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Final Order

promulgated thereunder to describe such fur products or furs which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1967), the initial decision should be adopted and issued as the decision of the Commission:

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

It is further ordered, That respondents, Market Fur Dressing Corp., a corporation, and Milton Mainwold, individually and as an officer of said corporation, shall, within sixty (60) days after service of this order upon them, 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.

IN THE MATTER OF

THERMOCHEMICAL PRODUCTS, INC., ET AL.

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

Docket 8725. Complaint, Jan. 9, 1967—Decision July 25, 1969

Order requiring a New York City marketer of water repellent paints and coatings to cease misrepresenting that it is a division of Union Carbide Co. or any other large company, exaggerating the earnings of prospective franchised dealers, misrepresenting the quality of its paints, using a fictitious subsidiary to collect its accounts, failing to reveal that its purchase contracts may be negotiated to third parties, making false guarantees, and using other deceptive means to recruit salesmen and dealers to sell its products.

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 Ther-

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mochemical Products, Inc., a corporation, and Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, and Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Walmart Discount Corporation, a 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 Thermochemical Products, Inc., 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 1860 Broadway, New York, New York.

Respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, are officers of said corporate respondent and their address is the same as that of said corporate respondent Thermochemical Products, Inc.

Respondents Charles A. Jacobs and David Jacobs are managers of the said corporate respondent and their address is the same as that of the said corporate respondent Thermochemical Products, Inc.

Respondent Walmart Discount 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 1841 Broadway, New York, New York. It is a wholly owned subsidiary of respondent Thermochemical Products, Inc.

Respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, as officers, and Charles A. Jacobs and David Jacobs as managers, formulate, direct and control the acts and practices of the corporate respondent Thermochemical Products, Inc., including the acts and practices hereinafter set forth.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water repellent paints and coatings to dealers for resale to the public under the trade names, among others, of "Aqua-Chek," "Vivilume" and "Vin-L-Brush-On."

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 and transported 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 hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Walmart Discount Corporation is now, and for some time past has been, engaged in the collection of past due or delinquent accounts and negotiable paper for the respondent Thermochemical Products, Inc., and others.

PAR. 5. In the course and conduct of its business, respondent Walmart Discount Corporation is now, and for some time last past has been, receiving accounts and negotiable paper for collection from outside the State of New York. In addition thereto said respondent has sent and received, by means of the United States mail, letters, checks and documents to and from States other than the State of New York and maintains, and at all times herein mentioned has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. 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 products of the same general kind and nature as that sold by respondents.

PAR. 7. In the course and conduct of their business, respondents have operated, and continue to operate, a sales plan by means of which they secure dealers for the sale and distribution of their products to the purchasing public. These dealers are solicited and secured by salesmen employed by said respondents, such salesmen having been selected and trained by said respondents for this purpose. The primary function of these salesmen is to establish said dealerships and to obtain orders for the products of said respondents by means of written contracts or so-called "special dealership agreements" with which are combined an initial order for one of said respondents' products. This special dealership agreement assigns to the said dealer a particular territory within which he may operate and sell said respondents' products. The dealer has the option of paying for the merchandise purchased within a specified time, usually 10 days, or of paying the amount in installments, usually by executing three trade acceptances which are immediately transferred to a finance or discount com-

pany. When, in the course of attempts to enforce payment of such trade acceptances, dealers protest that their contracts with respondents were obtained as a result of misrepresentation, the position is asserted in opposition to such protest that the finance company is a holder in due course and not subject to such defenses.

It is the said respondents' usual practice to follow up this transaction within a few weeks by having another salesman, called a "back man," visit the dealer and, using the same tactics as the first salesman, attempt to sell the dealer an order of a different one of respondents' products than that which was included in the first sale.

During the course of the sales presentations, as aforesaid, the said respondents' salesmen use physical demonstrations to portray the water repellent properties of the particular product being sold. The equipment for these demonstrations is supplied to the salesmen by the said respondents. When the product is delivered it is sometimes different from that used by the salesmen in the demonstrations and the dealer cannot perform the same demonstrations for his customers as did the salesman.

