were not thereby afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 12. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented either directly or by implication that prices of such fur products had been reduced from regular or usual prices of such products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the said fur products were not reduced in price as represented and the rep-

1297

Decision and Order

resented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 13. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ludwig C. Graf, also known as Ludi Carl Graf, is an individual trading under his own name and as Graf's Furs with his office and principal place of business located at 1200 Fifth Avenue, in the City of San Diego, State of California.

Respondents Ludi H. Graf and Fred J. Graf are individuals and employees of Graf's Furs, and their address is the same as that of Ludwig C. Graf.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Ludwig C. Graf, also known as Ludi Carl Graf, an individual trading as Graf's Furs, or under any other trade name and Ludi H. Graf and Fred J. Graf, individually and as employees who cooperate with the said Ludwig C. Graf in the management and operation of said Graf's Furs and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying such products by any representation that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so represented was usually and customarily sold at retail by the respondents unless such merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondents' products.

3. Falsely or deceptively representing in any manner, directly or by implication, on labels or other means of identification that prices of respondents' fur products are reduced.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false and deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

Decision and Order

3. Setting forth on the invoices pertaining to fur products the name or names of any animal or animals other than the name of the animal producing the fur contained in the fur product as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

4. Representing directly or by implication on invoices that the fur contained in fur products is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

5. Misrepresenting in any manner, directly or by implication, the country of origin of the fur contained in fur products.

6. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

7. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

8. Failing to set forth on invoices the item number or mark assigned to fur products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur products, and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Represents, directly or by implication, that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by respondents in the recent past.

3. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

4. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

Complaint

63 F.T.C.

D. Making claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

BETTER RHINESTONE JEWELRY CORPORATION ET AL.

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

Docket C-620. Complaint, Nov. 12, 1963—Decision, Nov. 12, 1963

Consent order requiring assemblers of jewelry which they sold to distributors, jobbers and retailers, to cease representing falsely that certain of their jewelry was sterling silver of the established and accepted standard by placing it in individual boxes having the words "Sterling Silver" or "Sterling Silver Pendette" printed thereon or on tags inserted therein.

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 Better Rhinestone Jewelry Corporation, a corporation, and Lee Better, individually, as an officer of said corporation and trading and doing business as Masco, 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 Better Rhinestone Jewelry Corporation 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 115 West 29th Street, in the City of New York, State of New York.

Respondent Lee Better is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the cor-

porate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent. Respondent Lee Better trades and does business under the name Masco with his principal place of business also located at 115 West 29th Street in the City of New York, State of New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the assembly, offering for sale, sale and distribution of jewelry to distributors, jobbers and to retailers for resale to the public. Respondents' business is conducted in the following manner. Respondents' jewelry is assembled by respondent Better Rhinestone Jewelry Corporation and certain of the jewelry so assembled is sold to distributors, jobbers and retailers by Better Rhinestone Jewelry Corporation. Respondent Lee Better causes the remainder of said jewelry to be sold to himself, trading and doing business as Masco, and thereafter sells such jewelry to distributors, jobbers and retailers under the name Masco. Respondents cooperate and act together in carrying out their business.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their jewelry, 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 maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. For the purpose of inducing the purchase of their jewelry, respondents engage, and have engaged, in the practice of placing certain of their jewelry in individual boxes having the words "Sterling Silver" or "Sterling Silver Pendette" imprinted therein or in individual boxes having tags or labels inserted therein bearing the words "Sterling Silver" or "Sterling Silver Pendette". Respondents thereby represent, directly or by implication, that the jewelry packaged in said boxes or the pendants of the jewelry packaged in said other boxes is made of sterling silver having a silver content meeting the established and accepted standard for sterling silver.

The established and accepted standard for sterling silver is that any article or part thereof which is marked, described or otherwise represented to be "Sterling Silver" must be 925/1000ths pure silver a fact of which the Commission takes official notice.

In truth and in fact, the jewelry packaged in said boxes is not made of sterling silver of at least 925/1000ths pure silver and the pendants of the jewelry packaged in said other boxes are not made of sterling silver of at least 925/1000ths pure silver.

Therefore, the aforesaid statements and representations were, and are, false, misleading and deceptive.

PAR. 5. By the aforesaid practices, respondents place in the hands of distributors, jobbers and retailers, means and instrumentalities whereby they may mislead and deceive the public as to the composition of respondents' jewelry.

PAR. 6. In the course and 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 jewelry of the same general kind and nature as that sold by respondents.

PAR. 7. 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' jewelry by reason of said erroneous and mistaken belief.

PAR. 8. 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 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Better Rhinestone Jewelry Corporation 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 115 West 29th Street in the city of New York, State of New York.

Respondent Lee Better is an officer of said corporation, and his address is the same as that of said corporation. He also trades and does business as Masco with his principal place of business also located at 115 West 29th Street, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Better Rhinestone Jewelry Corporation, a corporation, and its officers, and Lee Better, individually, as an officer of said corporation and trading and doing business as Masco or under any other name or names, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of jewelry or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that an article or any part thereof is made of sterling silver when such article or part is not made of sterling silver containing at least 925/1000ths pure silver, or otherwise misrepresenting the composition of respondents' merchandise.

(2) Placing in the hands of others the means and instrumentalities whereby they may mislead and deceive the public as to any of the matters set forth above.

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.