

IN THE MATTER OF
C. G. OPTICAL COMPANY ET AL.

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

Docket 6260. Complaint, Nov. 5, 1954—Decision, Jan. 18, 1957

Order requiring a Chicago seller of eyeglasses who sent to those answering his advertisements devices designated "Self-Test Opto-meter" or "Home Eye Tester" for their home use in the measurement of the face and nose, to cease representing falsely in advertising and in directions accompanying the eye-testing kit, that the eyeglasses made pursuant to the results of tests of the eyes by recipients using his devices would correct the defects in vision of all persons.

Mr. Frederick McManus for the Commission.

Frank E. & Arthur Gettleman, of Chicago, Ill., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration upon the complaint, answer thereto admitting all the allegations set forth in the complaint, and proposed findings as to the facts and conclusions presented by counsel.

The complaint in this proceeding was issued November 5, 1954, charging the respondent C. G. Optical Company, a corporation, and Benjamin D. Ritholz, individually, with the use of unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act.

At a hearing in this proceeding held on March 24, 1955, the parties entered into a stipulation for a consent order, which stipulation was accepted by the hearing examiner, and an initial decision was issued by him dated April 7, 1955, which was adopted by the Commission on May 20, 1955. Subsequent thereto, on March 1, 1956, on motion of respondent, the Commission issued its order reopening its proceeding, vacating the initial decision of the hearing examiner and the order of the Commission adopting the initial decision, and remanding this case to the hearing examiner for further proceeding in regular course.

Thereafter at a hearing in this proceeding held July 23, 1956, at Chicago, Illinois, the respondent by their counsel withdrew their answers previously filed and made an oral answer upon the record admitting all the allegations set forth in the complaint. In addition, counsel for respondent offered in evidence certain circulars pur-

porting to show a change in respondents' representations which were being used and had been used by respondents for six months prior to the date of said hearing. Further proceeding before the hearing examiner was waived except the filing of proposed findings as to the facts and conclusions.

The hearing examiner has given consideration to the proposed findings as to the facts and conclusions submitted by both parties, and all findings of fact and conclusions of law proposed by the parties respectively not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered this matter and being now fully advised in the premises makes the following findings as to the facts and conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

1. Respondent, C. G. Optical Company, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its place of business located at 20 East Delaware Place, Chicago, Illinois. The business of respondent, C. G. Optical Company, while ostensibly that of a corporation, is actually the business of respondent Benjamin D. Rithholz which he carries on under the name of the corporation. This individual formulates the policy of said corporation and directs, controls and puts into effect all of its acts and practices including those hereinafter referred to. His address is the same as that of the corporate respondent.

2. Respondents are now and for several years last past have been engaged in the business of selling eyeglasses in interstate commerce, and as an inducement or instrumentality in the sale of said glasses make use of a certain device designated a "Self-Test Opto-meter" or "Home Eye Tester" and other devices for the measurement of the face and nose. Eyeglasses are a device, as "device" is defined in the Federal Trade Commission Act.

Respondents maintain and at all times mentioned herein have maintained a course of trade in said eyeglasses in connection with said "Self-Test Opto-meter" and other devices, and instructions for the use thereof in commerce, between and among the various states of the United States.

3. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements concerning said eyeglasses and of the devices referred to above, by United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including

Findings

53 F.T.C.

but not limited to advertisements inserted in newspapers and periodicals and by means of circulars and form letters, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said eyeglasses; respondents have also disseminated and caused the dissemination of advertisements concerning their said eyeglasses and the devices referred to above, including but not limited to the advertising media referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said eyeglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in the said advertisements are the following:

GLASSES BY MAIL!

(Pictorial representation
of a pair of glasses.)

SAVE UP TO \$15.00 30 Day Trial

Test your eyes at home for far or near with our **HOME EYE TESTER**.
Save money.

Send name, address, age, agents wanted

FREE! for 30 Day Trial Offer.

