

Complaint

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sion a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

ZENITH LABORATORIES, INC., ET AL.

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

Docket 8426. Complaint, June 15, 1961—Decision, Mar. 30, 1962

Consent order requiring Englewood, N.J., distributors of drugs to wholesale and retail sellers, to cease representing falsely in advertisements in periodicals and catalogs, letters, and other mailing pieces, that they had "quality control" and exercised "exacting controls and assays"; that their timed disintegration capsules disintegrated over a stated period and at an even rate; and that their laboratory was equipped with experimental animals.

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 Zenith Laboratories, Inc., a corporation, and Benjamin Wiener, Harry Wiener and Thomas Baty, individually and as officers of said corporation, hereinabove 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 Zenith Laboratories, 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 130-150 S. Dean Street, in the city of Englewood, State of New Jersey.

Respondents Benjamin Wiener, Harry Wiener and Thomas Baty 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 have been for more than one year last past, engaged in the sale and distribution to retail druggists and pharmacists, and drug wholesalers and distributors, of drugs and preparations containing ingredients which come within the classification of drugs and foods as the terms "drug" and "food" are defined in the Federal Trade Commission Act.

Among, but not all inclusive of, the said preparations are those designated as follows:

1. WEIGHT-A-WAY 900 Calorie Food Concentrate.
2. Vitamin B-12 25 micrograms (Tablets).
3. Digitalis Tablets Enteric Coated 1½ grams Green.
4. Ferrous Sulfate 5 gr. (Tablets).
5. Thyroid Tablets 1 grain.
6. Pentaerythritol Tetranitrate Lapsules 30 mg. Sustained Action Capsules.
7. Zenidex 15—Dextro Amphetamine Sulfate, 15 mg. (Tablets).
8. Special Vitamins and Mineral T.D. Capsules.

PAR. 3. Respondents cause their said drugs and preparations, when sold, to be transported 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. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said drugs and preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said drugs and preparations by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in periodicals and catalogs, letters and other mailing pieces, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said drugs and preparations by drug wholesalers and distributors, and have disseminated, and caused the dissemination of, advertisements concerning said drugs and preparations by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said drugs and preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

QUALITY CONTROLS

To assure continuance of superior quality which has become synonymous with the Zenith name, a complete modern laboratory is maintained for the prime purpose of exercising exacting controls and assays. Frequent analysis of the quality of raw materials used and systematic spot checking of finished products assures the high standard of accuracy and reliability expected in Zenith pharmaceuticals.

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ZENITH LAPSULES (R)

* * *

TIMED DISINTEGRATION CAPSULES

The Controlled Rate-Of-Disintegration Capsule For 8 to 12 Hours Of Even Therapeutic Effect.

Developed through long research by Zenith Laboratories and checked through intensive testing, LAPSULES offer the most reliable method of sustaining an even flow of medication. An even disintegration period of 8 to 10 hours assures a smooth therapeutic effect lasting up to 12 hours while avoiding the "highs" and "lows" often associated with other sustained-release medications.

RESEARCH &
CONTROL LABORATORIES

A fully equipped laboratory, including animal cages and experimental animals, supplies our clients with complete laboratory service.

PAR. 6. Through the use of said advertisements and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication:

1. By stating that they have "quality control" and that they exercise "exacting controls and assays," that they employ an adequate control system.

2. That their timed disintegration capsules:

- (a) Disintegrate over a period of eight (8) to ten (10) hours.
- (b) Disintegrate at an even rate.

3. That respondents' laboratory includes experimental animals.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. Respondents do not have an adequate control system.
2. Some of respondents' timed disintegration capsules:
 - (a) Disintegrate in a significantly lesser period of time than eight (8) to ten (10) hours.
 - (b) Do not disintegrate at an even rate.
3. Respondents' laboratory is not equipped with experimental animals.

PAR. 8. The dissemination by the respondents of the false advertisements, as aforesaid, constituted and now constitutes unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Berryman Davis, supporting the complaint.

Bernstein, Kleinfeld & Alper, by *Mr. Sheldon E. Bernstein* of Washington, D.C., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

The complaint in this proceeding was issued on June 15, 1961, charging respondents with violating the Federal Trade Commission Act in connection with the sale of food and drug products.

Subsequently, the corporate respondent and two of the individual respondents, Benjamin Wiener and Harry Wiener, together with their counsel and counsel supporting the complaint, entered into an "Agreement Containing Consent Order to Cease and Desist." That agreement, dated January 3, 1962, was approved by the Chief, Division of Food and Drug Advertising, and the Director, Bureau of Deceptive Practices, and submitted to the Hearing Examiner on January 17, 1962, under the provisions of Rule 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, issued May 6, 1955, as amended.

The agreement identifies respondent Zenith Laboratories, Inc., as a corporation existing and doing business under and by virtue of the laws of New Jersey, with its office and principal place of business at 130-150 S. Dean Street, Englewood, N.J. It further identifies respondents Benjamin Wiener and Harry Wiener as officers of the corporate respondent, who formulate, direct and control its acts and practices, and whose address is the same as that of the corporate respondent.

In providing for the dismissal of the complaint as to Thomas Baty, individually and as an officer of the corporate respondent, the agreement recites that Thomas Baty had resigned as an officer and severed all connections with the corporate respondent before issuance of the complaint in this proceeding; that his present whereabouts are unknown; and that the complaint has not been served on him. These allegations are supported by the affidavit of respondent Benjamin Wiener, which has been attached to the agreement as exhibit A and incorporated by reference.

Accordingly, in accordance with the recommendation contained in the agreement, the complaint is being dismissed as to Thomas Baty, individually and as an officer of the corporate respondent, and the term respondents, as used hereafter, shall not include Thomas Baty.

Respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents waive any further procedural steps before the hearing examiner or the Commission; the making of findings of fact or

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conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. All parties agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement, including the affidavit annexed as exhibit A; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the order to cease and desist, as contained in the agreement, when it shall have become a part of the decision of the Commission, shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; that the complaint herein may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

Having considered the allegations of the complaint and the provisions of the agreement containing the consent order, the Hearing Examiner is of the opinion that such agreement and order provide an adequate basis for appropriate disposition of this proceeding.

