

Decision

IN THE MATTER OF
NIRESK INDUSTRIES, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6779. Complaint, Apr. 16, 1957—Decision, June 5, 1959

Order requiring Chicago mail order sellers of kitchenware to cease, in advertising in publications of wide distribution, representing fictitious and excessive amounts as usual retail prices of their cooker-fryers and electric skillets and the offered prices as reductions therefrom; misrepresenting the manufacturer of their cooker-fryer through prominent use thereon of the phrase "Westinghouse Automatic Thermostat"; and representing falsely, through the manner of use of the Good Housekeeping Guaranty Seal, that their said cooker-fryer had been awarded such seal.

Mr. John Mathias and Mr. Morton Nesmith for the Commission.

Herman & Pollak, by *Mr. William J. Welsh* and *Mr. B. L. Pollak*, of Chicago, Ill., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondents have violated the Federal Trade Commission Act by making false, misleading and deceptive statements and representations in advertisements which they have used in connection with the sale and distribution in commerce of a cooker-fryer and an electric skillet.

There are four specific charges:

1. That the prices advertised as "regular value" and "suggested retail" were not the regular and customary retail prices of the products, but were greatly in excess thereof;
2. That the products were being offered at substantial reductions from the regular and customary retail prices and that such reductions constituted savings to purchasers, whereas in fact there were no reductions and no savings;
3. That by the indiscriminate use of the phrase "Westinghouse Automatic Thermostat," respondents falsely represented that their cooker-fryer was manufactured by Westinghouse Electric Corporation; and
4. That by the improper display of the Good Housekeeping Guaranty Seal, respondents falsely represented that their cooker-

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fryer, as a whole, had been awarded this seal and that they were entitled to display it on the product and in their advertising.

In respondents' answer, the allegations of the complaint as to corporate organization and control, the nature of their business, that they were engaged in interstate commerce and in competition with other firms and individuals, and that they have made representations as covered by charges 1 and 2, above, are admitted. The remaining allegations of the complaint are denied.

After hearings, counsel in support of the complaint and counsel for respondents submitted proposed findings, conclusions and orders. Upon the basis of the entire record, the following findings and conclusions are made and order issued:

1. Respondent Niresk Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located at 2331 North Washtenaw Avenue, Chicago 47, Ill. Respondent Bernice Stone Kahn is president of the corporate respondent, and formulates, directs and controls its policies, acts and practices. Her business address is the same as that of the corporate respondent; her home address is 175 Prospect Avenue, Highland Park, Ill.

2. Respondents are now, and for some time have been, engaged in the mail order sale and distribution of kitchenware, in commerce, to the public. In the regular and usual course and conduct of this business, respondents have caused their products to be advertised in publications having a distribution in the various States of the United States, and have caused said products, when sold, to be transported from their place of business in the State of Illinois to the purchasers thereof located in various other States of the United States. They are in commerce.

3. Respondents' business has been and is substantial, and in its course and conduct they are now and have been in substantial competition in commerce with other corporations, firms and individuals, likewise engaged in the sale and distribution of kitchenware.

4. Although two specific products, a cooker-fryer and an electric skillet, are mentioned in the complaint, no substantial evidence was introduced as to the electric skillet or any of the charges relating thereto. All of the further discussion herein will be limited, therefore, to the evidence as it relates to the cooker-fryer.

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5. The cooker-fryer sold by respondents was manufactured by Merit Enterprises, Inc., Queens Village, N.Y., and its unit cost to respondents was \$5.25. It is a 6-quart capacity, copper-clad utensil, with black enamel base, Fire-King Oven Glass cover, an automatic heat-control unit built by Westinghouse, and a G.E. cord. It is provided with a colander-type french-fry basket.

6. Among the pricing statements made by respondents during the period from May, 1955 through March, 1958, relating to the cooker-fryer are the following:

Regular Value \$39.95
While-They-Last Your Cost \$8.95
This is the biggest bargain we
have ever offered * * * . ;
Regular Value \$29.95
While-They-Last Your Cost \$7.95
This is the biggest bargain we
have ever offered * * * . ;
Regular Value \$29.95
While-They-Last Your Cost \$6.95
This is the biggest bargain we
have ever offered * * * . ;
List Price \$21.95
Your Price \$ 6.95.