Free Eye Tester. Latest
Style Catalog and full
information

C. G. OPTICAL CO., DEPT. C-552
20 E. Delaware Place, Chicago 11, Ill.

Sensational Device

TESTS EYES

(Pictorial representation of a man using the Tester and a pair of eyeglasses.)

SAVE up to \$15.00

ON GLASSES

Big news to the Millions of Spectacle
Wearers and prospects. Means **Free-**
dom from outrageous prices. Sold on
Money-Back Guarantee.

MAKE BIG MONEY

Show it to friends and others. Let them use it Free and watch their amazement over this self testing system. Here is a great new opportunity in a tremendous new field of unlimited possibilities. Spare or full time. No experience needed. Write for complete sample kit.

C. G. OPTICAL CO., Dept. A-108
20 E. Delaware Place Chicago 11, Ill.

GET YOUR OWN GLASSES AS A BONUS!

—and Make Big Money Besides

Will you share your good fortune with your friends—
will you give them the benefit of our amazingly low prices? Your friends will be grateful to you. Surely you are interested in them and want to see them benefited.

Take our tester to their homes. Let them use it. Make out an order for them on one of the order blanks in the book and send it in. The first sheet in the book is for your own order—the others for friends' orders. Collect a deposit of \$2.00 and we will ship the glasses direct to your friends, who will pay the postman only the balance due plus postage. In other words, your friends pay you a deposit of \$2.00 and the balance upon delivery.

Keep the \$2.00 deposit you collect, as your pay. It is your profit. Take only a few orders and you have collected enough to pay for your own glasses so that they become yours, without cost. Take as many orders as you can. You make \$2.00 profit on each. This is a splendid way to earn extra money. Many who have dealt with us in the past have done it. You'll be surprised at the money you can make just by rendering your friends a great service which they need and will appreciate. Profits of \$35.00 a week for spare time or \$75.00 a week for full time are well within your reach. *Of course you need not take orders unless you want to, but may order only one pair of glasses for yourself at our low price.*

Rush your order at once, also as many orders as you can get from friends and others. More order books will be supplied on request. This offer applies to all orders for glasses selected from Style Sheet.

C. G. OPTICAL CO. 20 E. Delaware Pl., Chicago, Ill.

4. Respondents' "Test Your Own Eyes" advertising disseminated by them as aforesaid is being and has been answered by persons in various states of the United States. Said persons, in answering such advertising, have requested that respondents' kit of free samples, including the various devices above referred to, for use in testing of the eyes, be sent to them. Said kits have been ordered alike by individuals desiring to purchase eyeglasses for themselves and by other individuals desiring to sell glasses by acting as agents of respondents. Individuals receiving respondents' kits have attempted to use the devices contained therein to determine the eyeglasses necessary to correct defects in their vision, have written out their own prescriptions for respondents' eyeglasses upon the forms provided by respondents, have mailed the prescriptions to respondents and respondents have shipped to them the eyeglasses ordered pursuant to said prescriptions.

Sales agents of respondents, located in various states of the United States, receiving respondents' said kits have attempted to use the devices contained therein to determine the eyeglasses necessary to correct the defects in the vision of others and have written prescriptions or assisted in the writing of prescriptions for respondents' eyeglasses upon the forms provided by respondents, have mailed the prescriptions to respondents and respondents have shipped said glasses ordered pursuant to said prescriptions to various customers.

5. Through the use of the advertisements containing the state-

Conclusions

53 F.T.C.

ments hereinabove set forth and explanatory literature and directions which accompany the eye testing kit sent by respondents to those requesting it, respondents represented, directly and by implication, that the eyeglasses sold by them, made pursuant to the results of tests of the eyes using respondents' devices, will correct the defects in vision of all persons.

6. Said advertisements were and are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the eyeglasses sold by respondents, made pursuant to the results of tests of the eyes using respondents' devices, will not correct defects in vision of all persons. On the contrary, such glasses are capable of correcting defects in vision of only those persons approximately forty years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses.

7. The use by the respondents of the foregoing advertisements containing the false, misleading and deceptive statements and representations above referred to have had and now have the capacity and tendency to mislead and deceive substantial numbers of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the use of respondents' devices and the purchase of substantial quantities of respondents' eyeglasses, because of such erroneous and mistaken belief.

8. In connection with their admission answer, respondents offered in evidence certain circulars which were sent out with their "Self-Test Opto-meter" to parties answering respondents' advertisements. In the opinion of the hearing examiner the statements in the circulars do not overcome the initial false impression engendered by respondents' advertisements that respondents' "Self-Test Opto-meter" can be satisfactorily used by the public generally. Furthermore, these circulars were adopted during the past six months and there is no assurance that respondents will not revert to their original practice in the future.

CONCLUSIONS

The aforesaid acts and practices as herein found 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.

654

Opinion

ORDER

It is ordered, That respondents, C. G. Optical Company, a corporation, and its officers, and respondent Benjamin D. Ritholz, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of eyeglasses, do forthwith cease and desist from:

1. Disseminating, or causing to be disseminated, any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that the eyeglasses sold by respondents, made pursuant to the results of tests of the eyes using respondents' devices, will correct, or are capable of correcting, defects in vision of persons unless expressly limited to those persons approximately forty years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses.

2. Disseminating, or causing to be disseminated, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of their eyeglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains the representation prohibited in paragraph 1 hereof.

OPINION OF THE COMMISSION

By SECRET, Commissioner:

This matter is before the Commission on respondents' appeal from the hearing examiner's initial decision filed August 28, 1956. The complaint charges, and the hearing examiner found, that respondents, C. G. Optical Company, a corporation, and Benjamin D. Ritholz, individually, violated the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices in commerce. The hearing examiner found, as charged in the complaint, that respondents had represented in advertisements that eyeglasses sold by them, made pursuant to the results of tests of the eyes using respondents' devices, will correct the defects in vision of all persons, whereas such glasses are capable of correcting defects in the vision of only those persons approximately forty years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses. The initial decision orders respondents to cease and desist the acts and practices

Opinion

53 F.T.C.

found to be unlawful, and from this decision respondents have appealed.

As indicated by the hearing examiner, the following are typical of the advertisements disseminated by respondents:

Sensational Device

TESTS EYES

(Pictorial representation of a man using the Tester and a pair of eyeglasses.)

SAVE UP TO \$15.00

ON GLASSES

Big news to the Millions of Spectacle Wearers and prospects. Means Freedom from outrageous prices. Sold on Money-Back Guarantee.

MAKE BIG MONEY

Show it to friends and others. Let them use it Free and watch their amazement over this self testing system. Here is a great new opportunity in a tremendous new field of unlimited possibilities. Spare or full time. No experience needed. Write for complete sample kit.

C. G. OPTICAL CO., Dept. A-108

20 E. Delaware Place Chicago 11, Ill.

* * * * *

Profits of \$35.00 a week for spare time or \$75.00 a week for full time are well within your reach. *Of course you need not take orders unless you want to, but may order only one pair of glasses for yourself at our low price.*

Rush your order at once, also as many orders as you can get from friends and others. More order books will be supplied on request. This offer applies to all orders for glasses selected from Style Sheet.

C. G. OPTICAL CO. 20 E. Delaware Pl., Chicago, Ill.

When an inquiry is received in response to such advertisements, respondents send to the inquirer a sample kit and various devices for testing the eyes. Included is a device designated a "Self-Test Opto-meter" or "Home Eye Tester," purportedly to enable an individual to determine his own eyeglass prescription. The prescription is written out on a form provided and mailed to respondents, who in turn ship to the individual the eyeglasses ordered pursuant to the prescription.

During the course of this proceeding and six months prior to the hearing held July 23, 1956, respondents sent out certain circulars with their "Self-Test Opto-meter" to parties answering their advertisements, which circulars were admitted in evidence. These circulars contain statements relative to the limitations of respondents' products and were offered purportedly to show a change in representations.

In this appeal, respondents have taken a number of exceptions to the findings as well as an exception to the order in the initial decision. Initially, they take issue with the hearing examiner's finding

that respondents in their substituted answer on the record, admitted all the allegations set forth in the complaint. The following appears in the record relative to this answer:

Mr. GETTLEMAN: Yes. If the Trial Examiner pleases, the Respondents at this time wish to withdraw the answers previously filed and admit, if I may file an oral answer, admitting all the allegations set forth in the complaint.

* * * * *

Hearing Examiner KOLB: Now, as I understand, Mr. Gettleman, you are admitting all the material allegations of the complaint?

Mr. GETTLEMAN: That is right.

Hearing Examiner KOLB: And you are waiving all procedure, so far as putting in testimony?

Mr. GETTLEMAN: Correct.

Hearing Examiner KOLB: And so forth, and leaving it for the Hearing Examiner to proceed with his finding of fact or initial decision?

Mr. GETTLEMAN: That is right.

The record reveals no qualification of the substituted answer admitting the allegations of the complaint. Respondents do not appear to deny the plain showing of the record, but now assert that it was not their intention to admit all the allegations, such as the import of all their advertising or any of the conclusory charges of the complaint. They claim it was intended to admit only that respondents had disseminated the challenged advertising and that their eyeglasses would correct defects in vision only within the limits charged in the complaint.

It is the opinion of the Commission that respondents did admit on the record all the material allegations contained in the complaint. However, even if it was their intention not to admit certain of the conclusions or inferences contained therein, they have not been prejudiced, since it is within the province of the hearing examiner and the Commission to make the appropriate conclusions on the basis of the whole record. Consequently, although the substituted answer on the record disposes of most of the questions in this appeal, the findings excepted to having been admitted, the Commission will, nevertheless, render its own judgment on the issues raised meriting consideration.

Respondents have taken exception to certain of the examiner's findings as to the likelihood that the contested advertisements induce the purchase of respondents' eyeglasses and as to the capacity and tendency of such advertisements to mislead the public into purchasing respondents' eyeglasses, asserting that purchase is impossible prior to the receipt of further information and the eye testing device. Whether or not purchase is possible from the initial advertisements alone is immaterial. While further steps may have to be taken by

the reader of an initial advertisement to obtain possession of a pair of eyeglasses, this does not alter the effects of the representations made therein. The hearing examiner's findings in this connection are proper.

Respondents have also taken exception to the finding in the initial decision to the effect that through the use of the advertisements set forth in the complaint and the literature and directions which accompany the eye testing kit, respondents represented, directly and by implication, that their eyeglasses will correct the defects in vision of all persons. Respondents argue that they never said their eyeglasses would correct all defective vision and that such cannot properly be inferred from the contested advertisements. The Commission believes that the hearing examiner found correctly in this respect. It is perfectly clear that respondents' eyeglasses, made pursuant to the results of tests of the eyes using respondents' devices, will not correct defects in vision of certain groups of persons or the defects in vision of all persons. Rather, respondents' eyeglasses are what might be described as simple reading glasses, intended only for magnification or minification. They are not intended for children, for example, or for those who have astigmatism or diseases of the eye. Respondents' products are otherwise limited in usefulness to those persons of approximately forty years of age and older. There is no doubt that respondents' advertisements offer devices for the correction of visual defects. To so advertise products of this type without mentioning the material limitations in use unquestionably is to represent that such products, made in connection with a self-testing device, are appropriate and satisfactory for the general public. In short, the advertisements embody a broad and sweeping claim which is not justified and constitutes a false representation.

In connection with the circulars of somewhat recent use and containing qualifying statements, respondents take exception to the hearing examiner's finding that these did not overcome the initial impression gained by the reader from preliminary advertisements, contending that such a finding is arbitrary. They assert that the circulars, which inquirers receive before they part with their money, set forth in clear and unambiguous language the appropriate limitations, and that there is no conflict as between the statement in the circulars and the original representations, merely an amplification. The examiner's finding is not in error. The Federal Trade Commission Act is violated if the first contact is secured by deception, even though the true facts are made known to the purchaser before he enters into the contract to purchase. *Carter Products, Inc. v. Federal Trade Commission*, 186 F. 2d 821, 824 (C.A. 7, 1951).

