

IN THE MATTER OF
ROBERT W. HAILEY, G. P. HUBBLE, AND H. F. HALL,
TRADING AS COOKWARE ASSOCIATES

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5084. Complaint, Nov. 17, 1943—Decision, June 25, 1945

Where two individuals engaged in interstate sale and distribution of cooking utensils which, prior to 1940, they purchased in the form of stainless aluminum castings and finished for the market in their polishing and finishing plant, and, subsequent to 1941, when Government restrictions due to war demand were placed upon the production of aluminum products, were glass and ceramic, known respectively as "fire glass ware" and "Old Hickory Ceramic Ware"; and which they sold direct to the public through agents whose practice it was to arrange demonstration meals involving the use of the utensils at the homes of housewives, to which friends and neighbors were invited, and thereafter solicit orders from those interested at said demonstrations under a plan by which a cash payment was made at the time of the order, which the agent retained as part compensation, and shipment was made C.O.D. either for the balance or, if sold under installment contract, for not less than 40% of the contract price; following a change to a baser alloy in 1940, due to war conditions, in the formula for the castings purchased by them, so that the utensils had a tendency to stain or darken and become pitted—

- (a) Continued, through their said agents, to make demonstrations, using the original stainless aluminum samples, and to take orders without advising the purchasers that utensils of a baser metal would be delivered; and aided and abetted in said deception of purchasers by repeatedly accepting orders taken in said manner; and countenanced the use of the stainless aluminum samples in the making of demonstrations;
- (b) Did not notify purchaser in advance that a baser-metal utensil would be supplied, but, on the same day that a shipment was forwarded, sent a notice advising the purchaser that they were sending utensils made of a newly improved alloy which reached the purchaser at about the time of the C.O.D. shipment, giving him no opportunity to cancel his order because of such change; and in all cases where a purchaser canceled or attempted to cancel the order because of the delivery of utensils different from the samples, refused to make any refund of the down payment; and

Where said individuals, following said discontinuance of the sale of aluminum and metal utensils and at a time when they knew they could not make deliveries—

- (c) Followed a practice of taking all orders possible therefor, instructing their agents to continue taking orders and to collect down payments;
- (d) Endeavored to induce purchasers, secured as aforesaid, to accept partial delivery and let the balance of the order stand until after the duration, or attempted to substitute cooking utensils made of glass or ceramic ware for the aluminum or aluminum alloy ordered by the customer; and
- e) Pursued the policy, if the purchaser was unwilling to accept substitute cooking utensils, of refusing to refund the down payment to the customer or to cancel the contract, and in all such instances notified the purchasers that they could not refund the deposit but would ship the ordered goods as soon as the governmental restrictions on the production of aluminum and aluminum alloy products were lifted;

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Complaint

Whereby they fraudulently induced a substantial portion of the purchasing public to enter into contracts to purchase cooking utensils which they failed to deliver in accordance therewith, and to pay substantial deposits thereon which they refused to refund;

Effect of which practice of procuring orders for merchandise which they could not deliver, together with down payments, and then refusing to cancel such orders or to refund the down payment, enabled them to compel or attempt to compel purchasers to accept partial deliveries or the substitution of glass or ceramic utensils in lieu of the utensils ordered, under penalty of forfeiture of the deposits paid, or to await the termination of the wartime restrictions at an uncertain future date, pending which they were deprived of the use of the goods contracted for at the solicitation of said agents:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. J. Earl Cox*, trial examiner.

Mr. Merle P. Lyon and *Mr. Clark Nichols* for the Commission.

Mr. Edward A. Myers, of Bucyrus, Ohio, for respondents.

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 Robert W. Hailey, G. P. Hubble, and H. F. Hall, individuals, trading as Cookware Associates, hereinafter referred to as the 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 interest of the public, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondents, Robert W. Hailey, G. P. Hubble and H. F. Hall, are individuals, trading under the name and style of Cookware Associates, with their office and principal place of business located at 1101 East Warren Street, Bucyrus, Ohio. Respondents are now, and for several years last past have been, engaged in the sale and distribution of cooking utensils. Respondents cause, and have caused, said cooking utensils, when sold, to be shipped from their place of business in the State of Ohio to the purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their said business, the respondents have solicited orders for their said cooking utensils by means of traveling salesmen and representatives, who have contacted customers and prospective customers by direct canvassing and house-to-house calls, and have then exhibited their wares by practical cooking demonstrations with utensils alleged by them to be identical with the utensils offered by respondents for sale to said customers. If orders were received, a printed contract was signed by the customer providing for the payment of a deposit to the salesman and future delivery of the cookware by the respondents at a later date to be fixed by the customer.

