

Complaint

IN THE MATTER OF

EDWIN A. AMES, EDWIN A. AMES, TRADING AS OSTERMOOR & COMPANY, AND OSTERMOOR & COMPANY, INC.

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914

Docket 1133—February 15, 1926

SYLLABUS.

Where an individual and his corporate successor, engaged in the manufacture of mattresses composed of compressed, superimposed layers or bats of cotton felt, and in the sale thereof; used in their labels and trade-marks, and in their advertising matter pictorial representations showing said mattresses with an uncovered end flaring to a thickness very greatly in excess of the expansion actually possessed by the aforesaid superimposed bats or layers, and in their advertising emphasized the supposed extraordinary resiliency of such mattresses falsely implied by the aforesaid representations, with the result that substantial numbers of purchasers were misled and deceived and induced to purchase the same in preference to the products of competitors who did not engage in such misrepresentation: *Held*, That such misbranding or mislabeling, and such false and misleading advertising, under the circumstances set forth, constituted unfair methods of competition.

Mr. Richard P. Whiteley for the Commission.

Mr. C. C. Cousins, of Foster, LaGuardia & Cutler, of New York City, for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent individual, and respondent corporation, his successor in business, a New York corporation, organized and controlled by him and engaged in the manufacture, among other things, of mattresses composed of superimposed layers of cotton felt or "bats," and in the sale thereof throughout the States, with principal place of business in New York City, with misbranding or mislabeling and with advertising falsely or misleadingly in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce, in that they sold their mattresses with brands or labels attached thereto containing depictions or representations which were designed to and did deceive and mislead purchasers and

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prospective purchasers into believing that they were truthful portrayals of an Ostermoor mattress; that eight cotton felt layers or "bats," from 40 to 60 inches in thickness were used in the manufacture of each mattress having such brand or label; and that they were possessed of such resiliency that if released from the covering of the mattress they would expand from their confined total thickness of from 6 to 8 inches to from 40 to 60 inches, the fact being that the brands or labels were not truthful depictions of a mattress of respondents, either in process of or after manufacture, but were made from a model built of wood, cloth, etc., and with lines painted thereon to represent the divisions between the various pretended bats; that the depictions were grossly exaggerated and fanciful, representing bats of a total thickness many times greater than actually used; and that the bats actually used if released from pressure, would not expand to any such extent as portrayed by such brands or labels but would expand only from 2 to 4 inches from their compressed thickness of 6 to 8 inches; and in that in all their matter advertising their said mattresses among dealers and among the public generally they included the aforesaid depictions or representations, as truthfully and accurately portraying the nature and quality thereof and methods of manufacture, with the tendency and capacity to deceive and mislead for the reasons above set forth; "all to the prejudice of the public and of respondents' competitors."

Upon the foregoing complaint the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served an amended complaint upon the respondents above named, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act.

The respondents having entered their several appearances and filed their several answers herein, and testimony having been taken, thereupon this proceeding came on for decision, and the Commission, having duly considered the record and being fully advised in the premises, makes this its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Edwin A. Ames, trading as Ostermoor & Co., was engaged in the business of manufacturing and selling bed

mattresses, cushions, and similar goods composed of cotton filling, throughout the several States of the United States for a number of years prior to June 24, 1922. On this date said Ames caused to be incorporated under the laws of the State of New York the respondent Ostermoor & Co., Inc., and said Ostermoor & Co., Inc., thereupon took over the aforesaid business from Edwin A. Ames, trading as Ostermoor & Co. Respondent Edwin A. Ames, individual, owns 4,998 of the 5,000 shares of the capital stock of respondent Ostermoor & Co., Inc.; Charles A. Campbell and Arnold W. Becker each own one share of the capital stock of said corporation. Respondent corporation has continuously engaged in interstate commerce since its incorporation and has its principal place of business at No. 116 Elizabeth Street, New York City, N. Y., as had respondent Ames trading as Ostermoor & Co. before the incorporation. Ostermoor & Co., Inc., and its predecessors had been in competition for a number of years with persons, partnerships, and corporations also engaged in the manufacture and sale throughout the United States of bed mattresses, cushions, and similar products which contain cotton filling.

