

Order

50 F. T. C.

IN THE MATTER OF
JOSEPH ROSENBLUM AND SADIE ROSENBLUM DOING
BUSINESS AS MODERN MANNER CLOTHES

*Docket 5263. Complaint, Jan. 2, 1945—Findings and order, Dec. 19, 1950, 47
F. T. C. 712. Order vacating, etc. and opinion, May 4, 1954*

Charge: Advertising falsely as to free wearing apparel.

Before *Mr. George Biddle*, hearing examiner.

Mr. Harold A. Kennedy for the Commission.

Mr. Copal Mintz, of New York City, for respondents.

ORDER DISPOSING OF RESPONDENTS' MOTION TO VACATE CEASE AND
DESIST ORDER AND FOR OTHER RELIEF; VACATING CEASE AND DESIST
ORDER; AND DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon respondents' motion (a) that the order to cease and desist entered herein on December 19, 1950, be vacated and that an order be entered dismissing the complaint in its entirety, (b) that Paragraphs Five and Six of the findings as to the facts and the conclusion be stricken and that the findings and conclusion recommended by the respondents be substituted therefor, and (c) that counsel to the Commission be authorized and directed to join in an application to the United States Court of Appeals for the Second Circuit to vacate the order to cease and desist made and entered by that Court and to enter in lieu thereof a decree dismissing the proceedings, and answer to said motion filed by counsel supporting the complaint; and

The Commission having duly considered said motion, answer thereto, and the record herein, and being of the opinion that, for the reasons set forth in the accompanying opinion of the Commission, the said motion should be granted to the extent indicated in the said opinion, and that the order to cease and desist heretofore entered in this proceeding should be vacated and the complaint dismissed in its entirety:

It is ordered, That the respondents' said motion be, and it hereby is, granted to the extent indicated in the accompanying opinion of the Commission.

It is further ordered, That the order to cease and desist entered herein on December 19, 1950, be, and it hereby is, vacated.

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

It is further ordered, That the General Counsel of the Commission be, and he hereby is, authorized and directed to join the respondents in application to the United States Court of Appeals for the Second Circuit to vacate the final decree heretofore entered by that Court in this matter and to enter in lieu thereof a decree dismissing the proceeding.

Commissioner Mead dissents. (See Mead dissent in the matter of Walter J. Black, Inc., et al., Docket 5571.)¹

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter is before the Commission upon a motion filed by the respondents requesting (a) that the order to cease and desist entered herein on December 19, 1950, be vacated and that an order be entered dismissing the complaint in its entirety; (b) that Paragraphs Five and Six of the findings as to the facts and the conclusion be stricken, and that findings and conclusion recommended by the respondents be substituted therefor; and (c) that counsel to the Commission be authorized and directed to join in an application to the United States Court of Appeals for the Second Circuit to vacate the order to cease and desist made and entered by that court and to enter in lieu thereof a decree dismissing the proceeding.

The Commission, on December 19, 1950, issued its order directing the respondents to cease and desist from:

"Using the word 'free', or any other word or words of similar import or meaning, to designate, describe, or refer to wearing apparel, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the performance of some service inuring directly or indirectly to the benefit of the respondents."

The respondents petitioned the United States Court of Appeals for the Second Circuit to review and set aside the Commission's order to cease and desist. The court, on November 29, 1951, entered an order affirming the Commission's order (*Rosenblum v. FTC*, 192 F. 2d 392). The Supreme Court, on March 24, 1952, denied respondents' petition for a writ of certiorari.

The order to cease and desist entered in this matter was in strict conformity with the Commission's policy in effect at the time the order was issued and was identical with orders which had theretofore been issued against many other advertisers concerning the use of the word "free." However, subsequent to the date of the issuance of its

¹ See p. 225 of this volume.

order to cease and desist in this case, the Commission changed its position with respect to the use, in advertising, of the word "free." As announced by the Commission in the matter of Walter J. Black, Inc., etc., Docket 5571 (September 11, 1953), henceforth, the use of the word "free" or other words of similar import or meaning, in advertising or in other offers to the public, to designate or describe an article of merchandise will be considered to be unfair and deceptive only (1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or (2) when, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either increases the ordinary and usual price, reduces the quality, or reduces the quantity or size of such article of merchandise.

