Commission's Rules of Practice.

MAGNAFLO COMPANY, INC., ET AL.

Docket 8422. Order and Opinion, Mar. 29, 1963

Order vacating initial decision and remanding case to hearing examiner for further proceedings.

This matter having come on to be heard by the Commission upon exceptions to the initial decision filed by respondent Magnaflo Company, Inc., and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission by order issued June 29, 1962, having placed the case on its docket for review as to respondent Webster B. Harpman; and

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

It is ordered, That the initial decision filed May 25, 1962, be, and it hereby is, vacated and set aside.

It is further ordered, That this case be remanded to the hearing examiner for further proceedings as to Paragraph Six of the complaint, as amended, in conformity with the views expressed in the aforesaid opinion.

It is further ordered, That after such proceedings have been terminated, the hearing examiner shall forthwith make and file a new initial decision in disposition of all the charges, based on the record as then constituted.

Opinion of the Commission

By Anderson, *Commissioner:*

Respondents have been charged with violation of the Federal Trade Commission Act in connection with their promotion and sale of a battery additive product. The following representations used in promoting the sale of the additive are challenged in Paragraph Three of the complaint:

(1) Is guaranteed;
(2) Is backed by an insurance company;
(3) Is approved by millions of users;
(4) Is in effect approved by a leading battery maker;
(5) Will result in year-long driving without battery trouble;
(6) Will charge and permanently charge a battery;
(7) Is Government approved;
(8) Has been found by a Ford Plant to hold a charge three times the normal time;
(9) Is backed by free winter start insurance.

Respondents have agreed by stipulation to a cease and desist order which would prohibit them from using the first eight of these representations. As to the ninth representation, the respondents have agreed to an order which would prohibit them from claiming that they insure winter starting of automobiles, unless they pay for every starting of the automobile that may be required.

In addition to the foregoing representations, the complaint as originally issued contained the following charge:

PARAGRAPH SIX: Through the use of the trade name "Lifetime Charge" respondents have represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged. In truth and in fact, said product will not of itself charge or recharge a battery.

On the basis of a stipulation between counsel, this paragraph was amended by the hearing examiner to allege:

PARAGRAPH SIX: Through the use of the trade name "Lifetime Charge" respondents have represented that their product will keep a battery charged for

life or that the product will charge or recharge batteries that have become discharged. The name "Lifetime Charge" is false and deceptive. Among other things, said product will not of itself charge or recharge a battery, and it is not a lifetime charge.

Counsel have stipulated that respondents for the preceding two years have not used the name "Lifetime Charge" in their advertising without the addition of other language, such as "Doubles Battery Life", "Gives New Power to Your Battery", and "Automatically Helps Keep Your Battery Fully Charged". The respondents have stipulated that the name "Lifetime Charge" used alone "may be deceptive", but contend that the additional language used by them removes any deceptiveness that may exist in the trade name. Respondents have also stipulated, in regard to an allegation in Paragraph Three of the complaint, that their product "will not charge a battery." On the basis of these stipulations and certain exhibits of advertising material, the hearing examiner found the respondents' trade name has a tendency to deceive when used alone and that the deceptive tendency is not removed when used in conjunction with the three claims referred to. His order would prohibit respondents from using "Lifetime Charge" or any other name of similar import for their product. Respondent Magnaflo has taken exception to the hearing examiner's findings and order on this issue.

During oral argument before the Commission it was stated by counsel for respondent Magnaflo that the reason Magnaflo conceded that the trade name used alone "may be deceptive" is that it realized that some members of the public might erroneously believe that its product will be effective for the lifetime of the user. It is Magnaflo's contention that the word "lifetime" in the trade name is intended to refer only to the lifetime of the battery and that this is clarified for the consumer by use of the claim "Doubles Battery Life" in conjunction with the trade name. Complaint counsel's contention is that the trade name is deceptive even when used with this and the other two claims for two reasons: (1) that the word "lifetime" is still deceptively ambiguous, and (2) that the public would understand the word "charge" in Lifetime Charge to mean that the product will impart a new charge to a battery. Respondent Magnaflo's response to the second argument is that the public would understand the word "charge" to mean only that the use of this product will "keep" the battery charged.[1] We take Magnaflo's argument to mean that their product will *preserve an existing charge* in a battery.

We agree with the hearing examiner that the three conjunctive claims used by respondents do not relieve the trade name of its

[1] The complaint itself apparently recognizes this as one meaning of the trade name, although not the only one.

deceptive tendency. It is our view that to the purchasing public the word "charge" is subject to either of the two interpretations placed thereon by the parties. With particular reference to complaint counsel's assertion, we believe that the public's knowledge of the many remarkable contributions of modern chemistry may well serve to strengthen the erroneous belief that this product is a new scientific discovery that will introduce a new charge into a battery. Respondents have conceded that their product does not perform this function. Thus, even under respondents' argument that the product will preserve an existing charge, as to which we make no finding, any qualification to be acceptable would have to clearly eliminate the deceptive meaning and leave standing the meaning they urge as truthful. Respondents' purported qualifications fail to do this. "Gives New Power To Your Battery" strengthens rather than removes the possible deception. "Doubles Battery Life" and "Automatically Helps Keep Your Battery Fully Charged" do not aid the consumer in discovering the truth, as these claims are entirely consistent with the belief that the product will charge or recharge a battery.

Moreover, these three conjunctive claims do not establish a definite meaning for the word "Lifetime" so as to relieve that word of a capacity to deceive. The claim "Doubles Battery Life" is clearly not consistent with the word "Lifetime" and, in addition, the word "Life" in that claim is subject to being construed synonymously with the word "liveliness". As previously noted, counsel for respondent Magnaflo has taken the position that the word "Lifetime" refers to the life of the battery. However, this in itself is ambiguous as the life of the battery may refer to various concepts such as the structural life or, as stated by the individual respondent in oral argument before the hearing examiner, lifetime from an "electrical standpoint and from a use standpoint" may refer to "the time that it takes for that battery to discharge."

We have found that the three claims used by respondents do not constitute adequate qualification of the trade name. There remains, therefore, the trade name alone which, in this posture, respondents concede may be deceptive. On this record, we have no evidence from which to determine whether the trade name may be qualified so as to relieve any tendency to deceive or whether complete excision is required. Obviously, to make such a determination, it is necessary to know all bases for the possible deception. We have respondents' concession that the product will not impart a charge to a battery. Therefore, it is our view that, in order to determine whether to require excision or permit qualification of the trade name, evidence is first required as to whether the product will preserve an existing

charge in a battery. If so, the extent of this preservation must be determined so that, as to the word "Lifetime", the life referred to may be defined.

Under the circumstances, we are remanding this case to the hearing examiner for further proceedings. As we are of the opinion that the charges in Paragraph Three of the complaint are adequately and appropriately disposed of by the stipulation between counsel relating thereto, the proceedings on remand are to be confined to the allegations in Paragraph Six, as amended. Specifically, the hearing examiner is directed to receive such additional evidence as may be required for a finding on the issue of whether or not respondents' product will preserve an existing charge in a battery to the extent necessary to give a purposeful and truthful meaning to the word "Lifetime" in the trade name.