

Complaint

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IN THE MATTER OF

LUXURY INDUSTRIES, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 7728. Complaint, Jan. 6, 1960—Decision, Sept. 12, 1961*

Order requiring sellers of carports, patios, storm doors and windows in Washington, D.C., to cease advertising special prices which were not bona fide offers for sale but were made to obtain leads to prospective purchasers who were then pressured to buy higher priced products; and representing falsely that purchasers who allowed the products installed to be used for model home demonstrations would receive a price reduction, that their products were unconditionally guaranteed, and that carports or patios were "all aluminum" and included a supporting foundation wall and a completed floor.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Luxury Industries, Inc., a corporation, and Arthur Hankin, individually and as an officer of said corporation, and Arthur Hankin, trading and doing business as Patilum Co. and Patalum Luxury Industries, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Luxury Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with an office and place of business located at 3002 12th Street, N.E., Washington, D.C.

Respondent Arthur Hankin is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is 1118 Brighton Street, Philadelphia, Pennsylvania.

Respondent Arthur Hankin trades and does business as Patilum Co. and Patalum Luxury Industries, with an office and place of business located at 3002 12th Street, N.E., Washington, D.C.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of, among other things, carports, patios, storm doors and windows to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their products, respondents have made certain statements with respect thereto on television, in newspapers of general circulation and through other advertising media. By and through the use of such statements, and through oral statements made by their salesmen, respondents have represented:

(1) That they are making a bona fide offer to sell carports or patios, storm windows and doors for the full price of \$77.00, \$6.49 and \$16.50, respectively.

(2) That persons who allowed the products installed by respondents to be used for model home demonstration purposes in selling to others, will receive a reduction in price;

(3) Through the use of the word "Lifetime Guarantee" and "Fully Guaranteed" that said products were unconditionally guaranteed;

(4) That the carport or patio referred to in subparagraph (1) above was "all aluminum";

(5) Through the use of pictures in advertisements, that the carport or patio referred to in subparagraph (1) includes a supporting foundation wall and a completed floor.

PAR. 5. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

(1) The offer set forth in subparagraph (1) of Paragraph Four above was not a genuine or bona fide offer but was made for the purpose of obtaining leads and information as to persons interested in the purchase of said products. After obtaining such leads through response to such advertisements and calling upon such persons, respondents and their salesmen made no effort to sell the advertised products at the advertised price, but, instead, disparaged such products in such a manner as to discourage their purchase and attempted to, and frequently did, sell much higher priced products.

(2) Respondents did not intend to use, nor did they use, the home of any of their purchasers for demonstration purposes, this statement being used only as a means to induce resistant purchasers into the buying of said products under the mistaken impression that they

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were receiving some sort of a special price because of their willingness to allow their homes to be used for this purpose.

(3) Respondents' guarantee is not unconditional. The guarantee, if any is given, is limited in certain respects and such limitations and the manner and form in which the guarantor will perform are not disclosed to the purchaser.

(4) The carport and patio referred to in subparagraph (4) of Paragraph Four above is not "all aluminum" but instead has wooden supporting rafters and wooden supporting posts.

(5) The carport or patio depicted in the advertisement and offered for sale at \$77.00 does not include a supporting foundation wall or a floor.

PAR. 6. In the course and conduct of their business at all times mentioned herein, the respondents have been in substantial competition in commerce with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now 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.

Mr. Michael J. Vitale for the Commission.

Mr. Mark B. Sandground of *Amram, Hahn & Sundlun*, Washington, D.C., and *Mr. Samuel Packman*, Philadelphia, Pa., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence. The filing of proposed findings as to the facts and conclusions were waived by the parties and the matter submitted to the

hearing examiner upon the record. The hearing examiner having considered the record herein, and being now fully advised in the premises, now makes the following findings as to the facts, conclusions drawn therefrom and order :

FINDINGS AS TO THE FACTS

1. Respondent Luxury Industries, Inc., is a corporation organized under the laws of the State of Pennsylvania. The individual respondent Arthur Hankin is an officer of the corporate respondent, and formulates, directs and controls the acts and practices of the corporate respondent. In addition, said respondent Arthur Hankin also does business as Luxury Industries, Inc., Luxury Industries, Patalum Luxury Industries, and Patilum Co., all located at 3002 12th Street, N.E., Washington, D.C.

2. For several years last past the respondents have been engaged in the sale and distribution of carports, patios, storm doors and windows in interstate commerce and in the District of Columbia in competition with corporations, firms and individuals engaged in the sale and distribution of similar products in interstate commerce.

3. The corporate respondent and the individual respondent Arthur Hankin, doing business under his various trade names hereinabove described, have adopted a sales plan, or method of sale, which was designed to mislead and deceive prospective purchasers and to induce them to purchase higher priced merchandise than that offered for sale in their various advertisements.

4. In the course and conduct of their business, and for the purpose of inducing the sale of their products, it was the practice of the respondents to place advertisements in local newspapers and other periodicals, offering for sale an all aluminum patio or carport for the price of \$77.00 installed, storm windows for the price of \$6.49, and storm doors at the price of \$16.50. Such representations were also made by means of statements contained in television broadcasts. Such advertisements contained a pictorial representation of a patio including supporting foundation walls and completed floor.

5. Such representations were not in fact genuine or bona fide offers for sale of the advertised products, but were made for the purpose of obtaining leads and information as to persons interested in the purchase of such products. The carports and patios offered for sale at the special price of \$77.00 were not all aluminum as advertised, but instead were made of very flimsy light-weight aluminum with wooden posts and wooden supporting rafters. The special price did not include supporting foundation wall or a floor as represented by the pictorial depiction of the patio in said advertisements.

6. When a member of the purchasing public answered such advertisements, salesmen of the respondents called upon him, and either made no effort to sell the advertised products, or if the customer agreed to purchase the item advertised the salesmen belittled and disparaged the product to discourage the purchaser from going through with his purchase, and attempted to, and frequently did, sell higher priced products.

7. Seven customers who answered respondents' advertisement for a carport or patio, fully installed, for \$77.00 were called as witnesses to show the results obtained through the use of the sales methods adopted by the respondents. Each of these witnesses was induced to purchase more expensive carports or patios at the following varying prices depending on allowances granted: \$797.00, \$621.00, \$500.00, \$500.00, \$471.00, \$461.00 and \$320.00. In like manner four customers who answered respondents' advertisement for storm doors at \$16.50 and storm windows at \$6.50 were induced to purchase these products in the following quantities and for the following prices: 15 storm windows and one storm door for \$355.00; 11 storm windows and one picture storm window for \$316.00; 19 storm windows and one storm door for \$700.00 and 10 storm windows and two storm doors for \$350.00.

8. When the prospective purchaser objected to the price, the respondents represented that a special discount would be allowed if the purchaser permitted his home to be used for demonstration purposes in selling to others. While a number of the carports and patios were sold at an alleged reduction on the condition of using the purchaser's home for demonstration purposes, there is no evidence that the respondents ever brought prospective purchasers for any such demonstration, but instead such representation was a subterfuge to induce purchaser to believe he was getting a special reduction off the price for this purpose.

9. Respondents also advised prospective purchasers that their products carried a lifetime guarantee, and that said products were guaranteed unconditionally. While the respondents did a substantial amount of business during the time that they were operating, neither Luxury Industries, Inc., or Arthur Hankin doing business under his various trade names, were financially equipped to give performance on any guarantee so made, but instead were engaged only in advertising the products, purchasing them from others, and erecting them when purchased. Respondents' guarantee is not unconditional but is a limited guarantee only and such limitations in many cases are not disclosed to the purchaser.

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10. Through the use of the aforesaid false, deceptive and misleading statements and representations in advertising as part of and in conjunction with respondents' sales plan, hereinabove described, the respondents have induced a substantial portion of the purchasing public to purchase substantial quantities of respondents' more expensive carports, patios, storm windows and other products as is indicated by the fact that respondents' gross volume of sales for the year 1959 amounted to \$301,783.75.

CONCLUSION

The aforesaid acts and practices as herein found 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.

ORDER

It is ordered, That respondents, Luxury Industries, Inc., a corporation and its officers and respondent Arthur Hankin an individual trading as Luxury Industries Inc., Luxury Industries, Patilum Co., and Patalum Luxury Industries and as officers of Luxury Industries, Inc., and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of carports, patios, storm doors and windows or other similar merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that said merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered;
2. The use of any sales plan or procedure involving the use of false, deceptive or misleading statements or representations in advertising which are designed to obtain leads or prospects for the sale of other or different merchandise;
3. Representing, directly or by implication, that their carports and patios are all aluminum construction when in fact the posts or other supports are made of materials other than aluminum;
4. Using pictorial representations in advertising to represent that respondent's patios or other products contain certain features or construction which are not in fact supplied by respondents for the price advertised;
5. Representing, directly or by implication, that any special price, allowance or discount is granted by respondents in return for the

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furnishing of any service or facility which is not in fact supplied such as permitting the premises on which respondents' products have been installed to be used for model home demonstration purposes in selling to others when in fact no such use is made or intended;

6. Representing, directly or by implication, that respondents' products are guaranteed unconditionally or carry a lifetime guarantee when in fact such guarantee is a limited guarantee only and is not an unconditional or lifetime guarantee;

7. Representing, directly or by implication, that respondents' products are guaranteed without disclosing to the purchaser the limitations applicable to such guarantee.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The complaint charges respondents with various unfair trade practices in connection with the advertising, offering for sale, sale and distribution of carports, patios, storm doors and windows. After hearing a number of witnesses in support of the complaint and waiver by respondents of their right to present evidence, the hearing examiner rendered his initial decision consisting of findings of fact, conclusions of law and an order intended to prohibit the unfair practices alleged in the complaint. Although neither side has appealed, we have carefully reviewed the initial decision on our own initiative and have determined that it should be corrected in two respects.

The first of these concerns the allegations of the complaint that respondents had falsely and deceptively represented that persons who allowed products installed by respondents to be used for model home demonstration purposes in selling to others would receive a reduction in price. The record discloses in this connection that this representation had been made to prospective purchasers by respondents' salesmen and the hearing examiner so found. The hearing examiner further found that such representation was deceptive since there was "no evidence that the respondents ever brought prospective purchasers for any such demonstration."

Absence of evidence or lack of evidence is hardly a proper basis upon which to support findings and conclusions. Indeed, it is fundamental that the proponent of a rule or order shall have the burden of proof and that findings and conclusions must be bottomed on "reliable, probative, and substantial evidence."¹ Thus, although we are in agreement with the hearing examiner's conclusion that the representation was deceptive, we believe that the initial decision

¹ Section 7(c), Administrative Procedure Act, 60 Stat. 241 (1946), as amended, 5 U.S.C. § 1006.

should be modified to state more accurately the factual basis for that conclusion. We do not think that the hearing examiner intended to rely upon an absence of evidence to support his finding since there is a clear showing in the record that respondents did not bring prospective purchasers to inspect the homes of the various witnesses who testified that representation in question had been made to them by respondents' salesmen. Nor do we think it necessary to determine whether this showing will support the inference, apparently drawn by the examiner, that respondents did not grant special discounts in consideration for services to be provided by the purchaser. There is ample evidence in the record that such discounts were not allowed by respondents. Illustrative of such evidence is the following testimony of the president of respondent corporation with respect to the company's policy concerning the granting of discounts in return for services to be furnished by purchasers:

Q. Well, do you ever reduce the price of any of the merchandise that you sell by virtue of certain of your customers allowing you to take photographs of the work that the company did for its model home photographs?

A. Not to my knowledge.

Q. Have you ever authorized your salesmen to make representations that if a person will allow their homes to be used as a model home that they would get a lower price?

A. Did I ever——

Q. Authorize your salesmen to make that representation?

A. Definitely not.

Q. And it is not a practice of yours to do that; is that correct?

A. No.

Such evidence, together with the showing that respondents' salesmen had made the representation in question, is adequate to support the aforementioned allegation.

The other matter which we are correcting relates to paragraph 5 of the order contained in the initial decision. This paragraph, as it is now written, would prohibit respondents from representing that they allow a special price or discount in return for the furnishing of a service or facility unless respondents actually make use of, or intend to make use of, such service or facility. The gravamen of the charge which this paragraph purports to cover, however, is that respondents had misled purchasers into believing that they were receiving a reduction in price or special discount, and not that respondents had misrepresented the reasons for giving a reduction or discount. The hearing examiner's order would not prohibit respondents from claiming that they will grant a special discount in return for certain services or facilities, when they do not in fact grant such discount, if they make use of, or intend to make use of, the services or facilities to be furnished by the purchaser. The order is clearly inadequate

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to prohibit the deceptive representations found to have been made by respondents and will, therefore, be changed so as to accomplish that result.

The initial decision will be modified to conform with this opinion and, as modified, will be adopted as the decision of the Commission.

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

FINAL ORDER

This matter having been considered by the Commission upon its review of the hearing examiner's initial decision, filed May 23, 1961, and the Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be modified:

It is ordered, That Paragraph 8 of the initial decision be modified to read as follows:

8. When the prospective purchaser objected to the price, the respondents represented that a special discount would be allowed if the purchaser permitted his home to be used for demonstration purposes in selling to others. While a number of the carports and patios were sold at an alleged reduction on the condition of using the purchaser's home for demonstration purposes, respondents did not in fact grant a reduction in price or special discount in return for such services to be furnished by the purchaser. Such representation was a subterfuge to induce the purchaser to believe that he was receiving a reduction in price.

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

It is ordered, That respondents, Luxury Industries, Inc., a corporation, and its officers and respondent Arthur Hankin, an individual trading as Luxury Industries, Inc., Luxury Industries, Patilum Co., and Patalum Luxury Industries and as officer of Luxury Industries, Inc., and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of carports, patios, storm doors and windows or other similar merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that said merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered;
2. The use of any sales plan or procedure involving the use of false, deceptive or misleading statements or representations in advertising

which are designed to obtain leads or prospects for the sale of other or different merchandise;

3. Representing, directly or by implication, that their carports and patios are all aluminum construction when in fact the posts or other supports are made of materials other than aluminum;

4. Using pictorial representations in advertising to represent that respondents' patios or other products contain certain features or construction which are not in fact supplied by respondents for the price advertised;

5. Representing, directly or by implication, that any special price, allowance or discount is granted by respondents in return for the furnishing of any service or facility by the purchaser such as permitting the premises on which respondents' products have been installed to be used for model home demonstration purposes in selling to others.

6. Representing, directly or by implication, that respondents' products are guaranteed unconditionally or carry a lifetime guarantee when in fact such guarantee is a limited guarantee only and is not an unconditional or lifetime guarantee;

7. Representing, directly or by implication, that respondents' products are guaranteed without disclosing to the purchaser the limitations applicable to such guarantee.

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

It is further ordered, That respondents, Luxury Industries, Inc., and Arthur Hankin, 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 herein.

IN THE MATTER OF

SPENCER GIFTS, INC., ET AL.

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