PAR. 2. Respondent Ostermoor & Co., Inc., and its predecessors have been engaged in the manufacture and sale of mattresses since 1853. It was the pioneer in introducing the method used by it in making so-called cotton felt mattresses whereby layers of cotton are placed one upon the other to a thickness greater than that required in the finished mattress, then compressed to the thickness of such mattress, inserted in the ticking or cover, and tufted at various points with needle and thread. Respondent company or its predecessors began making mattresses in this manner some thirty years ago, and on December 21, 1899, March 21, 1900, and April 23, 1905, filed application before the United States Patent Office for the registration of several trade-marks, accompanying said applications with statements as follows:

Our trade-mark consists of the representation of expanded superimposed layers of a fabric material appearing from the partly opened-up cover * * *

This trade-mark has been continuously used in business by us since the 15th day of January, 1895.

The class of merchandise to which this trade-mark is appropriated is household articles, and the particular description of goods comprised in said class on which it is used by us is mattresses, pillows, cushions, and hassocks.

It has been our practice to mark the trade-mark on the goods and on labels and tags affixed to the goods, in any desired manner.

The above-quoted statement was made in connection with the application for registration of trade-mark No. 34063.

inches, while the flaring free ends are of such proportion that they plainly indicate the thickness of the cotton filling when freed from restraint to be at least 35 or 40 inches.

PAR. 5. For a number of years respondents have printed and distributed catalogues and circulars featuring the Ostermoor mattresses, cushions, and pillows; among these are "The Test of Time," "Built for Sleep," "Church Cushions," "Sleep," and "A Sleep Inducer." "The Test of Time" has not been published since the 1917 issue, although this issue continued to be distributed until the copies were exhausted, in 1921. In these several catalogues and circulars appear the picturizations or pictorial representations of the Ostermoor mattresses in course of construction, showing the superimposed layers of cotton felt being laid in place, also showing the layers partially enclosed within a ticking which is being sewed up by a woman standing beside the mattress, and further showing mattresses completely enclosed at one end, with the other end represented open for inspection and revealing the layers or bats of cotton felt tremendously expanded at the end which has been laid open. Under certain of these pictures appears reading matter directing attention to the resiliency or expansion of these mattresses, such as the following:

Absolute uniformity in thickness, softness and elasticity, with every square inch exactly duplicating the other, brings a sleep full of rest from head to foot.

Showing the built-up Ostermoor sheets appearing from out a completely finished cushion ripped open for inspection. Note resiliency of filling.

Showing the Ostermoor sheets all hand-laid and partially compressed within the already completed covering. Note the evenness of the lofty resiliency.

Showing the superimposed Ostermoor sheets appearing from out a completely finished cushion ripped open for inspection. Note resiliency of filling.

Stress is thus laid upon the resiliency or elasticity or expansion of the Ostermoor mattresses in connection with the pictorial representations of said mattresses. The said pictorial representations purport to be actual and real pictures of the construction, content and expansion of Ostermoor mattresses and cushions, and not merely fanciful illustrations of a principle.

PAR. 6. In October, 1896, respondents first began to advertise nationally the Ostermoor mattress, using the pictorial representations or depictions of an open-ended mattress greatly expanded at the open end, and so many responses to this advertising were received that respondents began advertising broadly, using the trade-mark and picturization in every advertisement. At that time there were few, if any, competitors making cotton felt mattresses, but thereafter competition arose and many manufacturers began to make mattresses of a similar kind. The respondents have expended some four million

tress enclosed at one end and opened and greatly expanded at the other end. This exaggerated picture was incorporated by respondents in the several trade-marks adopted by them. About January 15, 1895, respondents began using the picturizations or depictions of open-end mattresses as trade-marks, and attached to all mattresses manufactured and sold by them a label or brand bearing pictorial representations of an Ostermoor mattress in the later processes of construction. The device upon this label is a circle set within a square and quartered by lines of diameter intersecting at the center; in one quarter is a mattress cover upon which has been placed several layers or bats of cotton felt, a woman is in the act of adding a final layer to the mattress filling; in the second quarter of the label is shown a mattress with upper portion of the cover drawn in part over the filling so as to restrain one end, at the other end the mattress filling is shown as flaring widely, showing eight layers or bats; in the third quarter a woman is represented as in the act of fastening the edges of the cover together, she has progressed in the process some inches from the end of the mattress and the filling has flared or expanded toward the other end so as to show the bats or layers of filler rising to about the height of the woman's head although the support of the mattress reaches only to a point below the pictured woman's hip and the enclosed top to about her hip; in the fourth quarter is shown a mattress in sections, the smaller section completed and tufted, while in the larger section the filling for a few inches is restrained by the cover and for the rest of the distance it is exposed, showing a flare similar to that shown in the adjacent quarter. Following one of the diameter lines which divide the circle is the word "Ostermoor," and following the other diameter line is the legend "Hand-Laid Filling," thus giving the impression that the representations in series upon the label were of the final processes of Ostermoor mattress construction. Legends following the periphery of the circle are: "Never Requires Remaking," "Never Gets Lumpy," "Will Not Mat," "Vermin-Proof, Non-Absorbent." Within the corners of the square in which the circular center of the label is set are repeated the words "Ostermoor & Co., 116 Elizabeth St., New York."