Accordingly, the hearing examiner accepts the agreement containing consent order to cease and desist, and pursuant to its terms, makes the following jurisdictional findings and enters the following order:

FINDINGS

1. Respondent Zenith Laboratories, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 130-150 S. Dean Street, in the city of Englewood, State of New Jersey.

Respondents Benjamin Wiener and Harry Wiener are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The complaint states a cause of action under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents, Zenith Laboratories, Inc., a corporation, and its officers, and Benjamin Wiener and Harry Wiener,

individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of drugs or food do forthwith cease and desist, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement:

(a) Uses the terms "quality control" or "exacting controls", or any other words or terms of similar import or meaning; or

(b) Represents, directly or indirectly:

(1) That respondents have an adequate control system, or misrepresents the nature or extent of the procedures used by them in the manufacture, preparation or distribution of drugs or food.

(2) That respondents' timed disintegration capsules disintegrate over a period of eight (8) to ten (10) hours, unless such is the fact, or otherwise misrepresents the time periods or manner in which timed disintegration capsules disintegrate.

(3) That respondents' laboratory includes experimental animals.

2. Disseminating or causing the dissemination of any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of drugs or food, which advertisement contains any of the terms or representations prohibited in paragraph 1 hereof.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to Thomas Baty, individually and as an officer of Zenith Laboratories, Inc., a corporation.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing examiner shall, on the 30th day of March 1962, become the decision of the Commission; and, accordingly:

It is ordered, That respondents, Zenith Laboratories, Inc., a corporation, and Benjamin Wiener and Harry Wiener, individually and as officers 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.

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IN THE MATTER OF
RAYEX CORPORATION, ET AL.

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

Docket 7346. Complaint, Jan. 6, 1959—Decision, Apr. 2 1962

Order requiring assemblers of sunglasses in Flushing, Queens, N.Y., to cease representing falsely—as they did on shipping containers and on tickets and labels affixed to the sunglasses—that the glasses contained lenses having a diopter curve of 6 and met the specifications and standards of the United States Air Force or Department of Defense; and to cease preticketing their sunglasses with fictitious prices, represented thereby as the usual retail selling prices.

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 Rayex Corporation, a corporation, and Ray Tunkel, Harry Kramer, and William Jonas, 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 Rayex Corporation is a corporation organized, existing and doing business under the laws of the State of New York, with its office and principal place of business located at 133-30 37th Avenue, Flushing 54, Queens, N.Y. Respondents Ray Tunkel, Harry Kramer, and William Jonas are officers of the corporate respondent. They formulate, control and direct the acts, practices and policies of the corporate respondent, including the acts and practices hereinafter set out. The address of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and have been for some time, engaged in the assembling, sale and distribution of sunglasses.

In the regular and usual conduct of their business, respondents now cause, and have caused, said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof, many of whom are located in various other States of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said sunglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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PAR. 3. In the course and conduct of their business, respondents have made, and are making, deceptive and misleading statements with respect to their products. These statements are, and have been, made on cartons and in sales brochures, counter display cards and other promotional material supplied to jobbers, retailers and dealers, and also on tickets and labels affixed by respondents to such sunglasses prior to their sale and distribution as aforesaid.

Among and typical, but not all-inclusive, of such statements are the following:

6

BASE

HARD (R) GLASS

CERTIFIED

LENSES

one pair GLASSES, FLYING PERSONNEL

HIGH SPEED—CLEAR VISION

SPECIFICATION No. 8306-21200

CONTRACT No. 290412

LENSES, GROUND and POLISHED, THEREAFTER THERMALLY CURVED
MFGD. TO CS-79-40 SPECIFICATIONS

PAR. 4. Through the use of the foregoing statements, and others similar thereto but not specifically set forth herein, respondents have represented, and now represent, directly or by implication:

(a) That their sunglasses by reason of the designation "6 Base" contain lenses having a diopter curve of 6;

(b) That their sunglasses described above as manufactured to CS-79-40 Specifications meet the specifications and standards of the United States Air Force or the Department of Defense.

PAR. 5. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, (a) the sunglass lenses designated by respondents as "6 Base" do not have a diopter curvature of 6; (b) the sunglasses described by respondents as "MFGD. TO CS-79-40 SPECIFICATIONS" do not meet the specifications and standards of the United States Air Force or the Department of Defense.

PAR. 6. In the further course and conduct of their business, respondents have made, and are making, deceptive and misleading representations with respect to the prices of their sunglasses. Respondents attach, or cause to be attached, to certain of their sunglasses, labels or tickets upon which various prices are printed, thereby representing, directly and by implication, that such prices are the regular and usual retail prices for said sunglasses. In truth and in fact, the said prices are not the regular and usual retail prices for said sunglasses, but are fictitious and exaggerated prices.

PAR. 7. Respondents also purchase and resell sunglasses manufactured in Japan. In connection with the sale of certain of said sunglasses of Japanese manufacture, respondents do not clearly and conspicuously disclose by markings or labels on the product that said sunglasses were manufactured in Japan.

PAR. 8. There is a preference among a substantial number of the purchasing public for products manufactured in the United States over those manufactured in Japan. The aforesaid practice of the respondents as described in Paragraph Seven, of failing to clearly and conspicuously disclose that said sunglasses were manufactured in Japan, has the capacity and tendency to create the mistaken and erroneous belief among purchasers and prospective purchasers that said sunglasses are of domestic origin.

PAR. 9. By furnishing to jobbers, retailers and dealers the cartons, sales brochures, counter display cards and other promotional material, and preticketed, labeled sunglasses, and by failure to clearly and conspicuously disclose the foreign origin of their sunglasses, as aforesaid, respondents provide to such jobbers, retailers and dealers means and instrumentalities through and by which they may mislead and deceive the purchasing public.

PAR. 10. In the course and conduct of their business, respondents are in direct and substantial competition with corporations, firms and individuals engaged in the manufacture, sale and distribution of sunglasses in commerce.

PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead and deceive 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 because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 12. 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. Morton Nesmith for the Commission.

