

Decision

IN THE MATTER OF
ARROW METAL PRODUCTS CORPORATION ET AL.

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

Docket 6471. Complaint, Nov. 21, 1955—Decision, Feb. 20, 1957

Order requiring two manufacturers, with places of business at Haskell and Wayne, N.J., respectively, to cease using the term "Porcenamel" to describe the organic plastic resin finish or coating of their metal awnings, component parts for metal awnings, or enamel-coated metal strips and pieces.

Terral A. Jordan, Esq., for the Commission.

Gurtman & Schomer, by *William N. Gurtman*, Esq., of Passaic, N.J., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On November 21, 1955, the Federal Trade Commission issued its complaint against Arrow Metal Products Corporation, Awnair Corporation of America, and Alex Levine, James V. Cosman and Wm. N. Gurtman, individually, and as officers of both corporations (all hereinafter collectively referred to as respondents), charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance that respondents, through the use of the name "Porcenamel" to describe the finish of their products, falsely represented that such products were finished with porcelain enamel. Respondents appeared by counsel and filed a joint answer admitting the corporate, commerce and competition allegations of the complaint, but denying the alleged violation of the Act.

Pursuant to notice, hearings were thereafter held on January 25, January 27, and March 23 in New York City and Washington, D.C., before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding. Prior to the initial hearing, counsel supporting the complaint filed a motion requesting that official notice be taken concerning the meaning and usage of the words "porcelain enamel." In support thereof, counsel supporting

the complaint cited the definitions contained in *Colliers*, *Britannica* and *The New International Encyclopedias*,¹ plus the finding of the Commission in the *Davidson* case,² all of which define porcelain enamel substantially as hereinafter officially noticed and found. In addition, the Commission at that time, some 14 years ago, found that porcelain enamel finishes were "widely accepted and understood by members of the consuming public."

Argument pro and con with respect to said motion was heard from counsel for both parties at the opening of the initial hearing. Thereafter official notice was taken that porcelain enamel is a term of general and common usage, accepted by the public and members of industry, and means an "inorganic vitreous or glass material fused to the surface of a metal."

All parties were represented by counsel, participated in the hearings, and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. All parties waived oral argument and, pursuant to leave granted, thereafter filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.³

Upon the entire record in the case and from his observations of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, respondents admitted, and it is found that Arrow Metal Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Third Avenue, Haskell, New Jersey. Awnair Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at Black Oak Ridge Road, Wayne, New Jersey. Respondents Alex Levine, James V.

¹*Colliers Encyclopedia*, 1st Ed., Vol. 16, p. 211; *Encyclopedia Britannica*, 14 Ed., Vol. 18, p. 239; and *The New International Encyclopedia*, 2d Ed., Vol. 7, p. 714.

²*Davidson Enamel Co.*, 34 F.T.C. 1210 (1942).

³5 U.S.C. §1007(b).

Cosman and Wm. N. Gurtman are, respectively, President, Treasurer, and Secretary of said Arrow Metal Products Corporation and President, Vice-President and Treasurer, and Secretary of said Awnair Corporation.

The aforesaid individual respondents, acting in cooperation with each other, formulate, direct and control all of the policies, acts and practices of both corporate respondents.⁴ The principal address of each individual respondent is the same as that of Arrow Metal Products Corporation. Arrow Metal Products Corporation also has established, has done and now does business under the trade style of Sunmaster Aluminum Awning Company in addition to the business transacted under its corporate name.

II. Interstate Commerce and Competition

The complaint alleged, respondents admitted, and it is found that they are now and have been for more than one year last past engaged in the manufacture, sale and distribution of metal awnings, component parts for metal awnings, or enamel coated metal strips and pieces used in the fabrication and manufacture of metal awnings, in commerce, among and between the various states of the United States and the District of Columbia. Arrow Metal Products Corporation and Awnair Corporation ship such products from their respective places of business in New Jersey to their respective customers located in practically every state of the United States, as well as various South American countries, South Africa, New Zealand and other foreign countries.

Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said products, in commerce, among and between the various states of the United States and the District of Columbia. Respondents sell and distribute, and at all times mentioned herein have sold and distributed, their aforesaid products to retailers, dealers, and manufacturers for resale to the purchasing public. In connection therewith, respondents supply and have supplied a variety of circulars and other advertising material to said retailers, dealers and manufacturers, both for distribution to the purchasing public in connection with the sale of said products and for use by such retailers, dealers and manufacturers in selling

⁴Although this was admitted by respondents' answer, they now urge that the individual respondents should not be included as parties because no proof was adduced at the hearings, in spite of such admission, to show the extent of their control over the corporations. This contention is without merit and any order found should run against the individual respondents as well as the corporations, for the reasons stated by the courts in: *F.T.C. v. Standard Education Society*, 302 U.S. 112 (1937); and *Standard Distributors v. F.T.C.*, 211 F. 2d 7 (C.A. 2, 1954).

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such products to the public. In the course and conduct of their business, respondents are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale and distribution of such products.

III. The Unlawful Practices

A. *The Issues Framed*

The basic and primary issue in this case is whether respondents, by the use of the term "Porcenamel," falsely represented their products to be finished with porcelain enamel.

B. *The False Representation*

It is undisputed that respondents use the term "Porcenamel" to describe the finish applied to their product, aluminum strips, and furnish to their customer dealers, retailers and manufacturers advertising material so describing said finish, both for distribution to the public and use by such customers in selling respondents' product.

It is further undisputed that Porcenamel is an organic plastic resin and is not porcelain enamel. As previously found, porcelain enamel is a vitreous or glass material fused to the surface of metal. More specifically, it is a mixture of finely crushed glass, an inorganic material known as frit, applied to metal and then fused thereto at temperatures as high as 1700°, which results in a layer of glass, of extreme hardness and many other characteristics not applicable to paint, inseparably bonded to the metal. Such temperatures would destroy respondents' finish and other paints and enamels. The record establishes that respondents' plastic organic resin is a baked-on enamel, and the highest temperature used is 500°. Organic compounds are naturally destroyed by the temperatures needed to produce porcelain enamel, and in addition lack many of its characteristics, at least in the same degree.

Respondents' advertising, numerous examples of which were received in evidence as exhibits, describes Porcenamel as having many of the properties and characteristics more, and in some instances exclusively, applicable to porcelain enamel. No finding of violation is made with respect to such representations, inasmuch as the complaint contained no allegation concerning them and hence they were not in issue. Nevertheless they are important as background or explanatory evidence, demonstrating as they do what respondents apparently meant and represented by use of the term Porcenamel.

Some of this advertising was furnished to respondents' customers for distribution to the public, and some of it was furnished for

oral explanations or demonstrations to the public concerning the properties of Porcenamel. Without reviewing all of it in detail, in general it referred to Porcenamel as a finish bonded or fused inseparably to metal, of incomparable adhering ability, the toughest by test, smooth as glass, hard, extremely resistant to weather, atmosphere and abrasion, and the most durable science can produce. Much if not all of the foregoing applies to porcelain enamel, either to a greater degree than to Porcenamel or in some instances exclusively. Porcelain enamel is much harder, more inseparably bonded to the metal, fused rather than baked on, in many respects a much tougher finish, not only as smooth as glass but literally a layer of glass, far more resistant to abrasion, more durable and resistant to corrosion, weather and atmosphere, and possesses permanent color.⁵ It is apparent that respondents' descriptions of the alleged properties of Porcenamel enhance and enlarge their original representation that it is porcelain enamel.

In addition to the finding by the Commission as long ago as 1942 that the public widely accepted and understood porcelain enamel finishes, the record also establishes the wide dissemination of the characteristics and properties of porcelain enamel. All of the leading manufacturers of refrigerators, ranges, washing machines, freezers, sinks, bathtubs and numerous other common household products emphasize the use of porcelain enamel and its unique characteristics, as evidenced by the numerous advertisements received in evidence. In addition, the Porcelain Enamel Institute, composed of many of the leading manufacturers, such as Dupont, General Motors and U. S. Steel, engages in extensive advertising and educational campaigns designed to acquaint the public and the industry with the characteristics and desirability of porcelain enamel. The Institute also issues special tags to manufacturers to identify products finished with genuine porcelain enamel, over one and a half million of which were sold in 1955 alone, which outline specifically the outstanding characteristics of porcelain enamel.

