

IN THE MATTER OF

LEWIS & CONGER, AND CONRAD W. WOEHLER, TRADING
AS C. W. PRODUCTS COMPANY

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

Docket 5191. Complaint, July 17, 1944—Decision, Apr. 2, 1946

Where a corporation which operated a retail store specializing in house furnishings, including an item designated as "foxhole pillow," and an individual engaged in sale at wholesale to retailer customers of said article manufactured of materials furnished by him—

- (a) Represented through statements in advertisements in circulars, radio continuities and other advertising media, including pictorial representations—directed to relatives and friends of the men in the armed forces—that said pillows might be easily and satisfactorily carried beneath the webbing of a military helmet without coming in contact with the head or affecting the circulation of air;

The facts being that, after being so placed, said pillow would rest upon the head and cause the helmet to be so elevated as to fail to give the important and planned protection to the neck of the wearer, and its bulk would completely fill the space in the top of the helmet above the webbing and interfere with the circulation of air; and

- (b) Represented, as aforesaid, that their "foxhole pillows" were suitable for use by soldiers to rest their heads in foxholes when engaged in active combat; The facts being that Army regulations require that the steel helmet be worn day and night in active combat and in foxholes so that, due to such requirement and to the formation of the foxhole, the pillow could serve no useful purpose as a headrest and could not be used for the comfort of the soldier in combat; and,

- (c) Represented deceptively and misleadingly, through designation "foxhole pillow," that their product was suitable for use by soldiers engaged in active combat in foxholes;

With effect of misleading and deceiving a substantial portion of the purchasing public and of causing members thereof, concerned for the comfort of relatives and friends in the armed services and in an effort to lighten the burden of men engaged in combat, to buy substantial quantities of their said "foxhole pillows" in the erroneous belief that they were satisfactory for use as represented by them:

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. Randolph Preston*, trial examiner.

Mr. William L. Pencke for the Commission.

Haggerty, Myles & Wormser, of New York City, for Lewis & Conger, and along with *Mr. F. A. McKenzie*, of New York City, for Conrad W. Woehler.

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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 Lewis & Conger, a corporation, and Conrad W. Woehler, trading and doing business as C. W. Products Co., 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. Lewis & Conger is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at Forty-fifth Street and Sixth Avenue in the city and State of New York, where respondent operates and maintains a retail store, specializing in house furnishings, including an item designated as "Foxhole Pillow".

Conrad W. Woehler is an individual trading and doing business under the firm name of C. W. Products Co., with his principal place of business located at 155 East Forty-fourth Street in the city and State of New York. Said respondent is a wholesale distributor of said "Foxhole Pillow" which he causes to be manufactured from materials furnished by him and which pillows he sells and distributes to his retailer customers.

PAR. 2. Respondents are now, and have been for more than 10 months last past, engaged in the sale and distribution of a pillow designated as "Foxhole Pillow". Respondents sell and distribute said pillows to retailers and members of the purchasing public respectively as aforesaid, which purchasers are situated in the various States of the United States and in the District of Columbia. Respondents cause said pillows to be transported from their respective places of business in the State of New York to purchasers thereof located in the various States of the United States other than the State of New York, and in the District of Columbia. Respondents maintain, and at all times herein mentioned have maintained, a course of trade in said pillows in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their said businesses in commerce as aforesaid, and for the purpose of inducing their prospective customers to purchase said pillows, the respondents have made and are making numerous false, deceptive, and misleading statements and representations with respect to the merits and functions of their said

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pillows in newspaper and magazine advertisements, circulars, testimonial letters, radio continuities, and other advertising media. Among and typical of said statements and representations used as aforesaid by the respondents are the following:

The horseshoe shape of the pillow makes it possible to slip it into its carrying position in the crown of the helmet liner under the webbing with the greatest of ease and it should not come in contact with the top of the head or interfere with the circulation of air.

The use of the pillow assures normal head blood circulation when resting on the side.

Foxhole Pillow—comfort for him anywhere—on trains, transports, in the field. Washable covering of sturdy tackle twill with a hair pillow inside. He'll carry it easily in his helmet or pocket.