Mr. Gilbert Ehrenkranz, of Orange, N.J., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

Respondents are charged in the Commission's complaint issued on January 6, 1959, with having made false, misleading and deceptive statements with respect to their sunglasses in the conduct of their business:

(a) in that they designated their sunglass lenses as "6 Base" when they did not have a diopter curvature of 6;

(b) in that they described their sunglasses as "manufactured to Specification No. 8306-21200, Contract No. 290412" and that respondents' sunglasses did not meet the specifications and standards of the United States Air Force or the Department of Defense;

(c) in that they did not clearly and conspicuously disclose by markings or labels on their sunglasses that such sunglasses were manufactured in Japan;

(d) in that they engaged in the practice of using fictitious price tickets in connection with the labeling and advertising of their sunglasses; all of the foregoing in violation of the Federal Trade Commission Act.

At the conclusion of the presentation of evidence and testimony by counsel supporting the complaint, on respondents' motion, charges herein numbered (b) and (c), above, were stricken from the complaint by order of the hearing examiner dated March 9, 1960, because of the insufficiency of the evidence to establish a prima facie case. On motion of counsel supporting the complaint the hearing examiner, in his discretion, by order dated April 18, 1960, permitted a reopening with respect to (b), above, to permit counsel in support of the complaint to adduce additional evidence.

Respondents' answer is essentially a general denial of the charges of deception.

Following hearings on the issues and pursuant to leave granted by the hearing examiner, proposed findings of fact and conclusions and proposed orders were filed by counsel in support of the complaint and counsel for the respondents. Oral argument was had thereon on March 23, 1961. The examiner has carefully reviewed and considered the proposed findings and briefs, the replies thereto, and oral argument of counsel. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following:

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FINDINGS OF FACT

1. Respondent Rayex Corporation is a corporation organized, existing and doing business under the laws of the State of New York, with its office and principal place of business located at 133-30 37th Avenue, Flushing 54, Queens, N.Y. Respondents Ray Tunkel, Harry Kramer, and William Jonas are officers of the corporate respondent. They formulate, control and direct the acts, practices and policies of the corporate respondents, including the acts and practices herein-after set out. The address of the individual respondents is the same as that of the corporate respondent.¹

2. Respondents are now, and have been for some time, engaged in the assembling, sale and distribution of sunglasses. In the regular and usual conduct of their business, respondents now cause, and have caused, said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof, many of whom are located in various other states of the United States.

3. In the course and conduct of their business, respondents have made deceptive and misleading statements with respect to their products. These statements have been made on containers and boxes in which respondents' sunglasses are shipped to jobbers, retailers and dealers and also on tickets and labels affixed by respondents to such sunglasses prior to their sale and distribution to such jobbers, retailers and dealers.

Among and typical, but not all-inclusive, of such statements are the following:

6
BASE
HARD (R) GLASS
CERTIFIED
LENSES
one pair GLASSES, FLYING PERSONNEL
HIGH SPEED—CLEAR VISION
SPECIFICATION No. 8306-21200
CONTRACT No. 290412
LENSES, GROUND and POLISHED, THEREAFTER THERMALLY
CURVED * * *

¹In *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, the Supreme Court held that officers, directors or stockholders of a corporation may be included in a Commission order to cease and desist when necessary for such order to be fully effective in preventing the unfair practice found to exist. Subsequent to that decision, the courts have repeatedly held that an officer of a corporation who is responsible for initiating unfair trade practices or who participates in the use of such practices may properly be included in the order in his individual capacity. *International Art. Co. v. Federal Trade Commission*, 109 F. 2d 393; *Sebrone Co. v. Federal Trade Commission*, 135 F. 2d 676; *Parke, Austin & Lipscomb, Inc. v. Federal Trade Commission*, 142 F. 2d 437; *Steelco Stainless Steel, Inc. v. Federal Trade Commission*, 187 F. 2d 693; *Consumer Sales Corp. v. Federal Trade Commission*, 198 F. 2d 404.

4. Through the use of the foregoing statements respondents represented directly or by implication:

(a) That their sunglasses by reason of the designation "6 Base" contain lenses having a diopter curve of 6;

(b) That their sunglasses, flying personnel described above as manufactured to Specification No. 8306-21200, Contract No. 290412, meet the specifications and standards of the United States Air Force or the Department of Defense.

5. The statements and representations hereinbefore set forth were false, misleading and deceptive. In truth and in fact, (a) the sunglass lenses designated by respondents as "6 Base" do not have a dioptic curvature of 6; and (b) the sunglasses described by respondents as glasses, flying personnel . . . Specification No. 8306-21200, Contract No. 290412, do not meet or comply with the specifications and standards of the United States Air Force or the Department of Defense.

6. In the further course and conduct of their business, respondents have made deceptive and misleading representations with respect to the prices of their sunglasses. Respondents attached to certain of their sunglasses, labels or stickers upon which various prices were printed, thereby representing, directly or by implication, that such prices were the regular and usual retail prices for their sunglasses. In truth and in fact, said prices were not the regular and usual retail prices for respondents' sunglasses but were fictitious and exaggerated prices.

7. By furnishing to jobbers, retailers and dealers the cartons, marked "Flying Personnel" with specification and contract numbers, and the preticketed and labeled sunglasses, indicative of price and "6 Base" precision, respondents have provided to such jobbers, retailers and dealers means and instrumentalities through and by which they may mislead and deceive the purchasing public.

8. In the course and conduct of their business, respondents are in direct and substantial competition with corporations, firms and individuals engaged in the manufacture, sale and distribution of sunglasses in commerce.

9. Respondents purchase for resale sunglasses manufactured in Japan. In connection with such sale of certain of said sunglasses of Japanese manufacture, respondents do clearly and conspicuously disclose by markings or labels on products that sunglasses were manufactured in Japan.

