

be furnished under Paragraphs 6 and 7.

It is further ordered, That each respondent named herein shall file with the Commission within sixty (60) days after the effective date of this order, a report in writing under oath, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

It is further ordered, That the Commission's order of stay in this matter dated September 27, 1963, be, and it hereby is, vacated.

IN THE MATTER OF

HARRY E. STRAUSS ET AL. TRADING AS CAPRA GEM
COMPANY

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

Docket 8509. Complaint, June 18, 1962—Decision, Dec. 18, 1963

Order requiring Philadelphia sellers of synthetic stones to the public, to cease representing falsely in advertising and otherwise their products as "authentic", "Capra Gem", "Capra Gems are 7¼ on the Mohs hardness scale", and "surpass the brilliance of diamonds", and that their synthetic stones were precious or semiprecious stones.

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 Capra Gem Com-

*Order of Sept. 14, 1962, amended the complaint as follows:

It is ordered, That the complaint herein be amended by deleting the name of the never-existent corporation, Capra Gem Company, Inc., and any reference to its corporate officers, and inserting in lieu thereof the individual respondents Harry E. Strauss and Frank E. Luckenbach, trading as partners under the name of Capra Gem Company at 5901 York Road, Philadelphia, Pennsylvania.

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pany, Inc., a corporation, and Harry E. Strauss and Frank E. Luckenbach, 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 it complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Capra Gem Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 1618 West Olney Avenue in the city of Philadelphia, State of Pennsylvania.

Respondents Harry E. Strauss and Frank E. Luckenbach are individuals and 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 synthetic stones to the public.

PAR. 3. In the course and conduct of their business, respondents Capra Gem Company, Inc., Harry E. Strauss and Frank E. Luckenbach now cause, and for some time last past have caused, their said synthetic stones, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said synthetic stones in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements and representations with respect to the nature of the synthetic stones offered for sale and sold by them, in advertisements in magazines of national circulation and by other means, of which the following are typical:

Authentic

Capra Gem

Capra Gems are $7\frac{1}{4}$ on the Mohs hardness scale

surpass the brilliance of diamonds

Pictorial representations that the synthetic stone is blue white

PAR. 5. Through the use of the aforesaid statements, respondents represent that their said synthetic stones are gems, are authentic and natural stones, are $7\frac{1}{4}$ on the Mohs hardness scale, surpass the brilliance of diamonds, and through the use of pictorial representations,

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represent that the synthetic stones are blue white in color. Through the use of the word "gem" in the corporate name and otherwise in advertising to designate their product, respondents represent directly or by implication that said synthetic stones are precious or semiprecious stones and that respondents are engaged in the sale and distribution of precious or semiprecious stones.

PAR. 6. Said statements and representations are exaggerated, false, misleading and deceptive. In truth and in fact, said synthetic stones are not authentic or natural stones, are not $7\frac{1}{4}$ on the Mohs hardness scale, are not equal to and do not surpass the brilliance of diamonds, are not blue white, are not precious or semiprecious, and are not gems. Furthermore, respondents are not engaged in the sale and distribution of precious or semiprecious stones.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of diamonds, imitation and synthetic stones.

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' synthetic stones by reason of said erroneous 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 of the Federal Trade Commission Act.

Mr. John W. Brookfield, Jr., Mr. Lawrence W. Fenton supporting the complaint.

Mr. William F. Sullivan, Obermayer, Rebmann, Maxwell & Hippel, for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

JANUARY 17, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on June 18, 1962 issued its complaint charging Capra Gem Company, Inc., a corporation, and Harry

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E. Strauss, and Frank E. Luckenbach, individually and as officers of said corporation, with violation of Section 5 of the Federal Trade Commission Act. During the prehearing conference herein of August 21, 1962, it was stipulated on the record that the complaint be amended, and by order dated September 14, 1962, the complaint was amended to charge Harry E. Strauss and Frank E. Luckenbach, individuals and partners trading as Capra Gem Company, with the aforesaid violation of Section 5 of the Federal Trade Commission Act.

