

It is further ordered, That the initial decision as so modified shall, on the 12th day of January, 1961, become the decision of the Commission.

It is further ordered, That the respondent, Perfect Equipment Corp., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF
STANLEY PERKIS TRADING AS
MURRAY HILL HOUSE

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

Docket 7748. Complaint, Jan. 18, 1960—Decision, Jan. 12, 1961

Order requiring a distributor of unwoven cotton and rayon fiber towels in Farmingdale, Long Island, N.Y., to cease representing falsely in newspaper, magazine, and other advertising that such products had the appearance, thickness, and texture of towels customarily used in the home.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondent on January 18, 1960, charging him with violation of the Federal Trade Commission Act in connection with the advertising and offering for sale of certain unwoven cotton and rayon fiber products. A hearing was held before a duly designated hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed July 19, 1960, the hearing examiner found that the charges had not been sustained by the evidence and ordered that the complaint be dismissed.

The Commission having considered the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and the entire record in this proceeding and having determined that the appeal of counsel supporting the complaint should be granted and that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with

Findings

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the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Stanley Perkis, is an individual trading as Murray Hill House, with his office and place of business located at 25 Roxbury Street, Farmingdale, Long Island, New York. Respondent is engaged in the business of selling by mail order unwoven cotton and rayon fiber products.

2. In the course and conduct of his business, respondent has been engaged in the sale and distribution of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. Respondent at all times mentioned herein has been in substantial competition in commerce with other corporations, firms and individuals in the sale of towels.

4. In the course and conduct of his business, and for the purpose of inducing the sale of said products, respondent has made certain statements with respect to said products in advertisements in magazines and newspapers of national circulation of which the following are typical:

24	LARGE	Less than
	NEW	5¢ ea.
	TOWELS	

That's right! Two dozen large soft fluffy white towels for only \$1.00 * * * Think of it — LARGE SIZE unwoven cotton and rayon towels for less than a nickel apiece. Terrific value you've got to see to believe.

5. Four public witnesses called by counsel supporting the complaint testified that respondent's advertising led them to believe that the product described therein was a bath towel or large cloth towel, similar to a terry cloth or turkish towel. Another public witness testified to the effect that his first impression from the advertisement was that large bath towels were being offered for sale but that because of the low selling price he would expect to receive hand towels or face cloths that could be used as towels.

6. An official of the firm that has supplied respondent with said products testified that they are made by a paper mill and that the same process is used as in making paper except that fibers are used instead of pulp. The product is designated in the supplier's literature as "154 Open Mesh" and is described as "Non-Woven Cheese-cloth." An examination of the product discloses that it can be easily torn or shredded and that it closely resembles soft paper toweling in appearance, thickness and texture.

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7. On the basis of the foregoing evidence, the Commission finds that respondent, through use of the aforesaid advertising, has represented that he is offering for sale large cloth towels which have the appearance, thickness and texture of cloth towels customarily used in the home, whereas, in truth and in fact, said products closely resemble soft paper toweling, and do not have the appearance, thickness or texture of cloth towels customarily used in the home.

8. The practice of the respondent, as hereinbefore found, has had and now has the tendency and capacity to mislead and deceive purchasers of this unwoven cotton and rayon fiber products with respect to the appearance, composition and quality of such products and thereby induce the purchase of substantial quantities thereof. As a result, substantial trade in commerce may be unfairly diverted to respondent from his competitors and substantial injury has been done to competition in commerce.

CONCLUSIONS

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

ORDER

It is ordered, That the respondent, Stanley Perkis, trading as Murray Hill House or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of unwoven cotton and rayon fiber products, or any other like merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that such product has the appearance, thickness or texture of cloth towels or misrepresenting in any manner the appearance, thickness or texture of such product.

It is further ordered, That respondent, Stanley Perkis, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter charges respondent with violation of Section 5 of the Federal Trade Commission Act. The hearing examiner held in his initial decision that the charges were not sustained by the evidence and ordered that the complaint be dismissed. The matter is now before the Commission on the appeal of counsel supporting the complaint from this decision. Oral argument was not had.

The complaint challenges certain advertising used by respondent in connection with the sale by mail order of certain unwoven cotton and rayon fiber products. The following representations are typical of those used in the advertising of such products:

24	LARGE NEW TOWELS	Less than 5¢ ea.
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That's right! Two dozen large soft fluffy white towels for only \$1.00 * * * Think of it — LARGE SIZE unwoven cotton and rayon towels for less than a nickel apiece. Terrific value you've got to see to believe.

The following allegations with respect to this advertising were made in the complaint:

"PAR. 5. Through the use of the aforementioned statements, respondent represented directly and by implication, that the product offered for sale is a large cloth towel which has the appearance, thickness and texture of towels customarily used in the home.

"PAR. 6. Said statements and representations were false, misleading and deceptive. In truth and in fact, said so-called towel is not of the type customarily used in the home but is an unwoven product which does not have the appearance, thickness or texture of towels customarily used in the home and is not large compared to household towels since its dimensions are 12 inches wide by 18 inches long."

The first question raised on the appeal concerns the hearing examiner's interpretation of the complaint. Although he assumed that respondent's advertising would be interpreted by the public in the manner indicated in Paragraph 5, he ruled in effect that the principal issue framed by Paragraph 6 was whether respondent's product is a towel of the type customarily used in the home and that it was incumbent upon counsel supporting the complaint, therefore, to show what type or types of towels are customarily used in the home and that respondent's product is not of such type or types. He then found that respondent's product falls within the definition of the term "towel", which includes "absorbent paper" as well as "cloth",

and that there are many types of towels customarily used in the home. Since the record failed to show that respondent's product was not one of these types, the hearing examiner held that the charge had not been sustained.