It is obvious that the outstanding order against the respondents in this proceeding prohibits them from using the word "free" under circumstances which would not now be considered as unfair or deceptive, and imposes upon the respondents requirements which would not be imposed upon their competitors.

Although the order in this case has been affirmed by the United States Court of Appeals for the Second Circuit, the Commission has the power and duty to vacate or modify the order if conditions exist which warrant any such action. *American Chain & Cable Co. v. FTC*, 142 F. 2d 909 (C. A. 4th 1944). We believe the change in the Commission's position with respect to the circumstances under which the use of the word "free" will be considered unfair and deceptive has created such a condition that the public interest requires action by the Commission in this case.

Under these circumstances it is necessary that we re-examine the facts disclosed by the record in this case to determine whether the respondents' use of the word "free" has been such as to be unfair or deceptive under the Commission's new existing policy. The facts presently material can be summarized as follows:

The respondents, operating under the name Modern Manner Clothes, carry on a mail order business in interstate commerce in women's wearing apparel. Respondents engage saleswomen in various parts of the country to take orders for the merchandise from the public. The services of such salespersons are obtained by inserting advertisements in the want ad sections of newspapers, typical of which is the following:

"WE START YOU IN BUSINESS

"Fifth Avenue, New York, firm desires women to sell dresses, coats, sportswear, negligee, lingerie featured in 'Vogue' and 'Mademoiselle.' Also children's garments. Good commission. Sample book free. Write Modern Manner * * * New York."

Interested women who communicate with the respondents for further information are informed that if they become representatives of the respondents, they will receive, in addition to their regular commissions, free dresses, coats, suits, and other garments. Typical of the statements and representations to that effect are the following:

"Moreover, in addition to your regular profits you will get your own dresses, coats, and suits—Free."

"Your own Dresses Free. Modern Manner enables you to have all your personal dresses, suits, coats, lingerie Free. Every month Modern Manner offers a special bonus to active representatives. Practically every Modern Manner representative earns at least from 10 to 12 dresses a season without any cost to her."

"By getting all these free bonus dresses, you have a complete wardrobe of smart Fifth Avenue styles."

"You, too, have a most marvelous opportunity to get your new wardrobe."

"Here is our special offer—

"SELL 12 dresses and GET a \$5.00 dress FREE
15 dresses and GET a \$6.00 dress FREE
20 dresses and GET a \$9.00 dress FREE
25 dresses and GET a \$12.00 dress FREE
30 dresses and GET a \$15.00 dress FREE
(or 3—\$5.00 dresses)"

The Commission found that the respondents' use of the word "free" in the manner above indicated was false, misleading, and deceptive because "the respondents do not give the dresses or other articles of wearing apparel free, but require the payment of a valuable consideration on the part of the agents or salespersons in the form of service and the sale of a certain number of articles of wearing apparel by said agents or salespersons before the same are delivered to the agents or salespersons."

It appears to us that respondents' offer of "free" merchandise to their representatives upon the completion of a specified number of sales is clear and unambiguous. All of the terms and conditions of the offer are clearly set forth. The persons to whom the offer is made are not required to purchase any other merchandise in order to obtain the

“free” merchandise. There is no reasonable probability that anyone could misunderstand or be misled by the offer. We believe, therefore, that respondents’ use of the word “free” as disclosed by the record in this case cannot be considered unfair or deceptive under the Commission’s present policy on this subject.

In view of the foregoing, the order to cease and desist heretofore entered in this matter will be vacated and the complaint will be dismissed in its entirety, and the General Counsel of the Commission will be authorized and directed to join in an application to the United States Court of Appeals for the Second Circuit to vacate the final decree heretofore entered by that Court in this matter and to enter in lieu thereof a decree dismissing the proceeding.

Commissioner Mead dissents. (See Mead dissent in the matter of Walter J. Black, Inc., et al., Docket 5571.)

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IN THE MATTER OF

AQUELLA PRODUCTS, INC., AND PRIMA PRODUCTS,
INC., ET AL.