PAR. 4. Such pictorial representations of the bed mattresses of respondents so set forth upon such brands or labels indicate great elasticity and resiliency and an expansion of the filling when unrestrained to several times the thickness of such filling when bound in such mattresses, such filling when flared out or expanded being at least six or seven times as thick at the extreme free or open end as in the covered portion of the mattress. The thickness of the completed stock mattresses of respondent is from about 4 inches to about 6

inches, while the flaring free ends are of such proportion that they plainly indicate the thickness of the cotton filling when freed from restraint to be at least 35 or 40 inches.

PAR. 5. For a number of years respondents have printed and distributed catalogues and circulars featuring the Ostermoor mattresses, cushions, and pillows; among these are "The Test of Time," "Built for Sleep," "Church Cushions," "Sleep," and "A Sleep Inducer." "The Test of Time" has not been published since the 1917 issue, although this issue continued to be distributed until the copies were exhausted, in 1921. In these several catalogues and circulars appear the picturizations or pictorial representations of the Ostermoor mattresses in course of construction, showing the superimposed layers of cotton felt being laid in place, also showing the layers partially enclosed within a ticking which is being sewed up by a woman standing beside the mattress, and further showing mattresses completely enclosed at one end, with the other end represented open for inspection and revealing the layers or bats of cotton felt tremendously expanded at the end which has been laid open. Under certain of these pictures appears reading matter directing attention to the resiliency or expansion of these mattresses, such as the following:

Absolute uniformity in thickness, softness and elasticity, with every square inch exactly duplicating the other, brings a sleep full of rest from head to foot.

Showing the built-up Ostermoor sheets appearing from out a completely finished cushion ripped open for inspection. Note resiliency of filling.

Showing the Ostermoor sheets all hand-laid and partially compressed within the already completed covering. Note the evenness of the lofty resiliency.

Showing the superimposed Ostermoor sheets appearing from out a completely finished cushion ripped open for inspection. Note resiliency of filling.

Stress is thus laid upon the resiliency or elasticity or expansion of the Ostermoor mattresses in connection with the pictorial representations of said mattresses. The said pictorial representations purport to be actual and real pictures of the construction, content and expansion of Ostermoor mattresses and cushions, and not merely fanciful illustrations of a principle.

PAR. 6. In October, 1896, respondents first began to advertise nationally the Ostermoor mattress, using the pictorial representations or depictions of an open-ended mattress greatly expanded at the open end, and so many responses to this advertising were received that respondents began advertising broadly, using the trade-mark and picturization in every advertisement. At that time there were few, if any, competitors making cotton felt mattresses, but thereafter competition arose and many manufacturers began to make mattresses of a similar kind. The respondents have expended some four million

dollars in advertising and in all such advertising have used the picturization of the mattress expanded at the open end at least six or seven times the thickness of the enclosed end. It is estimated that respondent corporation now manufactures and sells about 40,000 mattresses per year.

Many of respondents' competitors in the business of manufacturing and selling cotton felt mattresses have used pictorial representations or depictions of an open-end mattress greatly expanded, similar to those used by respondents as hereinbefore set out. Respondents have protested to these competitors, on the ground that their trade-marks were being appropriated, and many, because of such protests, have discontinued the use of such pictorial representations; some competitors, however, have refused to accede to respondents' request that they cease using such picturizations, contending that the pictorial representations are descriptive representations of the mattress, even though exaggerated, and that all makers of such mattresses have the right to use such representations of mattresses in their advertising.