It seems abundantly clear, and hence is found, that much if not most of the public is familiar with and aware of the desirable characteristics of porcelain enamel. It is probably true, as contended by respondents, that most of the public does not know the scientific

⁵In addition to the testimony and exhibits in the record establishing these characteristics of porcelain enamel, counsel supporting the complaint suggested an experiment directly comparing the hardness and resistance to abrasion of the two products by physically scratching the samples thereof, received in evidence as exhibits, with a sharp metal point, such as a straightened paper clip. Such a test in fact revealed that the Porcenamel finish scratched off, revealing the underlying metal, while a much harder scratching of the porcelain enamel chip made no visible impression.

or chemical composition of porcelain enamel, but such fact is irrelevant. Knowing its unique and desirable properties, they are inevitably misled and injured by representations that respondents' finish is porcelain enamel. Even if it be assumed *arguendo* that the public is unaware of the characteristics of porcelain enamel, it is well settled that they are entitled to get what they want, even though their choice may be dictated by caprice, fashion or ignorance, and not to be misled into purchasing something else.⁶

C. Respondents' Contentions and Defense

While respondents admit the use of the term Porcenamel to describe the finish of their products, and admit that it is not porcelain enamel, their principal contentions are: (1) they have every right to use the term Porcenamel; (2) it does not constitute a representation that their finish is porcelain enamel; (3) there is no proof in the record of substantial competition or diversion of trade because nobody else manufactures porcelain enamel awnings; and (4) it would be improper for the Commission to prevent the use of the name Porcenamel because it did not prohibit the use of similar terms in the *Freeman* and *Davidson* cases.⁷

(1) Respondents contend Porcenamel is a trade name they invented to describe the finish of their product, derived from the initials p, o, r and c from the first letters of the words "plastic," "organic," "resin," and "compound," combined with the word enamel. This is an ingenious but ineffective argument. If in fact the term represents that the finish is porcelain enamel its use is false and deceptive, and a derivation from other sources neither explained nor revealed in its usage cannot alter such a result. It would indeed be a simple device to evade the prohibitions of the Act by coining words allegedly from other sources which in fact inevitably misrepresented to the public the nature of the product. The extent of such misrepresentations would be limited only by the ingenuity of their creators.

(2) Respondents further argue that the word Porcenamel does not represent to anyone porcelain enamel. Counsel supporting the complaint argues that Porcenamel, either orally or visually, clearly amounts to a representation that the finish is porcelain enamel. Patently the word is similar to porcelain enamel, and either written or pronounced, might inevitably confuse some into believing porce-

⁶*F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933); *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

⁷*Freeman and Freeman*, 40 F.T.C. 512 (1945); *Davidson Enamel Co.*, 34 F.T.C. 1210 (1942).

lain enamel was meant. As the courts have frequently held, the Act was designed to protect the innocent and naive as well as the informed and sophisticated.⁸ In addition, the record herein establishes that respondents' advertising further enhanced the representation of porcelain enamel by describing characteristics more applicable to it. Even the more-informed, aware of most of the properties of porcelain enamel, might well conclude, in view of such descriptions of Porcenamel, that it was a trade name used by respondents to designate their own porcelain enamel.

While it is well established that the Commission need not prove, but properly may infer the deception of the public by such misrepresentations,⁹ in this case it is unnecessary to infer that the term Porcenamel would mislead some of the public. An impartial public survey, conducted by a reliable organization and received into evidence, revealed that a substantial proportion of those interviewed believed either that Porcenamel was the same as porcelain enamel or that it would have similar characteristics and properties. This same survey also revealed that a majority of those interviewed were, in varying degrees, familiar with the outstanding characteristics of porcelain enamel, as previously found herein.

