

IN THE MATTER OF
SALYER REFINING CO., INC., ET AL.

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

Docket 6339. Complaint, May 2, 1955—Decision, Feb. 14, 1958

Order requiring a concern in Oklahoma City, Okla., engaged in selling to dealers for resale to the purchasing public reclaimed lubricating oil obtained from crankcase drainings, to cease advertising for sale or selling such oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on the containers.

Mr. John W. Brookfield, Jr., for the Commission.

Mr. Leslie L. Conner, of Oklahoma City, Okla., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the sale of lubricating oil made from previously used oil, without disclosing such prior use. After the filing of respondents' answer (which was subsequently amended) hearings were held at which a substantial amount of evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been filed by the parties, and respondents Salyer Refining Co., Inc., and B. M. Salyer, Jr. (erroneously referred to in the complaint as Ben M. Salyer, Jr.) have also filed a motion to dismiss the complaint. The case is now before the hearing examiner for final consideration.

2. Respondent Salyer Refining Co., Inc., is a corporation organized and doing business under the laws of the State of Oklahoma, with its office and principal place of business at 2400 Northeast 4th Street, Oklahoma City, Okla. Respondent B. M. Salyer, Jr., is president of the corporation and owner of practically all of its capital stock. He formulates all of its policies and directs and controls all of its activities. While respondents P. A. Salyer and Lester L. Suenram are or have been officers of the corporation, their relationship to it has been nominal only, and neither of them has ever participated actively in the control and management of its affairs. It is therefore concluded that the complaint should be dismissed as to respondents P. A. Salyer and Lester L. Suenram, and the word respondents as used hereinafter will not include these individuals.

3. Respondents are engaged in the sale of lubricating oil made from oil which has previously been used in automobile motors. In

the sale of their product respondents are engaged in interstate commerce, substantial quantities of their oil being regularly sold and shipped by them to purchasers located in various States of the United States other than Oklahoma. They are in competition with other corporations and individuals engaged in the sale of lubricating oil in interstate commerce.

4. Respondents purchase "crankcase drainings," that is, oil which has previously been used in automobile motors, subject the oil to certain refining or re-refining processes, and then sell the finished product to dealers—usually wholesalers. These dealers resell the oil to service stations, who, in turn, retail it to the public. The oil is packaged by respondents in metal containers of the same size and general appearance as those in which oil made from virgin crude oil is sold, and there is nothing on respondents' containers indicating that the oil is made from previously used oil.

Three service station operators, upon examining respondents' containers, testified that in the absence of information to the contrary from other sources they would expect the containers to contain new oil made from virgin crude; and they further testified upon the basis of their experience with the public that in their opinion the public would expect the same thing. That this is the correct view is obvious from an examination of the containers themselves. Unquestionably, members of the public purchasing the oil would be under the impression that the oil was an entirely new product made from virgin crude oil. (Since the issuance of the complaint, respondents have adopted new containers. These will be discussed later.)

5. On the question of public preference, these same witnesses testified that the public prefers lubricating oil made from virgin crude over oil made from previously used oil. And respondent B. M. Salyer, Jr., in his testimony recognized that many members of the public are prejudiced against oil made from previously used oil.

There is testimony on behalf of respondents from three witnesses engaged in the advertising business that the public in purchasing any product is usually interested only in the essential merit of the product; that it is not interested in the source of the product or its ingredients. This testimony, however, is so broad and general in nature as to be of little probative value in determining the issues in the present proceeding. None of the witnesses had had any experience in the oil business nor any substantial contact with the public insofar as lubricating oil is concerned.

While there is testimony on behalf of respondents from two service station operators that the public has no interest in whether lubricating

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oil is made from virgin crude or from perviously used oil, the weight of the evidence appears clearly to be to the contrary. The finding on this issue therefore is that there is a preference on the part of a substantial portion of the public for lubricating oil made from virgin crude oil over oil made from previously used oil.

6. Respondents urge that what they are selling is not used oil or oil which has merely been reclaimed or reprocessed, but is, in fact, new oil. They insist that oil does not wear out; that all that is necessary to make used oil as good as new is that the contaminating substances be removed; that their refinery is complete and modern in every respect; and that their product when put on the market is as good as or even better than lubricating oils made from virgin crude oil. All of this, however, overlooks the vital consideration that the public is entitled to know what it is getting. It is entitled to be informed as to the true nature of respondents' product in order that it may make its own decision as to whether it will purchase that product or oil made from virgin crude.