A further exception is taken to the finding of the hearing examiner to the effect that while circulars, spelling out certain limitations, may now be in use, there is no assurance that respondents will not revert to their original practice in the future. In view of our opinion as to the illegality of the original representations, which continue in use, it is unnecessary to consider this question. The practices alleged in the complaint have not been discontinued.

The exception that respondents have taken to the order in the initial decision is made on the grounds that it exceeds the Commission's statutory authority; that it is not a reasonable, allowable choice of a remedy, and that it should not issue in this case to cover a practice now discontinued.

Under the first ground, it is argued that the Commission has no authority to couch its orders in terms that will only effectuate the "informative function" of advertising, citing *Alberty v. Federal Trade Commission*, 182 F. 2d 36. The *Alberty* case is clearly distinguishable. There, the order, before modification, required the advertiser of a drug admittedly beneficial in one ailment to state affirmatively that there are other ailments not reached by the drug. No such affirmative requirement is contained in the order in this case. It requires only that respondents limit their representations to the uses which they can truthfully claim for their products. In other words, it prohibits false advertisements, and, as such, is clearly an order which the Commission has statutory authority to issue.

In their second ground, respondents argue that the order was not a reasonable, allowable choice of remedy and rely, in part, on *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608. The *Siegel* case is distinguishable factually from the instant matter. There, the question related to whether the Commission abused its discretion in concluding that no change short of excision of a trade name would give adequate protection. No such question arises herein since no trade name or brand name is involved. Moreover, in *Siegel* the Supreme Court stated that the Commission has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. In this case the remedy not only has a reasonable relation, but, in fact, precisely prohibits only those representations found to be false and nothing more. It is clearly a reasonable and allowable choice of remedy. If the requirements of the order applied only to some of respondents' advertisements, as urged, it would largely fail to prevent the practices found to be unlawful.

The final ground for exception to the order is that an order should not issue in this matter to cover a discontinued practice. The prac-

Order

53 F.T.C.

tice, however, as we have stated above, has not been discontinued. The circulars subsequently adopted by the respondents do not overcome the initial false representations and these initial representations are still in use.

Insofar as other exceptions of respondents have not been considered herein, they are denied. Respondents' appeal is likewise denied and the findings, conclusions, and order contained in the initial decision are adopted as those of the Commission.

Commissioner Kern did not participate in the decision herein.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents, and briefs of counsel in support thereof and in opposition thereto, no oral argument having been requested; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions and order contained in the initial decision:

It is ordered, That 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 contained in the initial decision.

Commissioner Kern not participating.

Decision

IN THE MATTER OF
STEPHEN F. WHITMAN & SON, INC.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a)
OF THE CLAYTON ACT*Docket 6560. Complaint, June 1, 1956—Decision, Jan. 18, 1957*

Consent order requiring a Philadelphia manufacturer of assorted chocolates and confections, including its prestige "Whitman's Sampler" package, with nation-wide distribution, to cease discriminating in price in violation of Sec. 2(a) of the Robinson-Patman Act through use of an annual cumulative quantity discount system under which individual outlets of chain retail stores were allowed discounts based on the aggregate annual purchases of the entire chain, thus qualifying them for the maximum 10% discount, while many independents, selling a greater quantity than the individual outlets with which they competed got no discount at all or at best no more than 2, 3 or 4 per cent.

Cecil G. Miles, Esq., for the Commission.

Norris, Lex, Hart & Eldredge, by *John Ross, Esq.*, of Philadelphia, Pa., and *Howrey & Simon*, by *Harold F. Baker, Esq.*, of Washington, D.C., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on June 1, 1956, charging it with having violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Respondent appeared by counsel and entered into an agreement, dated November 20, 1956, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondent, pursuant to the aforesaid agreement, has admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondent waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the