

Decision

IN THE MATTER OF

WILLIAM E. BROWN ET AL. DOING BUSINESS AS
THE DIOPTRON COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6349. Complaint, May 6, 1955—Decision, Feb. 18, 1956*

Order—consented to by respondent distributors—requiring two individual manufacturers located in Milwaukee and the corporate seller which was their exclusive distributor in the New England area, to cease representing falsely in advertising matter of general circulation that their fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" would eliminate flies, prevent any possibility of disease caused by flies, and prevent polio; and

Dismissing the allegation that respondent manufacturers advertised falsely that the fly trap "was nationally approved for use for the Boy Scouts", since the representation was substantially true.

Mr. Michael J. Vitale for the Commission.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint against the above-named respondents on May 6, 1955, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act. Said complaint charges that respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company, in Milwaukee, Wisconsin, for several years have been engaged in the manufacture and sale of a fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" and "Big Stinky Control Fluid" to distributors located throughout the several states, one of such distributors being the respondent Joseph Breck & Sons Corporation which had the exclusive distributorship for said products in the New England area. It is further alleged that in the course and conduct of its business, the respondent Joseph Breck & Sons Corporation made certain statements and claims in advertising matter which were alleged to be false, deceptive and misleading and that respondents William E. Brown and John R. Seeger furnished the material to said Joseph Breck & Sons Corporation which was used by said corporation in

the preparation of the allegedly false and misleading advertisements and participated with said corporation in the payment of the cost of such advertisements. It was further charged that the use by the respondents of the false, misleading and deceptive statements had the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were and are true and to induce a substantial portion of the purchasing public because of such mistaken and erroneous belief to purchase the fly trap and baiting fluid sold by respondents and that, as a result thereof, substantial trade has been unfairly diverted to respondents from their competitors and substantial injury is being done and has been done by respondents to competition in commerce.

Respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company, filed an answer on June 6, 1955, denying that they had furnished advertising material to respondent Joseph Breck & Sons Corporation containing the language appearing in the complaint and denying that they had participated in payment of the cost of the advertisements. They admitted, however, that the use of the statements contained in the complaint would, to a degree, be false, deceptive and misleading.

One of the allegations of the complaint was that the respondents had used in their advertising matter a statement that the "BIG STINKY FLY TRAP is the Fly Trap that was nationally approved for use for the Boy Scouts." With respect to this allegation, these respondents denied the allegation, asserting that the National Supply Service Division of the Boy Scouts of America had approved their product.

On July 29, 1955, there was transmitted to the hearing examiner for his consideration, an agreement for consent order by the attorney in support of the complaint as to all of the respondents except respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company, which agreement was duly executed by respondent Joseph Breck & Sons Corporation and individual respondents Luther A. Breck, Jr., James Shiels and Clarence Wells, individually and as officers of Joseph Breck & Sons Corporation and also signed by Michael J. Vitale, counsel supporting the complaint, and approved by Joseph E. Sheehy, Director of the Bureau of Litigation. In said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. It was also provided in said agreement that the said respondents waived any

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further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. It was further provided by the agreement that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint. It is further provided that an order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents; that, when so entered, it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of said order.

It appearing that the order provided for in said agreement conforms in all respects to the order in the notice portion of the complaint with respect to said respondents and that said agreement provides for an appropriate disposition of that portion of the complaint which involves said respondents signing said agreement and it appearing that, with respect to such issue, this proceeding is in the public interest, the said agreement is hereby accepted and, in accordance therewith, the order contained therein is included in the order hereinafter made. With respect to the remainder of the proceeding, based on the entire record pertaining thereto, and from his observation of the witnesses, the undersigned finds that this proceeding is in the interest of the public and makes the following

FINDINGS OF FACT

I

Respondents William E. Brown and John R. Seeger are co-partners doing business under the name of The Diopttron Company with their office and principal place of business located at 704 West Wisconsin Avenue, Milwaukee, Wisconsin. Said respondents are now and for several years last past have been engaged in the business of manufacturing and selling a fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" and "Big Stinky Control Fluid" to distributors, including wholesalers and retailers, and granted to respondent Joseph Breck & Sons Corporation the exclusive distributorship for said products in the New England

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area from 1951 through 1954. Since 1954 sales of said products have been made to respondent Breck on a non-exclusive basis. Said respondents cause and have caused said products to be transported in substantial quantities from their said place of business in the State of Wisconsin to respondent Joseph Breck & Sons Corporation at its place of business in the State of Massachusetts.

II

In the course and conduct of their business and for the purpose of inducing the purchase of their said products, said respondents William E. Brown and John R. Seeger, co-partners, doing business as The Dioptron Company, represented either directly or through respondent Joseph Breck & Sons Corporation in advertising matter of general circulation (a) that the use of said products will eliminate flies; (b) that the use of said products will prevent any possibility of disease caused by flies; (c) that the use of said products will prevent polio; and (d) that the fly trap manufactured by said respondents was nationally approved for use by the Boy Scouts.

III

In truth and in fact, said products will not (1) eliminate all flies in a given area; (2) prevent the possibility of disease caused by flies; or (3) prevent the spread of polio. Said products, however, will aid in reducing the fly population and, to that extent, will decrease the possibility of disease being caused by flies.