PAR. 8. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the sales of their products, respondents have made certain statements and representations to prospective dealers, by and through oral statements of their salesmen and representatives and by means of brochures and other written and printed material, directly or by implication.

Typical and illustrative, but not all inclusive, of said statements and representations, are the following:

1. That the respondent Thermochemical Products, Inc., is a subsidiary of, a division of or is affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America.
2. That the products of the said corporate respondent are manufactured, or have been developed, by one of the aforesaid companies.
3. That products sold by the respondents are unconditionally guaranteed for five or ten years as the case may be.
4. That respondents' dealers will realize various profits up to \$18,000 per year from the resale of respondents' products.
5. That the respondents' dealers may return to the respondents any merchandise that is not sold or that the respondents will transfer it to another dealer.

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6. That respondents' products are waterproof.
7. That respondents' products are suitable for both inside and outside of a building.
8. That a survey has been made of the territory in which the prospective dealer is located, prior to the visit of the respondents' salesman to the dealer.
9. That one coat of any of respondents' products will be sufficient to cover the surface to be painted.
10. That respondents will assist the dealer in making sales by sending a representative to contact prospective customers of the dealer, by erecting billboards for display, by furnishing newspaper mats for the use of the dealer free of charge and by preparing suitable mailings on the dealer's letterhead which are to be sent to prospective customers of the dealer.

PAR. 9. In truth and in fact:

1. Respondent Thermochemical Products, Inc., is not a subsidiary of, a division of or is not affiliated with Union Carbide Company, General Electric Company, Aluminum Company of America or any other corporation.
2. The products of the corporate respondent Thermochemical Products, Inc., are neither manufactured nor developed by any one of said companies, although one of the ingredients in said products may have been manufactured by one or the other of said corporations and is placed in combination by the respondents with other ingredients not manufactured by such company.
3. The products sold by the respondents are only guaranteed in a limited way and not unconditionally.
4. Few, if any, dealers earn \$18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.
5. Respondents seldom, if ever, permit the return of unsold merchandise or transfer such merchandise to other dealers.
6. Respondents' products are not waterproof but only water repellent.
7. Respondents' products are not suitable for use on the inside of a structure.
8. No survey has ever been made of the territory in which the prospective dealer is located for the purpose of ascertaining the potential sales within that territory.

9. One coat of any of respondents' products is not sufficient to cover the surface to be painted.

10. Respondents do not assist the dealer in making sales either by sending a representative to contact prospective customers of the dealers, by erecting billboards and other displays, by furnishing newspaper mats for the use of the dealer free of charge, or by preparing suitable mailings on the dealer's letterhead.

PAR. 10. When trade acceptances are taken in payment of merchandise purchased they are discounted with Ambassador Factors Corporation or some other discount company claiming to be holders in due course. After a default in the payment of such trade acceptances, the same are assigned to respondent Walmart Discount Corporation which company brings suit in its name, alleging that it is an assignee of a holder in due course and therefore entitled to all the rights of a holder in due course.

PAR. 11. In truth and in fact, said Walmart Discount Company is a wholly owned subsidiary of the respondents, so that the effect of such assignment is the same as if the paper had been assigned to the other corporate respondent, the original holder thereof.

PAR. 12. The fact of assignment to Walmart Discount Corporation and the bringing of suit in its name as assignee has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suit is brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses they may have against the respondents and to make payments which they might otherwise not have made.

PAR. 13. The use by the respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their said products and the status of Walmart Discount Corporation, has had, and now has, the capacity and tendency to mislead and deceive a substantial number of their said dealers as well as members of the purchasing public into the erroneous and mistaken belief that such statements and representations were, and are, true and to cause substantial numbers of said dealers, as well as members of the purchasing public, to purchase substantial quantities of the said respondents' products because of such erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constituted, and

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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. Roy B. Pope and Mr. Herbert S. Forsmith for the Commission.