7. As indicated above, respondents, since the issuance of the complaint, have adopted new containers for their product and they insist that these containers adequately inform the public as to the nature of the product. These new containers carry in close proximity to the brand name of the oil and in large type the words "Guaranteed Re-Refined". In a panel on the reverse side of the container there appears in much smaller type the following:

STAY—READY

STAYS FULL LONGER
LUBRICATES BETTER

STAY—READY is refinery re-refined exclusively from Motor oil that has stood the test in the crank case. Petroleum is a mineral and the more it is re-refined the purer it becomes.

Oil does not wear out with use in the crank case, but merely becomes contaminated. Each time it is re-refined it is further purified. Among the large users of re-refined oils are the motoring public, the U.S. Air Forces, and the American Railroads. STAY—READY is guaranteed to give complete satisfaction or your money back.

I personally endorse this Product to be one of the finest Motor Oils on the Market today.

B. M. Salyer, Jr.
President

SALYER REFINING COMPANY, INC.

Insofar as the words "Guaranteed Re-Refined" are concerned, these clearly are insufficient to apprise the public as to the true nature of the product, that is, that it is oil made from previously used oil.

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As to the other statements, if a prospective purchaser were suspicious enough or cautious enough to examine the container carefully he probably would see the statements and be put on notice as to the source of the oil or at least have his suspicions aroused sufficiently to cause him to make further inquiry. The statements, however, are clearly insufficient to protect the average member of the public. Not only are they lacking in clarity and directness, but they are so inconspicuously placed and in such relatively small type that they would almost certainly escape the attention of the average purchaser. It is therefore concluded that respondents have not, in fact, abandoned or discontinued the practice charged in the complaint.

8. The failure of respondents to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new and unused oil, made from virgin crude oil, and to cause such members of the public to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. This failure of respondents to reveal the nature of their product also serves to place in the hands of retail dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product. The present proceeding is therefore in the public interest. Respondents' practice is to the prejudice of the public and of respondents' competitors, and constitutes an unfair method of competition and an unfair and deceptive act and practice in commerce in violation of the Federal Trade Commission Act.

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It is ordered, That respondents, Salyer Refining Co., Inc., a corporation, and its officers, and B. M. Salyer, Jr. (erroneously referred to in the complaint as Ben M. Salyer, Jr.), 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 and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

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

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents P. A. Salyer and Lester L. Suenram.

OPINION OF THE COMMISSION

By Anderson, Commissioner:

In the initial decision, the hearing examiner found that the respondents there designated were engaging in unfair methods of competition and unfair and deceptive acts and practices by failing to disclose that the motor oil distributed by them is made from previously used oil. The hearing examiner also found that two nominal corporate officers named as respondents in the complaint had not participated in the illegal acts and practices and the initial decision's order provides for their dismissal as parties. No appeal has been filed by counsel supporting the complaint from this ruling, but the respondent, Salyer Refining Co., Inc., and the respondent, B. M. Salyer, Jr., its president and principal stockholder, who are the parties named in the initial decision's order to cease and desist, have appealed from that decision. They, the parties bringing this appeal, are referred to hereinafter as the respondents.

The complaint under which this proceeding was instituted alleges that the respondents' oil consists of used oil obtained from drainings from motor crankcases and other sources which is reclaimed or reprocessed by them and thereafter sold in containers bearing no markings to that effect. In the absence of disclosure in that respect, the complaint additionally alleges, it is the understanding and belief on the part of consumers and dealers that the respondents' oil is new oil and that it is purchased as such, that a deceptive instrumentality is placed in the hands of retailers whereby the public may be misled, and that trade is unfairly diverted to respondents from their competitors.

The following record facts are not in dispute. The respondents purchase "crankcase drainings," that is, oil previously used in automobile motors and left or discarded by motorists at filling stations and garages when changing their oil. The respondents subject those waste products to refining or re-refining processes. The oil so processed is sold by them in commerce to jobbers and others who resell it to filling stations and similar outlets for retailing to the public. The metal containers in which the respondents package their oil are of the same size and general appearance as those in which oil refined from crude customarily is sold. The oil itself has the appearance of new oil. At the time this proceeding was instituted, nothing appeared on the

respondents' containers stating or in any way suggesting that the oil was made from previously used oil.