During the year 1941 and prior thereto, the respondents made their cooking utensils of aluminum or of aluminum alloy, and said utensils were

in high demand by housewives generally and were greatly esteemed for their brilliance, luster and durability. Subsequent to the year 1941 certain restrictions were placed by various governmental agencies on the production and sale of aluminum and aluminum alloy cooking utensils, so that in many instances the respondents were unable to perform contracts providing for the delivery of such utensils, or to deliver such utensils to their customers.

Notwithstanding the inability of respondents to perform such contracts, they continued to solicit sales of aluminum and aluminum alloy cooking utensils through their sales representatives and agents, and continued to accept orders and deposits providing for the sale and delivery of such cooking utensils. The deposits paid by the purchasers were retainers by the salesmen in whole or in part to apply on commissions due said salesmen on said contracts, and the orders were forwarded by said salesmen to the respondents for future delivery in accordance with the terms of said orders. In many instances during the years 1941 and subsequent thereto, the respondents were unable or unwilling to fill said orders in accordance with the terms thereof, and attempted to substitute cooking utensils made of glass or ceramic ware in place of the aluminum or aluminum alloy ware ordered by the customer. If the customer was unwilling to accept the substitute cooking utensils, the respondents pursued the policy of refusing to refund the deposit to the customer or to cancel the contract. In all such instances the respondents notified the purchasers that they would not refund the deposit, but would ship the ordered goods as soon as the governmental restrictions on the sale and delivery of aluminum or aluminum alloy ware were lifted and production of same was again permitted.

PAR. 3. The aforesaid acts and practices of the respondents in offering for sale and selling cooking utensils made of aluminum or aluminum alloy under circumstances where respondents knew or had reason to know that future delivery of said cooking utensils would be impossible or highly improbable due to existing governmental restrictions on the sale of strategic minerals for civilian use, have been and are highly prejudicial to the purchasing and consuming public. The respondents have attempted to compel the purchasers to accept inferior glass or ceramic cooking utensils in lieu of the cookware ordered by them, under the penalty of forfeiture of the deposits paid by them in good faith or of awaiting the termination of wartime restrictions on the sale of aluminum and aluminum alloy products at an uncertain future date, and in the meantime being deprived of the use of goods contracted for in good faith and at the solicitation of the agents and sales representatives of the respondents.

PAR. 4. The acts, practices and methods of respondents as aforesaid in soliciting and accepting orders for cookware, and in accepting deposits from purchasers for cookware, which respondents cannot deliver, if at all, until some uncertain time in the future, are misleading and deceptive and purchasers are mistakenly led to believe that respondents contemplate and can make immediate delivery of such cookware, and a substantial portion of the consuming public is thereby induced to, and does, place orders for, and pay deposits upon, said cookware because of such erroneous and mistaken belief. As a result many members of the public have contracted to purchase, and paid substantial deposits upon, respondents' said cookware products and respondents have failed to make delivery to such purchasers of cookware products of the quality and in the quantity sold.

PAR. 5. The aforesaid acts and practices of the respondents, as herein

alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 17, 1943, issued and subsequently served its complaint in this proceeding upon the respondents, Robert W. Hailey, G. P. Hubble, and H. F. Hall, individually, and as co-partners, trading as Cookware Associates, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the said act. After the issuance of the said complaint, testimony and other evidence in support of, and in opposition to, the allegations of said complaint were taken before a trial examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon said complaint, testimony and other evidence, report of the trial examiner upon the evidence, and brief in support of the complaint (respondents not having filed brief or requested oral argument); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents, Robert W. Hailey, G. P. Hubble, and H. F. Hall, are individuals, trading under the name and style of Cookware Associates, with their office and principal place of business located at 1101 East Warren Street, Bucyrus, Ohio. Respondents for several years last past have been engaged in the sale and distribution of cooking utensils. Respondents cause said cooking utensils, when sold, to be transported from their place of business in the State of Ohio to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. Prior to 1940, the respondents were engaged in the sale of stainless aluminum utensils known as "Health-Craft Ware." These utensils were purchased from the Aluminum Company of America and from the National Bronze and Aluminum Company in the form of castings, which the respondents machine-polished and finished for the market in their polishing and finishing plant at Bucyrus, Ohio. In 1940, due to war conditions, the formula for the castings purchased by the respondents was changed, with the result that the utensils had a tendency to stain or darken on use and to become pitted. In 1941, due to the demand for aluminum in the war effort, certain governmental restrictions were placed upon the production and sale of aluminum and aluminum alloy cooking utensils so that the respondents were unable to make delivery of such utensils. As a result, the respondents attempted to market utensils made of glass, which

were known as "Fire Glass Ware," and also ceramic utensils known as "Old Hickory Ceramic Ware."

