

Complaint

IN THE MATTER OF
DOESKIN PRODUCTS, INC.COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 5800. Complaint, Aug. 14, 1950—Decision, May 15, 1952*

Where a corporation engaged in the manufacture and interstate sale of its "Sanapak" sanitary napkins; in statements on cartons in which it packaged its product, in a full page advertisement in an issue of a Chicago newspaper of wide interstate circulation, and through a large broadside or circular distributed widely among its dealers—

- (a) Represented that tests conducted by Consumers Union showed its said product to be the safest and most absorbent of all sanitary napkins tested; facts being that all that the tests, as reported by Consumers Union, had shown was that respondent's napkins were among the first three in absorbency, and the actual ratings on absorbency—disclosed by the evidence but not included in the report—showed that according to the tests, respondent's napkin was the third or last in the group;
- (b) Stated in said newspaper advertisement, which also carried the picture of a young woman, that its product had been endorsed or approved by a "famous New York stylist"; when in fact the person so referred to was a young lady who was employed by respondent as secretary to one of its officers and made no claim to being a stylist, and the picture in the advertisement was of a professional model;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to respondent's product and to cause it to purchase such product as a result of the mistaken belief so engendered:

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. William L. Pack*, hearing examiner.

Mr. B. G. Wilson for the Commission.

Cravath, Swaine & Moore, of New York City, and *Wilmer & Brown*, of Washington, D. C., for respondent.

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 Doeskin Products, Inc., a corporation, hereinafter referred to as respondent, has 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:

Complaint

48 F. T. C.

PARAGRAPH 1. Respondent, Doeskin Products, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 11 West 42nd Street, New York 18, New York, and maintains three manufacturing establishments in Massachusetts.

PAR. 2. The respondent is now and for more than two years last past has been engaged in the manufacture of sanitary napkins bearing the registered trade-mark "Sanapak" and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia.

Respondent causes its said product when sold to be transported from its places of business in the States of New York and Massachusetts and to purchasers thereof located in various other States of the United States and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in its said product in commerce between and among the various States of the United States and in the District of Columbia. Respondent's volume of business in such commerce is substantial.

PAR. 3. In the course and conduct of its said business and for the purpose of inducing the purchase of its said product, said respondent has made in advertisements in newspapers having a general circulation, circulars and upon the containers in which said product is sold many statements and representations concerning the nature and quality of its said sanitary napkins and the results that may be expected to be obtained from the use thereof. Among the typical of such statements and representations are the following:

(Upon Containers)

Consumers Union tests report Sanapak safest.

(In Advertisements)

Consumers Union tests report Sanapak safest sanitary napkin.

... the scientific independent test made by Consumers Union clearly demonstrated the startling superiority of Sanapak's amazing absorbency—gave conclusive impartial proof of Sanapak's unsurpassed safety.

Depiction of an apparatus which it is stated is "to test the absorbency of sanitary napkins" accompanied by depictions of bacteriological culture tubes, a microscope, and an individual operating the apparatus, and the statement, "To test the absorbency of sanitary napkins a special test apparatus was set up by a completely independent testing laboratory. The type of apparatus is pictured above."

"You'd never dream anything could be as soft as Sanapak" says New York stylist. Joan Ellis, famous New York stylist, says: "I found a sanitary napkin that's a glorious improvement. It's Sanapak—and I never thought I'd find a napkin that's so amazingly soft and comfortable. You see, Sanapaks are

uniquely shaped to fit without bulk or chafing. Packed with cotton, too," accompanied by a depiction of a personable young woman.

Proved most absorbent of all leading brands by scientific fact-finding service—We publish this news independent of Consumers Union because we believe it to be of vital importance to the vast majority of American women.

PAR. 4. Through the use of the foregoing depictions, statements and representations and others of similar import not specifically set out herein, the respondent represents and has represented, directly and by implication, that a scientific independent test made by Consumers Union proved respondent's product Sanapak to be the safest and most absorbent sanitary napkin; that the apparatus depicted is the type used by Consumers Union in conducting its test, and that the microscope and culture tubes were used therein; that Joan Ellis is a "famous New York stylist," that the depiction is of her, and that she has honestly endorsed the softness, comfort, shape and freedom from bulk and chafing of Sanapak; that because of the alleged superiority in absorbency, Sanapak is superior for use under ordinary and usual conditions to other sanitary napkins under like conditions.

PAR. 5. The foregoing statements and representations used and disseminated by the respondent in the manner aforesaid are false, misleading and deceptive. In truth and in fact said test by Consumers Union does not show Sanapak to be either the safest or most absorbent of all sanitary napkins. The apparatus depicted in respondent's advertisements is not of the type used by Consumers Union in its test, and the culture tubes and microscope were not used therein. The "Joan Ellis" to whom respondent's advertisement refers is non-existent, and the picture is of a person unknown to respondent. Under ordinary and usual conditions of use the alleged superiority in absorbency of Sanapak does no render it superior to many other sanitary napkins.

PAR. 6. The representations and claims hereinabove set forth, and others similar thereto not specifically set out herein concerning the properties of respondent's product as allegedly shown by the said test are misleading and deceptive for the further reason that respondent's product, as offered by means of the said advertisements, is not the same product as that which was tested by Consumers Union, is inferior to it in absorbency and is also inferior in that respect to many other sanitary napkins.

PAR. 7. The use by respondent of the aforesaid false, deceptive and misleading statements, depictions and representations has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations are true and cause a

Decision

48 F. T. C.

substantial portion of the public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's said product.

PAR. 8. The aforesaid acts and practices of respondent 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.

ORDERS AND DECISION OF THE COMMISSION

Order denying appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 5800, May 15, 1952, follows:

This matter came on to be heard by the Commission upon appeals by both the respondent and counsel supporting the complaint from the initial decision of the hearing examiner, briefs filed in support of and in opposition to both appeals and oral argument of counsel.

This proceeding relates to respondent's advertising claims for its product "Sanapak", a sanitary napkin. These appeals are concerned with the meaning and truthfulness of respondent's representations as to the results of a test of the comparative absorbency of its product and other brands of sanitary napkins conducted by Consumers Union and published in the magazine "Consumer Reports".

The representations referred to are as follows:

(1) As set out on one side of the carton in which respondent's product was sold:

CONSUMERS UNION TESTS
REPORT SANAPAK SAFEST!

(2) As set out on another side of its cartons:

Amazing Results of Independent, Impartial, Unsolicited Research CONSUMERS UNION TESTS REPORT SANAPAK SAFEST SANITARY NAPKIN Proved Most Absorbent of all Leading Brands by Scientific Fact-Finding Service Report Published in "Consumer Reports" Magazine.

(3) As set out in an advertisement published in a Chicago newspaper of wide circulation and in an advertising circular widely distributed by respondent to its dealers:

Amazing Results of Independent,
Impartial, Unsolicited Research!
CONSUMERS UNION TESTS REPORT
SANAPAK SAFEST SANITARY NAPKIN
Proved Most Absorbent of all Leading
Brands by Scientific Fact-Finding Service

Report Published in "Consumer Reports" Magazine

These startling tests published in the August 1949 issue of "Consumer Reports", official publication of Consumers Union, rated Sanapak most absorbent—thus, safest—of all leading sanitary napkins tested. The report stated: "In Sanapak . . . water-repellent paper was used between cores of filler; Sanapak had excellent absorbency."

This water-repellent material—both in the center of the napkin, plus three full layers at the back (Sanapak's famous "Pink Safety Back")—is the reason for Sanapak's amazing extra safety. It is the reason, too, why thousands of women have learned by actual experience that they prefer Sanapak to all other brands. Sanapak is so much safer—so much more comfortable. You know you're safe with Sanapak.

We publish this news independent of Consumers Union, because we believe it to be of vital importance to the vast majority of American women. Consumers Union is a subscription service for members only, and was not trying to increase Sanapak sales. It was testing solely to determine the facts, the unvarnished truth. Sanapak's amazing superiority was demonstrated solely on its merit.

Prove it to yourself. Get Sanapak today—without risking a single penny. Sanapak is the safest and most comfortable sanitary napkin you ever wore, or its makers guarantee double your money back!

The report of the results of the tests referred to in these advertisements, as published in "Consumer Reports" magazine, stated that the absorbency of respondent's product and of two other brands was excellent and that they were superior in this respect to the other brands tested. The magazine article did not contain any comparison of the results of the test as among these three brands rated excellent. The records of the actual test reveal, however, that respondent's product rated third in absorbency in this group. Upon this record the hearing examiner, in his initial decision, found that respondent had falsely represented that this test showed its product to be the safest and most absorbent of all sanitary napkins tested and prohibited it from making such representation in the future.