It is true, as respondents point out, that their advertising also referred to a few characteristics of Porcenamel not applicable to porcelain enamel, such as the fact that Porcenamel was a "thermo-set plastic finish," could be shaped, bent or formed, and was resilient to blows by a hammer, which would fracture the hard glass finish of porcelain enamel. However, in view of the word Porcenamel itself, together with the many other represented characteristics either exclusively or more descriptive of porcelain enamel, it would take an expert to realize that porcelain enamel was not meant. Even if respondents' truthful representations concerning the properties of Porcenamel were not more than offset by its representations more applicable to porcelain enamel, the effect of the name Porcenamel, standing alone, would still be deceptive. As the Commission recently said in an analogous case:¹⁰ "The use of the word 'chamois' is a representation that the product is that which has traditionally been sold under the name 'chamois' and which has been so accepted by the public after years of buying experience. Although the ordinary buyer does not know how chamois is made, he is entitled to believe

⁸*Standard Education Society v. F.T.C.*, 302 U.S. 112 (1937).

⁹*Brown Fence & Wire Co. v. F.T.C.*, 64 F. 2d 934 (C.A. 6, 1933); *Bear Mill Mfg. Co. v. F.T.C.*, 98 F. 2d 67 (C.A. 2, 1938); *Progress Tailoring Co. v. F.T.C.*, 153 F. 2d 103 (C.A. 7, 1946).

¹⁰*Atlantic Sponge and Chamois Corp.*, Docket No. 6162 (1955).

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that the particular product sold under that name is in fact 'chamois' as that term is understood by manufacturers and distributors. If such be the implication of the label 'chamois,' it is not offset by the qualifying words suggested. [For use in the order.] After reading both, the ordinary consumer would still not know the truth about the product without resorting to specialized information which he does not possess. In other words, the capacity and tendency to deceive which the hearing examiner has found to exist in the wrongful use of the word 'chamois' would still be there."

Respondents also argue that to prohibit their using the term Porcelainamel would be in effect creating a monopoly among those who manufacture products finished in porcelain enamel, which words are of common or public heritage and may be used by all. The absurdity of this argument is evident. It amounts to saying that respondents must be permitted falsely to represent their finish, because not to do so would create a monopoly among those who truthfully use the term porcelain enamel. The latter is exactly what Congress intended and the Act provides. If respondents seriously urge such a result, their argument more properly should be directed to Congress. Certainly the words "solid" and "gold" are part of our common heritage. If respondents are correct, no one could be prevented from using the term "solid gold" to represent his brass or lead products as, to quote respondents, a "valid exercise of a legal business privilege."

(3) Respondents' contention concerning a lack of proof of substantial competition or diversion of trade is based upon an erroneous interpretation of the law applicable and is without merit. It is of course well settled that the Commission properly may infer that false representations mislead the public into purchase, thereby unfairly diverting trade from competitors and causing substantial injury to competition.¹¹ Respondents' answer admitted that they were engaged in substantial competition with other firms engaged in the sale of the same products, and accordingly no proof thereof was offered. Now, because the record reveals no company or person engaged in the regular manufacture of aluminum strips or awnings *coated with porcelain enamel*, respondents urge a finding of no substantial competition. Respondents misconceive the competition referred to in the pleadings. It consists of all those engaged in the manufacture of metal awnings, parts, and metal strips who compete with respondents. Respondents apparently believe that because no one actually manufactures *porcelain enamel awnings*, their representation hurts no one since such a product is not available in any event. The misconception of the injury to competition is apparent.

¹¹F.T.C. v. *Raladam Co.*, 316 U.S. 149 (1942).

Presumably competing manufacturers do not falsely represent the character of their finishes. Obviously all such competitors are injured by respondents' representations which divert trade to it. The admission in the answer establishes substantial competition in the industry, as distinguished from substantial competition by porcelain enamel awning manufacturers.

(4) Respondents' contention that the Commission should not prohibit them from using the term Porcenamel because it did not prohibit somewhat similar terms in the *Freeman* and *Davidson* cases¹² is without merit and overlooks the fact that the Commission did, in both of those cases, *prohibit the false representations found*. In the *Davidson* case, where the Commission adopted the definition of porcelain enamel previously alluded to, the respondent was representing its product to be "porcelain" and "tile," when in fact it was metal finished with porcelain enamel. It clearly was not porcelain tile and hence the representation was found to be false and prohibited. The Commission did not prohibit the use of the words "porcelain enamel," because it found them to mean what they have been found to mean herein, and because they were not alleged to be, and in fact were not, a false representation.

In the *Freeman* case, respondents manufactured a product called "Porcelainize," which was an automobile cleaner or polish represented to produce a porcelain finish, or one comparable to it. The Commission found that the product did not and could not produce such a finish, but was a polish, and that the representations that it would produce a structurally-changed finish comparable to porcelain were false. The order to cease and desist prohibited, *et al.*, directly or indirectly representing that the product would produce a hard, smooth finish comparable to that produced in the annealing of porcelain. The Commission made no finding that the name "Porcelainize" itself constituted a representation concerning porcelain, although it was so alleged in the complaint, and hence it was not included in the order to cease and desist. Just why no finding was made is not revealed.

On the other hand, no finding was made that it did not constitute such a representation, nor was there any conclusion or order dismissing that allegation. The failure to dispose one way or the other of the allegation concerning the term "Porcelainize" leaves the case as no precedent for either conclusion. In any event, the Commission did prohibit the false representations found. In the instant case, the representation is clearly false and is limited to the use of the

¹²Footnote 7, *supra*.

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term Porcenamel only. Whatever may have been the Commission's reasons for its action in the *Freeman* case, certainly it cannot be argued that it now prevents the present Commission from prohibiting representations now found to be false.

D. Concluding Findings

The undisputed evidence in the entire record establishes, and hence it is found, that respondents, by the use in commerce of the term Porcenamel to describe the finish of their products, and by the use in commerce of such term to describe the finish of their products in the advertising material furnished to their customer retailers, dealers and manufacturers both for distribution to the public and for use by such customers in the sale of respondents' product, falsely and deceptively represented that their products were finished with porcelain enamel when in truth and in fact they were not.

It is further concluded and found that respondents, by the practices above found, have placed in the hands of retailers, dealers and manufacturers a means and instrumentality whereby they may deceive and mislead the purchasing public as to the composition and characteristics of the finish of respondents' products.

E. The Effect of the Unlawful Practices

The acts and practices of respondents, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the quality, composition and characteristics of the finish of respondents' products and thereby induce the purchase of substantial quantities thereof. As a result, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors, and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act.

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

3. As a result of the above-found acts and practices of respondents, substantial injury has been done to competition in commerce.

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4. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondents.

ORDER

It is ordered, That respondents Arrow Metal Products Corporation, a corporation, its officers, Awnair Corporation of America, a corporation, its officers, and Alex Levine, James V. Cosman and Wm. N. Gurtman, individually and as officers of said corporations, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of metal awnings, component parts for metal awnings, or enamel coated metal strips and pieces in commerce, as "commerce" is defined in the Act, do forthwith cease and desist from:

Using the term "Porcenamel," or any other word, phrase or term of similar import or meaning implying porcelain enamel, to describe the finish or coating of the aforesaid products or of any other products which are not in fact finished or coated with porcelain enamel.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The respondents in this proceeding are two corporations and three individuals who formulate and control those companies' policies and practices and serve as their officers. The corporate respondents have been engaged in the manufacture and the sale and distribution in commerce of metal awnings and component strips and parts therefor. In advertising furnished to dealers and other resellers for their information and guidance and for distribution to the public, the respondents have featured extensively the coined expression "Porcenamel" as a designation for and descriptive of the finish with which their products are coated. The initial decision, filed by the hearing examiner after hearings for the reception of testimony were concluded in this proceeding, held that the charges of the complaint were sustained by the greater weight of the evidence and that through their use of the term "Porcenamel" the respondents falsely have represented, directly and by implication, that their awning products are finished or coated with porcelain enamel. Holding that the respondents' practices in that regard constituted unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, the order contained in the hearing examiner's initial decision directed the respondents' cessation therefrom, and the respondents have appealed.

