

IN THE MATTER OF
LIFETIME CUTLERY CORP. ET AL.

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

Docket 7292. Complaint, Nov. 5, 1958—Decision, Dec. 13, 1960

Order requiring Brooklyn suppliers of cutlery to distributors and jobbers to affirmatively disclose the foreign source of carving fork heads, the word "Japan" on the shanks of which was concealed in the process of assembling

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with domestic handles; to cease attaching tags bearing fictitious prices to their merchandise and placing such prices on the packaging cartons, thereby representing the exaggerated figures to be the regular retail prices; and to cease representing falsely that merchandise having an electrolytic application of gold alloy was "24 karat gold plated", and that they manufactured certain of their merchandise in their plant in Sheffield, England.

Mr. Ames W. Williams for the Commission.

Reiman & Reiman, by *Mr. Irving R. Reiman*, of New York, N.Y., for respondents.

AMENDED INITIAL DECISION BY ABNER E. LIPSCOMB,
HEARING EXAMINER

On October 30, 1959, the Commission issued its opinion in this proceeding, denying the appeal of counsel supporting the complaint, but remanding the case to the Hearing Examiner with the direction that he receive such evidence as might be offered relative to the charge in the complaint that Respondents have misrepresented their products as being "24-carat gold-plated". In addition, the Commission stated in its opinion that in one respect the initial decision issued on June 18, 1959, was incomplete in that it failed to recite that on February 19, 1959, the Hearing Examiner had taken official notice of the fact that a substantial portion of the purchasing public maintains a preference for products of domestic manufacture rather than Japanese manufacture, and that paragraph 3 of the findings should be amended accordingly. The Commission then directed that after the reception of additional evidence, the Hearing Examiner should indicate any changes which he might wish to make in his initial decision.

PROCEEDINGS SUBSEQUENT TO REMAND

In compliance with the Commission's order, a hearing was held in Providence, Rhode Island, on May 25, 1960, at which expert testimony was received relative to the charge that Respondents' product was not "24-carat gold-plated".

After considering that evidence in its relation to the entire record, the Hearing Examiner has rewritten paragraph 5 of his initial decision, and, in consonance therewith, has added a fifth provision to the order to cease and desist. He has also amended paragraph 3 of his initial decision to conform to the Commission's opinion concerning that paragraph.

1. The Complaint and Answer

On November 5, 1958, the Commission issued its complaint in the above-entitled proceeding, charging the Respondents named above with the violation of the Federal Trade Commission Act by selling and distributing in commerce cutlery in which fork heads imported from Japan are so assembled that the country of origin is not revealed in the finished product; by attaching or causing to be attached to their merchandise tickets or tags on which prices are printed representing as the regular and usual retail price for said merchandise prices which are in fact fictitious and are greatly exaggerated over the prices at which such products are usually and customarily sold; by representing that certain parts of their merchandise are "24-carat gold-plated", when such parts do not have a substantial surface plating of gold alloy applied by a mechanical process, but the surface plating thereon is applied by electrolytic means; and by representing on their invoices that they own plants in Sheffield, England, when such is not the fact.

In connection with this latter charge, the complaint alleges that there is a preference on the part of a substantial number of the purchasing public for dealing with manufacturers of products, in the belief that there are certain advantages in doing so, including but not limited to cheaper prices. The complaint further alleges that as a result of the above-described practices, trade has been unfairly diverted to Respondents and substantial injury has thereby been done to competition in commerce, to the prejudice and injury of the public.

On January 15, 1959, Respondents submitted an answer to the complaint herein, admitting their identity and substantial engagement in business in interstate commerce, but denying the principal charges of the complaint.

2. Hearings and Proposed Findings

Subsequent thereto, hearings were held, at which evidence was presented in support of the allegations of the complaint. Upon completion of the presentation of such evidence, prior to the remand, the Respondents, by their counsel, declined to present evidence on their behalf, but moved to dismiss this proceeding on the ground that counsel supporting the complaint had failed to sustain his burden of proof with respect thereto. Proposed findings as to the facts and proposed conclusions were thereafter submitted by both counsel supporting the complaint and counsel for the Respondents. Subsequent to the remand and the reception of additional evidence, counsel supporting the complaint submitted pro-

posed findings as to the facts and conclusions, but counsel for Respondents submitted no proposals. Each of the proposals submitted, both before and after the remand, has been separately considered by the Hearing Examiner, and those not adopted and embodied in substance herein are hereby rejected.

The Hearing Examiner, having now reconsidered the entire record herein, finds the facts to be as follows:

FINDINGS AS TO THE FACTS

1. Identity of Respondents

Respondents, in their answer to the complaint herein, admit that Respondent Lifetime Cutlery Corp. is a New York corporation, with its principal place of business located at 54 Knickerbocker Avenue, Brooklyn, New York, New York, and that Respondents Benjamin R. Berlin and Muriel Berlin are officers of the corporate Respondent and formulate, direct and control the acts and practices thereof, and that their address is the same as that of the corporate Respondent.