MODIFIED CEASE AND DESIST ORDER

Docket 5622. Order, May 4, 1954

Order modifying Commission's prior order, dated June 1, 1953, 49 F. T. C. 1394, in accordance with the decision of the Court of Appeals for the Second Circuit in *Prima Products, Inc. et al. v. F. T. C.*, 209 F. 2d 405, in which said court on January 7, 1954, filed its decision modifying said order and affirming the same as modified, and on January 26, 1954, entered its final decree enforcing said order as modified—

So as to delete from said order the prohibition against representing that respondents' product "Aquilla" will waterproof or prevent the penetration of water through the walls of underground fortifications such as those constructed on the Maginot Line, but in other respects affirming the provisions of said order prohibiting respondent Prima Products, Inc. et al., and certain officers thereof—the Commission having dismissed in the said original order, the complaint as to respondent Aquella Products, Inc., and certain of its officers—from misrepresenting, as there and below set forth, the nature and qualities of said "Aquilla" product.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Edward L. Smith, Mr. George M. Martin and *Mr. J. M. Doukas* for the Commission.

Mr. Robert E. Kline, Jr., of Washington, D. C., and *Kirlin, Campbell & Keating*, of New York City, for Aquella Products, Inc., and the officers thereof.

Mr. Milton Elias Schattman, of New York City, for Prima Products, Inc., and the officers thereof.

Brody & Brody, of Bridgeport, Conn., also represented Charles S. Brody.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answers of the respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before a hearing examiner of the Commission theretofore duly designated by it; and the hearing examiner having thereafter filed his initial decision; and the matter having thereafter come on to be heard by the Commission upon appeals from said initial decision filed by counsel for respondents Prima Products, Inc., Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer, and by counsel supporting the complaint,

briefs in support of and in opposition to said appeals, and oral arguments of counsel; and the Commission having duly considered and ruled upon said appeals, considered the record, found that the proceeding was in the interest of the public, made its findings as to the facts, concluded that respondents Prima Products, Inc., a corporation, Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer had violated the provisions of the Federal Trade Commission Act, and, on June 1, 1953, issued an order to cease and desist against said respondents, and their respective agents, representatives, and employees; and the Commission having dismissed the complaint as to respondent Aquella Products, Inc., a corporation, respondents Ira A. Campbell, L. J. Clarke, Leandro W. Tomarkin, and Zella F. Campbell, individually and as officers of Aquella Products, Inc.; and

Respondents Prima Products, Inc., Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer having filed in the United States Court of Appeals for the Second Circuit their petition to review and set aside said order to cease and desist; and that Court having heard the cause on briefs and oral argument and having thereafter, on January 7, 1954, filed its decision modifying said order and affirming said order as modified, and, on January 26, 1954, entered its final decree enforcing said order as modified; and

The Commission being of the opinion that its order should be modified so as to accord with the aforesaid judgment of the United States Court of Appeals for the Second Circuit:

It is ordered, therefore, That respondent Prima Products, Inc., a corporation, and respondents Milton P. Schreyer, Charles S. Brody, Milton E. Schattman, and Edward P. Schreyer, individually and as officers of said corporation, and their respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product, now designated "Aquella," or any other product of substantially similar composition or possessing substantially similar properties under whatever name sold forthwith cease and desist from—

(1) Representing, directly or by implication, that respondents' product, now designated "Aquella," operates on an entirely new principle in the control of water seepage through porous masonry;

(2) Representing, directly or by implication, that the manner of application of respondents' product, now designated "Aquella," is as easy or simple as whitewashing or that the ease of application of said product in any way approaches the ease of application of whitewashing;

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(3) Representing, directly or by implication, that the application of respondents' product, now designated "Aquella," to porous masonry surfaces below grade will render such structures impermeable to or proof against the passage of water or moisture; and

(4) Using the words "waterproof" or "watertight" or any other word or words of similar import or meaning to designate respondents' product or to describe or refer, directly or by implication, to use thereof, when applied to below grade masonry surfaces or structures.

It is further ordered, That said respondents, within thirty (30) 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.