Respondent appealed from this decision upon the grounds that (1) respondent did not represent that the Consumers Union test did find Sanapak to be the most absorbent of all sanitary napkins; (2) these tests did find that Sanapak was the most absorbent of all sanitary napkins available to the average consumer; and (3) there is no public interest in this proceeding.

In support of its first ground for appeal respondent contends that a consideration of the complained of advertisements as a whole shows respondent represented that the tests found Sanapak to be the most absorbent of all leading brands of sanitary napkins, not that they found it to be the most absorbent of all brands. This contention is believed to be of no merit. The Commission is of the opinion that the representation "CONSUMERS UNION TESTS REPORT

SANAPAK SAFEST" clearly means that Sanapak was found by these tests to be the safest of all brands tested in the sense of having superior absorbency. Thus, this representation standing alone on one side of the carton in which respondent's product was sold, is clearly false.

As to those advertisements in which the representation "CONSUMERS UNION TESTS REPORT SANAPAK SAFEST SANITARY NAPKIN" was accompanied by the statement that these tests proved Sanapak to be the most absorbent of all leading brands, it is believed that this accompanying statement does not have the effect of showing that the tests found Sanapak to be superior to the largest selling brands only. The Commission is of the opinion that these advertisements considered in their entirety represent that these tests proved that Sanapak is the safest from a standpoint of absorbency of those brands of sanitary napkins tested, which brands included the best brands sold. This representation is false and misleading.

Respondent further contends that even if its advertisements were interpreted as representing that these tests found Sanapak to be the most absorbent of all sanitary napkins, that such representation would be true as the tests found that Sanapak was the most absorbent of all sanitary napkins available to the average consumer. The record does show that sales of Aimcee, one of the brands testing higher than respondent's product, had been discontinued prior to the publication of the results of said tests. However, the record shows that Sanflex, the other brand testing higher than respondent's product, was available to consumers in New York, Detroit and St. Louis. There is no evidence that it was not also available in many other areas. The record is silent as to the total sales of Sanflex or its position in the industry. The record does show that compared to Kotex and Modess, whose combined sales comprise ninety-five per cent of total sales in the United States, all of the other brands sales are small. Among these other brands Sanapak excels in total sales. However, inasmuch as Sanflex is available to consumers, respondent's contention that the test results as to it should be ignored is of no merit.

Respondent further contends that there is not sufficient public interest in this proceeding to support the Commission's jurisdiction because the proceeding is moot and involves only a private controversy. In support of its claim that this proceeding is moot, respondent contends that the practice has been stopped and that respondent offered to consent to an order to cease and desist. The record shows that prior to the publication of the complained of advertisements, respondent was informed by the organization which had conducted the tests that its proposed representation that the tests showed Sana-

1331

Decision

pak to be safest was false. Even after the Commission's investigation in this matter respondent continued to sell its product in cartons on which were printed the complained of representations and told the Commission that it intended to continue to do so until its supply of cartons on hand was used up. At that time respondent had approximately 450,000 of such cartons on hand. After issuance of the complaint herein respondent stopped the complained of practice and offered to consent to an order to cease and desist, but at all times it has maintained that its advertisements were legal. The Commission is of the opinion that this record does not provide sufficient assurance that respondent may not at some time in the future resume such representations unless it is prohibited from doing so by an order of the Commission.

In support of its contention that this proceeding is only a private controversy, respondent states that this proceeding arose out of a complaint by Consumers Union, which organization was concerned with respondent's unauthorized use of its material rather than the truth or falsity of respondent's reports of the results of the tests conducted by it. Respondent further states that the proper forum for determination of this controversy is the District Court of the United States for the Southern District of New York in which Consumers Union has brought a private suit against respondent, seeking damages for the use of its test results and further seeking an injunction against the republication of the complained of representation. In fact this proceeding does not relate to respondent's unauthorized use of the results of the Consumers Union tests, but relates to the false and misleading nature of respondent's advertisements. The Commission is of the opinion that the hearing examiner correctly held that these advertisements contained false and misleading representations which had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and to cause them to purchase respondent's product as a result of the erroneous and mistaken belief so engendered. Therefore, the Commission is of the further opinion that the hearing examiner correctly concluded that the public interest is served by this proceeding and that respondent's contention to the contrary is of no merit.