IV

With respect to the representations made by said respondents concerning the approval of respondents' fly trap "for use for the Boy Scouts," it appears that a catalogue of Camp and Waterfront Equipment published by the National Supply Service Division of the Boy Scouts of America in 1953 contains an advertisement of "Big Stinky" as a fly control. It was advertised "for controlling and abating fly problem at camp and other rural installations. Flies are lured by odor, keep regenerating trap. Tested and endorsed by Health and Safety Service." It further appears that the Purchasing Agent of the Boy Scouts, operating under the National Supply Service Division, in a letter dated January 7, 1952, addressed to respondent William E. Brown, stated with respect to the "Big Stinky Fly Trap," "We have decided after a thorough trial and on recommendation of our Health and Safety Committee to list this item in our camp catalogue, which we are working on at the present time." However, an Assistant Director of the

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Supply Service Division of the Boy Scouts of America testified that the statement quoted from the catalogue did not authorize anyone to state that the item had been approved by the Boy Scouts or was endorsed by the Boy Scouts without explicit authorization for such reference in advertising. He further explained that respondents' advertising implied that the fly trap was an official item or product of the Boy Scouts of America which was not the case; that normally such official items would be made according to the Boy Scouts' specifications and would carry the seal of the Boy Scouts of America and that respondents' fly trap had never carried such seal. It was admitted by him that the product had been approved to the extent that it "was approved for use by our local Councils primarily in the conduct of their local Scout Camps." This witness insisted, however, that his organization had not given to the respondents herein authorization to make such reference in advertising and that his organization objected to such advertising as a matter of organization policy.

CONCLUSION

The use by respondents of the foregoing false, misleading and deceptive statements and representations mentioned in Paragraph III hereof has had and now has the tendency and capacity to mislead a substantial portion of the purchasing public and distributors into the erroneous and mistaken belief that such statements were and are true and to induce a substantial portion of the purchasing public and distributors because of such mistaken and erroneous belief to purchase the fly trap and baiting fluid sold by respondents and to unfairly divert substantial trade to respondents from their competitors.

With respect to the representations that the respondents' product was "approved for use for the Boy Scouts," it is believed that this representation is substantially true and, although the Boy Scouts of America may have objection to such representation, the fact that these products were advertised in the Boy Scout catalogue as products "Tested and endorsed by Health and Safety Service" would justify the respondents in advertising that the products had been approved for use for Boy Scouts unless the Boy Scouts of America had specifically notified the respondents that such catalogue listing did not authorize respondents to represent to the public that the products had been approved for use for Boy Scouts. Furthermore, the letter in the record written by the Purchasing Agent of the Boy Scouts of America to respondent Brown advising him that the trap was to be listed in the camp catalogue which was to be

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distributed to local retail dealers and local Council Camps without advising that such action on the part of the Boy Scouts of America did not entitle these respondents to advertise this fact, would also tend to justify the respondents in the statements made as alleged in the complaint. Accordingly, the allegations of the complaint with respect to this representation should be dismissed.

The acts and practices of all respondents, as hereinabove found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company; and Joseph Breck & Sons Corporation, a corporation, and its officers; and Luther A. Breck, Jr., James Shiels and Clarence Wells, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of the fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" and "Big Stinky Control Fluid," or by any other name or names, do forthwith cease and desist from representing, directly or by implication, that the use of their said products will:

1. Eliminate flies.
2. Prevent the possibility of disease caused by flies.
3. Prevent polio.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the allegation in Paragraph Six thereof.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The Commission having considered the initial decision of the hearing examiner herein; and

It appearing that the respondent Joseph Breck & Sons Corporation was erroneously designated "John Breck & Sons Corporation" in Paragraph II of the findings of fact; and

It further appearing that the words "and its officers" were erroneously omitted from the order to cease and desist:

It is ordered, That this case be, and it hereby is, placed on the Commission's own docket for review.

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It is further ordered, That the name "Joseph Breck & Sons Corporation" be, and it hereby is, substituted for the name "John Breck & Sons Corporation" in Paragraph II of the findings of fact contained in the initial decision.

It is further ordered, That the words "and its officers" be, and they hereby are, inserted immediately after the words "Joseph Breck & Sons Corporation, a corporation," in the order to cease and desist contained in said decision.

It is further ordered, That the initial decision as so modified shall, on the 18th day of February 1956, become the decision of the Commission.

It is further ordered, That the respondents herein shall, within sixty (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 the order to cease and desist.

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IN THE MATTER OF
DAVID CRYSTAL, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6412. Complaint, Sept. 13, 1955—Decision, Feb. 22, 1956

Consent order requiring a manufacturer in New York City to cease representing—through use in advertisements in periodicals and on attached labels the word "London", the word "Limited" or its abbreviation "Ltd.", a pictorial simulation of the British Royal Coat of Arms, and the phrase "By Appointment to H. M. the Late King George VI"—that the men's and women's clothing it manufactured was made in England.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. R. D. Young, Jr. for the Commission.

Mr. Arnold M. Grant, of New York City, 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 David Crystal, 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:

PARAGRAPH 1. Respondent, David Crystal, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 498 Seventh Avenue, New York, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the design, manufacture, sale and distribution of men's and women's wearing apparel.

In the course and conduct of its business, respondent ships its said wearing apparel from the State of New York to the purchasers thereof located in various other States and in the District of Columbia, and maintains, and has maintained, a course of trade in said wearing apparel, in commerce, between and among the various States of the United States and in the District of Columbia.

3. In the course and conduct of its business as aforesaid, and for the purpose of inducing the purchase of its said wearing apparel, in commerce, respondent made and is now making certain