It is further ordered, That the complaint be dismissed as to the respondents Aquella Products, Inc., a corporation, Ira A. Campbell, L. J. Clarke, Leandro W. Tomarkin, and Zella F. Campbell, individually and as officers of Aquella Products, Inc.

IN THE MATTER OF
BORDEN-AICKLEN AUTO SUPPLY CO., INC. ET AL.
DOCKET 5766 AND D & N AUTO PARTS CO., INC. ET AL.
DOCKET 5767

Orders and opinion, May 5, 1954

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. Eldon P. Schrup, *Mr. James E. Corkey* and *Mr. Francis C. Mayer* for the Commission.

Taylor & Taylor, of Memphis, Tenn., for Borden-Aicklen Auto Supply Co., Inc. et al.

Mr. Frank J. Tipler, Jr., of Andalusia, Ala., for D & N Auto Parts Co., Inc. et al.

ORDERS DENYING APPEALS FROM RULINGS OF
HEARING EXAMINER

These matters having come on to be heard by the Commission upon respondents' appeals from orders of the hearing examiner denying respondents' motions to dismiss the complaints and briefs and oral arguments of counsel in support thereof and in opposition thereto; and

The Commission having duly considered said appeals and being of the opinion, for the reasons set forth in the accompanying opinion of the Commission, that the hearing examiner properly denied respondents' motions to dismiss the complaints and that the appeals should therefore be denied:

It is ordered, That respondents' said appeals be, and they hereby are, denied.

Commissioner Howrey not participating.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

These matters are before the Commission upon appeals from orders of the hearing examiner denying motions of the respondents to dismiss the complaints.

So far as material here, the complaints in these proceedings are the same. Respondents in each case are charged with violation of subsection (f) of Section 2 of the Clayton Act, as amended. After the complaints were issued and respondents had filed their answers, hearings were held before a hearing examiner and considerable evidence was

introduced in support of the allegations of the complaint. However, before counsel supporting the complaint had completed their cases in chief, respondents filed motions with the hearing examiner to dismiss the complaints, contending that the facts alleged are insufficient to constitute a violation of subsection (f) of Section 2 of the Clayton Act, as amended. The hearing examiner denied these motions and respondents in each case applied for leave to appeal. The Commission, believing that a prompt decision on the appeals was necessary in order to prevent unusual expense and delay in the proceedings, granted respondents' requests for leave to appeal, as well as their requests for oral argument on the appeals. Briefs were filed and oral arguments were made in support of and in opposition to the appeals.

The only question we are called upon to resolve is whether the complaints in these cases allege sufficient facts to constitute a violation of subsection (f) of Section 2 of the Clayton Act, as amended.

Respondents' contentions that the allegations of the complaints are insufficient to constitute a violation of Section 2 (f) of the Clayton Act, as amended, appear to be based primarily on the decision of the Supreme Court of the United States in *Automatic Canteen Company of America v. Federal Trade Commission*, 346 U. S. 61, which was rendered after the hearings were begun in these cases. So far as pertinent here, the Court in that case held that a buyer is not liable under Section 2 (f) if the lower prices he induces are either within one of the seller's defenses, such as cost justification, or not known by him not to be within one of those defenses. The Court made no decision as to the sufficiency of the complaint in the *Automatic Canteen* case. Instead, it outlined the burden of proof to be assumed by the Commission in proving a violation of Section 2 (f). The effect of the decision on the cases here under consideration is to require that counsel supporting the complaint assume the burden of showing that the discriminatory prices allegedly knowingly induced and received by the respondents were not within one of the sellers' defenses and that respondents knew or should have known that the lower prices were not within one of those defenses.

The complaints in these proceedings charge that the respondents have demanded discriminatory prices not otherwise offered or granted by the sellers; that respondents have demanded discounts, rebates, or allowances based on the aggregate of their purchases through a group buying organization which does not function as a purchaser for its own account; that respondents have adopted, followed, and pursued purchasing policies and practices which were knowingly designed and intended to and did induce discriminatory prices from sellers; that a

group buying organization (Mid-South Distributors in one case and Cotton States, Incorporated, in the other) has been utilized and employed to knowingly induce prices which were discriminatory and that each and all of the respondent jobbers made individual purchases upon which they knowingly induced and received through the group buying organization favorable discriminatory prices which were not otherwise available to, offered, or granted by the sellers to the respondents or their competitors.

