

Syllabus

IN THE MATTER OF

FRACKMAN DIAMOND CORPORATION, AND MORTON
FRACKMAN, JOSEPH FRACKMAN, GILBERT E.
HORTON, TRADING AND DOING BUSINESS
UNDER THE NAME HORTON FIFTH
AVENUE JEWELERS

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

Docket 4518. Complaint, June 10, 1941—Decision, Sept. 18, 1945

Where a corporation and an individual, in cooperation with whom it operated a retail jewelry store, and two brothers, who controlled aforesaid corporation and were partners also in said retail business, engaged in the interstate sale and distribution of jewelry—

- (a) Represented in catalogs distributed throughout the United States that the prices at which their merchandise was offered for sale were wholesale prices, through such statements as "included herein is one of the most complete lines of fine diamond and precious stone jewelry available at authentic manufacturers' wholesale prices", "NOW FOR THE FIRST TIME in its history, this firm selling through HORTON directly to the public at manufacturers' wholesale prices is able to eliminate all middlemen's profits and overhead expenses, thereby offering you tremendous savings on your diamond purchases";

The facts being that their prices were actually retail prices, and greatly in excess of customary wholesale prices;

- (b) Represented, as aforesaid, that the customary retail prices of their merchandise were greatly in excess of the actual selling prices quoted in such catalogs, and that such quoted prices were special or reduced, through such typical statements as "RSG-630—HOOP RING, yellow gold; 2 large round white diamonds set in white gold; approx. wt. .50 ct. Customary retail price: \$135. Our net cost to you: \$65";

The facts being the prices represented as "customary retail prices" were fictitious, being greatly in excess of their regular retail prices, and the prices designated as "Our net cost to you" were in no sense special or reduced but were their regular and customary retail prices;

- (c) Represented that certain of the mountings used for their rings were made entirely by hand, through the use in their catalogs of the legend "Hand Made Mountings" and through the use of the legend "Hand Made" on the mountings themselves;

The facts being said mountings were not, as long understood from the term "Hand Made", the substantially more costly mountings made entirely by hand by skilled craftsmen, but were in many cases made by machine or cast in a mould, with only a small amount of finishing done by hand;

- (d) Represented the carat weight of the diamonds in their rings in such manner as to mislead the public, through such typical statements in their catalogs as "RSG-637—SOLITAIRE ENGAGEMENT RING, yellow gold; large round white center diamond, flanked on either side with 2 small diamonds set heart shaped, in white gold; approx. wt. .40 ct. * * *";

The facts being that, contrary to the longtime custom in the jewelry industry

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and the public understanding, said weight would not apply to the large diamond without regard to the other smaller ones, and it was only by combining the weights of all of the diamonds in the ring that they were able to arrive at the figure given in the advertisement;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to such products and their prices, and thereby to cause it to purchase substantial quantities thereof:

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

Before *Mr. John P. Bramhall*, trial examiner.

Mr. R. A. McOuat for the Commission.

Kommel & Rogers, of New York City, 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 Frackman Diamond Corporation, a corporation, and Morton Frackman, Joseph Frackman and Gilbert E. Horton, individuals, all trading and doing business under the name Horton Fifth Avenue Jewelers, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Frackman Diamond Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. Respondents Morton Frackman and Joseph Frackman are brothers and are, respectively, the president and secretary-treasurer of the said respondent corporation, are in active control thereof and formulate its practices and policies. Respondent Gilbert E. Horton is the nephew of respondents Morton Frackman and Joseph Frackman, and is ostensibly the owner of a retail business conducted under the trade name Horton Fifth Avenue Jewelers, and assists in the conduct of said business, which is, at least in part, owned and operated by respondent Frackman Diamond Corporation. The interest of respondent Horton therein is to the Federal Trade Commission unknown. Respondents maintain their principal office and place of business at 545 Fifth Avenue, in the city of New York, State of New York.

PAR. 2. From said place of business, the respondents sell jewelry locally at retail, and also conduct a retail mail order business in jewelry. In the conduct of their retail mail order business, respondents cause jewelry, when sold, to be transported from their said

place of business to purchasers thereof located in the several States of the United States. Respondents maintain, and for more than two years last past have maintained, a course of trade in said jewelry in commerce among and between the several States of the United States.

PAR. 3. In the course and conduct of their retail business in commerce as aforesaid, and for the purpose of inducing the purchase of their jewelry, the respondents have published, and caused to be published, and have distributed, and caused to be distributed, in the several States of the United States, to purchasers and prospective purchasers at retail, catalogs in which said jewelry is descriptively and pictorially represented, and in which catalogs the following statements are made:

* * * fine diamond and precious stone jewelry available at authentic manufacturers' wholesale prices.

NOW FOR THE FIRST TIME in its history, this firm [Frackman Diamond Corporation] selling through HORTON [Fifth Avenue Jewelers] directly to the public at manufacturers' wholesale prices is able to eliminate all middlemen's profits and overhead expenses, thereby offering you tremendous savings on your diamond purchases.

YOUR DOLLAR GOES NEARLY TWICE AS FAR when you buy at HORTON whether you buy a \$10 diamond or a \$10,000 diamond.

The foregoing statements are false and misleading. In truth and in fact the prices at which respondents offer for sale and sell their jewelry at retail to the purchasing public are not authentic manufacturers' wholesale prices, nor are they substantially lower than the usual retail prices of the same or similar articles of comparable quality sold by other retailers.

PAR. 4. In the catalogs aforementioned, each description of the items of jewelry offered for sale and sold by respondents is accompanied by representations purporting to set forth the "Customary retail price" and the "net cost" to the purchaser of said items. Typical of these representations as to "Customary retail price" and "net cost" are the following:

RSG-630—HOOP RING, yellow gold; 2 large round white diamonds set in white gold; approx. wt. .50 ct. Customary retail price: \$135. Our net cost to you: \$65

RSG-644—SOLITAIRE ENGAGEMENT RING, yellow gold; 1 large round white center diamond, and 1 round white diamond on each side. Customary retail price: \$50 Our net cost to you: \$23

RW-471—Smartly tailored design. Channel set with 7 matched graduated round white diamonds Customary retail price: \$40 Our net cost to you: \$17

RMG-541—YELLOW GOLD MOUNTING. Engraved pierced shank and sides. Customary retail price: \$30 Our net cost to you: \$13.50.

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By means of the foregoing statements, and of others similar thereto but not specifically set forth herein, respondents represent that the selling prices so quoted are substantially lower than the retail prices at which they and other retailers ordinarily and customarily sell the same articles of jewelry, or articles of jewelry of comparable quality and value. Such representations are false and misleading. The prices designated by respondents as the "Customary retail prices" are inflated and fictitious. In truth and in fact the prices quoted by the respondents as "Our net cost to you" are the prices at which respondents customarily sell their jewelry at retail to the purchasing public, and are substantially the same as, or higher than, the customary retail prices of the same or similar articles of jewelry of comparable quality and value offered for sale and sold by other retailers to the purchasing public.

PAR. 5. In the respondents' catalogs aforementioned certain ring mountings are described as being "14K Solid Gold Hand Made Mountings," and, after listing and describing a number of rings and ring mountings, respondents state and represent that "Above mountings are hand made * * *." Certain rings and ring mountings are physically stamped or branded with the words "hand made."

The foregoing statements and representations, and others similar thereto not specifically set out herein, are false and misleading. In truth and in fact, many of the ring mountings represented by respondents to be hand-made are not made entirely by hand, but are machine made, or cast in a mould, with the addition of a small amount of hand work. The term "hand made," when applied to a ring or ring mounting, is, and for many years has been, understood by the jewelry industry and the public to indicate a ring or ring mounting made and fashioned entirely by hand out of an amorphous chunk of gold, with the use of only a few simple tools, by craftsmen expert and skilled in the art of fashioning and producing rings by hand. The value and usual price of hand-made rings and ring mountings is substantially higher than that of rings and ring mountings cast in moulds or made by machine.

PAR. 6. In the catalogs aforementioned, the descriptions of many of respondents' rings offered for sale and sold include representations and statements as to the carat weight of the diamonds in said rings in such a manner as to mislead the purchasing public, and to cause them to believe that the carat weight so set forth is the weight of the largest diamond in the ring, when actually the carat weight given is the combined weight of all the diamonds in the ring. Typical of these descriptions and representations as to the carat weight is the following:

RSG-637—SOLITAIRE ENGAGEMENT RING, yellow gold; large round white center diamond, flanked on either side with 2 small diamonds set heart shaped, in white gold; approx. wt. .40 ct. * * *

The foregoing description and representation, and others similar thereto not specifically set out herein, are false and misleading. In truth and in fact .40 carats is not the approximate weight of the center and largest diamond in said ring, as represented and implied by respondents, but is the approximate combined weight of all of the three diamonds in the ring. In the jewelry industry it is customary, and has been customary for many years, in describing diamond rings containing one large diamond and other smaller diamonds, to designate a single carat weight which indicates, and which is understood by the industry and by the purchasing public to indicate, the weight of the largest of the diamonds in the ring, and not the combined or total weight of all of the diamonds in the ring.

PAR. 7. The use by the respondents of the foregoing false and misleading statements, representations, and descriptions as aforesaid, has had, and has, the tendency and capacity to mislead and deceive, and does mislead and deceive, purchasers and prospective purchasers into the erroneous and mistaken belief that such statements, representations, and descriptions are true, and has caused, and causes, a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' jewelry.

PAR. 8. 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 June 10, 1941, issued and subsequently served its complaint in this proceeding upon the respondents, Frackman Diamond Corporation, a corporation, and Morton Frackman, Joseph Frackman and Gilbert E. Horton, individuals, all trading and doing business under the name Horton Fifth Avenue Jewelers, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing by the respondents of their answers to the complaint, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and such testi-

mony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on the complaint, answers, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions to such report, and brief in support of the complaint (no brief having been filed on behalf of the respondents and oral argument not having been requested); 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. Respondent Frackman Diamond Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. Respondents Morton Frackman and Joseph Frackman are brothers and are, respectively, president and secretary-treasurer of the respondent corporation. They are in active control of the corporation and formulate its policies and practices. As a part of its business operations the respondent corporation operates, in cooperation with respondent Gilbert E. Horton, a retail jewelry store under the name of Horton Fifth Avenue Jewelers, located at 545 Fifth Ave., New York, N. Y. Respondent Gilbert E. Horton, who is a nephew of respondents Morton Frackman and Joseph Frackman, is a partner in such retail business and participates actively in its operation and management. The trade name Horton Fifth Avenue Jewelers is registered in his name.

PAR. 2. A substantial portion of the business done by the retail store consists of sales made through the United States mails. In the course and conduct of this mail order business the respondents cause their jewelry, when sold, to be transported from their place of business in the State of New York to purchasers located in various other States of the United States. Respondents maintain and have maintained a course of trade in their jewelry in commerce among and between various States of the United States.

PAR. 3. In order to induce the purchase of their jewelry by mail, the respondents distribute catalogs among many prospective purchasers located at various points throughout the United States. These catalogs contain numerous statements with respect to respondents' jewelry and the prices at which such jewelry is offered for sale. Among such statements are the following:

In presenting this illustrated catalog Horton Fifth Avenue Jewelers does so with a sense of pride because included herein is one of the most complete

lines of fine diamond and precious stone jewelry available at authentic manufacturers' wholesale prices. (Com. Ex. 1, p. 1)

NOW FOR THE FIRST TIME in its history, this firm selling through HORTON directly to the public at manufacturers' wholesale prices is able to eliminate all middlemen's profits and overhead expenses, thereby offering you tremendous savings on your diamond purchases. (Com. Ex. 1, p. 3)

Through the use of these statements and others of similar import respondents have represented that the prices at which their merchandise is offered for sale are wholesale prices, that is, prices at which such merchandise is customarily sold at wholesale. This representation is erroneous and misleading. Respondents' prices are not wholesale prices but are retail prices, being greatly in excess of the prices at which such merchandise is customarily sold at wholesale.

PAR. 4. Respondents have further represented in their catalogs that the customary retail prices of their merchandise are greatly in excess of the actual selling prices quoted in such catalogs and that such selling prices are special or reduced prices. The following is typical of the manner in which respondents' merchandise is presented in their catalogs:

RSB-630—HOOP RING, yellow gold; 2 large round white diamonds set in white gold; approx. wt. .50 ct. Customary retail price: \$135. Our net cost to you: \$65 (Com. Ex. 1, p. 4)

These representations are erroneous and misleading. The prices represented as "customary retail prices" are fictitious prices, being greatly in excess of the prices at which respondents' merchandise is regularly sold by them at retail. The prices designated as "Our net cost to you" are in no sense special or reduced prices, but are the regular and customary prices at which respondents sell such merchandise at retail in the usual and normal course of business.

PAR. 5. A further representation made by respondents is that certain of the mountings used for their rings are made entirely by hand, such representation being made through the use in respondents' catalogs of the legend "Hand Made Mountings" and through the use of the legend "Hand Made" on the mountings themselves. Actually, many of the mountings so designated and described are not made by hand but are made by machine or cast in a mould and the only hand work done on such mountings is a small amount of finishing work.

The term "Hand Made" when applied to a ring mounting has for many years been understood in the jewelry industry and by the public as indicating a ring mounting made entirely by hand out of a piece of precious metal by skilled craftsmen with the use of a few

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simple tools. Ring mountings made by hand command substantially higher prices than those cast in moulds or made by machine.

PAR. 6. Respondents have also used representations as to the carat weight of the diamonds in their rings in such manner as to mislead the public. Typical of such representations in respondents' catalogs is the following:

RSG-637—SOLITAIRE ENGAGEMENT RING, yellow gold; large round white center diamond, flanked on either side with 2 small diamonds set heart shaped, in white gold; approx. wt. .40 ct. * * * (Com. Ex. 1, p. 4)

In the jewelry industry it has long been customary, in describing diamond rings containing one large diamond and other smaller diamonds, to state the carat weight of the large diamond only, the weight of the smaller stones being disregarded. The public understands that in such cases a single carat designation refers to the large stone only. The use by respondents of the designation ".40 ct." in the advertisement quoted above constituted a representation that the large or center diamond in such ring had a carat weight of approximately 40/100 carat. Actually, the weight of the center diamond was substantially less than 40/100 carat. It was only by combining the weights of all of the diamonds in the ring that respondents were able to arrive at the figure given in the advertisement.

PAR. 7. The use by the respondents of these erroneous and misleading representations with respect to their products had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the character and value of such products and the prices at which such products were customarily sold, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondents' products as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice 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, the answers of the respondents, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, report of the trial examiner upon the evidence and the exceptions to such re-

port, and brief in support of the complaint (no brief having been filed on behalf of respondents and oral argument not having been requested); 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, Frackman Diamond Corporation, a corporation, and its officers, and Morton Frackman, Joseph Frackman, and Gilbert E. Horton, individuals, trading under the name Horton Fifth Avenue Jewelers or any other name, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of jewelry or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the prices at which respondents' merchandise is regularly offered for sale at retail are wholesale prices.

2. Representing as the usual or customary prices of respondents' merchandise prices which are fictitious or in excess of the prices at which such merchandise is customarily sold by respondents in the usual and normal course of business.

3. Representing, directly or by implication, that the prices at which respondents' merchandise is offered for sale are less than the customary prices of such merchandise when such prices are in fact the usual and customary prices at which such merchandise is regularly sold by respondents.

4. Representing, directly or by implication, that any ring mounting not made entirely by hand is hand made.

5. Using a single carat weight designation in connection with rings containing one large diamond and other smaller diamonds unless such large diamond alone is of the weight indicated by such designation.

6. Misrepresenting in any manner the carat weight of the diamonds in respondents' rings or other jewelry.

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.

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