PAR. 3. In the course and conduct of their business, the respondents sold their cooking utensils direct to the public through agents or field representatives originally designated as "associates" and later as "distributors." The customary procedure was for a field representative to call on a housewife and arrange for a demonstration at her home, to which her friends and neighbors were invited. In the course of this demonstration a meal was cooked and served through the use of the cooking utensils carried by the representative as samples, and the merits of the various utensils were demonstrated and explained by the representative to the assembled guests. The representative usually made no sales at the time of the demonstration but, instead, obtained the names of those persons who might be interested in the purchase of the cooking utensils and arranged to call on such prospective purchasers at a later date. When a purchaser agreed to purchase any of respondents' cooking utensils, said representative caused such purchaser to sign a written order agreeing to purchase the specified merchandise from the respondents. At the time of taking such order the representative invariably secured a down payment from the purchaser, which was retained by the representative as part of his commission, and the merchandise specified in the order was delivered by the respondents C.O.D. for the balance due. The orders taken by the representative for C.O.D. shipment further provided that the order was not subject to cancellation, alteration, substitution, or refund. In some instances installment contracts were entered into with the purchaser, which provided for a cash payment to the representative and a C.O.D. payment on delivery, which together constituted not less than forty percent of the contract price, with the balance paid in monthly installments.

The compensation received by respondents' agents or field representatives was entirely on a commission basis. This commission varied on different articles and sets of articles sold, and averaged approximately thirty-eight percent of the order. Under the plan of procedure developed by the respondents, the representative collected approximately twenty-five percent of this commission as a down payment, which was retained by him. When the entire collection was made, the respondents paid the representative the balance of such commission or credited same to his account.

In addition, the respondents also employed certain so-called "key managers," who were in charge of, and supervised, a number of representatives in a specific area. These key managers were paid a commission based upon the sales made by the representatives working under their supervision.

PAR. 4. After the formula for respondents' utensils was changed in 1940 because of war demands from the original stainless aluminum formula to a baser alloy, respondents' representatives continued to make demonstrations using the original stainless aluminum samples and taking orders for such utensils without advising the purchasers that utensils of a baser metal would be delivered. The respondents aided and abetted in this deception of purchasers by repeatedly accepting orders taken in this manner and countenanced the use of the stainless aluminum samples in the making of demonstrations. Furthermore, for the purpose of inducing the purchaser to accept the order the respondents did not notify such purchaser that a baser-metal utensil would be supplied until shipment was actually made. On the same day that a shipment was forwarded to a purchaser, the re-

spondents sent a notice advising the purchaser that they were sending utensils made of a newly improved alloy, such notices reaching the purchaser at about the time or immediately prior to the delivery of the C.O.D. shipment and without opportunity on the part of the purchaser to cancel said order because of such change. In all cases where a purchaser would cancel or attempt to cancel the order because of the delivery of utensils composed of material different from that of the samples, the respondents refused to make any refund of the down payment.

PAR. 5. After the sale of aluminum and metal utensils was ordered discontinued by the United States Government in 1941 and at a time when respondents knew that they could not make deliveries on orders, the respondents did not discontinue taking orders for such aluminum and metal utensils but, instead, followed the plan and practice of taking all orders possible. Respondents instructed their agents and representatives to continue to take orders for aluminum utensils and to collect down payments.

For example, in instructions dated February 7, 1942, sent out by respondents to all their representatives, the respondents stated:

Now here's what every Associate is to do. Here's orders:—You dive right in and put on all the Healthware dems you can get. Sell every dam order you can get them to sign and pay the downs. * * *

When they are settling on the shipping date, tip em off this way "Why not make the date sometime in May or June—maybe July, Mr. and Mrs. Jones. Im not supposed to know a thing about it—but Ive been tipped off by a friend in the office that the company has been getting ready for something new for months and I have a hunch they'll be coming out with it by April or May. It'll be a knockout, too. Beat this stuff all hollow. If you are willing to wait then you will get the chance to get the new product. The way they'll doubtless do will be to write every customer telling them about the new product and giving them a chance to decide which they want—the old or the new. They'll have to know so they can know how much of the old to make before they dismantle the machinery and get ready to produce the new."