The complaint as issued alleges respondents to have been engaged for some time last past in the interstate sale and distribution directly to the public of synthetic stones. Respondents are further alleged to have made statements and representations in advertisements in magazines of national circulation and by other means for the purpose of inducing the purchase of the said stones, which were and are exaggerated, false, misleading and deceptive to the purchasing public. Respondents in such connection are alleged to have stated and represented that said synthetic stones are gems, are authentic and natural stones, are $7\frac{1}{4}$ on the Mohs hardness scale, surpass the brilliance of diamonds, and through the use of colored pictorial representations, that said synthetic stones are blue-white in color. Through use of the word "gem" in their trade name and in said advertising to designate their product, respondents are also alleged to have represented directly or by implication that said synthetic stones are precious or semi-precious stones and that respondents are engaged in the sale and distribution of precious or semi-precious stones.

Answer to the complaint both admitting and denying various of the allegations of the complaint was filed July 19, 1962. Respondents' answer admits that said stones are synthetic and manufactured rather than mined or found in nature, but denies that they are "synthetic stones" in the sense that they are man-made or manufactured versions of stones which are chemically and organically similar to natural stones. Respondents' answer alleges that natural stones of the kind dealt with by respondents are not found in nature and that respondents' product is not a synthesized or manufactured version of any stone which exists in nature. Said answer admits respondents to have made certain advertising statements as alleged in the complaint for the purpose of inducing the sale of their product, but avers that such statements must be viewed in the full context in which they appear rather than as individual statements in their own right. It is denied that through use of the word "gem" that respondents have represented their product to be a precious or semi-precious stone.

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Respondents' answer further denies that they have pictorially or otherwise represented their product is blue-white in color, and also alleges the discontinuance in their advertising as of various past dates, of the term "authentic", use of the product rating of $7\frac{1}{4}$ on the Mohs hardness scale, and the statements that their product is more brilliant than or surpasses the brilliance of a diamond. Respondents' answer avers the use of the term "authentic" and the aforesaid product rating to have been valid, and alleges that their product is a gem within every legitimate meaning of the word "gem", that it is in fact a semi-precious stone, and that respondents are engaged in the sale and distribution of semi-precious stones. It is finally averred that respondents are in substantial competition only with others engaged in the mail-order sale and distribution of rutile stones, and that the imposition upon respondents of the relief prayed for in the complaint without similar action against their competitors engaged in identical acts and practices, will work an extreme hardship and injustice to respondents.

Following the prehearing conference held herein on August 21, 1962, and made part of the record by agreement of respective counsel, a hearing was held in New York, New York on October 22 and 23, 1962. During said hearing, respondent Harry E. Strauss; Victor A. Lambert, President, Lambert Brothers, Jewelers, Lexington Avenue and 60th Street, New York, New York; William P. Lusk, President, Tiffany & Company, Jewelers, 727 Fifth Avenue, New York, New York; and George R. Crowningshield, Gemmologist, Director of the New York office and the Gem Trade Laboratory, Gemmological Institute of America, 580 Fifth Avenue, New York, New York, appeared and testified as witnesses and the case-in-chief was thereafter closed. Presentation of respondents defense immediately followed with respondent Harry E. Strauss being recalled, and Mitchell P. Rosnov, Jeweler and Gemmologist, 719 Sampson Street, Philadelphia, Pennsylvania, appearing and testifying as a witness and following which the case for the defense was closed.

Respective counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses, and to introduce such evidence as is provided for under Section 4.12 (b) of the Commission's Rules of Practice for Adjudicative Proceedings. The record exhibits marked for identification and received in evidence in this proceeding are Commission exhibits 1 through 18 and respondents' exhibits 1, 2, 17 and 18. Respondents' exhibits marked for identification 3 through 16 and 19 through 21 were rejected. During the hearing of October

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23, 1962, official notice was requested and taken of Rule 39, Federal Trade Commission Trade Practice Rules for the Jewelry Industry, promulgated June 28, 1957. Official notice was also requested and taken of respondents' rejected exhibits 19 through 21 during the oral argument held herein on December 19, 1962.