Mr. Miles Warner, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER
DECEMBER 11, 1968

The complaint, issued in this proceeding on January 9, 1967, charges Thermochemical Products, Inc., a corporation, Jeannette Vine, Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Wolmart Discount Corporation, a corporation, hereinafter referred to as respondents, with using false, deceptive and misleading statements and misrepresentations to recruit dealers for respondents' paints and coatings, in violation of Section 5 of the Federal Trade Commission Act.

Through counsel, respondents answered the complaint and denied the substantial allegations. Hearings have been held in Los Angeles and San Francisco, California, Chicago, Illinois, Houston, Texas, Greensboro, North Carolina, and New York, New York, to receive testimony offered by complaint counsel. Defense hearings were delayed due to the illness of the individual respondent, Charles A. Jacobs. Defense hearings have now been completed and proposed findings of fact and conclusions of law have been filed by respective counsel. All proposed findings and conclusions not found or concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent, Thermochemical Products, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 1860 Broadway, New York, New York (Answer, Par. 1).
2. The individual respondent, Beatrice Freeman, is the wife of the individual respondent, David Jacobs (Tr. 1663-64), but does

business under her maiden name, Beatrice Freeman (CX 133A). The individual respondents, Jeannette Vine and Beatrice Freeman Jacobs, are the officers and directors of Thermochemical Products, Inc., Jeannette Vine being president and treasurer, and Beatrice Freeman Jacobs being Secretary thereof (Tr. 1663, 1669, 1670, 1674; CX 134A; Answer, Par. 1). Jeannette Vine and Beatrice Freeman Jacobs own all of the outstanding capital stock of the corporate respondent, Thermochemical Products, Inc. (Tr. 1664; CX 135 and 187).

3. The individual respondents, Charles A. Jacobs and David Jacobs, are agents of the individual respondents, Jeannette Vine and Beatrice Freeman Jacobs, appointed to operate Thermochemical Products, Inc. As such agents, Charles A. Jacobs and David Jacobs are managers of said corporate respondent. Their business addresses are the same as that of corporate respondent (CX 133A and B; Answer, Par. 1). As such managers, the said Charles A. Jacobs and David Jacobs control the acts and practices of Thermochemical Products, Inc., as agents for the individual respondents, Jeannette Vine and Beatrice Freeman Jacobs (CX 187; Tr. 1690-91, 2194).

4. The gross business of respondent Thermochemical Products, Inc., for the year ending October 31, 1967, amounted to approximately \$2,000,000 (Tr. 1967).

5. The respondent, Walmart Discount Corporation, is a corporation organized under the laws of the State of New York on December 17, 1964 (Glantz, Tr. 1932). No stock has been issued by Walmart Discount Corporation, and no capital stock paid in. There are no directors, and the only officer is Bruce Mund, who is acting as secretary (Glantz, Tr. 1933; Mund, Tr. 1812). Walmart Discount Corporation had no bank account until November 18, 1965 (Mund, Tr. 1874).

6. Thermochemical Products, Inc., along with the individual respondents named herein and above referred to, is now, and for some time last past has been, engaged in the offering for sale, sale, and distribution of paints and coatings to dealers for resale to the public under the trade names, among others, of "Aqua-Chek," "Permalume," "Vivilume," and "Vin-L-Brush-On" (Answer, Par. 2; CX 133A and 133B).

7. Prior to the formation of Thermochemical Products, Inc., the respondents, Charles A. Jacobs and David Jacobs, were engaged in the offering for sale, sale, and distribution of paints and coatings under the corporate names of Ohmlac Painting and Re-

fining Company, Inc., Sterling Materials Company, Inc., and Carbozite Coatings, Inc., and their sales methods were similar to those now used by Thermochemical Products, Inc. The Federal Trade Commission entered an order against the said Charles A. Jacobs and David Jacobs, and the three corporations named in the preceding sentence, directing the respondents to cease and desist from certain practices found therein to be deceptive (Docket No. 6426, 52 F.T.C. 909; Jacobs, Tr. 2229). A civil penalty proceeding was brought against said respondents in Docket No. 6426 for violation of the order entered therein, which resulted in a consent judgment for \$28,000 against the said respondents (CX 129 and 130).