Respondent's exceptions to Paragraphs Three (d), Three (e), Six (a), Six (b) and Nine of the findings contained in the initial decision are rejected for the reasons stated hereinabove.

Counsel supporting the complaint appeals from the failure of the hearing examiner to find that respondent's product is not the most absorbent sanitary napkin. The complaint alleges that respondent represented that Sanapak is superior for use under ordinary and

usual conditions to other sanitary napkins. It further alleges that "the alleged superiority in absorbency of Sanapak does not render it superior to many other sanitary napkins" and that respondent's product "is also inferior in that respect [i. e., absorbency] to many other sanitary napkins". Upon this issue the hearing examiner found that the evidence as to the relative absorbency of the various brands of sanitary napkins tested is at best inconclusive and that, therefore, this charge in the complaint has not been sustained. From this finding counsel supporting the complaint appeals contending that every test in the record shows that respondent's product is not the most absorbent, with the exception of certain tests by respondent which were improperly and unscientifically conducted.

The Commission is of the opinion that the hearing examiner properly concluded that on a basis of the evidence contained in this record the comparative absorbency of the brands of sanitary napkins tested cannot be determined. The variations in the results of the tests by Consumers Union and of the test by Foster D. Snell, Inc., are so great as to permit no conclusion to be based upon them as to the comparative absorbency of the brands tested.

The Commission is of the further opinion that all of the findings as to the facts contained in the initial decision are supported by the reliable, substantial, and probative evidence of record; that the conclusion contained therein is correct; and that the order to cease and desist is proper upon this record and is required to provide proper relief from respondent's illegal practices.

The Commission, therefore, being of the opinion that both of the appeals herein are without merit and that the hearing examiner's initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint and the appeal of respondent from the initial decision of the hearing examiner be, and they both hereby are, denied.

It is further ordered, That the initial decision of the hearing examiner shall, on the 15th day of May, 1952, become the decision of the Commission.

It is further ordered, That respondent Doeskin Products, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in said initial decision, a copy of which is attached hereto.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY WILLIAM L. PACK, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 14, 1950, issued and subsequently served its complaint in this proceeding upon the respondent, Doeskin Products, Inc., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing by respondent of its answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named trial examiner theretofore duly designated by the Commission, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by the trial examiner on the complaint, answer, testimony and other evidence, proposed findings and conclusions submitted by counsel, and oral argument of counsel, and the trial examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Doeskin Products, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 11 West 42nd Street, New York, New York. Respondent maintains three manufacturing establishments, two of them being located in Massachusetts and one in Delaware. Respondent is now and for a number of years last past has been engaged in the manufacture and sale of sanitary napkins, such product being sold under the registered trade name "Sanapak."

PAR. 2. Respondent causes its product, when sold, to be transported from its places of business in the States of New York, Massachusetts and Delaware to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains and has maintained a course of trade in its product in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. (a): This proceeding involves the use by respondent of alleged misrepresentations in advertising its product. The first charge in the complaint is that respondent has misrepresented the results of certain tests of sanitary napkins made by Consumers Union, a non-profit organization in New York City which is engaged in the

Findings

48 F. T. C.

work of obtaining and supplying to consumers information with respect to various products, such information being for use by consumers in making their purchases. As a part of its work Consumers Union investigates, examines and tests numerous products, and the information thus obtained is published by the Union in its printed reports which are issued monthly and have a circulation of some 400,000 copies throughout the United States.

(b) In June 1949 some nineteen different brands of sanitary napkins (pads) were tested for absorbency by Consumers Union and the results of the tests were published by the Union in its August 1949 report. With one exception, all napkins tested were found to be "acceptable" and the acceptable napkins were further divided into three groups. The first group comprised three different brands, including respondent's product Sanapak which appeared as the first on the list. Immediately above this group of three napkins appeared the following statement: "The absorbency of the following pads was excellent." The second group of napkins were listed under the statement: "The following pads, while less absorbent than those above, were considered adequate for average need." Above the third group was the statement: "The following pads were less absorbent than those in the groups above, but would be satisfactory for minimum needs." Near the top of the page and above all of the listings was the following caption, printed in large type and running across the entire page:

RATINGS OF SANITARY PADS AND TAMPONS: 19 brands of sanitary pads and 5 brands of tampons were tested by CU. Grouping is in terms of absorbency; choice will depend on individual needs. Listing within each group is by cost; the figures in parentheses show average cost per dozen when bought in the largest package size found by CU's shoppers at time of purchase.