We agree with counsel supporting the complaint that the hearing examiner erred in his interpretation of this charge. In construing the complaint, Paragraphs 5 and 6 must be read together. Paragraph 5 contains the allegation that respondent had represented that the product offered for sale is a large cloth towel having the appearance, thickness and texture of towels customarily used in the home. When read in context, the phrase "towels customarily used in the home" means cloth towels customarily used in the home, not paper towels or some other non-woven products. Paragraph 6 negates the representation made by respondent, stating in effect that the product is not a cloth towel of the type customarily used in the home and that it is not large compared to such towels. The issues raised, therefore, are whether respondent's advertisements create the impression that the product described therein is a large cloth towel having certain physical characteristics of cloth towels customarily used in the home, whether it is a towel of this particular type, and whether it is large compared to household towels.

Five public witnesses were called by counsel supporting the complaint for the purpose of testifying as to their understanding of respondent's advertising. Four of the witnesses stated that they would be led to believe by such advertising that the products offered for sale were bath towels, such as turkish towels, and one witness stated that he believed that the advertised products would be hand towels or face cloths. Although the testimony of these witnesses fully supports the allegation in Paragraph 5, the hearing examiner made no finding to that effect but merely assumed that the advertising created the impression as alleged. He ruled, however, that the evidence given by these witnesses was entitled to little weight since "their testimony and demeanor was such as to indicate that their statements were influenced by the interview" with the Commission's investigator. Counsel supporting the complaint has taken exception to this ruling.

While we will ordinarily accept a hearing examiner's evaluation of the testimony of witnesses who have appeared before him, we believe that the record in this matter clearly discloses that the examiner was not justified in holding that the statements made by the public witnesses were not worthy of credence. In the first place, we find nothing in the testimony of these witnesses to indicate that they had been influenced by an interview with the Commission's

investigator. It is also obvious from the remarks made by the hearing examiner during the hearing that his determination with respect to the credibility of these witnesses was based on a preconceived notion that any public witness who is interviewed prior to giving testimony will be unduly influenced by the interview. In this connection, the hearing examiner made the following observations on the record prior to giving testimony will be unduly influenced by the interview. In this connection, the hearing examiner made the following observations on the record prior to hearing the testimony of all of the public witnesses:

... I have said repeatedly in these cases and I think I might as well repeat it, I am not thrilled with these witnesses who are brought in after having been interviewed and talked to by somebody connected with one side or the other of the case.

You just can't help be somewhat influenced by what took place and I think the testimony is worth very little. I am not talking for your benefit. I am talking for the benefit of the lawyer and I just can't get excited about it and I would base very little finding upon their opinion. . . .

* * *

Now, if you are going to read the ad and interpret the ad as a whole, your interpretation is not acceptable, and I have told you, Mr. O'Connell, before we came here that I had very little reliance on public witnesses, and this is an example of why I cannot as a Hearing Examiner rely on their testimony.

They look at a thing. They have been given the notion of what the case is about. They get some idea what they have to say and they say it. I say that from experience, because I have had witnesses on the stand that had not been told by anybody what they were to say, but they knew when they were interviewed first that there was some case involved, some funny advertising involved, and they tried to make a case out for what they thought was wanted. . . .

We do not subscribe to the position taken by the hearing examiner, nor do the courts. *Gulf Oil Corporation v. F.T.C.*, 150 F. 2d 106 [4 S. & D. 374] (5th Cir. 1945); *Stanley Laboratories v. F.T.C.*, 138 F. 2d 388 [3 S. & D. 596] (9th Cir. 1943); *Rhodes Pharmacal Co., Inc. v. F.T.C.*, 208 F. 2d 382 [5 S. & D. 582] (7th Cir. 1953). On the basis of the testimony of the public witnesses and from our own reading of respondent's advertising, it is our opinion that the public may be led to believe by such advertising that the products described therein are cloth towels having the appearance, thickness and texture of cloth towels customarily used in the home. The use of the words "soft fluffy" in its advertisements would certainly contribute to this mistaken belief.

The final questions presented for our determination are whether respondent's product is a cloth towel of the type customarily used in the home and whether the product is large compared to household towels. With respect to the latter point, the complaint alleges that the product is not large since its dimensions are 12 inches wide and

18 inches long. As found by the hearing examiner, however, respondent's product measures 17 inches by 47 inches. Consequently, the allegation that respondent had misrepresented the size of his product has not been sustained.

There can be no doubt, however, that respondent's product is not a cloth towel having the appearance, thickness and texture of towels customarily used in the home. This is obvious from an inspection of the product and from the testimony of one of the officials of the firm that supplied the product to respondent. The product is designated in the supplier's literature as "No. 154 Open Mesh" and is described as "Non-Woven Cheesecloth." The president of this firm testified that the process used in making the product is the same as that used in making paper towels except that cotton and rayon fibers are used instead of pulp. He also testified that the product will disintegrate if washed and that it is used as a disposable towel. From our own examination of the product, we find that it can be torn or shredded without difficulty and that it closely resembles soft paper toweling in appearance, thickness and texture. It may well be that respondent's product may be considered to be a type of towel, as found by the hearing examiner, but it is not a cloth towel of the type used in the home nor does it resemble such towels.

For the foregoing reasons, it is our conclusion that respondent's advertising of unwoven cotton and rayon fiber products constitutes an unfair trade practice in that such advertising has the capacity and tendency to mislead the public into believing that the product offered for sale is a cloth towel of the type customarily used in the home. We are, therefore, issuing our own findings, conclusions and order to cease and desist in lieu of the initial decision of the hearing examiner, which is vacated and set aside.