8. In the course and conduct of its business, Thermochemical Products, Inc., and the individual respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of New York, or from the place where such products are manufactured in the State of New Jersey, to purchasers thereof located in various other States of the United States, and maintain, and at all times herein mentioned have maintained, a substantial course of trade in said products in commerce (Answer, Par. 3).

9. In the conduct of its business, the corporate respondent, Thermochemical Products, Inc., has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as that sold by respondents (Answer, Par. 6).

10. The charging allegations of the complaint allege, among other things, that:

In the course and conduct of the business of Thermochemical Products, Inc., the respondents have operated, and continue to operate, a sales plan by means of which they secure dealers for the sale and distribution of their products to the purchasing public. These dealers are solicited and secured by salesmen employed by respondents, such salesmen having been selected and trained by respondents for this purpose. The primary function of these salesmen is to establish said dealerships and obtain orders for the products of Thermochemical Products, Inc., by means of written contracts or so-called "Special Dealership Agreements" with which is combined an initial order for one of respondents' products. This Special Dealership Agreement purports to assign to the said dealer a particular territory within which the dealer may op-

erate and sell respondents' products. The dealer has the option of paying for the merchandise purchased within a specified time, usually ten days, or of paying the amount in installments, usually by executing three trade acceptances which are immediately transferred to a finance or discount company.

11. The complaint further alleges that it is the respondents' usual practice to follow up this original transaction within a few weeks by having another salesman, called a "back man," visit the dealer and, using the same or similar representations as the first salesman, attempt to sell the dealer an order for a product similar to that purchased by the dealer from the first salesman, but under a different trade name.

12. The complaint further alleges that, during the course of the sales presentations by respondents' salesmen, said salesmen use physical demonstrations to portray the water repellent properties of the particular product being sold. The equipment for these demonstrations is supplied to the salesmen by the respondents. When the product is delivered to, and received by, the dealer, it is generally different from that used by the salesmen in the demonstrations, and the dealer cannot perform the same demonstration with the product as did the salesmen.

13. The complaint further alleges that, in the course and conduct of their business, and for the purpose of inducing the sales of their products, respondents have made certain statements and representations to prospective dealers, by and through oral statements of their salesmen and representatives and by means of brochures and other written and printed material, directly or by implication; and that, typical and illustrative, but not all inclusive, of said statements and representations, are the following:

(a) That the respondent Thermochemical Products, Inc., is a subsidiary of, a division of or is affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America; whereas, in truth and in fact, respondent Thermochemical Products, Inc., is not a subsidiary of, a division of or is not affiliated with Union Carbide Company, General Electric Company, Aluminum Company of America or any other corporation.

(b) That the products of the said corporate respondent are manufactured, or have been developed, by one of the aforesaid companies; whereas, in truth and in fact, the products of the corporate respondent Thermochemical Products, Inc., are neither manufactured nor developed by any one of said companies, although one of the ingredients in said products may have been

manufactured by one or the other of said corporations and is placed in combination by the respondents with other ingredients not manufactured by such company.

(c) That products sold by the respondents are unconditionally guaranteed for five or ten years as the case may be; whereas, in truth and in fact, the products sold by the respondents are only guaranteed in a limited way and not unconditionally.

(d) That respondents' dealers will realize various profits up to \$18,000 per year from the resale of respondents' products; whereas, in truth and in fact, few, if any, dealers earn \$18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.

(e) That the respondents' dealers may return to the respondents any merchandise that is not sold or that the respondents will transfer it to another dealer; whereas, in truth and in fact, respondents seldom, if ever, permit the return of unsold merchandise or transfer such merchandise to other dealers.

(f) That respondents' products are waterproof; whereas, in truth and in fact, respondents' products are not waterproof but only water repellent.

(g) That respondents' products are suitable for both inside and outside of a building; whereas, in truth and in fact, respondents' products are not suitable for use on the inside of a structure.

(h) That a survey has been made of the territory in which the prospective dealer is located, prior to the visit of the respondents' salesman to the dealer; whereas, in truth and in fact, no survey has ever been made of the territory in which the prospective dealer is located for the purpose of ascertaining the potential sales within that territory.

(i) That one coat of any of respondents' products will be sufficient to cover the surface to be painted; whereas, in truth and in fact, one coat of any of respondents' products is not sufficient to cover the surface to be painted.

(j) That respondents will assist the dealer in making sales by sending a representative to contact prospective customers of the dealer, by erecting billboards for display, by furnishing newspaper mats for the use of the dealer free of charge and by preparing suitable mailings on the dealer's letterhead which are to be

sent to prospective customers of the dealer; whereas, in truth and in fact, respondents do not assist the dealer in making sales either by sending a representative to contact prospective customers of the dealers, by erecting billboards and other displays, by furnishing newspaper mats for the use of the dealer free of charge, or by preparing suitable mailings on the dealer's letterhead.

14. The complaint further alleges that, when trade acceptances are taken in payment of merchandise purchased from respondents, the trade acceptances are discounted with Ambassador Factors Corporation or some other discount company which claims to be a holder in due course; and, when the discount company or factor attempts to enforce payment of such trade acceptances, and the dealer claims that the purchase of corporate respondent's product and the execution of the trade acceptances were obtained by misrepresentation, the finance company or factor asserts that it is a holder in due course and not subject to such a defense.

15. The complaint further alleges that, after a default in the payment of such trade acceptances, the same are assigned to the respondent, Walmart Discount Corporation, which company brings suit in its name, alleging that it is an assignee of a holder in due course and therefore entitled to all the rights of a holder in due course; that, in truth and in fact, said Walmart Discount Corporation is a wholly owned subsidiary of the respondents, so that the effect of such assignment is the same as if the paper had been assigned to the other corporate respondent, the original holder thereof; that the fact of assignment to Walmart Discount Corporation and the bringing of suit in its name as assignee has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suits are brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses which they may have against the respondents and to make payments which they might otherwise not have made.

16. The complaint further alleges that the use by the respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their products and the status of Walmart Discount Corporation has had, and now has, the capacity and tendency to mislead and deceive a substantial number of their said dealers, as well as members of the purchasing public, into the erroneous and mistaken belief that such statements and representations were true and to cause substantial numbers of said dealers and members of the purchasing public to purchase

substantial quantities of respondents' products because of such erroneous and mistaken belief; and that the aforesaid acts and practices of respondents were and are to the prejudice and injury of the public and of respondents' competitors and 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.

17. To establish the allegations of the complaint, especially with respect to the allegedly false representations made by respondents' salesmen to prospective dealers for the resale of respondents' products, complaint counsel offered the testimony of approximately 40 persons engaged in various types of retail businesses, who had been personally solicited by respondents' salesmen to purchase respondents' products and become local retail dealers therefor. It is the allegedly false, deceptive, and misleading statements and representations made by respondents' salesmen to these prospective dealers which constitute a substantial portion of the testimony offered by complaint counsel to establish the violations of Section 5 of the Federal Trade Commission Act alleged in the complaint. The evidence shows that respondents' salesmen called on and solicited prospective dealers among persons who operated retail businesses in various sections of the United States. At hearings held in California, 11 residents of that State testified concerning representations made to them by respondents' salesmen. In addition to the testimony of these 11 operators of businesses, two investigators from the District Attorney's office in Santa Clara County testified at the hearings held in San Francisco concerning representations made to them by salesmen for Thermochemical Products, Inc. (Howard B. Hamilton, Tr. 655-703; William D. Reed, Tr. 704-717). Ten witnesses testified at hearings held in Chicago, Ill., including three witnesses who resided in Ohio, two in Michigan, two in Indiana, one in Wisconsin, and two in Illinois. Eleven persons who resided in various sections of Texas testified at hearings held in Houston, Texas. Six persons who resided in North Carolina testified at hearings held in Greensboro, North Carolina. Two persons who resided in Pennsylvania and two from New York State testified at hearings held in New York, N.Y., concerning representations made to them by respondents' salesmen, along with other witnesses who testified on other phases of the case, including employees of respondents and the individual respondents. The testimony of each of these witnesses will not be discussed separately in this decision.