(c) During the latter part of 1949, after the publication of the Consumers Union report, respondent began to market its napkins in a new carton. On one side of this carton appeared the legend: "CONSUMERS UNION TESTS REPORT SANAPAK SAFEST!," and on the other side the following:

Amazing Results of Independent,
Impartial, Unsolicited Research
CONSUMERS UNION TESTS REPORT
SANAPAK SAFEST SANITARY NAPKIN
Proved Most Absorbent of all Leading
Brands by Scientific Fact-Finding Service
Report Published in "Consumer Reports" Magazine

Respondent also inserted a full page advertisement in the February 2, 1950, issue of a Chicago newspaper which has a wide circulation

not only in Chicago and Illinois, but in other States as well, the advertisement reading in part as follows:

Amazing Results of Independent,
Impartial, Unsolicited Research!
CONSUMERS UNION TESTS REPORT
SANAPAK SAFEST SANITARY NAPKIN
Proved Most Absorbent of all Leading
Brands by Scientific Fact-Finding Service

Report Published in "Consumer Reports" Magazine

These startling tests published in the August 1949 issue of "Consumer Reports," official publication of Consumers Union, rated Sanapak most absorbent—thus, safest—of all leading sanitary napkins tested. The report stated: "In Sanapak . . . water-repellent paper was used between cores of filler; Sanapak had excellent absorbency."

This water-repellent material—both in the center of the napkin, plus three full layers at the back (Sanapak's famous "Pink Safety Back")—is the reason for Sanapak's amazing extra safety. It is the reason, too, why thousands of women have learned by actual experience that they prefer Sanapak to all other brands. Sanapak is so much safer—so much more comfortable. You know you're safe with Sanapak.

We publish this news independent of Consumers Union, because we believe it to be of vital importance to the vast majority of American women. Consumers Union is a subscription service for members only, and was not trying to increase Sanapak sales. It was testing solely to determine the facts, the unvarnished truth. Sanapak's amazing superiority was demonstrated solely on its merit.

Prove it to yourself. Get Sanapak today—without risking a single penny. Sanapak is the safest and most comfortable sanitary napkin you ever wore, or its makers guarantee double your money back!

In addition to its cartons and newspaper advertisement, respondent distributed widely among its dealers a large broadside or circular containing substantially the same statements as the carton and newspaper advertisement.

(d) In the examiner's opinion respondent's representations were inaccurate and misleading. The clear purport and implication of the statements was that the tests conducted by Consumers Union had shown respondent's product to be the safest or most absorbent of all sanitary napkins tested. Actually, this was not the fact. All that the tests, as reported by Consumers Union, had shown was that respondent's napkin was among the first three in absorbency. The only reason the product was listed first in this group of three was that it was lowest in price. In fact, the actual figures or ratings on absorbency disclosed by the evidence show that according to the tests respondent's napkin was third or last in this group. These figures were not included in the report and respondent therefore cannot be charged with knowledge of them. The report did, however, as shown above, expressly state

Findings

48 F. T. C.

that "Listing within each group is by cost," and the prices listed in the report showed the price of Sanapak to be the lowest of the napkins in the first group.

(e) It is urged by respondent that it did not represent that the tests showed Sanapak to be the most absorbent of all napkins tested, but that it represented only that the tests showed Sanapak to be the most absorbent of all "leading brands" tested; that the two brands of sanitary napkins which enjoy the largest sales were not included by Consumers Union in the first group listed in the report; that respondent's product is next to these two napkins in sales; and that therefore the tests did show Sanapak to be the most absorbent of the leading brands. In the examiner's opinion the representations cannot be justified on this ground. In the first place, the statement on one side of the carton made no reference to leading brands but read simply "Consumers Union Tests Report Sanapak Safest!". Aside from this, however, the general purport and implication of the advertisements was that the tests had found Sanapak to be the most absorbent sanitary napkin of all those tested.

PAR. 4. In connection with the reference in its advertisements to the Consumers Union tests, respondent used a picture of a testing device or apparatus, which picture also included a microscope and certain test tubes such as are used for bacteriological cultures. The complaint attacks this picture as misleading, charging that the device pictured is not the same kind of device as that used by Consumers Union, and that no microscope or culture tubes were used in the tests. As for the device pictured, both it and the device which was actually used by Consumers Union were exhibited to the examiner during the hearings. While there are certain minor differences between the two, the apparatus of Consumers Union having certain refinements which are not present on the other device, the two devices are of the same general type and are operated in essentially the same manner. In the examiner's opinion the use by respondent of the picture of the device was not misleading. As for the microscope and culture tubes, these doubtless were included by respondent in the picture merely to connote scientific accuracy and care. It is difficult to see how their use could mislead the public. The matter would also appear to be so inconsequential as to be without public interest.