COMMENTS RELATIVE TO FINDINGS

1. In connection with the issue as to whether or not the sunglasses represented to be "6 Base" are in fact "6 Base," the evidence does not disclose as indicated by counsel for respondents that the Commission's witnesses were experts in the ophthalmic or eye corrective profession and that their opinion of required precision under the terminology "6 Base" must necessarily vary from the opinion of the respondents' experts who were engaged in the manufacturing of sunglasses. According to the respondents' counsel, the opinion of the experts in the manufacturing of sunglasses should prevail. As the evidence indicates, the experts in the ophthalmic profession testified "6 Base" lens should be required to have a curvature of 6 diopters or a 6-dioptic curvature, whereas the experts in the sunglass or non-ophthalmic industry testified that 6 Base merely means a lens manufactured on a 6 Base tool even though at points it may measure 4 diopters only. Counsel for respondents also emphasize the fact that there are different standards under the Trade Practice Rules for the ophthalmic industry and the sunglass industry. These arguments overlook the fact that the respondents have imputed precision equivalent to that recognized in the ophthalmic industry in representing that their sunglass lenses are 6 Base. If a misrepresentation were not intended to indicate 6 Base precision, there would be no point in so identifying the lenses. It is elemental that a purchaser is interested in representations as to the quality of the product he buys and not as to the representations concerning the type of equipment (i.e., a 6 Base tool) used in its manufacture. Measurement of the lenses sold by the respondents indicates they do not have a 6-diopter curvature throughout and that, therefore, their precision is misrepresented.

2. With respect to the issue involving whether or not there is a misrepresentation that the respondents' sunglasses meet the standards and specifications of the United States Army, Air Force and Department of Defense, an expert testified that respondents' sunglasses have not met the specifications of the Air Force and Navy Department in their entirety during and after 1948. The opinion was premised upon one sale of sunglasses only. Respondents, in this connection, urge that the Commission has not examined a representative group of sunglasses and that expert opinion with regard one pair of sunglasses sold is not proof that the specifications as represented have not been normally met.

The evidence is unequivocally clear, however, that the Commission's exhibit, the pair of sunglasses in question, was sold by the National Retail Stores on or about May 15, 1958. The evidence is equally clear that the proof adduced in the Commission's case does not establish that the sunglasses were sold by the respondents or placed on the market by them upon any specific date. Nevertheless, it is reasonable to infer that the sunglasses in question, which were sold in the retail market in May 1958, were made available for sale in that market within the period contemplated by the complaint. It would seem unreasonable to conclude that the sunglasses in question would have been in the store of the National Outlet Stores for a period in excess of ten years before being sold in the retail market, in the absence of evidence to the contrary.

Respondents had the opportunity of going forward with the evidence to establish, if they could, that the sunglasses, which have been identified as their sunglasses, were not representative of their product or were not marketed by them during the period contemplated by the complaint, contrary to the reasonable inference which must otherwise be drawn from the evidence now before the hearing examiner. However, they elected to rest their case without the adduction of such evidence.

It is well established that the trier of the facts may draw all reasonable inferences and deductions from the evidence adduced. *Caldwell v. U.S.*, D.C., Pa. 30 F. Supp. 308 affirmed, CCA, 114 F. 2d 995, 32 C.J.S. 1130, 31 Sec. 1044 citing 18 states following this doctrine. See also *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, as quoted and followed in *Radio Officers v. N.L.R.B.* (1954), 347 U.S. 17, 48-49; also *F.T.C. v. Pacific States Paper & Trade Assn.* (1927), 273 U.S. 52; *Brown Fence & Wire Co. v. F.T.C.* (C.C.A. 6, 1933), 64 F. 2d 934; *E. F. Drew & Co., Inc. v. F.T.C.*, 235 F. 2d 735. A reasonable inference is as truly evidence as the matter on which it is based, and is not a mere presumption or guess. *Stickling v. Chicago R.I. & R. Ry. Co.*, 247 N.W. 642 (Iowa); *Hodgson v. Bigelow*, 7A 2d 338 (Pa.).

Indeed, it is the duty of the trier of the facts to give consideration to all inferences and deductions which may properly be drawn. 32 C.J.S. 1131, Sec. 1044, Note (4). In determining whether or not inferences may be drawn from certain facts the conclusions and tests of every day experience must control the standards of legal logic. Wigmore on Evidence (2nd Edition) Vol. 1, Sec. 27, p. 232.

As regards the same issue, respondents also contend that the language identifying the sunglasses by specification and contract number

does not impute an Armed Forces specification or contract number since no reference is made to personnel using them except flying personnel. However, the hearing examiner is of the view that the combination of flying personnel specifications and contract numbers does reasonably infer that the product is Armed Forces surplus since such surplus has been similarly advertised nationwide so that the public have become accustomed to associating such language with the sale of Armed Forces surplus. Official notice is taken of the public cognizance in this respect.

3. As regards the issue of price ticketing at a fictitious price, the record discloses that a wholesaler testified that a sale of sunglasses with a sticker thereon of \$4.95 was purchased by him from the respondents. He further testified that he paid \$9 a dozen for these glasses and sold them to retailers for \$14.40 a dozen, and that the general retailer sold his glasses for roughly \$2.50 per pair. It was the further testimony of this witness that he requested this markup in price which request was honored by Rayex. He further testified that respondents had affixed these prices to lenses and that he had affixed nothing thereto.

Another witness testified that he bought sunglasses from a National Outlet Store, in Hartford, Connecticut, and that there was a sticker attached to the lens marked \$7.95, among other things, which was affixed thereto when he purchased the sunglasses. He further testified he paid therefor \$3.07, \$2.98 plus 9¢ tax. The price paid was supported by a receipt which was received in evidence.

The foregoing proof appears to establish prima facie evidence of the fact that the manufacturer's ticketed price is not the usual and regular price in the sense that the price pattern as evidenced indicates the nonexistence of a usual and regular price. Under these circumstances, unless explained by the respondents in going forward with the evidence, which they failed to do, it would appear that the price tickets provided by the respondents are meaningless and if so, fictitious. This inference is nonetheless reasonable because there is a growing number of discount houses in the market place which sell at less than the manufacturer's ticketed price. The effect of this increasingly competitive market for goods that appear to be sold at reduced prices may in and of itself have caused manufacturer's pre-ticketing at a specified price to become misrepresentative of a regular and usual price. However, the intention of the manufacturer is not an issue. The real issue would seem to be whether or not the manufacturer's indicated price is a misrepresentation in substantial segments of the market where it is usually and regularly not the adopted retail price. See *Household Sewing Machine Company*, Docket 6148, 52 FTC 250; *The Orloff Company, Inc.*, Docket 6184, 52 FTC 709;

The Clinton Watch Company, FTC Docket 7434, and *The Baltimore Luggage Company*, FTC Docket 7683.