7. Through the use of such statements respondents have represented that the regular and usual selling prices of the cooker-fryer have been \$21.95, \$29.95 or \$39.95, whereas the record shows that respondents have never sold the appliance at any of those prices, and the manager of respondents' business knew of no sales having been made by others at such prices. The lesser prices, \$8.95, \$7.95 and \$6.95, have been the regular prices at which respondents' sales have been made. Reference was made to a small advertisement published in Life Magazine, May 23, 1955, by Merit Enterprises, in which an appliance the same as, or similar to, that sold by respondents was priced at \$39.95. Respondents' manager, when asked about this, stated, "I had been convinced that it had been, but I do not know that it was sold at that price." On further direct examination he repeated, "No, I don't have facts that it was sold at \$39.95." All the witness knew about the higher price was that he had seen the Life advertisement. It was obvious that he did not believe the appliance had ever been offered in good faith for sale at such a price. Of like character were some "flier" advertisements put out by

Merit Enterprises and by other dealers (Empire Products; Eastern Metal Mfg. Company; Century Enterprises, Inc.), pricing the same or similar cooker-fryers at \$39.95. All of these refer to national advertising, and indicate a definite attempt or design to establish a fictitious price upon which a tongue-in-cheek reduced price might be based.

Two witnesses of experience testified that during the period of time involved in this proceeding, a fair market price at retail stores of cooker-fryers which might be considered comparable to those sold by respondents ranged from \$12 to \$20. Mail order prices would normally be lower.

8. Through such advertising statements respondents have falsely represented that the "Regular Value" and "List Price" prices were the prices at which said products were regularly and customarily sold at retail; that their products were currently being offered for sale at substantial reductions therefrom; and that such reductions constituted substantial savings to purchasers. Such representations, being false, misleading and deceptive, constitute acts and practices which are to the prejudice and injury of the public and respondents' competitors, and are unfair acts and practices and unfair methods of competition, and in violation of the Federal Trade Commission Act.

9. In their early advertising, respondents so conspicuously displayed the name "Westinghouse" as to constitute an implied representation and leave the impression upon a casual or hurried reader that the appliance itself was manufactured by Westinghouse Electric Corporation, whereas Westinghouse manufactured only the thermostat which controlled the heat at which the cooker-fryer would operate. This gave rise to a suit between Westinghouse Electric Corporation and Niresk Industries, Inc. in the United States District Court for the Northern District of Illinois, Eastern Division, which was settled by a consent decree, issued January 25, 1957, in which "Niresk Industries, Inc., its officers, agents, servants, employees, attorneys and all persons in active concert or participation with it [were] * * * permanently enjoined from infringing the trademark rights of plaintiff in its registered trademark 'Westinghouse'" by using the name "Westinghouse" in a manner other than as "set forth in the Plaintiff's SELLING POLICY, No. 27-500, dated October 10, 1956," which provides as follows:

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1. When the customer or any of its vendees employs the term "WESTINGHOUSE" on such product or the carton therefor, or in any literature, advertisement or leaflet, the term "WESTINGHOUSE" shall be presented less prominently (with regard to size, style, color-contrasts, position, etc.) than the commercial name (i.e. trade name) of the customer. The term "WESTINGHOUSE" shall not be employed unless the customer's commercial name also appears thereon.

2. The customer and its vendees shall not associate the term "WESTINGHOUSE" with such product, other than to state that such product is "EQUIPPED WITH WESTINGHOUSE (item)." In such statement the words "Equipped With" must immediately precede and appear as prominently as the term "WESTINGHOUSE." In such statement, substitute for parenthetical, the particular item or items purchased from Westinghouse, such as Thermostat, Heating Element, etc. In no case shall a Westinghouse Trademark, including the logotype name "WESTINGHOUSE" be used.

10. The foregoing order, which antedated the complaint dated April 16, 1957, has been complied with, according to statement of respondents' counsel. Since the court order, respondents have issued two catalogs, in which the entire expression "Equipped With Westinghouse Thermostat" is in capital letters of uniform size and style; but in magazine advertising in Royal Neighbor and Woodman of the World magazines for December, 1957, respondents advertised the cooker-fryer as

Equipped With Nationally Famous
WESTINGHOUSE Thermostat.

The word "Westinghouse" is in full caps, conspicuously displayed; the rest is in upper and lower case letters.

11. Respondents assert that the manner of their use of the "Westinghouse" term is a personal matter involving only the rights of the respondents and of Westinghouse Electric Corporation, but in other cases the Commission has decided that there is a preference on the part of the purchasing public for products produced or manufactured by large, well-established business firms, and that it is in the public interest that respondents who do not manufacture such products should not use such names in a manner which would lead the public to believe that the products offered were manufactured by such well-established and well-known firms.

12. In the past respondents have used the name "Westinghouse" in a manner which has had the capacity and tendency to mislead prospective purchasers and cause them to believe, contrary to fact, that their cooker-fryer was manufactured by

Westinghouse Electric Corporation, and so have violated the Federal Trade Commission Act. The discontinuance urged by the respondents as having been effected by them since the issuance of the court order, *supra*, is not of such a nature as to justify a firm finding that it will be permanent. The current advertising of respondents, such as that mentioned in the latter part of paragraph 10, above, seems to indicate a tendency still to use the Westinghouse name in a manner which may be deceptive. In the public interest, with which the Federal Trade Commission is here concerned, the issuance of a cease-and-desist order relating to this practice is, under the circumstances disclosed by the record in this proceeding, fully justified. The court order determines only the rights of the parties who participated in the particular litigation before that court. A cease-and-desist order will protect the rights of the public generally.

