

IN THE MATTER OF
WILLIAM ADAMS, INC., ET AL.

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

Docket 6575. Complaint, June 22, 1956—Decision, June 20, 1957

Order requiring a company in New York City to cease selling cutlery assembled from English or domestic blades and tines and Japanese handles without disclosing the foreign origin of the handles, and representing on containers of English cutlery combined with Japanese handles that such products were of English origin.

Mr. Morton Nesmith supporting the Complaint.

Netter & Netter, by *Mr. Richard Netter* of New York City and *Mr. Nathan L. Silberberg* of Washington, D. C., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

STATEMENT OF THE CASE

On June 22, 1956 Commission complaint was issued charging respondents with unfair and deceptive acts and practices and unfair methods of competition in commerce in connection with their business of selling cutlery. Answer was filed which admitted the jurisdictional allegations of the complaint and certain of the factual allegations. The answer also denied other factual allegations, the conclusions embodied in the complaint and set up certain affirmative defenses. The charges, denials, admissions and affirmative defenses will be discussed under the Findings of Fact. Hearings were held in New York and Philadelphia for the taking of evidence in support of the complaint after which respondents filed motion to dismiss, supported by memorandum brief. Answer was filed to the motion, supported by brief. After consideration of the motion and brief, answer to the motion, brief in support of the answer and the record, the motion was denied without prejudice to the right to renew it when the taking of evidence was completed. A hearing was then held in New York for the taking of evidence on behalf of respondents and a subsequent hearing was set in Washington, D.C. for the same purpose. Before the hearing was held, by agreement of counsel, it was stipulated that an affidavit of Mr. Edward Greeman be substituted in lieu of hearing him testify and order was entered making the affidavit a part of the record.

Respondents then rested their defense and renewed the motion to dismiss. Action on renewal of the motion was reserved and both

sides" given opportunity to file proposed findings of fact, conclusions of law and orders together with the reasons therefor. Counsel supporting the complaint filed such proposed findings, conclusions, order and the reasons therefor but respondents did not. The matter is now before the hearing examiner for an initial decision including decision upon respondents' motion to dismiss. All findings of fact, and conclusions of law proposed not herein specifically found or concluded are hereby specifically rejected.

All parties were represented by counsel, participated in all hearings and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues and to argue orally upon the record.

Upon the entire record in the case, and observation of the witnesses while testifying the hearing examiner makes the following:

FINDINGS OF FACT

Respondent William Adams, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 15 West 47th Street, New York 36, New York. Respondent Jack S. Landes is treasurer of the corporate respondent and manager of the business. His business address is the same as that of the corporate respondent.

The complaint alleges that respondent Landes dominates, directs and controls the policies, acts and practices of the corporate respondent described in the complaint. The answer denies this. The evidence on this point shows that there are two other officers of the corporate respondent with whom respondent Landes consults on matters of policy and other problems from time to time, but they have other interests and are not actively engaged in the business of the corporate respondent. Respondent Landes devotes his full time to it. There is no intimation that the other officers direct or control the policies, acts or practices. They merely discuss these matters with Landes when he calls on them for advice according to the testimony. The responsibility is therefore Landes' and it is so found.

The corporate respondent is now and for several years last past been engaged among other things in the business of selling cutlery to stores which in turn retail it to consumers. The annual value of business is approximately one-half million dollars, 65% of which consists of sales to customers in states other than New York and results in the goods when sold, being transported from the place of

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business of the corporate respondent in the State of New York to the customers in other states.

In the course and conduct of its said business, the corporate respondent is in direct and substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of cutlery.

Until about three and one-half years ago all merchandise imported by the corporate respondent came from England. About that time the corporate respondent began importing porcelain handles for cutlery from Japan and assembling them with blades and tines imported from England. These handles, when received by the corporate respondent, had the word "Japan" on the edge that the tines or blade fits into. When assembled into the completed article of cutlery the word "Japan" is not visible. Prior to April 1956, some of the blades imported from England had etched on them the words "William Adams, Inc., Sheffield, England." When the completed article of cutlery was sold by the corporate respondent the etching on the blade was visible and the fact that the handle was made in and came from Japan was not disclosed in any manner.

Prior to August 1956 respondents shipped the above described cutlery to its customers in boxes that had printed on them the words "William Adams, Since 1854, Birmingham-Sheffield England."

The complaint alleges that respondents by the use of the above practices and their failure to disclose that the handles of the cutlery were made in Japan, represent that the cutlery, in its entirety, is a product of England. This is denied by the answer. Looking at the cutlery itself, which is in evidence, sustains this allegation of the complaint, without reference to the boxes in which it was shipped. There is also evidence in the record to this effect. Furthermore, the evidence shows that dealers who purchased the cutlery from respondents for resale, could not tell that the handles were a product of Japan. Cutlery being offered for sale in the boxes mentioned above, even if there was no marking of any kind as to origin on the cutlery itself, would have the capacity and tendency to cause purchasers to think that the cutlery, in its entirety, was the product of William Adams of Birmingham and Sheffield, England. It is so found.

About the same time that the corporate respondent began assembling and selling the Japanese handles and English blades and tines, it also began assembling the same type of Japanese handles with domestic blades and tines and selling them without any marking as to origin on either the blades, tines or handles. So far as the record shows, this is still being done. The complaint alleges that when

an article is offered for sale and there is no disclosure made that a substantial portion of the article is imported, many people understand and believe that such articles are entirely of domestic origin. This is denied by the answer.

There is in the record the undisputed testimony of the witnesses Flowers and Kremer on this point. Both of them said that where domestic blades were assembled with Japanese handles, without disclosure of the origin of the handles, the public would think the entire product was domestic. Flowers got his information from wholesalers and retailers with whom he came in contact in his business. Kremer got his information from talking with retail purchasers with whom he came in contact in his business. This was competent and probative testimony on the point.¹ Moreover, the Commission has made findings in a number of contested cases which are in line with this allegation of the complaint.² It is therefore found that when respondents' cutlery consisting of domestic blades and tines and Japanese handles, without any disclosure as to origin, is offered to the public, a substantial portion of the purchasing public believes such cutlery to be entirely of domestic origin.

Paragraph Seven of the complaint alleges that there is a preference on the part of many persons in this country for products, especially cutlery, manufactured in their entirety in England and that there is also a preference on the part of many other persons for articles, including cutlery entirely of domestic manufacture. This is denied by the answer.

In the Manco Watch Strap Company case, Docket Number 5854, the Commission found in an order issued December 21, 1953 that the evidence indicated:

* * * that there are no domestic watch or wrist bands sold at prices comparable to the prices at which respondents' imported bands are sold. There is no evidence in the record showing a preference on the part of a substantial number of members of the purchasing public for the higher priced domestic bands over respondents' lower priced imported bands.

For that reason the Commission dismissed the complaint.

In view of this decision, it is necessary to consider paragraph twelve of the complaint (also denied by respondents) in connection with the issue of preference. This paragraph alleges, among other things that the failure to disclose the foreign (Japanese) origin of

¹ *Benton Announcements, Inc., v. F.T.C.*, 130 F. 2d 254.

² *Hollywood Racket Manufacturing Company, Inc.*, 33 F.T.C. 611; *Segal Optical Company*, 34 F.T.C. 218; *L. Heller & Son, Inc., et al*, 47 F.T.C. 34.

The Tariff laws require goods of foreign origin to be marked so as to indicate to the ultimate purchaser the country of origin, U.S.C.A. Title 19 § 1304.

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substantial parts (handles) of their cutlery has the capacity and tendency to deceive retailers and members of the purchasing public and to induce them to purchase respondents' cutlery, thereby unfairly diverting trade in commerce from respondents' competitors. It is admitted that the corporate respondent is in direct and substantial competition in commerce with others engaged in the sale of cutlery.

There is a conflict in the evidence on the issue of preference. All of the witnesses testified on this point. There were 14 of them including Edward Greeman, who testified by affidavit, which affidavit was by agreement accepted as evidence.

After hearing all of the witnesses testify, except Edward Greeman and carefully reviewing the record of the testimony, it is found that a preponderance of the evidence is to the effect that there is a preference on the part of a substantial portion of the purchasing public for products made entirely in England over products containing substantial parts made in Japan.

In regard to cutlery, this preference is in favor of that made entirely in England over respondent's lower priced cutlery made of English blades and tines and Japanese handles. There is also a preference on the part of a substantial portion of the purchasing public for products of entirely domestic manufacture over products containing substantial parts made in Japan. In regard to cutlery, this preference is in favor of that of entirely domestic manufacture over respondent's said lower priced cutlery. There is also a preponderance of the evidence to the effect that if respondent's said cutlery were sold at a sufficiently lower price than wholly English made or wholly domestic made cutlery, the price appeal would override the preference. However, there is no substantial evidence to show how much lower respondent's cutlery would have to sell for to accomplish this. There is the undisputed testimony in the record of one retailer that the price of respondent's cutlery was dropped approximately 10% or 15% when respondents substituted Japanese handles for entirely British made cutlery. In addition to that respondent Landes was asked the question:

Are any of these prices that you mention for your products competitive or comparable to prices of like products wholly of English origin?

His answer was:

To the best of my knowledge there are English knives being sold at the present moment made entirely in England for one half this price. * * * I am not familiar with the complete range of what they are making. I have however seen both in retail stores and trade exhibits a wholly made English or China handled knife, sold by Regent, which is wholesale, for \$3.75 for a box of six, which is approximately one half the price of the knife we are selling.

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In view of the above recited evidence, it would seem that the facts which were the basis of the dismissal of the Manco Watch Strap Company case are not present in this proceeding.

CONCLUSIONS

The use by the corporate respondent of the practices hereinabove set forth, including the failure to disclose the foreign origin of the handles of their cutlery had the capacity and tendency to mislead and deceive retailers and ultimate purchasers and thereby to induce them to purchase its cutlery. As a result thereof, trade in commerce has been diverted to the corporate respondent from its competitors and injury has been done to competition in commerce.

The aforesaid acts and practices of the corporate respondent as herein found were all to the prejudice and injury of the public and the corporate respondent's competitors and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the meaning and intent of the Federal Trade Commission Act.

The respondent Jack S. Landes having been found to be responsible for the aforesaid acts and practices, of the corporate respondent, any order to cease and desist should also run against him individually.

Considering the record as a whole, although it shows the corporate respondent has discontinued most of the practices found to be deceptive, the only way the Commission can be assured of a cessation of these practices in the future is by the issuance of an order to cease and desist.³

ORDER

It is ordered, That the respondent, William Adams, Inc., a corporation, and its officers and respondent Jack S. Landes, individually and as an officer of said corporation, 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 cutlery or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly—

1. Offering for sale or selling cutlery containing handles made in Japan, or in any other foreign country other than England, combined with other parts made in England which bear the legend "William Adams, Sheffield, England" or any other legend indicative

³ *Eugene Dietzgen v. F.T.C.*, 142 F. 2d 321.

of English origin without clearly disclosing the country of origin of the handles;

2. Offering for sale or selling cutlery containing handles made in Japan, or any other foreign country, combined with other parts made in the United States without clearly disclosing the foreign origin of the handles;

3. Offering for sale or selling any product, any substantial part of which was made in Japan, or in any other foreign country, without clearly disclosing the foreign origin of such part;

4. Representing by words or symbols on the containers in which cutlery or other products, made in substantial part in Japan, or any other foreign country other than England, are shipped, or in any other manner, that such products are of English origin.

It is further ordered, That respondents' motion to dismiss be, and the same hereby is, denied.

OPINION OF THE COMMISSION

By KERN, Commissioner:

Complaint herein was issued on June 22, 1956. Hearings were afterwards conducted before a hearing examiner, who, on April 17, 1957, issued an initial decision consisting of findings of fact, conclusions therefrom and an order to cease and desist. Neither respondents nor counsel supporting the complaint filed an appeal from the initial decision, but on May 14, 1957, the Commission, in conformity with § 3.21 of its Rules of Practice, placed the matter on its own docket for review. The initial decision has now been reviewed on the whole record of the proceeding.

I

The order proposed by the hearing examiner would, in substance, forbid—

(1) The sale of English cutlery combined with Japanese handles and bearing legends indicative of English origin without clearly disclosing the Japanese origin of the handles;

(2) The sale of cutlery composed of Japanese handles and other parts made in the United States without clearly disclosing the Japanese origin of the handles;

(3) The sale of any product, any substantial part of which is made in Japan, without clearly disclosing the Japanese origin of such part; and

(4) Representing by words or symbols on the containers in which products made in substantial part in Japan are shipped, or in any other manner, that such products are of English origin.

When the Commission undertakes to devise a remedy adequate to correct a given commercial abuse, its "power is not limited to proscribing only the particular scheme used in the past. It may also prohibit variations on the basic theme." *Consumer Sales Corp. v. F.T.C.*, 198 F. 2d 404, 408 (2d Cir. 1952), *cert. denied* 344 U.S. 912 (1952). See also *American Tack Co. v. F.T.C.*, 211 F. 2d 239 (2d Cir. 1954), and cases cited. We believe that the proposed order, limited as it is to merchandise of partly or wholly Japanese provenance, would not afford a full measure of protection to the purchasing public from the possibility of deception as to the true origin of respondents' future products, or substantial components thereof, and we shall therefore modify it so as to render it applicable to such of respondents' products as originate in whole or in part in any foreign country, or, in the case of cutlery which respondents may offer or sell as being of English manufacture, in any foreign country other than England.

II

The proposed order would further prohibit respondents from—

5. Representing through use of the words 'Factories—Birmingham—Sheffield—England' on invoices or in any other manner that respondents or either of them own, operate or control a factory in England or any other foreign country in which their products are made.

The apparent justification for such a prohibition is set out in the hearing examiner's findings as follows:

It is also found, on another issue raised by the complaint and answer, that there is a preference on the part of a substantial number of purchasers for dealing directly with a factory. There is little evidence on this point. What there is comes from respondents' witness Lawrence Kaplan. It tends to support the allegations of the complaint. However the Commission has passed on this point many times with Court approval.

Here are cited the court decisions of *Herzfeld v. F.T.C.*, 140 F. 2d 207 (2d Cir. 1944); *F.T.C. v. Mid West Mills*, 90 F. 2d 723 (7th Cir. 1937); *Bear Mill Manufacturing Co. v. F.T.C.*, 98 F. 2d 67 (2d Cir. 1938); *F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933).

It is important to note that in these cases the courts were approving *specific findings*, based on *substantial evidence*, to the effect that purchasers of the *particular merchandise involved* preferred to deal directly with manufacturers instead of middlemen. *Stephen Rug Mills (Herzfeld)*, 34 F.T.C. 958, 967 (1942); *Mid West Mills, Inc.*, 22 F.T.C. 566, 572 (1936); *Bear Mill Manufacturing Co.*, 24 F.T.C. 912, 916 (1937); and *Royal Milling Co.*, 15 F.T.C. 38, 46 (1931).

Though he found that "there is a preference on the part of a substantial number of purchasers for dealing directly with a fac-

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tory," the examiner admitted that "[t]here is little evidence on this point." Our reading of the record bears him out; indeed, there is no substantial evidence on the point at all. Under the circumstances, therefore, we believe it was improper to resort to earlier decisions as a means of repairing the evidentiary deficiency.

Consequently there will be excised from the initial decision the findings that relate to the allegation, in Paragraph Ten of the complaint, that a substantial number of purchasers prefer to deal directly with a factory. Inasmuch as this will remove an essential element of the factual justification for ordering respondents to cease and desist from representing that their products are made in their own factory abroad, that inhibition must fall. The findings made in respect of the allegations in Paragraphs Eight and Nine of the complaint are thus rendered surplusage and will likewise be stricken.

* * *

In other respects the initial decision is affirmed, as being supported by substantial evidence and correct in law, and it will be adopted as that of the Commission.

FINAL ORDER

The Commission having, on May 14, 1957, in conformity with Sec. 3.21 of its Rules of Practice, placed this matter on its own docket for review; and having reviewed the initial decision herein on the whole record of the proceeding before the hearing examiner; and having rendered its decision directing (1) modification of the findings of fact and the order to cease and desist in the respects and for the reasons recited, and (2) adoption of the initial decision as thus modified:

It is ordered, That there be stricken from the findings of fact that portion which begins with the last paragraph on page 6 of said initial decision and runs to the end of the findings at the top of page 8;

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in said initial decision:

It is ordered, That the respondent, William Adams, Inc., a corporation, and its officers and respondent Jack S. Landes, individually and as an officer of said corporation, 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 cutlery or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly—

1. Offering for sale or selling cutlery containing handles made in Japan, or in any other foreign country other than England, combined with other parts made in England which bear the legend 'William Adams, Sheffield England'

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or any other legend indicative of English origin without clearly disclosing the country of origin of the handles;

2. Offering for sale or selling cutlery containing handles made in Japan, or any other foreign country, combined with other parts made in the United States without clearly disclosing the foreign origin of the handles;

3. Offering for sale or selling any product, any substantial part of which was made in Japan, or in any other foreign country, without clearly disclosing the foreign origin of such part;

4. Representing by words or symbols on the containers in which cutlery or other products, made in substantial part in Japan, or any other foreign country other than England, are shipped, or in any other manner, that such products are of English origin.

It is further ordered, That respondents' motion to dismiss be, and the same hereby is, denied;

It is further ordered, That the initial decision, as hereinbefore modified, be, and it hereby is, adopted as the decision of the Commission;

It is further 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 to cease and desist.

IN THE MATTER OF

U.S. PACKAGING CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6580. Complaint, June 29, 1956—Decision, June 21, 1957*

Consent order requiring a company engaged in Bridgeport, Conn., in packaging snow-making chemicals in pressurized over-sized containers only partially filled, under the trade name of "Frosty Snow", for sale mainly during the Christmas season, to cease representing falsely in advertising and counter displays furnished to dealers that because its containers were larger than those of competitive brands, a larger amount of snow would be produced therefrom, and that the amount of snow produced from an ounce of its material was substantially greater than that produced by an ounce of competitors'.

Mr. Edward F. Downs supporting the Complaint.

Weil, Gotshal & Manges, of New York City, for U.S. Packaging Corp. and *Mr. Jack Schenberg* and *Mr. Joseph G. Abramson*, of New York City, for H. R. Shepherd.

Respondent *Herbert L. Cohen* appearing for himself.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above named respondents on June 29, 1956 charging them with violation of the Federal Trade Commission Act as set forth in said complaint. After issuance and service of the complaint all respondents on April 29, 1957 entered into an agreement with counsel supporting the complaint for a consent order to cease and desist from the practices complained of which agreement purports to dispose of all the issues in this proceeding without hearing. This agreement has been duly approved by the Assistant Director and the Director of the Bureau of Litigation and has been submitted to the undersigned, heretofore designated to act as hearing examiner herein for his consideration in accordance with Rule 3.25 of the Rules of Practice of the Commission.

Respondents in the aforesaid agreement have admitted all the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of the jurisdictional facts had been duly made in accordance with such allegations. Said agreement provides further that respondents 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