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The respondents have adopted various trade names to identify their various lines of awnings and parts for promoting their distribution. The term "Porcenamel" has not been used, however, to designate a particular model or line of awnings, but instead identifies the finish with which the respondents' products are coated. Other facts not in dispute are that "Porcenamel" is an organic plastic resin and is not porcelain enamel. "Porcenamel" finish is a baked-on enamel applied at temperatures up to 500°. Porcelain enamel, however, is a vitreous or glass material which is fused and inseparably bonded to metal. The higher temperatures used for application of this inorganic material to metals range from 870° up to 1700° and are such that organic compounds would be destroyed. As the hearing examiner, in effect, found, porcelain enamel possesses characteristics of its own, not shared by the products which respondents designate as "Porcenamel," in that it combines a variety of physical properties, including color stability and high resistance to corrosion and abrasion.

In urging that the hearing examiner erred in concluding that the expression "Porcenamel" has the capacity and tendency to induce the mistaken belief among respondents' purchasers that their awnings and parts are finished with porcelain enamel, appellants assert that the term "Porcenamel" and the words "porcelain enamel" are not identical and that the former's proper pronunciation would not confuse the purchasing public. Their marked likeness and similarity, phonetically and visually, is patent however, and the arguments advanced by the respondents in support of contrary conclusions are unpersuasive. Neither is it material that some of the respondents' promotional matter has stressed that their finish is not marred by hammer blows. While blows of sufficient force will shatter porcelain enamel finishes, sales statements commenting on the resiliency of respondents' coating would not serve to distinguish them from porcelain enamel products, except perhaps for experts in the field of industrial product finishes. In no event would the statements in that vein, as heretofore used by the respondents, nullify or refute impressions that "Porcenamel" constitutes an improved or less brittle porcelain enamel.

Appellants further state that no metal awnings covered with porcelain enamel finishes are being produced and contend that this circumstance necessarily precludes deception among the purchasers of respondents' awnings. While they do not appear to be carried by manufacturers as stock items, the record suggests that use of porcelain enamel for metal awnings may have progressed beyond

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experimental stages. The situation presented in that respect is not controlling, however, inasmuch as porcelain enamel products have been used extensively for many years for kindred products, including architectural forms. For example, the record discloses that the exterior of a prefabricated house which was marketed widely for a time following the last war was composed almost entirely of metal finished with porcelain enamel.

Supporting the hearing examiner's conclusions that capacity and tendency to deceive has inhered in the respondents' use of the term "Porcenamel" is the fact that products finished with porcelain enamel have been accepted widely and extensively used by the purchasing public for many years. These products range from common household appliances such as refrigerators, washing machines, sinks, stoves, freezers and bathtubs to architectural forms and building materials. Furthermore, extensive advertising and educational campaigns have been conducted in the interest of acquainting the public and industry with the characteristics and attributes of these finishes. Many manufacturers utilize special tags or labels identifying their finishes as genuine porcelain enamel. Over one and one-half million labels were supplied to manufacturers in 1955 for use in that connection by the Porcelain Enamel Institute, Inc., a trade association composed of producers of such enamel products. The merchandising program of the respondent Arrow Metal Products Corporation likewise contains provision for the furnishing of seals imprinted with the term "Porcenamel" together with customer names. We think that the evidence clearly establishes that appellants' use of the term "Porcenamel" to describe their finishes inevitably serves to engender impressions and beliefs that their finishes are porcelain enamel or that "Porcenamel" is a trade name used by the respondents to designate their own porcelain enamel.

Respondents also contend that evidence relating to a survey conducted among members of the public was erroneously received into the record and improperly considered by the hearing examiner. The grounds of objection interposed here and below were that the documentary results of the poll constituted hearsay evidence and must be disregarded. The receipt of hearsay evidence is no cause for reversal of an administrative order though the validity of the order can never rest upon conjecture or chance. *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 690-1 (C.A. 9, 1949), cert. denied, 338 U.S. 860 (1949). The witness whose testimony related to the survey had prepared the questions used, selected the interviewees at random, conducted the interviews and tabulated and analyzed the survey results. Her