PAR. 7. The pictorial representations of Ostermoor mattresses which appear upon the labels and in the advertising of respondents grossly exaggerate the expansion which actually occurs in respondents' mattress filling freed at one end from restraint. As a matter of fact, the filling of respondents' mattresses when unrestrained rises above the thickness of the mattress when restrained, or completed, only about 50 to 100 per cent, or from 3 to 6 inches instead of 35 inches or more, as indicated in the aforesaid picturizations. Such pictorial representations used in the advertising of respondents and on the labels exaggerate the expansion of the filling of respondents' mattresses and imply a resiliency or elasticity far beyond the fact. The said pictorial representations upon such labels and in said advertisements are used by respondents as an aid in selling respondents' mattresses in the several States of the United States in competition with manufacturers of mattresses who do not use such means—that is to say, who do not use such pictorial representations in connection with their advertisements or their sales. Said pictorial representations, however, give added effectiveness to the advertisements of respondents used to promote sales in interstate commerce and are regarded by many purchasers as actual representations of mattresses with the filling exposed and as representing the expansion that would occur if said filling were freed from restraint, and the resiliency or elasticity implied are taken by such purchasers to represent actual expansion and actual resiliency or elasticity of the bed mattresses of respondents.

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PAR. 8. Many other mattress manufacturers who manufacture and sell in the several States of the United States in competition with respondents' cotton felt mattresses and who use the same method of manufacture respondents use, whereby layers of cotton are placed one upon the other to a thickness greater than that required in the finished mattress, then compressed to the thickness of such mattress, inserted in the ticking or cover, and tufted at various points with needle and thread, do not falsely and deceptively represent, pictorially or otherwise, that the mattresses so manufactured and sold by them if freed from restraint would have the expansion, resiliency or elasticity as shown in the representations of Ostermoor mattresses, and not warranted by the facts.

PAR. 9. Substantial numbers of purchasers of respondents' mattresses are misled and deceived by the grossly exaggerated pictorial representations of respondents, used in connection with the sale of their mattresses in interstate commerce, and are, by such misleading and deceptive representations and picturizations, induced to buy respondents' bed mattresses in preference to mattresses of respondents' competitors, who do not falsely and deceptively represent, pictorially or otherwise, that the mattresses manufactured by them if freed from restraint would have expansion, resiliency or elasticity not warranted by the facts. After having purchased such bed mattresses of respondents some of said purchasers have found that said mattresses have not the resiliency or elasticity which the pictorial representations in respondents' advertisements and upon respondents' labels led such purchasers to believe respondents' mattresses possessed; in several cases such purchasers complained to the dealers and had the mattress purchased replaced by respondents free of cost; in other cases they made no complaint but continued dissatisfied and convinced that they had been misled and deceived.

PAR. 10. Competitor manufacturers of bed mattresses made with cotton filling and experienced dealers in such mattresses are not and have not been deceived by the pictorial representations of respondents' mattresses as hereinbefore described. When respondents have used the pictorial representations as trade-marks and also where they have used them as part of their advertising matter, they have generally, if not invariably, labeled them "trade-mark." A substantial part of the purchasing public who have been prompted to buy Ostermoor mattresses because of these pictorial representations have considered them as true representations of an Ostermoor mattress, and the term "trade-mark" used in connection with the labels or advertising has not operated to remove such impression. These purchasers have understood the pictured representations of the exposed end of

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said mattresses to depict truly the expansion that would result were the cotton filling freed from restraint..

PAR. 11. Two of the registered trade-marks of respondent, Nos. 47831 and 47833, which show the open end of mattress tremendously expanded, but without the figure of a woman, have been canceled by the United States Patent Office, upon attack by competitors, on the ground that said trade-marks are descriptive. This ruling has been sustained by the Court of Appeals of the District of Columbia.

CONCLUSION

The methods of competition set forth in the foregoing findings are, under the circumstances therein set forth, unfair methods of competition in interstate commerce, in violation of the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission and answer thereto of the respondents, the testimony and evidence, the trial examiner's report upon the facts and exceptions thereto, and the Commission having made its findings as to the facts with its conclusion that respondents have violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It is now ordered, That respondents, Edwin A. Ames, Edwin A. Ames, trading as Ostermoor & Co., and Ostermoor & Co., incorporated, a corporation; its or their officers, agents, representatives, servants, and employees, cease and desist from directly or indirectly—