In contending that the factual charges of the complaint are not supported by the evidence and that conclusions of legal violation lack sound basis, the respondents argue that the evidence does not establish that there is a preference among the public for oil made from crude and that the public's interest when selecting oil must be regarded instead as limited to price and lubricating qualities. We think, however, that there is conclusive support in the record for the hearing examiner's finding that the public prefers oil made from crude over lubricants processed from previously used oil. The testimony of three filling station operators called by counsel supporting the complaint is clear and convincing on this score and far outweighs the matters cited by the respondents in support of their contentions that such preference does not exist. The testimony of the trade witnesses was to the further effect that they would expect the respondents' containers to contain oil refined from crude rather than from previously used oil and that the public would expect the same.

The appeal emphasizes that the respondents' processing represents a refining or re-refining operation and contends that oil does not wear out from use and that a new oil comparable in quality to oils made from crude accordingly results from their refining methods. Its re-refining notwithstanding, and even assuming the status of respondents' oil as new oil from a chemical or other scientific standpoint, their lubricants are made by processing previously used oil. Hence, they originate as and essentially constitute reclaimed products as distinguished from those long accepted by consumers and dealers which are made by refining crude oil. Substitution is unlawful even though a qualitative equivalence be shown and the consumer is prejudiced if on giving an order for one thing he is supplied with something else. *F.T.C. v. Royal Milling Co.*, 288 U.S. 212, 216, 217 (1933); *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 77, 78, (1934).

It is clear that the respondents' failure to disclose on the containers for their oil the true facts representing the origin of their products has entailed silence as to a fact highly material and important to users of motor oil. We think that the hearing examiner correctly found that the respondents' practices in that respect had the tendency and capacity to deceive and caused purchases of their oil under mistaken beliefs that it was new oil made from crude rather than a reclaimed product derived from previously used oil.

The respondents further contend that the Commission is not legally empowered to require a revealing statement on containers distinguish-

ing their oil from new or virgin oil. The appeal cites in this connection that the Federal Trade Commission Act is not a labeling law and that no Federal legislation has been enacted making it mandatory for marketers to state whether their oil is made from crude or processed from waste products. The Commission, however, may require affirmative disclosure by sellers where necessary to prevent deception resulting from failure to disclose material facts concerning the merchandise offered. *Haskelite Manufacturing Co. v. F.T.C.*, 127 F. 2d 765 (C.A. 7, 1942); *L. Heller & Son, Inc. v. F.T.C.*, 191 F. 2d 954 (C.A. 7, 1951).

Also lacking in merit are the exceptions by respondents to the initial decision's findings concerning the container labels adopted several months after this proceeding began. Those labels describe the oil, among other things, as "Guaranteed Re-Refined," and as "refinery re-refined exclusively from Motor oil that has stood the test in the crank case." The lack of clarity, small size of type and other considerations cited by the hearing examiner fully support his conclusions that the statements on the revised labels are a wholly inadequate basis for apprising the public generally that the respondents' products are made from previously used oil.

The appeal additionally contends that dismissal of this proceeding is warranted in the public interest for the reason, among others, that a requirement that distributors of re-refined oil products differentiate their wares from virgin oil may destroy the re-refining industry. Implicit in this argument is recognition that a considerable degree of prejudice exists against oil made from previously used oil. The use of deceptive acts and practices and unfair methods of competition is adverse to the interests of consumers and to competitors not resorting to such practices, and the arguments advanced under this aspect of the appeal are without merit.

Moreover, 20 of the States have enacted legislation relating to the marking of oil derived from waste lubricants. The oils to which these statutes pertain are designated variously as reclaimed, reprocessed, re-refined, re-run, re-distilled, re-cleaned and reconditioned. Those acts are by no means uniform but a substantial number require such oil be designated as so processed or as previously used products on labels and otherwise. Although Oklahoma, the State in which the respondent company is incorporated, has not so legislated, the respondents market their oil in several states where relevant enactments are in effect. To assert that corrective action against one or more marketers of re-refined oil will adversely affect the industry is to assume without proper warrant that concerns engaged in processing

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waste oils in States where legislation of this type has been enacted will be disadvantaged if rival re-refiners who distribute their products there from states where such legislation is not effective were similarly required to label them truthfully at processing establishments.