He'll tote it around inside his helmet and not even know it's there. He'll whip it out at a moment's notice for use as a seat during endless hours of waiting or as a pillow to catch a comfortable 40 winks.

The washable water-repellant cover of tackle twill cleans easily and the pillow packs handily in crown of helmet or pocket.

Specially constructed to fit snugly beneath webbing of liner, nor will it bulge in any pocket.

They are more comfort than anything else.

PAR. 4. Through the use of the aforesaid statements and representations, and others of similar import and meaning not herein set out, the respondents represent and imply to the purchasing public that said so-called "Foxhole Pillow" is capable of being placed in the crown of a soldier's steel helmet without difficulty; that said pillow will not prevent circulation of air and will not come in contact with the head; that said pillow will assure normal circulation of head blood; that the outside covering and the cover on the pillow itself is manufactured of tackle twill and that the stuffing consists of hair; that it is especially constructed to fit readily beneath the webbing of a soldier's helmet; that it will not bulge in any pocket; and that it affords more comfort than any other article which may be carried by a soldier.

The designation of respondents' product as foxhole pillow implies to the purchasing public that said pillow is suitable for use by members of the armed forces engaged in active combat when occupying so-called foxholes.

PAR. 5. In truth and in fact, said representations, statements, and implications disseminated as aforesaid are exaggerated, deceptive, and misleading. The size of respondents' pillow is approximately $7\frac{1}{2}$ by $8\frac{1}{2}$ inches with a thickness of approximately $2\frac{1}{2}$ inches, and it will not fit readily or snugly into the top of a steel helmet beneath the webbing. On the contrary, it can be placed in said helmet only with great difficulty and after being so placed, the helmet will be

elevated on the wearer's head and thereby fail to give the necessary protection to the neck of the wearer, which is one of the important purposes for which the helmet was designed. Placing said pillow in the top of the helmet will interfere with the circulation of air and will come in direct contact with the top of the head. Because of its size, the pillow will bulge the pocket of the regulation blouse if placed therein. In truth and in fact, not all of the cover material of said pillows is made of tackle twill, but on the contrary is manufactured of a material consisting of cotton and rayon. The filling of said pillows does not consist entirely of hair, but is composed of approximately 85 percent hogs' hair and 15 percent vegetable fiber; and while said content is set forth on the label attached to the pillow, it is attached to the cover of the pillow itself and not apparent to the observer unless the outer cover is removed, whereas on the box containing said pillow appears the statement, "Hair Pillow."

Respondents' pillows do not afford the wearer more comfort than any other article and moreover, constitute an excess and useless piece of baggage and an additional burden to a soldier whose necessary and essential equipment weighs 70 pounds.

The designation of respondents' product as foxhole pillow is deceptive and misleading, in that it implies that a soldier engaged in active combat may utilize said pillow when compelled to occupy what is known in military parlance as a foxhole. Foxholes are trenches dug by the individual soldier for the purpose of affording protection against direct enemy fire. In many cases, foxholes are exceedingly shallow, barely accommodating the body of a soldier. Any equipment not absolutely necessary in combat when a soldier occupies a foxhole must be discarded as useless, and respondents' pillow would constitute a hindrance and useless piece of equipment.

There are millions of members of the purchasing public who have relatives and friends in the armed forces and who readily seize upon every opportunity to lighten the burdens of the men engaged in military service. By reason of their great concern for the comfort of said relatives and friends, such persons readily believe the advertising representations made by respondents and as a result thereof are induced to purchase large quantities of respondents' product without having an opportunity to inquire whether such representations are truthful and according to the facts.

PAR. 6. The use of the said exaggerated, misleading, and deceptive statements and representations as aforesaid has had and now has the tendency and capacity to and does mislead and deceive a substantial number of the purchasing public into the erroneous and mistaken belief

that said representations and implications are true. As a result of such erroneous and mistaken beliefs, many members of the purchasing public have purchased a substantial number of respondents' said fox-hole pillows.