13. In respondents' early advertising, the cooker-fryer glass cover, to which was affixed a Good Housekeeping Guaranty Seal was prominently displayed. In some of the advertising, there was a heavy arrow pointing to the pictured cover, and upon this arrow were the words "With Famous FIRE-KING Glass Cover As Guaranteed by Good Housekeeping." To the careful reader this would seem to be adequate disclosure that the seal applied only to the lid, but to a hasty observer of the advertisement this statement might readily be overlooked. The facts are that the right to use the Good Housekeeping Guaranty Seal had been granted to Anchor-Hocking Glass Corporation, to be used by it as to certain specified Fire-King Ovenware under an agreement whereby that corporation agreed *not* to "delegate the right to use the seal or legend to any other individual, firm or corporation or to any other dealer or distributor." The seal was not applicable to or authorized for use as to the separate component parts of such specified ovenware. Niresk Industries, Inc. never had any authority to use the seal, nor did Merit Enterprises, Inc., from whom respondents procured the cooker-fryer. By telegram of March 29, 1956, Niresk Industries, Inc. had been advised by Good Housekeeping of this fact. Respondents' use of the seal in their advertising was not discontinued until late 1957 or early 1958.

14. The Good Housekeeping Guaranty Seal is recognized by those who have knowledge of it as indicative of product quality. As one witness said, "It should be good if it had the Good Housekeeping seal on it." The seal lends confidence to the customer, and purchases are made because of such confidence. The manner

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in which respondents used the seal on their product and in their advertising was false, deceptive and misleading, and in violation of the provisions of the Act.

15. On June 23, 1958, more than one year after issuance of the complaint, there was a meeting of the Board of Directors of Niresk Industries, Inc., at which a resolution was adopted reciting that certain types of the advertising which had been complained of by the Federal Trade Commission had been discontinued on specifically named dates, and that it was the intention and policy of the corporation that such advertising be terminated promptly and permanently. No reference is made in the minutes or in the resolution of any discontinuance or intent of discontinuance of the pricing practices alleged in the complaint and found herein to be misleading and deceptive. In view of the timing of the resolution and other facts and circumstances disclosed in this proceeding, this action of the board of directors cannot be accepted as being entirely in good faith. Certainly the facts of discontinuance or abandonment are not such as to come within the requirements prescribed by Commission practice and precedent for dismissal of the complaint with respect to any false and misleading acts and practices that have been engaged in by the respondents in this proceeding. The defense of discontinuance or abandonment is rejected.

16. The aforesaid acts and practices of respondents found to be false, deceptive and misleading are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act. This proceeding is in the public interest, and the following order is issued:

It is ordered, That respondent Niresk Industries, Inc., a corporation, and its officers, and respondent Bernice Stone Kahn, 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 the cooker-fryer or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. Certain amounts are the regular and usual retail prices of products when such amounts are in excess of the prices at which

such products are regularly and customarily sold at retail;

2. Any savings are afforded from the retail price of products unless such savings represent a reduction from the price at which said products are regularly and customarily sold at retail;

3. The cooker-fryer is the product of, or manufactured by, the Westinghouse Electric Corporation; or that any other product is the product of, or manufactured by, the Westinghouse Electric Corporation or any other corporation, firm, or individual, when such is not a fact;

4. The cooker-fryer has been awarded the Good Housekeeping Guaranty Seal; or that any other product has been awarded the Good Housekeeping Guaranty Seal, when such is not a fact.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

This matter having been heard on the respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision, filed December 12, 1958, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents, Niresk Industries, Inc., and Bernice Stone Kahn, 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.

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IN THE MATTER OF
J. JACOB SHANNON & COMPANY

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

Docket 7327. Complaint, Dec. 9, 1958—Decision, June 6, 1959

Consent order requiring a mail order merchandiser in Philadelphia, Pa., to cease advertising fictitious exaggerated amounts as "Reg." prices for purportedly reduced items.

Mr. Harold A. Kennedy for the Commission.

Mr. Oscar Brown, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

On December 9, 1958, the Federal Trade Commission issued its complaint against the above-named respondent, charging it with the use of unfair and deceptive acts and practices and unfair methods of competition in the sale of miscellaneous merchandise in commerce in violation of the provisions of the Federal Trade Commission Act.

On April 7, 1959, the respondent, by its duly authorized officer and by its attorney, entered into an agreement for consent order with counsel supporting the complaint in accordance with Section 3.25 (a) of the Rules of Practice and Procedure of the Commission, which agreement has been duly approved by the Bureau of Litigation. The hearing examiner finds that the content of the said agreement meets all the requirements of section 3.25 (b) of said rules. It is noted that this agreement is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order: