

SPENCER GIFTS, INC., ET AL.

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

Docket 8097. Complaint, Aug. 25, 1960—Decision, Sept. 12, 1961

Order requiring mail order merchandisers in Atlantic City, N.J., to cease such unfair practices as advertising in their catalogs "Arpege by Lanvin or Chanel No. 5 by Chanel only 70¢ per bottle with anything you order . . .", representing thus that perfumes were offered at a special low price when the products offered were in fact colognes and the price provided a substantial profit to respondents.

Complaint

59 F.T.C.

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 Spencer Gifts, Inc., a corporation, and Max Adler and Harry Adler, individually and as officers of said corporation, 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 Spencer Gifts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1601 Albany Avenue Boulevard, Atlantic City, New Jersey.

Respondents Max Adler and Harry Adler are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of miscellaneous merchandise to the public.

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

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have made the following statements in their catalogs:

Arpege by Lanvin or Chanel No. 5 by Chanel only 70¢ per bottle with anything you order from this catalog you get the generous one dram size in a dainty golden purse flacon. Exquisite, exclusive, truly elegant! Not for sale. Available at this special giveaway price only when you're ordering other items from this catalog. Shipped with your order. Limit 1 to a customer, plus 1 more if your order totals over \$10.00. This is our way of saying "thank you" for your valued patronage! Order ARPEGE (A31815) or CHANEL No. 5 (A-31823).

The foregoing language is accompanied with illustrations of the packaged articles. Printed on the reproduced illustrations is the following language: "Lanvin's Arpege purse size flaconet" and "Chanel No. 5 purse size flaconet."

[PAR. 5.]

PAR. 6. Through the use of the aforesaid statements, respondents represented that the advertised products were perfumes and were being offered to their customers at a special low price with little or no profit to them.

PAR. 7. Said statements and representations were false, misleading and deceptive. In truth and in fact, the products being offered and delivered to the purchasers were colognes and not perfumes and consequently the price at which the products were offered had no relationship to the price of perfume. The price at which the colognes were offered provided a substantial profit to respondents.

PAR. 8. In the conduct of their business respondents were, and are, in competition with corporations, firms and individuals engaged in the sale of colognes in commerce.

PAR. 9. 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 said 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 been, and is being, done to competition in commerce.

PAR. 10. 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. Harry E. Middleton, Jr. for the Commission.

Arkus & Cooper, Atlantic City, N.J., by *Mr. Saul W. Arkus*, for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence and proposed findings of fact and conclusions filed by counsel for respondents and by counsel supporting the complaint. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties and all findings of fact and conclusions of law proposed by the parties not hereinafter specifically found

or concluded, are herewith rejected, and the hearing examiner having considered the entire record herein makes the following findings as to the facts, conclusions drawn therefrom and order:

FINDINGS AS TO THE FACTS

1. Respondent, Spencer Gifts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1601 Albany Avenue Boulevard, Atlantic City, New Jersey.

2. Respondent Max Adler is an officer of the corporate respondent and he formulated, directed and controlled all of the acts and practices of the corporate respondent hereinafter found. Respondent, Harry Adler, is not now an officer of the corporate respondent. Although he was an officer of the corporate respondent until June 18, 1960, he did not formulate, direct or control the acts and practices of the corporate respondent.

3. Respondents are engaged in interstate commerce. Respondents are now and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of miscellaneous merchandise to the public. Respondents were and are in competition with corporations, firms and individuals engaged in the sale of colognes in interstate commerce.

4. Respondents for the purpose of inducing the purchase of their products have made the following statements in their catalog:

“A
F A B U L O U S
Exclusive
FOR SPENCER CUSTOMERS
ONLY!

ARPEGE by Lanvin . . . or CHANEL NO. 5 by Chanel
ONLY 70¢ per bottle

With anything you order from this catalog! You get a generous 1 dram size, in a dainty golden purse flacon! Exquisite, exclusive, truly elegant! Not for sale. Available at this special give-away price only when you're ordering other items from this catalog. Shipped with your order. Limit 1 to a customer, plus 1 more if your order totals over \$10.00. This is our way of saying "thank you" for your patronage! Order ARPEGE (A-31815) or CHANEL No. 5 (A-31823).

5. The manufacturers of Arpege cologne and Chanel No. 5 did not in 1959, and do not now, package and sell their cologne products at retail or otherwise in units of one dram.

Since August 1959, and up to the present time, Arpege and Chanel No. 5 colognes were and are packaged in the following non-spray size units and were and are sold at the respective retail prices as indicated, exclusive of tax:

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Conclusions

<i>Arpege Cologne</i>	<i>Chanel No. 5 Cologne</i>
4 oz. \$ 6.00	2 oz. \$ 3.50
8 oz. \$10.00	4 oz. \$ 5.50
	8 oz. \$ 9.00
	16 oz. \$15.00

Since August 1959, up to and including the present time, Arpege perfume and Chanel No. 5 perfume have been and are packaged in the following non-spray size units and have been and are now sold at the respective retail prices set out below, exclusive of tax:

<i>Arpege Perfume</i>	<i>Chanel No. 5 Perfume</i>
1 dram \$ 4.00	$\frac{1}{4}$ oz. \$ 7.50
$\frac{1}{2}$ oz. \$12.50	$\frac{1}{2}$ oz. \$12.50
1 oz. \$23.50	1 oz. \$20.00
	2 oz. \$35.00

6. Respondent sold Arpege and Chanel No. 5 colognes which had been rebottled by someone other than the manufacturers, and although they did not use the word "perfume" in their advertising they used the brand names which were brands of perfumes as well as brands of colognes without disclosing that the products offered were colognes. In one of respondents' catalogs a package of one of the products was shown with the phrase "EAU DE LANVIN" on the package, but this improvement over the earlier advertising does not appear to be adequate to disclose that the product was cologne.

CONCLUSIONS

The respondents stressed that they offered an unusual value, and this fact, plus the fact that the manufacturers of these brands did not package and sell these brands of cologne in smaller than two ounces but did package and sell perfume in one- or two-dram sizes, leads to the conclusion that many buyers could easily be led into believing that the products offered were perfume.

The representations of respondents had the capacity and tendency to mislead members of the purchasing public into the erroneous belief that the colognes advertised were, in fact, perfumes, and the fact that the price at which the colognes were offered was substantially lower than the price at which these brands of perfumes were usually offered, was not sufficient to put prospective buyers on notice that the products were colognes.

The acts and practices hereinabove found were to the prejudice and injury of the public and of respondents' 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.

Opinion

59 F.T.C.

ORDER

It is ordered, That respondents, Spencer Gifts, Inc., a corporation, and its officers, and Max Adler, 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 cologne 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 a cologne is a perfume.
2. Using the name of any brand of perfume to describe cologne, unless in close connection with such brand name the product is clearly stated to be cologne.
3. Offering for sale or selling a cologne, in bottles or other containers of the same size and appearance as containers in which perfumes are customarily or usually packaged, without clearly disclosing that such product is cologne.

It is further ordered, That the complaint herein is dismissed as to respondent Harry Adler, individually and as an officer of corporate respondent.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The complaint in this matter charges respondents with misrepresenting certain of their products as perfumes in violation of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations were sustained by the evidence and ordered the respondents (except for an individual as to whom the complaint was dismissed) to cease and desist from the practices found to be unlawful. Respondents have appealed from this decision.

Respondents are engaged in the sale of miscellaneous merchandise. The representations giving rise to the charge in this case appeared in respondents' catalog and read as follows:

A
FABULOUS
Exclusive
FOR SPENCER CUSTOMERS
ONLY!

ARPEGE by Lanvin . . . or CHANEL NO. 5 by Chanel ONLY 70¢ per bottle

With anything you order from this catalog! You get a generous 1 dram size, in a dainty golden purse flacon! Exquisite, exclusive, truly elegant! Not for sale. Available at this special give-away price only when you're ordering other items from this catalog. Shipped with your order. Limit 1 to a customer, plus

1 more if your order totals over \$10.00. This is our way of saying "thank you" for your valued patronage! Order ARPEGE (A-31815) or CHANEL NO. 5 (A-31823).

The products thus offered were colognes which had been rebottled in one dram units by someone other than respondents and which cost respondents forty-four cents per unit.

The undisputed facts show that Arpege and Chanel No. 5 are brand names of perfumes as well as colognes. However, neither of the manufacturers of these products packages and sells colognes in units of one dram. The smallest size non-spray unit of Arpege cologne available is four ounces which sells for \$6.00. The smallest such unit of Chanel No. 5 cologne is two ounces and sells for \$3.50. Arpege perfume is available in a one dram size (equivalent to one-eighth of an ounce) at \$4.00 and Chanel No. 5 perfume is available in a one-fourth ounce size for \$7.50.

The hearing examiner concluded that respondents' advertisement would lead buyers into believing that the products offered were perfumes. Several arguments are advanced by respondents as to why the hearing examiner erred in this conclusion. First, respondents argue, on the basis of testimony of respondent Max Adler to the effect that the products were sold at a loss, that the offer was an unusual value as represented. Also, they contend in substance that the size of the package is of no significance since one of the manufacturers does not package its perfume in the one dram unit. In our view, these arguments are wholly without substance. Regardless of respondents' profit or loss on the offer, we have no doubt that in reliance upon the fact that the brand names used were brands of well-known perfumes as well as colognes, together with the fact that the colognes were offered in small containers similar to those in which perfumes are sold, respondents' extravagant representations were calculated to, and would, convey the impression that expensive perfumes were being offered to customers as an inducement to purchase articles from their catalog. Also, since the products were offered to induce the sale of other goods, we agree with the hearing examiner that the price at which they were offered was not sufficient notice to prospective customers that the products were colognes.

About one month after distribution of the catalog in which the offer first appeared, respondents distributed a second edition containing the same offer. In the text of the second offer, respondents inserted the wording "the genuine product rebottled." This wording certainly does not inform prospective purchasers as to the nature of the product offered. Also, the words "Eau de Lanvin" and "Eau de Cologne" were inserted on the pictures of the packages shown in the

offer. However, the printing is so faint and small as to be practically indiscernible and thus cannot be considered adequate notice that the products were colognes. Accordingly, we find that this second offer is also deceptive.

Respondents next contend that an order to cease and desist should not issue since they have abandoned the practice. To resolve such questions we generally look to the timing and circumstances surrounding the alleged discontinuance. *Art National Manufacturers Distributing Co., Inc.*, Docket No. 7286 (May 10, 1961).

The facts disclose that the offer was initially published in the first edition of respondents' 1959 Christmas catalog, of which 956,000 copies were distributed at the end of August and the beginning of September of that year. During the first two weeks of October, respondents distributed 4,880,000 copies of the second edition of their Christmas catalog featuring the same offer. The third edition distributed at the end of October, and subsequent editions, did not contain the offer. Respondents discontinued the sale of the two products about the middle of December 1959.

The circumstances surrounding respondents' discontinuance of the offer do not lend support to their argument that the practice has been abandoned. The discontinuance was neither voluntary nor was it brought about by a desire to eliminate a practice which respondents considered to be deceptive. Briefly, the evidence disclosed that soon after the offer appeared, the manufacturer of the Arpege product complained to respondents about underpricing and the manufacturer of Chanel No. 5 challenged respondents' right to sell the product in a rebottled unit. As a result, respondents entered into written obligations with these manufacturers whereby respondents agreed to terminate the sale of the products. These agreements contain a specific denial by respondents of any misconduct on their part. We think it obvious that respondents did not abandon the practices but merely discontinued the specific offer under threat of litigation. While it appears that they are precluded from engaging in the same practice with respect to Arpege and Chanel No. 5 products, we have no reason to believe that, as a Christmas promotion or on any other occasion, respondents will not repeat the practice with the products of other perfume and cologne manufacturers. Therefore, as this record does not warrant a finding that the practice has been surely stopped with no likelihood of resumption, we believe that an order to cease and desist is required in the public interest.

The appeal of respondents is denied and the initial decision will be adopted as the decision of the Commission.

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Complaint

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered. That respondents, Spencer Gifts, Inc., a corporation, and Max Adler, individually and as an officer of said corporation, 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 the aforesaid initial decision.

By the Commission, Commissioner Secrest not participating.

IN THE MATTER OF

PACKARD MILLS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 8297. Complaint, Mar. 2, 1961—Decision, Sept. 12, 1961

Consent order requiring proprietors of woolen mills in Webster and Caryville, Mass., to cease violating the Wool Products Labeling Act by labeling or tagging as "75% Wool, 15% Nylon and 10% Cashmere" and "85% Wool, 15% Nylon," woolen fabrics which contained substantially less wool than was thus indicated, and by failing to label certain wool products as required.