CONCLUSIONS

1. The use by the respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead and deceive 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 because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

2. The aforesaid acts and practices of respondents, as hereinabove 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. The following order shall therefore issue:

ORDER

It is ordered, That the respondents, Rayex Corporation, a corporation, and its officers, and Ray Tunkel, Harry Kramer, and William Jonas, 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 sunglasses, or any other 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:

(a) That their sunglass lenses have a given dioptic curve unless such is the fact; provided, however, that in the case of ground and polished sunglass lenses a tolerance not to exceed minus or plus $\frac{1}{16}$ th diopters in any meridian and a difference in power between any two meridians not to exceed $\frac{1}{16}$ th diopter and a prismatic effect not to exceed $\frac{1}{8}$ th diopter shall be allowed.

(b) By preticketing, or otherwise, that a certain amount is the regular and usual retail price of merchandise, when such amount is in excess of the price at which such merchandise is usually and regularly sold at retail in a substantial segment of the market.

(c) That their sunglasses, or the lenses thereof, meet or comply with the specifications and standards of the United States Air Force or Department of Defense.

2. Placing in the hands of jobbers, retailers, dealers and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning the merchandise in the respects set out in paragraph 1, above.

It is further ordered, That the charges set forth in paragraph 7 and paragraph 8 of the Commission's complaint, are herein and hereby dismissed as provided in the hearing examiner's order of March 9, 1960, since the evidence discloses the national origin of the respondents' sunglasses has not been misrepresented by the respondents.

OPINION OF THE COMMISSION

By ELMAN, *Commissioner*:

This is an appeal by respondents from a hearing examiner's initial decision that they have violated Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) by making certain false and misleading representations in connection with the sale of sunglasses which they manufacture and distribute.

While several issues are raised, the one most strongly contested has to do with the legality of respondents' practice of "preticketing" the sunglasses with labels or stickers bearing printed prices. The hearing examiner found these price tickets to be unlawfully misleading in that they conveyed the impression that the stated prices were the regular and usual retail prices for the sunglasses when in fact "the price pattern as evidenced indicates the nonexistence of a usual and regular price. Under these circumstances, * * * it would appear that the price tickets provided by the respondents are meaningless and if so, fictitious." (Initial Decision, p. 672) The Commission adopts this finding as substantiated by the evidence.

I

Preticketing, as it has come to be called, is the practice whereby manufacturers and distributors attach to their goods distinctive labels or stickers, bearing prices and other information, prior to passing them on to the dealers who sell to the general public. The abundance of recent Commission cases dealing with varying aspects of the practice indicates that it is prevalent in much of the economy.¹ Its

¹ See, e.g., *Baltimore Luggage Co. v. Federal Trade Commission*, No. 8382, C.A. 4, Nov. 7, 1961; *Clinton Watch Co. v. Federal Trade Commission*, 291 F. 2d 838 (C.A. 7).

significance depends on the factual setting into which it is introduced.

The danger inherent in price preticketing is that, whatever other purpose it may serve, it gives many consumers the impression that the stated price is the retail price generally prevailing in the area. Everyone loves, and hopes to find, bargains. It is this universal human trait which is exploited by the practice of fictitious pricing, whatever its form. In *George's Radio & Television Company, Inc.*, Docket 8134, decided January 19, 1962, we held that "The representation 'Mfr's Sug. List' creates the impression that there is a usual and customary retail price for the product in the trade area, and that that price is the specified 'Mfr's Sug. List' price." (Opinion, p. 3) The record there showed that "the products in question were being widely sold in the trade area at a variety of retail prices significantly lower than" the "Mfr's Sug. List" price. (*Ibid.*) Accordingly, the Commission found that the public had been misled.

There is, of course, no convention requiring manufacturers and distributors to use preticketing as a means for "suggesting" resale prices to their dealers. They could as well simply enclose a list of suggested prices with each shipment. That procedure would involve no possibility of the sort of deception with which we are here concerned, assuming that the price list information was not passed on to the public. Such conduct would not necessarily be immune from scrutiny under other statutory provisions regulating business activity. For example, it might in some circumstances suggest the existence of illegal anti-competitive pricing conditions in the industry.² But ordinarily there would be no occasion to question such a practice on the ground that it is deceptive.

However, when resale prices supplied to dealers—whether through preticketing or some similar practice—are made public, the consequences may vary considerably. It may be, for example, that the industry in which the practice is undertaken is characterized by price rigidity or uniformity. That is to say, all dealers in a particular product may be content to sell at the same price. If a manufacturer of such a product pretickets it at what is in fact the uniform retail price in the area, he is not engaging in false or misleading pricing. Of course, rigidity and uniformity of price may make preticketing even more suspect as a manifestation of some form of illegal restraint of trade, but in such circumstances the practice is not vulnerable as deceptive to consumers.

A different problem is presented by an industry in which the manufacturer habitually labels his product at a given price and his dealers

² Compare, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29.

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in a trade area, or many of them, just as habitually market it for substantially less. This is the context of classic "fictitious" pricing. In such circumstances, the preticketing's tendency to deceive, and hence its illegality, are settled matters. As the court stated in *Clinton Watch, supra*, note 1, a case involving factory preticketing of watches at a price substantially in excess of the "normal" retail price:

Preticketing at fictitious and excessive prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged as well as to the value of the product acquired. Petitioners' practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. Notwithstanding the prevalence of these practices and the familiarity therewith among members of the trade, these activities are proscribed to protect the interest of the public. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494, (1922).

Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition. *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 340 (7th Cir. 1960), cert. denied 364 U.S. 883; *Harsam Distributors, Inc. v. Federal Trade Commission*, 263 F. 2d 396, 397 (2d Cir. 1959). 291 F. 2d, at 840.

In such a situation there is a substantial likelihood of deception, whether the dealers resell the product to the public at a uniform lower price or at a widely varying range of lower prices. Since the preticketed price is not in fact the usual or regular price generally prevailing in the area, the public may be misled. In appraising the capacity of a business practice to deceive and mislead, it is not the understanding or purpose of the manufacturer or distributor or dealer that is of critical importance; rather, it is the public impression created by that practice.³ And, so far as many members of the public are concerned, the impression made by preticketing is that it is the manufacturer's indication of the approximate retail value of his product, i.e., his representation that this is what it should and generally does sell for in the sales area.⁴

The manufacturer or distributor who provides his dealers with a spurious indication of a normal and generally prevailing price places

³ E.g., *Koch v. Federal Trade Commission*, 206 F. 2d 311, 319 (C.A. 6); *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 679 (C.A. 2).

⁴ The Commission so finds in the discharge of its duty to make the necessary factual determination of the impression on the public that advertising creates. See, e.g., *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337 (C.A. 7); *Kalwajtys v. Federal Trade Commission*, 237 F. 2d 654, 656 (C.A. 7); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 382 (C.A. 7).

in their hands a ready-made instrument of deception.⁵ If the buyer believes—as the preticketed price may well lead him to believe—that that is the going price generally being charged for the product, he will be forestalled from seeking it at a lower price elsewhere. The dealer can thus induce the consumer not to shop among his competitors for a bargain. Obviously, both consumers and competitors are thereby prejudiced.

II

Viewed in the light of these general principles, respondents' preticketing practice is clearly illegal. At the requests of some customers, they affix price stickers to the lenses of their sunglasses. These stickers contain in prominent letters the word "Rayex" (the name of respondent corporation) and a price (*e.g.*, \$4.95, \$7.95), as well as a brief set of cryptic abbreviations in much smaller print. Respondents freely admit to putting different price tags on different pairs of the same quality sunglasses. They assert that this merely reflects the different prices that different dealers can obtain for the glasses, because of differences in competitive situations.

To illustrate, one type of sunglasses in evidence is marked \$4.95. This type, it is said, was very popular on Madison Avenue in New York City for a time, and shops in that area could in fact get \$4.95 for them. A retailer located elsewhere in Manhattan might be able to obtain only \$2.95. Or, to cite another example described by respondents' counsel, a pair of sunglasses that could command as much as \$10.00 in a shop located in the Waldorf-Astoria Hotel might bring only \$2.95 in a drugstore on Times Square. In each instance, respondents would charge their distributors the same price for the same type of glasses. Only the retail-price tags placed on them were different.

It should be apparent, on this state of facts, that respondents have aided and abetted in a deception of the public. They are providing the high-priced dealers with a deceptive crutch upon which to carry their goods to market. Respondents stressed the fact that the Waldorf-Astoria shop and the Times Square drugstore are not in competition. Assuming this to be true, a major factor in eliminating any chance of competition between them is respondents' preticketing practice. By affixing stickers with different prices to accommodate different retailers, respondents give prospective buyers two false and misleading impressions: first, that the Rayex price tickets on the same product are the same throughout the area; and second, that the

⁵ See *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483; *Baltimore Luggage*, *supra*, note 1; *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273 (C.A. 3).

preticketed price is actually the prevailing retail price in the area. In a market not characterized by a uniform price level for the product, price preticketing, as respondents have engaged in it, is inherently deceptive and misleading within the meaning of Section 5.

Additional evidence of record supports the examiner's finding that respondents engaged in fictitious pricing.

First, there is the fact that one pair of sunglasses, appearing as an exhibit in the record, was purchased by a Commission investigator for \$2.98 plus \$.09 tax, despite having been preticketed by Rayex at \$7.95. Even more damaging is the testimony of Mr. Milton Spielman, a longtime wholesaler of sunglasses. Mr. Spielman testified that he bought one type of Rayex sunglasses for \$9.00 per dozen and sold them to retailers for \$14.40 per dozen, i.e., \$1.20 per pair. He stated that he knew that "these particular glasses sold anywhere between \$1.98, \$2.50, and . . . \$4.95." When asked what the "general trend" of prices for these glasses was, he replied "the two-and-a-half-dollar mark." Yet these sunglasses were preticketed by Rayex at \$4.95.

Mr. Spielman further testified that Rayex would preticket its sunglasses with the price that he, a wholesaler, requested. He also stated that he expected many of the glasses to sell for less than the preticketed price, and, significantly, that he had no control over the ultimate price his retailer customers actually charged for them. In a market of the sort involved in this case—in which different dealers sell the same item at widely disparate prices—respondents may not so casually and indifferently place a tool of deception at the disposal of dealers eager to promote the myth that they are giving customers a discount bargain.

III

Two other types of representations by Rayex were found deceptive by the hearing examiner. They appear in statements made on containers and boxes in which the sunglasses were shipped and on tickets and labels affixed to the glasses by Rayex. Typical of these statements are the following:

6
BASE
HARD (R) GLASS
CERTIFIED
LENSES
one pair GLASSES, FLYING PERSONNEL HIGH SPEED—CLEAR VISION
SPECIFICATION NO. 8306-21200
CONTRACT NO. 290412
LENSES, GROUND AND POLISHED, THEREAFTER THERMALLY
CURVED . . .

The hearing examiner found that, by these descriptions of their products, respondents were representing, directly or by implication, (1) that their sunglasses contain lenses having what is known in the trade as a diopter curve of 6, a precision designation for lenses, and (2) that certain of their sunglasses met the specifications or standards of the United States Air Force or Department of Defense. The examiner further found that neither of these representations was true.

Respondents' exceptions to these rulings may be quickly disposed of. The gist of their argument as to the representation of "6 Base" precision is that, since the sunglass industry and the optical industry are not congruent, the hearing examiner should have rejected the testimony of expert witnesses from the latter industry in favor of the less exacting standards postulated by respondents' expert witness from the former. While the two industries may be distinct for some purposes, it does not follow that they are different in every respect. The existence of areas of total differentiation between the two in no way refutes a factual showing of areas of overlap. Whatever meaning "6 Base" may have for a manufacturer of sunglasses, it also carries ophthalmic connotations. The term is thus susceptible of two interpretations, one having a meaning, in terms of standards of precision, totally at variance with the actual degree of precision of respondents' lenses. In this state of facts, respondents' use of "6 Base" must be judged deceptive.⁶

Moreover, the danger that the deceptive, rather than the correct, inference will be drawn by prospective purchasers seems real and substantial. In ophthalmic usage, "6 Base" means having a curvature of 6 diopters. Respondents' counter-definition, to be applied only to sunglasses, is that "6 Base" means merely made on a "6 Base" tool, regardless of variance of the lens from a "6 Base" curve. But obviously, as the hearing examiner pointed out, the buying public is interested in representations as to the quality of respondents' lenses, not as to the instrument upon which they are made. The likelihood that the consumer will read respondents' precision representations in a sense truly useful to him—i.e., as having reference to the glasses, rather than to the equipment used in their manufacture—is considerable. Hence, the capacity of these representations to mislead the public is clear.

⁶ See *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F. 2d 382 (C.A. 7); *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175 (C.A. 6), cert. denied, 314 U.S. 668. Cf., *United States v. Ninety-Five Barrels (More or Less) Alleged Apple Cider Vinegar*, 265 U.S. 438, 442-443.

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Respondents' objections to the examiner's finding that they have made misleading references to military standards and specifications are even less substantial. A review of the evidence, especially the expert testimony of Air Force Captain Donald G. Pitts, satisfies us that the examiner was correct in concluding both that one pair of sunglasses provides a sufficient sample for technical analysis, and that respondents' lenses have not conformed to United States Air Force or Department of Defense specifications for any period of years that could reasonably be considered relevant. Respondents' contention that the words "Specification No.," "Contract No.," and "Flying Personnel" do not warrant "the necessary and compelling inference" that the product has been manufactured to specifications of the Air Force or Defense Department lends no support to their position, even if we assume it to be true. An inference need not be "necessary and compelling," but only reasonable and probable, for it to be held unlawful when it has a tendency to mislead and deceive. That language used by respondents on the packaging of some of their sunglasses may reasonably be construed to imply conformance with military specifications cannot, we think, be seriously disputed; and, in fact, it does not seem to have been.

For the reasons stated, respondents' appeal is denied and an appropriate order will issue.

FINDINGS OF FACT

The Commission adopts the hearing examiner's findings of fact as its own, except that it amends finding "6" to read as follows:

6. In the further course and conduct of their business, respondents have made deceptive and misleading representations with respect to the prices of their sunglasses. Respondents attached to certain of their sunglasses labels or stickers upon which various prices were printed, thereby representing, directly or by implication, that such prices were the generally prevailing retail prices for their sunglasses. In fact, these were not the generally prevailing retail prices for respondents' sunglasses. The prices charged for respondents' sunglasses by different dealers in the same trade area varied considerably, so that no single uniform retail price existed. Further, respondents' sunglasses were widely sold in the same trade area at a variety of retail prices significantly lower than those stated on respondents' labels or stickers.

As so amended, finding "6" is adopted.

Final Order

CONCLUSIONS

1. The Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The use by the respondents of the aforesaid false, misleading, and deceptive statements and representations as to the precision of their lenses and the conformance of their sunglasses to military standards, has had, and now has, the capacity and tendency to mislead and deceive 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 because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

3. The use by the respondents of the aforesaid false, misleading, and deceptive representations as to prices has had, and now has, the capacity and tendency to mislead and deceive members of the purchasing public into the mistaken belief that the stated prices were the usual and regular retail prices for the sunglasses so marked, thus providing dealers in respondents' sunglasses with the means of deceiving the purchasing public.

4. The aforesaid acts and practices of respondents, as hereinabove found, are 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.

FINAL ORDER

It is ordered, That the respondents, Rayex Corporation, a corporation, and its officers, and Ray Tunkel, Harry Kramer, and William Jonas, 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 sunglasses, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

(a) That their sunglass lenses have a given dioptic curve unless such is the fact; provided, however, that in the case of ground and polished sunglass lenses a tolerance not to exceed minus or plus 1/16th diopters in any meridian and a difference in power between any two

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meridians not to exceed 1/16th diopter and a prismatic effect not to exceed 1/8th diopter shall be allowed.

(b) That their sunglasses, or the lenses thereof, meet or comply with the specifications and standards of the United States Air Force or Department of Defense.

And further, That in the sale of any merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, that respondents do forthwith cease and desist from the act or practice of preticketing merchandise at an indicated retail price, or of otherwise conveying an impression to the public concerning retail prices, when there is no generally prevailing retail price for such merchandise in the trade area, or when the indicated retail price is in excess of the prices at which such merchandise is sold at retail in a substantial segment of the trade area.

And further, That respondents do forthwith cease and desist from placing in the hands of jobbers, retailers, dealers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

And further, That the charges set forth in paragraphs 7 and 8 of the Commission's complaint be, and they hereby are, dismissed.

It is further ordered, That respondents, Rayex Corporation, Ray Tunkel, Harry Kramer, and William Jonas, 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.

IN THE MATTER OF

ADMIRAL EXCHANGE CO., INC., ET AL.

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

Docket C-107. Complaint, Apr. 2, 1962—Decision, Apr. 2, 1962

Consent order requiring San Diego, Calif., distributors of combs to retailers to cease misrepresenting their non-rubber combs by such practices as branding them as "Rubber", "Hard Rubber", and "Rubber-Resin", and using the same terms on boxes, packages, circulars, invoices, and other advertising matter.

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 Admiral Exchange Co. Inc., a corporation, and Gail Edwards, Dean L. Edwards and Kathryn M. Redding, 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 Admiral Exchange Co., Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 1443 Union Street in that city of San Diego, State of California.

Respondents Gail Edwards, Dean L. Edwards, and Kathryn M. Redding 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 combs designed for use on human hair to retailers for resale 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 product, when sold, to be shipped from their place of business in the State of California, and otherwise, to purchasers thereof located in various other states and territories of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said combs in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of combs designed for use on human hair.

PAR. 5. Respondents, in the course and conduct of their aforesaid business, and for the purpose of describing, and to induce the purchase of their combs, have stamped and branded said combs as "Rubber", "Hard Rubber" and "Rubber-Resin", thereby representing, directly or by implication, that said combs are made or composed of rubber or hard rubber. Respondents have also designated, referred to and represented their said combs as "Rubber", "Rubber-Resin" and

"Hard Rubber" on boxes, packages, circulars, invoices and in various other forms of advertising matter circulated by them.

PAR. 6. The said representations were and are false, misleading and deceptive. In truth and in fact, respondents' said combs so stamped, branded and referred to are not made or composed of rubber or hard rubber, but are made or composed of material other than rubber or hard rubber.

PAR. 7. There are among the purchasing public substantial numbers of persons who prefer combs made of rubber or hard rubber, as distinguished from combs made or composed of the materials used in respondents' said combs.

PAR. 8. 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' product by reason of said erroneous and mistaken belief.

PAR. 9. 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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement,

makes the following jurisdictional findings, and enters the following order:

1. Respondent, Admiral Exchange Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1443 Union Street in the city of San Diego, State of California.

Respondents Gail Edwards, Dean L. Edwards, and Kathryn M. Redding are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Admiral Exchange Co., Inc., a corporation, and its officers, and Gail Edwards, Dean L. Edwards, and Kathryn M. Redding, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of combs designed for use on human hair, do forthwith cease and desist from:

1. Using the word "rubber", or any other word of similar import or meaning, alone, or in combination with any other word or words, to designate, describe or refer to such combs which are not in fact made entirely of vulcanized hard rubber.

2. Representing in any manner that said combs are rubber or hard rubber or are made of rubber or hard rubber unless they are in fact made of vulcanized rubber.

It is further ordered, That the respondents herein 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 this order.

Complaint

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IN THE MATTER OF

GERALD M. WORMSER ET AL. TRADING AS WORMSER'S
OF LAFAYETTECONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket C-108. Complaint, Apr. 2, 1962—Decision, Apr. 2, 1962*

Consent order requiring Lafayette, La., furriers to cease violating the Fur Products Labeling Act by labeling fur products with fictitious prices; failing to use the term "natural" on labels and invoices and in newspaper advertising to describe furs not artificially colored; failing to show the true animal name of fur, on labels and invoices; failing to show on labels when furs were artificially colored and to use the term "Persian Lamb" as required; making price and value claims in advertising without maintaining adequate records as a basis therefor; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Gerald M. Wormser and Jack C. Wormser, individually and as copartners, trading as Wormser's of Lafayette, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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. Gerald M. Wormser and Jack C. Wormser are individuals and copartners trading as Wormser's of Lafayette, with their office and principal place of business located at East St. Mary Boulevard, Lafayette, La.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which the respondent usually and regularly sold such fur products in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Persian Lamb" was not set forth in the manner required by law, in violation of Rule 8 of the Rules and Regulations.

(b) The term "natural" was not used to describe fur products that were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed to show the true animal name of the fur used in the fur product.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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(a) The term "natural" was not used to describe fur products that were not pointed, bleached, dyed, tip-dyed or artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on invoices with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

PAR. 8. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 9. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents, which appeared in issues of The Advertiser, a newspaper published in the city of Lafayette, State of Louisiana, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements:

(a) Represented through the use of percentage savings claims such as "Savings up to 50%" that prices of fur products were reduced in direct proportion to the percentage of savings stated, when such was not the fact, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

(b) Represented that the volume of merchandise offered for sale was $\frac{1}{2}$ million dollars worth of furs and a \$500,000 trunk showing, when in truth and in fact the merchandise offered for sale was worth substantially less than such amount, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

(c) Failed to disclose that fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, were natural, in violation of Rule 19(g) of the Rules and Regulations promulgated under the Fur Products Labeling Act.

PAR. 10. Respondents falsely and deceptively advertised fur products in violation of Section 5(a)(5) of the Fur Products Labeling

Act by affixing labels to such fur products which contained fictitious prices, and misrepresented the regular retail selling prices of such fur products, in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which the respondent usually and regularly sold such fur products in the recent regular course of business.

PAR. 11. Respondents in advertising fur products for sale as aforesaid, made claims and representations respecting prices and values of fur products. Said representations were of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

PAR. 12. The aforesaid acts and practices of respondents as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

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1. Respondents Gerald M. Wormser and Jack C. Wormser are individuals and co-partners trading as Wormer's of Lafayette, with their office and principal place of business located at East St. Mary Boulevard, in the city of Lafayette, State of Louisiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Gerald M. Wormser and Jack C. Wormser, individually and as copartners, trading as Wormser's of Lafayette, or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. Falsely or deceptively labeling or otherwise identifying such products as to the regular prices or values thereof by any representation that the regular or usual prices of such products are any amount in excess of the prices at which respondent has usually and customarily sold such products in the recent regular course of business.

B. Failing to affix labels to fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

C. Failing to set forth the term "Persian Lamb" on labels in the manner required, where an election is made to use that term instead of the word "Lamb".

D. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal furs the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

E. Failing to disclose that fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored are natural.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Failing to set forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.

C. Failing to disclose that fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored are natural.

3. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of fur products, and which:

A. Represents through the use of percentage savings claims that prices of fur products are reduced in direct proportion to the percentage of savings stated, when such is not the fact.

B. Represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually and customarily sold such products in the recent and regular course of business.

C. Represents directly or by implication that the volume of merchandise to be offered for sale is higher than is the fact.

D. Represents in any manner that savings are available to purchasers of respondents' fur products when contrary to fact.

E. Fails to disclose that fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored are natural.

4. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That the respondents herein 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 this order.

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IN THE MATTER OF
SOFSKIN, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC.
2(d) OF THE CLAYTON ACT

Docket C-109. Complaint, Apr. 2, 1962—Decision, Apr. 2, 1962

Consent order requiring a manufacturer of hand creams and related products, with principal place of business in New York City, to cease violating Sec. 2(d) of the Clayton Act by such practices as paying promotional allowances of \$1400 to McKesson & Robbins, Inc., while not making such payments available on proportionally equal terms to all competing customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Sofskin, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 595 Madison Avenue, New York, N.Y.

PAR. 2. Respondent is now and has been engaged in the business of manufacturing, selling and distributing hand creams and related products. It sells its products to drug and sundries wholesalers located throughout the United States. Respondent's total sales are substantial, having exceeded \$650,000 in the year 1959.

PAR. 3. In the course and conduct of its business respondent has engaged and is now engaging in commerce as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business located in New York, to customers located in other states of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.