PAR. 7. 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 July 17, 1944, issued and subsequently served its complaint in this proceeding upon the respondents, Lewis & Conger, a corporation, and Conrad W. Woehler trading as C. W. Products Co., charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of the answer of the respondents thereto, 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, answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and exceptions filed thereto, and briefs filed in support of the complaint and in opposition thereto (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 Lewis & Conger is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at Forty-fifth Street and Sixth Avenue in the city and State of New York, where said respondent operates and maintains a retail store specializing in house-furnishings, including an item designated as "Foxhole Pillow."

Respondent Conrad W. Woehler is an individual trading and doing business under the firm name of C. W. Products Co., with his principal

place of business located at 155 East Forty-fourth Street in the city and State of New York. Said respondent is a wholesale distributor of said "Foxhole Pillow," which he causes to be manufactured from materials furnished by him and which pillows he sells and distributes to his retailer customers.

PAR. 2. Respondents are now, and for more than 1 year last past have been, engaged in the sale and distribution of a pillow designated as "Foxhole Pillow." Respondents sell and distribute said pillows to retailers and members of the purchasing public, respectively, as aforesaid, which purchasers are situated in the various States of the United States and in the District of Columbia. Respondents cause said pillows, when sold, to be transported from their respective places of business in the State of New York to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said pillows in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of their said businesses, and for the purpose of inducing the purchase of their said "Foxhole Pillows," the respondents have made false, deceptive, and misleading statements and representations in advertisements placed in magazines, newspapers, and other periodicals and in circulars, radio continuities, and other advertising media. These advertisements were directed to relatives and friends of the men in the armed forces and by means of statements and pictorial representations contained therein purport to describe the conditions under which said pillows may be used. Typical of the representations contained in said advertisements, circulars, radio continuities, and other advertising media are the following:

1. That respondents' "Foxhole Pillow" may be easily and satisfactorily carried beneath the webbing of a military helmet without coming in contact with the head or affecting the circulation of air.

2. That respondents' "Foxhole Pillow" is suitable for use by soldiers to rest their heads in foxholes when engaged in active combat.

PAR. 4. In truth and in fact, respondents' "Foxhole Pillows" cannot be easily and satisfactorily carried in the top of a military helmet beneath the webbing thereof because, after being so placed, said pillow will rest upon the head and cause the helmet to be elevated on the wearer's head and thereby fail to give the necessary protection to the neck of the wearer, which is one of the important purposes for which the helmet was designed. The bulk of the pillow will completely fill the space in the top of the helmet above the webbing and interfere with the circulation of air. Respondents' "Foxhole Pillows" are not

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suitable for use by soldiers engaged in active combat in foxholes. The foxhole was designed to give the soldier protection against small arms fire, overhead fire, and from tanks and armored vehicles. According to Army regulations, the standard size of a foxhole is 2 feet wide, 3½ feet long, and as deep as the soldier occupying it prefers. When in active combat and when in foxholes, Army regulations require that the steel helmet be worn day and night for the protection of the soldier. Consequently, due to the formation of the foxhole and due to the requirement that the helmet be worn at all times, respondents' "Foxhole Pillow" could serve no useful purpose as a headrest or pillow and could not be used for the comfort of the soldier in combat as represented by the respondents. The Commission further finds that the designation of their product by the respondents as a "Foxhole Pillow" is deceptive and misleading in that it constitutes a representation that the pillow so designated is suitable for use by soldiers engaged in active combat in foxholes.

PAR. 5. The use by the respondents of the foregoing false, deceptive, and misleading representations has the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public and has caused members of the purchasing public, concerned for the comfort of relatives and friends in the armed services and in an effort to lighten the burden of men engaged in combat, to buy substantial quantities of respondents' "Foxhole Pillows" in the erroneous belief that said pillows are satisfactory for use as represented by respondents.

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, answer of the respondents, testimony and other evidence in support of the complaint and in opposition thereto taken before a trial examiner of the Commission therefore duly designated by it, report of the trial examiner upon the evidence and exceptions filed thereto, and briefs filed in support of the complaint and in opposition thereto; 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 respondent Lewis & Conger, a corporation, and its officers, and the respondent Conrad W. Woehler, an individual, doing business under the trade name of C. W. Products Co. or doing business under any other name, 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 pillows now designated as "Foxhole Pillows" or any other similar article of merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Foxhole" or any other term of similar import or meaning to designate or describe respondents' product or any similar article of merchandise which is not suitable for use by soldiers when engaged in active combat in foxholes.