PAR. 5. (a): The newspaper advertisement in question also carried the picture of a young woman and immediately below the picture the following:

"YOU'D NEVER DREAM
ANYTHING COULD
BE AS SOFT AS SANAPAK"
SAYS NEW YORK STYLIST

Findings

Joan Ellis, famous New York stylist, says: "I found a sanitary napkin that's a glorious improvement. It's Sanapak—and I never thought I'd find a napkin that's so amazingly soft and comfortable. You see, Sanapaks are uniquely shaped to fit without bulk or chafing. Faced with cotton, too.

"Another feature is the 'Triple Protection' given by Sanapak's famous 'Pink Safety Back.' Get a box and see if you don't agree that they're wonderful!"

The carton and circular also carried the picture of the young woman and below the picture the legend "'You'd Never Dream Anything Could be as Soft as SANAPAK' says New York Stylist."

(b) The person referred to by respondent as Joan Ellis is, in fact, a young lady of another name who is employed by respondent in the capacity of secretary to one of its officers. She is not a stylist and makes no claims to that effect. As a part of her secretarial duties she occasionally answers letters from women regarding sanitary napkins, and particularly Sanapak, using in such correspondence the name Joan Ellis. Because of the nature of its product respondent feels that it is preferable that correspondence with women regarding the product be carried on under a feminine name, and the name Joan Ellis is merely the name chosen by respondent for that purpose. The picture in the advertisements is not that of the employee, but of a professional model. Obviously respondent's advertisements were unwarranted and misleading in that they represented or implied that its product had been endorsed or approved by an independent and impartial stylist or fashion authority.

PAR. 6. (a): Respondent urges that the element of public interest is lacking both with respect to the Joan Ellis issue and with respect to the representations concerning the results of the Consumers Union tests. In this connection respondent points out that the newspaper advertisement was inserted in only one issue of one newspaper; that while 750,000 of the cartons were manufactured, only 500,000 were packaged with sanitary napkins and of this number 200,000 were unpacked, in August 1950, and the empty cartons destroyed; and that subsequently, in December 1950, the remaining 250,000 empty cartons were destroyed. Thus, of the 750,000 cartons manufactured, only 300,000 actually reached the public. Respondent further asserts that it has no intention of using any of the questioned representations in the future.

(b) In the examiner's opinion these circumstances are insufficient to warrant a conclusion that the matters in question are without public interest. While it is true that the advertisement was inserted in only one issue of the newspaper, it was a full page advertisement in a news-

paper with very wide circulation and undoubtedly the advertisement was seen by hundreds of thousands of readers. Moreover, some of the 300,000 cartons of napkins were still being sold to the public by dealers at the time of the hearings, two of the packages being purchased at that time from retail drugstores in New York City by a representative of Consumers Union. In addition to the newspaper advertisement and the cartons there is the matter of the circular, which was widely distributed by respondent among its dealers.

PAR. 7. The complaint also charges that respondent's representations with respect to the Consumers Union tests are misleading for the further reason that there has been a change in the construction of respondent's napkin since the Consumers Union tests were made and that consequently the napkin now being sold by respondent is not the napkin which was the subject of the tests, being inferior to the tested napkin in absorbency. While there is some evidence in support of this charge, there is positive, unequivocal testimony, not only from officers of respondent but also from the employees who are actually engaged in manufacturing and testing the napkins, that during the last five years there has been no change whatever in the construction of the napkin, with respect to materials or otherwise. It appears that regular and frequent inspections of the napkins are made during the process of manufacture and also that the napkins are frequently tested for absorbency, all irregular or defective napkins being discarded. Respondent recognizes that occasionally a napkin which is irregular or defective may leave its plant, but respondent insists that such occurrences are accidental, being due to the factor of human error or to some temporary defect in the manufacturing machinery, and are not the result of any intentional change in the construction or method of manufacture of the product. In the examiner's opinion the weight of the evidence is against the complaint on this issue.