Respondents' rejected exhibits are subject to Section 4.12 (f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Harry E. Strauss and Frank E. Luckenbach are individuals and partners trading as Capra Gem Company, with their principal office and place of business located at 5901 York Road, Philadelphia, Pennsylvania.

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

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

4. In the course and conduct of their business, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements and representations with respect to the nature of the synthetic stones offered for sale and sold by them, in advertise

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ments in magazines of national circulation and by other means, of which the following are typical:

(a) MORE DAZZLING THAN DIAMONDS

CAPRA
GEMS

the glamour * * *

the look * * *

the romance of real diamonds * * * AT 1/30th THE COST

Hand-Set!

Hand-Polished!

Hand-Selected! More

Refractive Than Diamonds

according to independent testing

company. Just \$27 for a 1-carat

CAPRA GEM including Federal

tax compared to a 1-carat diamond

stone costing approximately \$1000.

Within the Price of Any Budget

FREE BOOKLET * * *

Get all the facts * * * FREE * * * in our beautifully illustrated catalog!
Shows you a wide selection of men's and women's styles plus prices, settings and
EASY PAYMENT PLANS! Write today * * * no obligation * * * no
salesman will call!

SEND NO MONEY

Capra Gems Co., Dept. DC-21, P.O. 5145, Phila. 41

Name.....

Address.....

City..... Zone..... State.....

(b) yours for 1/30th the cost of diamonds!

authentic

CAPRA GEMS

"more dazzling than diamonds"

* * * hand-cut, hand-polished, hand-selected

Get full facts, FREE, on the most
amazing discovery by modern science—

CAPRA GEMS. A miracle of science

described in recent issues of

Saturday Evening Post and Reader's Digest.

They're more dazzling than diamonds,

yet cost much less. CAPRA GEMS'

refractive quality is actually higher than

diamonds! Brilliantly beautiful,

dazzling CAPRA GEMS are hand cut,

hand polished and hand selected * * *

priced within the reach of all who

love fine gems. A 1-carat diamond stone

costs you approximately \$1000. A

comparable choice selected, 1-carat
 CAPRA GEM is yours for \$27, federal tax included
 * * * and can be bought on small easy payments.
 GET THE FACTS NOW * * * Valuable illustrated
 booklet shows a wide selection of men's and
 women's rings. Gives full details, including
 prices and settings * * * shows all CAPRA GEMS
 actual size. Limited supply, so send today
 without delay. No charge, no obligation. Get
 all the facts on CAPRA GEMS * * *
 more dazzling than diamonds.

SEND NO
 MONEY!
 MAIL TODAY

CAPRA GEM CO., Dept. EQ-31 P.O. 5145,
 Phila. 41, Penna.

Name.....

Address.....

City..... State.....

5. Prospective purchasers responding to such advertising as shown in 4 (a) and (b) above, are forwarded various sales brochures or catalogs illustrating and pricing respondents' products which can be purchased as unset stones or set in a mounting purchased from respondents as a completed ring.

One such brochure or catalog bears on its outside cover a large colored pictorial representation of what appears to be an unset round brilliant cut blue-white diamond. Inside this brochure or catalog are the following statements and representations, among others:

The Capra Gem story is a fascinating story of the genius of man. It is a tribute to the years of research and scientific development which has resulted in the purification and re-crystallization of a natural mineral, extracted from the earth. It is the belief of many scientists that diamonds were formed thousands of years ago by the intense heat of the earth which crystallized carbon. Thus, the Capra Gem, a radiant man-made gem of unequalled brilliance, is created by a scientific technique of heat, crystallizing to a superior radiance. The Capra Gem is "more dazzling than a diamond".