2. Representing, directly or by implication, that respondents' product now designated as a "Foxhole Pillow" or any similar article of merchandise can be satisfactorily carried in a military helmet when the result of such use is to raise the helmet from the head and fail to give protection to the neck of the wearer or cause the helmet to not give any of the protective functions for which it was designed.

3. Representing, directly or by implication, that respondents' product now designated as a "Foxhole Pillow" or any similar article of merchandise is suitable for use as a headrest by soldiers when engaged in active combat in foxholes.

4. Representing, directly or by implication, that respondents' product or any similar article of merchandise can be used without preventing the circulation of air in a military helmet when such product fills the space in the crown of a military helmet and presses upon the head of the wearer.

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.

Commissioners Freer and Mason not participating.

IN THE MATTER OF
MANHATTAN BREWING COMPANY¹

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

Docket 4572. Complaint, Aug. 20, 1941—Decision, Apr. 5, 1946

Where a corporation, engaged at Chicago in the brewing of ale and beer, including its "Canadian Ace Brand Beer" and "Canadian Ace Brand Ale," and for a time its "Old Wisconsin Lager Brand Beer," and in competitive interstate sale and distribution of its products to wholesalers and retailers, restaurants, taverns, and other purchasers—

(a) Featured the word "Canadian" or the words "Canadian Ace" in extensively

¹ The findings and order are published as modified by the following order of the Commission dated April 5, 1946, namely:

"This proceeding came on for hearing before the Federal Trade Commission on the complaint, answer of respondent, testimony and other evidence, report of the trial examiner, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel. The Commission, after duly considering the matter and finding that the proceeding was in the public interest, made, entered, and served upon respondent and duly recorded and filed in the office of the Commission on September 7, 1943, its findings as to the facts, its conclusion drawn therefrom and its order to cease and desist.

"Subsequently thereto, and after the statutory time allowed for the filing of a petition for review of said proceeding had expired, the Commission, on the 27th day of March 1946, duly notified respondent to appear and show cause why this proceeding should not be reopened and the findings of facts and order to cease and desist be altered, modified, and set aside, in part, in the manner and terms therein set forth.

"Respondent, on the 1st day of April 1946, having filed a waiver of hearing and its consent to the entry of an order modifying the findings of facts and the order to cease and desist in the manner set forth in the order to show cause, and the Commission having duly considered the matter and being now fully advised in the premises, and being of the opinion that the public interest requires that said findings of facts and order to cease and desist be altered, modified, and set aside, in part.

"It is now ordered, That this proceeding be, and the same hereby is, reopened.

"It is further ordered, That the second sentence of the second paragraph of paragraph 7 of the said findings of fact be, and the same hereby is, set aside, and the following finding substituted in lieu thereof:

"The Commission is of the opinion, however, and finds that these legends as heretofore used are too inconspicuous and inadequate to adequately explain or qualify the word "Canadian," so as to prevent deception or confusion in the mind of a substantial portion of the public."

"It is hereby further ordered, That paragraph 1 of said order to cease and desist be, and the same hereby is, set aside, and the following order substituted in lieu thereof:

"Using any brand or trade name containing the word "Canadian" or any simulation thereof, to designate, describe, or refer to any beer or ale which is not brewed in Canada unless accompanied in immediate connection and conjunction therewith by suitable statements clearly, conspicuously, and adequately informing prospective purchasers and the public that such beer or ale is brewed in the United States of America; or otherwise representing directly or by implication, that beer or ale which is not brewed in Canada is brewed in that country."

"It is further ordered, That the said findings as to the facts and conclusion and order to cease and desist, modified as hereinbefore set forth, shall be as follows:"

[Here follow the modified findings, and modified order, as published herewith, followed by concurring opinion of Commissioner Mason, dissenting opinions of Chairman Ayres, concurred in by Commissioner Davis, and further dissenting opinion of Chairman Ayres, all as set forth herein.]