2. Activities in Commerce

Respondents, in their answer, admit that they are now and for some time past have been engaged in the advertising, offering for sale, sale and distribution of cutlery in interstate commerce to distributors and jobbers, and that they have caused their products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other states of the United States, and have maintained a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. Concealment of Country of Origin of Product

The evidence shows that Respondents assemble certain items of their cutlery, using carving-fork heads manufactured in and imported from Japan and handles of domestic fabrication. The carving-fork heads are stamped on the shank with the word "Japan", but such legend is concealed by the handle in the assembling process, and the fact that such fork heads are made in and imported from Japan is not revealed in the finished product to any purchaser thereof. The forks, with heads of Japanese manufacture, are packed for sale in boxes which also contain carving knives, the blades of which are made in and imported from England, and visibly so marked. These blades, like the Japanese fork-heads, are attached to handles of domestic manufacture, which are not so marked.

In the course of this proceeding the Hearing Examiner, in an order issued on February 9, 1959, took official notice that:

1. A substantial portion of the purchasing public maintains a decided preference for products of domestic manufacture rather than of Japanese manufacture, and when the country of origin of merchandise is not marked, or if the markings are concealed, the purchasing public understands and believes such products to be wholly of domestic origin; and

2. There is a preference on the part of a substantial number of the purchasing public to deal with manufacturers of products in the belief that there are certain advantages in doing so, including but not limited to cheaper prices.

No evidence was offered to show the contrary, and no request was made to present any such evidence. Accordingly, the facts so noticed are now established as true.

Not only have Respondents failed to disclose the Japanese origin of their fork-heads, but, in the process of fitting handles thereto, they have concealed the word "Japan" on the shank of the fork-head, which, if left uncovered, would have revealed the foreign origin thereof. Because of the above-mentioned prevailing belief, we must conclude that the Respondents, by their failure to disclose that the carving-fork heads are imported from Japan, have represented that their cutlery, except for the English knife-blades, is made in the United States.

4. Preticketing

The evidence shows that the Respondents attach or cause to be attached to their merchandise tickets or tags upon which prices are printed. The evidence also shows that such prices appear upon the cartons in which the merchandise is packed. These price tags represent that such prices are the regular and usual retail prices for such merchandise. The testimony of a number of witnesses clearly shows, however, that the prices appearing on these price tags are not the regular and usual retail prices of the articles so marked, but are fictitious in that they greatly exaggerate the true usual and customary prices.

The logical conclusion to be drawn from these facts is that the Respondents, by attaching to their products tags showing fictitious and exaggerated prices, have supplied to the wholesalers, jobbers and other distributors of such products a means and instrumentality through and by which their retail customers are enabled to mislead the purchasing public as to the regular, usual and customary prices of such merchandise.

5. Misrepresentation as to "24-Karat Gold-Plated" Merchandise

The evidence shows that certain parts of the Respondents' products are described by the Respondents as "24-Karat Gold-Plated".

The evidence also shows that such gold plating is applied by electrolysis.

Mr. Granville E. Robbins, Chief Chemist and Assayer, Metals and Controls Division, Texas Instruments Corporation, Attleboro, Massachusetts, who had conducted over a quarter of a million assays upon precious metals over a period of thirty years, testified as an expert witness in that field. He testified specifically that he conducted tests upon Commission's Exhibit No. 18, which consists of several pieces of Respondents' cutlery ware, and that the electroplated gold deposit thereon assayed less than the represented 24-carat fineness, approximately 21 carat. He testified further that the thickness was approximately 2.4 millionths, or .0000024 inches, maximum.

Mr. Robbins further testified that the gold deposit on Commission's Exhibit No. 18 had very little intrinsic or utility value. Mr. Robbins testified that all the gold deposited upon Commission's Exhibit No. 18 was worth less than one dollar. He further stated that the electrolytic deposit thereon has slight resistance to wear and corrosion.

Mr. Robbins testified that 24-carat gold is gold that is 99.95% pure gold, and that "24-carat gold-plated" means 99.95% pure gold mechanically bonded to a supporting metal of predetermined thickness. He explained that mechanically-bonded gold has good utility, resistance to corrosion, intrinsic value and color permanence. Electroplated gold, on the contrary, in conventional use, has slight utility or intrinsic value and the deposit is so thin that it may be characterized as a coloring operation.

Likewise, Mr. Robbins testified that the use of a carat designation, when applied to conventional electroplating, is improper because the electrolytic bath does not plate out pure gold, and it is impossible to designate correctly a specific carat fineness as deposited thereon.

When asked about the durability of the two methods of applying gold, Witness Robbins testified that mechanically-applied gold might wear from twenty to forty years, and electroplated gold of the thickness of that on Commission's Exhibit No. 18 might not wear for two days.

The testimony of Mr. Robbins on the subject of gold-plating is so clear and forceful, in contrast to the prior brief testimony on that subject, and so free from any indication of falsehood or error through ignorance, that we must accept it as true. Accordingly, we must conclude that Respondents' products are not, in fact, 24-carat gold-plated as represented, but are only colored by an inconsequen-

tial electrolytic application of gold of less than 22-carat fineness; and that "24-carat gold-plated" means a product which has a substantial plating of pure gold (23.95 carats fine) bonded to a base metal by a mechanical process.