PAR. 8. (a): The complaint appears to raise also the issue of the relative merits of respondent's product as compared with other, competing sanitary napkins, this issue being wholly independent of the issue with respect to respondent's representations as to the results of the Consumers Union tests. The complaint alleges that respondent has represented that "because of the alleged superiority in absorbency Sanapak is superior for use under ordinary and usual conditions to other sanitary napkins under like conditions." The complaint then charges that "Under ordinary and usual conditions of use the alleged superiority in absorbency of Sanapak does not render it superior to many other sanitary napkins," and that respondent's product is "inferior in that respect (absorbency) to many other sanitary napkins."

(b) Obviously, a matter of this nature, involving a determination

1331

Order

of the relative merits of competing products, should be approached with the utmost caution. Certainly, such an adjudication should not be attempted except upon the basis of evidence which is clear and convincing. In the examiner's opinion such evidence is lacking in the present record. Tests made by Consumers Union and by an independent testing laboratory at the instance of Consumers Union after the publication by respondent of the newspaper advertisement in question tend to support the charge in the complaint. On the other hand, the first Consumers Union tests placed respondent's product among the three products in the first group. Also opposed to the complaint are certain tests made by respondent which, while apparently not conducted in as scientific and accurate manner as the other tests, are, in the examiner's opinion, not without some probative value. All of the tests indicate that sanitary napkins of the same brand and presumably the same construction frequently differ widely in absorbency. The tests appear, at best, to be inconclusive on the present issue. The examiner is therefore of the view that this charge in the complaint has not been sustained.

PAR. 9. The use by respondent of the erroneous and misleading representations set forth in Paragraphs Three and Five has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to respondent's product, and the tendency and capacity to cause such portion of the public to purchase such product as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of respondent as hereinabove set out 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

It is ordered, That the respondent, Doeskin Products, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of sanitary napkins in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That tests conducted by the organization known as Consumers Union have shown respondent's product to be the safest or most absorbent of all sanitary napkins tested.

Order

48 F. T. C.

2. That respondent's product has been endorsed or approved by any stylist or fashion authority, unless the person referred to is in fact an independent stylist not connected with respondent, and unless such person has in fact endorsed or approved said product.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That respondent Doeskin Products, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in said initial decision, a copy of which is attached hereto [as required by aforesaid order and decision of the Commission].

Syllabus

IN THE MATTER OF

UNITED STATES NAVY WEEKLY, INC. ET AL.

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

Docket 5841. Complaint, Jan. 18, 1951—Decision, May 15, 1952

Any qualification or explanation of the name "United States Navy Magazine" to the effect that a publication so entitled has no official connection with the United States Navy would only contradict rather than qualify the conclusion necessarily attendant upon the use of such name, and would not eliminate the tendency and capacity of the use of such name to mislead and deceive.

Where a private corporation, organized for profit, and its two officers, engaged in the publication and in the competitive interstate sale and distribution of their "United States Navy Magazine" and in soliciting advertising therein, and selling subscriptions thereto through methods designed to capitalize on the erroneous impression that it was officially connected with the Navy—

- (a) Represented falsely in their advertising, letters and circulars that said publication was officially connected with or sponsored by the Navy, and that it was owned, edited and published by Navy personnel; the facts being that, owned and published by said corporation, the magazine was largely carried on by its president, who was its principal stockholder and a retired Navy Chief Warrant Officer, and not by persons on active duty in the Navy;
- (b) Represented falsely, as aforesaid, that said publication contained a complete coverage of Navy news from correspondents on ships at Naval stations, bases and yards, and from Washington; and
- (c) Represented, as aforesaid, that said publication had a national office in Washington, D. C. and editorial offices in several other cities of the United States;

The facts being their only editorial office was that of the said president in Philadelphia; the address given as their national office was only a mailing address; and the other addresses listed were mailing addresses of the offices of free-lance advertising agents authorized to sell advertising space in said magazine;

- (d) Falsely represented and implied through use of the name, "United States Navy Magazine" as the title of their publication, that said magazine was an official publication of the United States Navy, notwithstanding affirmative statements therein and elsewhere to the contrary which, by reason of small type in inconspicuous locations and obscure language were of no substantial value in correcting the false impression thereby created;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into a mistaken belief that their publication was an official publication of the Navy, and that such other representations were true, and into the purchase of said publication or advertising space therein as a result, and thereby to divert to them from their competitors substantial trade in commerce:

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