The order contained in the initial decision also has been considered. Its requirement that a disclosure be set forth on the respondents' containers that their oil has been processed in whole or part from previously used oil, when such be the fact, is appropriate and has sound support in the record. Its provision additionally requiring that the facts in that respect also be disclosed in any advertising and promotional material utilized by the respondents in the future conduct of their business reflects due recognition of the fact that the public, in the absence of disclosure to the contrary, assumes and has the understanding and belief that oil offered to it in regular channels of trade is oil refined from crude instead of oil derived from used oil. Furthermore, this provision looks to protecting purchasers in marketing situations precluding their detailed examination of the respondents' containers at point of sale. The gravamen of the complaint challenges unfair and deceptive practices whereby oil made from previously used oil has been marketed by the respondents under circumstances causing it to be purchased as oil made from crude. To prevent continuance of the practices found above to be deceptive resulting from slight variations by the respondents in past sales methods, we think that the public interest requires inclusion of an additional provision in the order proscribing future resort by the respondents to affirmative claims that their oil is processed from crude.

In the light of the above and in the interest of clarity, the order contained in the initial decision is being modified. The respondents' appeal is denied and the initial decision, modified as noted above, is adopted as the decision of the Commission.

FINAL ORDER

This case having come on for final consideration upon the record, including the appeal of the respondents, Salyer Refining Co., Inc., and B. M. Salyer, Jr., from the initial decision of the hearing examiner; and the Commission having determined, for reasons stated in the accompanying opinion, that said appeal should be denied and that the order contained in the initial decision should be modified:

It is ordered, That the appeal from the initial decision be, and it hereby is, denied.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

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It is ordered, That respondents, Salyer Refining Co., Inc., a corporation, and its officers, and B. M. Salyer, Jr. (erroneously referred to in the complaint as Ben M. Salyer, Jr.), 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 and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

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

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents P. A. Salyer and Lester L. Suenram.

It is further ordered, That the respondents, Salyer Refining Co., Inc., and B. M. Salyer, Jr., 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 contained in said initial decision, as modified.

It is further ordered, That the initial decision of the hearing examiner, as modified hereby, be, and the same hereby is, adopted as the decision of the Commission.

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IN THE MATTER OF
FRANK A. KERRAN ET AL. DOING BUSINESS AS DOUBLE
EAGLE REFINING CO.

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

Docket 6432. Complaint, Oct. 27, 1955—Decision, Feb. 14, 1958

Order requiring copartners engaged in Oklahoma City, Okla., in re-refining crankcase drainings of lubricating oil which they then sold to dealers for resale to the purchasing public in the same containers used for new oil without indicating its used nature, to cease advertising for sale or selling such reclaimed oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on the containers.

Mr. John W. Brookfield, Jr., for the Commission.

Mr. John B. Ogden and *Mr. Josh Lee*, Oklahoma City, Okla. for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the sale of lubricating oil made from previously used oil, without disclosing such prior use. After the filing of respondents' answer to the complaint, hearings were held at which evidence in support of the complaint was received. Upon the conclusion of such evidence respondents moved to dismiss the complaint on the ground that a prima facie case in support thereof had not been established. This motion was denied by the hearing examiner, whereupon respondents elected to offer no evidence (other than certain exhibits which had been received during the cross-examination of the Government's witnesses) and rested their case upon the record as then made. Proposed findings and conclusions have been submitted by counsel for both sides. Oral argument has not been requested, probably because the case was argued at length at the time the motion to dismiss was made.

2. The respondents, Frank A. Kerran and Cameron L. Kerran, are copartners trading as Double Eagle Refining Co., with their place of business located at 1900 NE. First Street, Oklahoma City, Okla. Respondents are engaged in the sale of lubricating oil for use in motor vehicles. They purchase "crankcase drainings," that is, oil which has been previously used in automobile motors, and then subject such oil to certain re-refining processes, after which it is sold to dealers for resale to the public. There is no question as to the interstate charac-