6. Ownership of Plants or Factories

The evidence shows that Respondents have printed upon invoices used by them the words "Plants: New York . New Jersey . Ohio . Sheffield, England". We find that such use of the word "plants" constitutes a representation that the Respondents own or control plants or factories located in Sheffield, England, as well as in the other various places named on their invoices. The evidence shows that in truth and in fact the Respondents do not own or control any factories in Sheffield, England, or elsewhere. The belief thus engendered that Respondents have a factory in Sheffield, England, induces prospective purchasers to believe that the Respondents are manufacturers, and therefore that when they purchase merchandise from Respondents, they are buying directly from a manufacturer. In the Hearing Examiner's order of February 19, 1959, hereinbefore referred to, taking official notice of certain facts, notice was also taken of the following:

There is a preference on the part of a substantial portion of the purchasing public to deal with manufacturers of products in the belief that there are certain advantages in doing so, including but not limited to cheaper prices.

We find that this preference is general, and have no reason to believe that wholesalers, distributors and jobbers, as a class, are an exception thereto. Accordingly, we must conclude that wholesalers, distributors and jobbers, as well as the general public, partake of this preference. Therefore, because of this preference, Respondents, by the representation that they are manufacturers, have unfairly diverted trade to themselves from their competitors.

CONCLUSIONS

Consideration of all the evidence of record, in the light of the applicable principles of law, warrants the following conclusions:

1. The acts and practices of Respondents, as herein found, are all to the prejudice and injury of the public 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;

2. The Commission has jurisdiction over the Respondents and over their acts and practices as herein found; and

3. This proceeding is in the public interest. Accordingly,

It is ordered. That the Respondent Lifetime Cutlery Corp., a corporation, its officers, and the Respondents Benjamin R. Berlin and Muriel Berlin, individually and as officers 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 any 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 or any other product made or containing parts made in Japan or in any other foreign country, without clearly disclosing thereon the country of origin thereof;

2. Representing, by preticketing, or in any other manner, that a certain amount is the retail price of merchandise, when said amount is in excess of the usual and customary price at which said merchandise is sold at retail;

3. Furnishing to others any means or instrumentality by or through which the public may be misled as to the usual and customary prices of Respondents' products;

4. Representing, directly or by implication, that the Respondents, or any of them, own a plant or factory in Sheffield, England, or any other place, when such is not the fact; and

5. Representing that merchandise which has a surface coating of gold or gold alloy applied by an electrolytic process is gold-plated, or gold-plated with any carat designation.

OPINION OF THE COMMISSION

By the COMMISSION:

After considering an appeal from the hearing examiner's initial decision of June 18, 1959, the Commission remanded this case to the hearing examiner for the reception of such additional evidence as might be offered in support of and in opposition to the complaint's charges that the respondents had falsely represented their cutlery as "24 karat gold plated."

The evidence received following such remand consisted primarily of the oral testimony of a well qualified assayer who conducted tests of certain of the respondents' products received in evidence. He testified in substance that the gold surfacing on those articles was electrolytically applied rather than mechanically bonded, was a maximum of 2.4 millionths of an inch in thickness (.0000024), and that the gold assayed as less than 22 carat fineness. In the amended initial decision subsequently filed by him on August 10, 1960, the hearing examiner correctly found, among other things, that the

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respondents in designating and referring to their merchandise as gold-plated thereby represented that such articles had a substantial coating or surfacing of gold bonded to base metal by a mechanical process, whereas such merchandise was only colored by an inconsequential electrolytic application of gold.

On September 12, 1960, the hearing examiner filed an order proposing correction of an asserted clerical error in the particular paragraph of the initial decision's order to cease and desist directed against future misrepresentations of gold content. That revised provision would prohibit the respondents from representing that merchandise having a surface coating of gold or gold alloy applied by an electrolytic process is gold-plated or gold-plated with any carat designation. Although this provision appropriately prohibits continued passing off of respondents' electrolytically processed products as mechanically gold-plated, we think the order issuing here also should contain recognition that use of the terms gold electroplate or gold electroplated to describe articles having a substantial coating of gold, and not inconsequentially flashed or colored with that metal, would not violate the order. Revision of the order is likewise warranted to more directly relate the order's prohibitions to respondents' past misstatements respecting the carat fineness of their merchandise.

The amended initial decision of the hearing examiner as above modified is being adopted as the decision of the Commission.

Commissioner Mills did not participate in the decision of this matter.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's amended initial decision; and

The Commission having determined that the initial decision is not appropriate in all respects to dispose of this proceeding:

It is ordered. That the order contained in the amended initial decision be, and it hereby is, modified (1) by striking paragraph 5 thereof in its original form and as proposed to be corrected in the hearing examiner's order of September 12, 1960, and (2) by substituting the following paragraphs, the same to be designated as paragraphs 5 and 6 thereof:

5. Using the term "gold-plated", or any other word or words of similar import or meaning, to designate, describe or refer to an article which does not have a surface plating of gold or gold alloy applied by a mechanical process, provided, however, that any product, or part thereof, on which a substantial coating of gold or gold