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inquiry was undertaken at the request of the Porcelain Enamel Institute, Inc. The witness was a public relations consultant and her qualifications included prior experience in the planning of public opinion polls. Objections to the reception of the survey evidence, based solely on contentions that it violated the hearsay rule, were properly overruled. *In the Matter of Crown Zellerbach Corporation*, Docket No. 6180 (Decision on Interlocutory Appeal, May 16, 1955). The Commission, of course, is not required to sample public opinion to determine what meaning is conveyed to the public by a vendor's advertisements. *Zenith Radio Corporation v. Federal Trade Commission*, 143 F.2d 29, 31 (C.A. 7, 1944). Furthermore, conclusions as to the deceptive potentialities of respondents' use of the expression "Porcename" are amply supported here by other evidence previously discussed.

Appellants also except to the initial decision's conclusions respecting competitive injury resulting from their use of the term "Porcename." Contrary to its plain import and meaning, "Porcename" is not a porcelain enamel. A showing of actual instances of deception resulting from the respondents' practices is not required; it is sufficient instead to show that the representations have the tendency and capacity to deceive. *Gulf Oil Corporation v. Federal Trade Commission*, 150 F.2d 106 (C.A. 5, 1945). Having established that the representation is false, the Commission may infer that trade will be diverted from respondents' competitors, *Deer v. Federal Trade Commission*, 152 F.2d 65 (C.A. 2, 1945). It also is immaterial that selection of the letters p, o, r and c together with the suffix "enamel" for use in the expression "Porcename" may have been inspired by the fact that respondents' finish is a plastic organic resin coating enamel. A deliberate effort to deceive is not a prerequisite to a showing of use of unfair methods of competition within the prohibitions of the statute, *Gimbel Bros., Inc. v. Federal Trade Commission*, 116 F.2d 578 (C.A. 2, 1941). Appellants' objections and exceptions on these aspects are without merit.

Respondents also request that the order contained in the initial decision be modified to permit their future use of the term "Porcename" with appropriate qualifying language distinguishing their coating from porcelain enamel finishes. "Porcename" is not porcelain enamel and, being a generically different product, has different characteristics as a finish. Hence, a requirement that qualifying or disclaimer language, in one or more such respects, be set forth in advertising and on labels where that term appears, obviously would be attended by sales representations of contradictory and confusing

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import. In our view, therefore, the hearing examiner correctly concluded that an absolute prohibition of the expression "Porcenamel" was required in the public interest.

Also considered have been the additional exceptions interposed under the appeal. Being generally related in their vein to those discussed above, these likewise are without merit. The respondents' appeal accordingly is denied and the initial decision is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the hearing examiner, and upon the briefs filed in support of and in opposition to the appeal; 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 the respondents 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 said initial decision.

IN THE MATTER OF
ARNHEIMER, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket 6572. Complaint, June 19, 1956—Decision, Feb. 21, 1957

Order dismissing complaint charging a New York City furrier with violating the Fur Products Labeling Act by setting out on invoices of fur products fictitious prices or values and by failing to comply in other respects with invoicing requirements.

Mr. S. F. House for the Commission.

Mr. Norman Lazarus, of New York City, for respondents.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, and the Fur Products Labeling Act, the Federal Trade Commission on June 19, 1956, issued and subsequently served its complaint in this proceeding upon the above-named respondents, charging them with having violated the Fur Products Labeling Act and the rules and regulations issued thereunder, and the Federal Trade Commission Act. Thereafter counsel supporting the complaint moved for a continuance of the proceedings for the reason that the individual respondent is now deceased and that counsel for respondents would file an affidavit that the corporate respondent will cease doing business. On August 22, 1956, the undersigned granted said motion and issued his order cancelling the then scheduled hearing.

By motion filed December 28, 1956, counsel supporting the complaint moved for a dismissal of the complaint by reason of the death of the individual respondent and the cessation of business by the corporate respondent. In verification of these facts counsel submitted with said motion, and as a part thereof, a photostatic copy of the death certificate of the individual respondent and affidavits of the widow of said respondent attesting to the facts that at the time of his death the individual respondent was the sole active officer of the corporate respondent, that said corporate respondent has ceased doing business and that the widow of said individual respondent has no intention of resuming business under the name of the corporate respondent.