(1) Representing pictorially, mattresses or cushions with expanded superimposed layers of a fabric material appearing from a partly opened-up cover, with or without a woman in the act of attaching a binding to said cover, or in the act of placing the uppermost layer in position, where the exposed superimposed layers of fabric material are represented or depicted as being expanded to a thickness greater than the thickness of the expansion that would actually occur without artificial manipulation were the ends of said mattresses or cushions partly opened up as represented in said pictures;

(2) Representing pictorially, mattresses or cushions tufted in parts, of which one part appears finished or complete and the other

part appears partly opened up, disclosing expanded superimposed layers of the fabric material, where the expanded superimposed layers of fabric material are represented or depicted as being expanded to a thickness greater than the thickness of the expansion that would actually occur without artificial manipulation were the ends of said mattresses or cushions partly opened up as represented in said pictures;

(3) Representing pictorially and/or by reading matter in catalogues, advertising matter or otherwise, that the mattresses or cushions manufactured and sold by respondents in interstate commerce contain superimposed layers of a fabric material which, when unrestrained, will expand to a thickness greater than the thickness of the expansion that would actually occur without artificial manipulation were said mattresses or cushions partly opened up as represented in said pictures or advertisements or reading matter;

(4) Representing pictorially upon labels or tags attached to or placed upon the mattresses or cushions manufactured and sold by respondents in interstate commerce, mattresses or cushions with expanded superimposed layers of a fabric material appearing from the partly opened-up cover, with or without a woman in the act of attaching a binding to said cover, or in the act of placing the uppermost layer in position, where the expanded superimposed layers of fabric material are represented or depicted as being expanded to a thickness greater than the thickness of the expansion that would actually occur without artificial manipulation were the ends of said mattresses or cushions partly opened up as represented in said pictures.

It is further ordered, That the respondents, Edwin A. Ames, Edwin A. Ames, trading as Ostermoor & Co., and Ostermoor Co., Inc., shall, within sixty days after the service upon them of a copy 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 the order to cease and desist hereinabove set forth.

Dissent by Commissioner Humphrey

The order in this case does not follow the complaint, and therefore it is "improvident and when challenged will be annulled by the Court." *F. T. C. v. Gratz*, 253 U. S. 421.

The complaint alleges that the respondent deceived the public by pictures showing the construction of their mattress that misrepresented the resiliency of the completed product. The order is drawn upon the theory that the respondent deceived the public by pictures

showing that if a *constructed* mattress were opened up it would show the same resiliency as before construction, and when opened up the layers thereof would expand and increase their total thickness from 4 to 6 inches, to 35 to 40 inches.

There is no evidence in the record on which to base any such conclusion. No where is there evidence to show that the pictures were intended to represent anything of this character. The pictures assume to show the construction of the mattress in its unfinished state, the thickness and the resiliency of the layers *before* compression and *not afterwards*—and this is the theory of the complaint. But the order is based upon the theory that cotton after compression, without regard to the time or the amount of compression, will, when released therefrom, assume its original resiliency and condition. The whole order is entirely outside of the complaint, unsustained by the evidence, and contrary to common knowledge and common intelligence.

Let it be kept in mind that the only *competent evidence* in the record is the *picture itself*, and this picture shows the mattress before completion and before compression, and not as a mattress opened up after completion and use. The main purpose of the picture is to show:

1. The method of construction; that is, that the mattress is "built not stuffed," and

2. The resiliency of the material used in construction, the thickness of the layers so used before completion, and not after completion and use.

The order directs that the respondent shall make no depiction or other representation that would show a greater thickness of the layers or greater resiliency thereof, than would actually be shown by a mattress completed and then thereafter opened up—a perfectly absurd proposition. In other words, the whole order is based upon the theory that a cotton mattress after being completed and compressed, if opened up would by some magic restore itself into the exact condition that it was before compression, and this without regard to the length of time or the use that was made of it.

The order is absolutely impossible of intelligent interpretation, for it tells the respondent that it must not, by pictures or otherwise, show a greater resiliency or thickness of layers in the construction of its mattress, than actually would be shown by a completed mattress thereafter opened up. The order is silent as to whether such mattress when opened up, should be a day old, a year old or a decade old, or whether it had been used or not used, or whether it had been compressed only by the method of construction or whether it had been

compressed by years of use, as shown in one instance in the record, by the combined weight of husband and wife of 355 pounds.

All the attempts in the record to show deception were based upon the theory that the purchasers were deceived because the pictures represented that if a used mattress was opened up it would restore itself to the same condition that it was when under the process of construction as represented in the pictures—a proposition, that would impute to compressed cotton resiliency surpassing that of the finest watch springs.

The order prohibits the respondent from making pictures showing that in their mattress in the course of construction, the cotton has greater resiliency and that the layers thereof greater thickness than a mattress would have after compression and use, and, as already stated, placing no limit whatever upon either the amount of use or compression. In other words, the order absolutely attempts to prohibit the respondent from showing by pictures or other representations, the exact truth about its mattress. It is well to keep in mind that there is no complaint about the material used in the construction of the mattress, nor of the method of construction, but the sole complaint is based upon alleged misrepresentation as shown by the pictures, of the resiliency of a *completed mattress*.

There is no evidence in the record whatever that the pictures represent a completed mattress. The only item of evidence that can possibly be so construed, is in a pamphlet published more than twenty years ago, and which has not been in circulation for more than five years; and this picture referred to cushions and not to mattresses—so that there is an entire absence of any evidence whatever that the pictures refer to mattresses completed and then “opened up”; while the order is based entirely upon the proposition that the pictures show mattresses completed and opened up.

It is a matter known by all of ordinary experience and reasonable intelligence that the resiliency of cotton decreases instantly upon compression and in a comparatively short time largely disappears. The order is not only entirely at variance with the complaint and unsustained by any evidence, but it is absurd and impossible. It is words absolutely without meaning.

In my judgment it is not necessary to discuss the case further, yet in hope that it may be of some assistance in getting an authoritative opinion from some court upon other propositions, I am constrained to notice some other questions involved in the case.

The resilience of cotton under ordinary conditions, such as used in mattresses, is one of such common knowledge that it is certainly open

to question whether or not any ordinarily intelligent person, old enough to buy a mattress, would be deceived by pictures, even if they greatly exaggerate such quality.

TRUTHFULNESS IN ADVERTISING

The order is an attempt to compel exact truth in advertising. It will be noticed that the order allows no room whatever for exaggeration. It eliminates the thrilling and time sacred art of "puffing." The order in each paragraph allows no latitude whatever but says that the picture must "actually" represent the exact thickness of the layers of cotton used in the construction of a mattress when such layers are released from a completed mattress. No limit of time or use is specified.

If the Commission is going to attempt to enforce *exact truthfulness* in advertising, it seems to me that we should realize the magnitude of the undertaking. The respondent is forbidden by the thickness of a cotton fibre to misrepresent the thickness to which the layer of an opened up mattress will expand.

If this rule of exactness is to be enforced in advertising by pictures, then what will be done with a large part of magazine advertisements? What will be done with the advertisements by picture, exaggerating the thickness of the enticing cakes representing the wonderful power of self-rising flours? What of the shaving soaps that misrepresent the thickness of the lather on the beautiful face of the Sheik? What will become of our seed catalogues, if the pictures must correspond with the finished product? What of the advertisements on canned fruit, if the picture must truthfully depict the contents? What of the "before and after" pictures of baldness cures? Must they, like Providence, number the hairs when the photographs are taken? What of the fat and lean photographs? Must there be no exaggeration of poundage? What of the countless thousands of patent medicine advertisements if the cured victims must be represented exactly as they are? What about the millions of dollars that are spent in advertising the virtues of creams, powders, and other toilet articles? Are we going to compel a true photograph of the lovely creature who shows the magic results of these cosmetics to be used? It would be a dark day for advertisers, for the makers of these nostrums, and for certain ladies more or less known to fame, if we should decree that the use of photographs of those paid to advertise these articles should not possess any greater pulchritude than the female subject of the picture.

If this order is sustained and the policy therein announced enforced, it will destroy one-half of all the magazine advertising in

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America. It does seem to me that if we are going to attempt to enforce such rule of exact truthfulness in advertising, we should commence on the quacks, the fakes, and crooks that fill the magazines of the country with their false and misleading statements about their methods, remedies, and nostrums for beautifying the hopeful and credulous, for helping the afflicted and suffering and the unfortunate, rather than upon a concern engaged in legitimate business and which has for the last twenty-five years maintained the highest reputation for honesty and fair dealing.

Another question—Can it be said that a concern is conducting a business on a basis of deception and misrepresentation where it has advertised for years that it will refund the money or give a new mattress to any dissatisfied purchaser, and where it has strictly lived up to this promise, without evasion or equivocation, and where its business methods have given it an enviable reputation for honesty and fair dealing throughout the country for more than a quarter of a century? This material fact is found by the examiner and is not disputed, but it does not appear in the Commission's findings of fact. Does the interest of the public demand that the Commission shall issue an order in this case?

THE EVIDENCE

There are many pages in the record of so-called evidence by the testimony of witnesses. All this is immaterial and misleading rather than helpful. The authorities fully sustain the proposition that in cases of this character the findings and order of the Commission are more likely to be correct if based entirely upon the inspection of the picture, all other evidence being excluded. All of the testimony of all the witnesses throw no light upon the tendency or capacity of this picture to deceive the ordinary purchaser. All such testimony only has a tendency to confuse. *Radam v. Capital*, 26 Amer. State Reports, 783; *Lorillard Co. v. Peper*, 86 Fed. 956 (960); *Coats v. Merrick*, 149 U. S. 562 (565); *Yale v. Alder*, 154 Fed. 37; *Notaseme v. Straus*, 20 Fed. 99 (100).

In cases of this character, opinion evidence, whether regarded as expert or non-expert, is not admissible. *Radam v. Capital*, 26 Amer. State Reports, 783-788-789.

Proof of instances of actual deception is not conclusive evidence of probable deception. Possibility of deception is not proof of an unfair method of competition. Possibility of deception will not sustain a desist order by the Commission. "It is conceivable that a very stupid person might be misled by this method of selling books,

yet measured by ordinary standards of trade, we can not discover that it amounts to an unfair method of competition within the sense of the law. The order of the Commission is vacated," *Winston Co. v. F. T. C.*, 3 F. (2d) 961; *Lorillard Co. v. Peper*, 86 Fed. 956 (1960); *Coats & Co. v. Merrick*, 149 U. S. 562; *Radam v. Capital*, supra.

If instances of actual deception were issuable facts, as they clearly are not, a very few "sporadic and doubtful instances" out of many thousands of sales and in the course of a long period of years would not sustain a complaint. *Industrial v. U. S.*, 268 U. S. 64 (84).

I hope this question of evidence may soon be decided definitely by the courts, for if I am right in my conclusions, the Commission is annually wasting thousands of dollars in securing incompetent and immaterial opinion evidence.

Because of the foregoing reasons, I respectfully dissent from the majority opinion in this case.

Complaint

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IN THE MATTER OF

DAVID J. GOLDSMITH, DOING BUSINESS UNDER THE
TRADE NAME AND STYLE HAGEN IMPORT COMPANY
OF PENNSYLVANIA

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER
26, 1914

Docket 1236—March 6, 1926

SYLLABUS.

Where an individual engaged in the purchase of various kinds of merchandise from domestic manufacturers, and in the sale thereof at retail, and neither importing nor manufacturing the products dealt in by him,

- (a) Adopted a trade name which included the words "import company," and featured the same in his advertisements, catalogues, circulars, and other trade literature, and on his letterheads and bill heads, together with the additional phrases "Importers—Manufacturers—Jobbers," and "European Office, Munich, Germany," and the picturization of an ocean steamship, with the effect of misleading and deceiving the purchasing public and inducing the purchase by it of goods from him as an importer or manufacturer, to the prejudice of competitors who truthfully represented themselves as importers or manufacturers, as the case might be, from whom business was thereby diverted;
- (b) Advertised a domestic extract of barley malt as "Imported Bavarian Style Old Time Malt Extract," and featured such representation upon the labels of the containers thereof, together with a picturization of a steamship; with the effect of misleading and deceiving a substantial part of the purchasing public in reference to the source of the aforesaid extract, and inducing the purchase thereof in such mistaken belief, and with a tendency thereby to divert business from and otherwise prejudice competitors dealing in barley malt extract, which was made in the United States, and so labeled, advertised, and sold:

Held, That such practices, under the circumstances set forth, constituted unfair methods of competition.

Mr. Robert O. Brownell for the Commission.

Welsh & Bluett, of Philadelphia, Pa., for respondent.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an individual doing business in Philadelphia as Hagen Import Co. of Pennsylvania and engaged in the sale of various kinds of merchandise at retail to consumers in various states, with using misleading trade name, advertising falsely or misleadingly, naming product misleadingly, and misbranding or mislabeling, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce, in that, being neither