Im not in a position to tell you boys any more than I have told you. Cant mention the material. In fact, use the story like above and you'll be better off without knowing exactly what it is. * * *

* * *

All the aluminum Healthware has been sold that can be delivered. You have orders to demonstrate all you can—sell all you can—collect all the downs you can—— * * * And you have orders to tip em off to "something new" and delay the delivery dates until May or June. * * *

* * *

And, remember, you do not have to taper off Healthware and on to the extractor. Sell ALL THE HEALTHWARE YOU CAN—AND ALL THE EXTRACTORS YOU CAN. Just dont swamp us with more "at once" orders. Tip em off to the "secret" (something new a'coming) and try to date orders off to May, June, etc. And everyone of us will get along OK I am confident.

And remember—when we give you something new it will not be some make-shift merchandise—but it will be Health-ware. It will be something that'll tie in with our present story. Merely a change of the material used.

In accordance with such instructions respondents' representatives continued to take orders for said aluminum Health-Craft Ware and to accept deposits. The respondents would then endeavor to induce such purchasers

to accept partial delivery and let the balance of the order stand until after the duration or attempted to substitute cooking utensils made of glass or ceramic ware in place of the aluminum or aluminum alloy ordered by the customer. If the purchaser was unwilling to accept substitute cooking utensils, the respondents pursued the policy of refusing to refund the down payment to the customer or to cancel the contract. In all such instances the respondents notified the purchasers that they could not refund the deposit but would ship the ordered goods as soon as the governmental restrictions on the sale and delivery of aluminum and aluminum alloy ware was lifted and the production of same was again permitted.

PAR. 6. By means of the acts and practices herein described the respondents have fraudulently induced a substantial portion of the purchasing public to place orders with the respondents for cooking utensils and to pay deposits thereon in the erroneous and mistaken belief that respondents can make immediate delivery thereof or, in the event of inability so to do, that the deposits so made will be returned. As a result, many members of the public have entered into contracts to purchase respondents' cooking utensils and have paid substantial deposits thereon, and the respondents have failed to make delivery of the cooking utensils in accordance with the contract and have refused to refund the deposits made by such purchasers.

The practice of the respondents of procuring orders for merchandise which they could not deliver, together with down payments on such orders, and then refusing to cancel such orders or to refund the down payment, enabled the respondents to compel or attempt to compel purchasers to accept partial deliveries or the substitution of glass or ceramic utensils in lieu of the utensils ordered by them, under penalty of forfeiture of the deposits paid by them in good faith, or to await the termination of the wartime restrictions at an uncertain future date, in the meantime being deprived of the use of the goods contracted for in good faith and at the solicitation of the agents and sales representatives of the respondents.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it in support of the allegations of said complaint and in opposition thereto, report of the trial examiner upon the evidence, and brief filed in support of the complaint (respondents not having filed brief or requested oral argument); and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondents, Robert W. Hailey, G. P. Hubble, and H. F. Hall, individually, and as copartners, trading as Cookware Associates, and their respective representatives, agents, and employees, directly

or through any corporate or other device in connection with the offering for sale, sale, and distribution of cooking utensils and other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Soliciting sales or accepting orders and deposits for cooking utensils or other merchandise of a kind and quality which the respondents are not capable of delivering at the time of the sale or within the time specified in the order.

2. Representing directly or by implication that respondents are offering for sale sets of cooking utensils or other merchandise when respondents cannot or do not deliver all the pieces of the set specified or when the pieces or sets actually delivered are not of the kind and quality represented by the respondents.

3. The use of any sales plan or method which involves the taking of orders for merchandise which the respondents cannot or do not supply, together with a deposit or down payment upon such order, to induce the purchaser to accept merchandise of a kind or quality different from that ordered, under penalty of forfeiture of deposit or down payment.

4. The use of any sales plan or method which involves a sales demonstration or display with merchandise of a kind or quality different from that which respondents actually deliver.

5. Refusing to cancel orders or refund deposits or down payments made thereon for merchandise of a kind or quality which respondents cannot deliver within the time specified in the order or within a reasonable time thereafter.

6. Coercing or attempting to coerce purchasers to accept merchandise of a kind or quality different from that ordered by refusing to refund down payment or deposit made at the time the order was placed.

It is further ordered, That the respondents shall, within 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.