Therefore, if the facts alleged are proven, the required degree of knowledge will also be proven. Under these circumstances, the respondents could not have induced and received the discriminatory prices in the manner alleged without the knowledge that the lower prices were discriminatory and not within one of the sellers' defenses. The complaints thus set forth detailed charges which we believe are sufficient to fully apprise the respondents of the nature of the proceedings against them and the circumstances from which conclusions have been drawn that violations of Section 2 (f) of the Clayton Act, as amended, have occurred. In addition, the respondents have the benefit of the Automatic Canteen decision as to the extent of proof required to support the charges of the complaints.

As a result of the Supreme Court's decision in the *Automatic Canteen* case, the Commission has heretofore dismissed the complaints in two cases where the respondents were charged with violation of Section 2 (f) of the Clayton Act, as amended. Those cases were Safeway Stores, Incorporated, Docket 5990, and The Kroger Company, Docket 5991. In both those matters counsel supporting the complaint filed statements in which they said that they were of the opinion that the evidence then available was insufficient to prove the degree of knowledge on the part of the respondents which the Supreme Court in the Automatic Canteen decision said was necessary to be proven in order to establish a violation of Section 2 (f). Our order in the Safeway case, dismissing the complaint without prejudice, clearly shows that the lack of evidence to prove the required degree of knowledge was the reason the complaint was dismissed.

In the Kroger case, the hearing examiner, in his initial decision dismissing the complaint without prejudice, misconstrued the statement by counsel supporting the complaint as an admission that the allegations of the complaint were insufficient to constitute a cause of action. His dismissal of the complaint was on the grounds that no violation of Section 2 (f) was alleged. After reviewing the hearing examiner's initial decision, we adopted it as our decision. However, in the order adopting the hearing examiner's decision we noted that the hearing examiner had misconstrued the admissions made by counsel

supporting the complaint, but that the conclusion reached by him was correct. The conclusion referred to was that the complaint should be dismissed without prejudice.

No evidence had been introduced in either the Safeway or Kroger case at the time the complaints were dismissed. If we had thought that, as a result of the Automatic Canteen decision, the complaints did not state a cause of action, we could and should have amended them so that they would have stated a cause of action, unless, of course, the evidence then available did not indicate that a violation of the statute as it had been construed by the Supreme Court could be proven.

Our dismissal of the Safeway and Kroger complaints, therefore, constitutes no authority for holding that the complaints involved in these appeals do not state a cause of action.

We are of the opinion that the hearing examiner properly denied respondents' motion to dismiss the complaints in the two cases presently under consideration, and that the respondents' appeals should therefore be denied.

Commissioner Howrey did not participate.

IN THE MATTER OF
GEORGE GOLDBERG TRADING AS ARTGOLD LEATHER
GOODS MANUFACTURING COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 6139. Complaint, Nov. 3, 1953—Decision, May 8, 1954

Where an individual engaged in the manufacture and competitive interstate sale and distribution of luggage, including certain handbags, the leather part of which appeared to be thicker than was the fact, due to the presence, not discernible from ordinary or usual inspection, of a cardboard or other backing of nonleather material—

Failed to disclose that the leather in said bags was so backed with cardboard or other nonleather material:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of his competitors and constituted an unfair and deceptive act and practice in commerce and an unfair method of competition therein.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Charles S. Cox for the Commission.

Mr. Maurice B. Holsberg, of Boston, Mass., for respondent.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated May 8, 1954, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 3, 1953, issued and subsequently served its complaint in this proceeding upon the respondent George Goldberg, an individual trading as Artgold Leather Goods Manufacturing Company, charging him with the use of unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the provisions of said Act. On March 25, 1954, respondent filed his answer, in which answer he admitted all of the material allegations as to the facts as set forth in said complaint and waived all intervening procedure and hearing as to the said facts.