Capra Gems are $7\frac{1}{4}$ on the "Mohs" hardness scale (a diamond has the hardness of 10 on the "Mohs" scale) making it most suitable for ring wear.

Scientific tests have shown that Capra Gems are even harder than most birth stones, and should last a full lifetime under normal wear.

unset, individual Capra Gems * * * More Brilliant than Diamonds at 1/30th the cost!

The Capra Gem is processed just like a diamond of the finest quality. It is individually hand-cut and oriented with full 58 facets—the exact number found in fine, full-cut diamonds. Then, every Capra Gem is expertly polished to bring out its captivating brilliance and sparkle.

A higher degree of light refraction makes The Capra Gem more radiant, more fiery than a diamond. A Capra Gem has a refractive index of between 2.62 and 2.90, while a diamond's refractive index is 2.42. This equals 15% more brilliance in the Capra Gem than the finest diamond of similar size.

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Another of respondents' sales brochures or catalogs sent to prospective purchasers states and represents, among other things:

No need to wait any longer to enjoy the prestige that goes with owning a brilliant Capra Gem ring creation.
equal the beauty and surpass the brilliance of diamonds

Still another of respondents' sales brochures or catalogs sent to prospective purchasers contains the following statement or representation, among others, attributed by the respondents' to have been made in various alleged "fact-finding" magazines with relation to respondents' product:

SATURDAY EVENING POST Nov. 20, 1948 issue:

"The prospects are exciting for women who like rare jewels because when cut and polished the gem becomes more brilliant than a diamond
* * * as radiantly colorful as the most rare of precious gems."

6. Respondent Harry E. Strauss, is a partner of Frank E. Luckenbach, trading as Capra Gem Company, 5901 York Road, Philadelphia, Pennsylvania. The business of said company has been conducted since 1953 and consists of the mail-order sale direct to the purchaser of said company's products. Sales are made in all the States of the United States with the annual sales of said products totaling approximately \$300,000.

Mr. Strauss identified respondents' numerous advertisements and other sales material in evidence as exhibits in this proceeding, including the unset sample of respondents' synthetic stones also submitted as an exhibit. The witness testified that respondents' synthetic stones were sold both unset and set in ring mountings. As to the synthetic material from which respondents' stones were made, the witness stated he was not expert enough to give the chemical formula, but that the popular name is titania rutile.

Respondents do not buy the raw material from which the stones are made, but purchase their stones after they have been cut and polished into the finished product. Respondents were stated to purchase the finished stone at between \$6.50 and \$7 per carat and to sell an unset 1-carat stone for \$24.55 to the consumer purchaser. The respondents' advertised price for said stone was said to be \$27 which sum would include the excise tax of 10%.

Where such stone is sold set in a ring mounting, the additional purchase price would vary depending on the necessary gold and work involved in making the mounting, which is also purchased from outside sources. It was stated to cost from \$1.75 to \$2 to have a 1-carat stone set in a ring mounting (Comm. Ex. 17, style no. 701) and the cost of said mounting to respondents was stated to be about \$10, with

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the complete ring then being advertised by respondents for \$48, which price would include the 10% excise tax.

On recall in the presentation of respondents' defense, the witness testified that he supervised the design and content of respondents' advertising since its inception and that such advertisements were placed in magazines and newspapers. The witness stated the magazines were so many that he could not possibly remember them, but that a few of the larger ones were Diners' Club, Esquire, American Home, House Beautiful, Argosy and others. Respondents' customers are secured by this direct advertising to the public, according to the witness. When prospective purchasers respond to such advertisements, they are then sent respondents' brochures or catalogs and accompanying order blanks with other sales material.

The witness estimated that under respondents' product return program, about five or six thousand returns had been made, and that of this number, about three thousand people had written letters explaining the reason for such return. The reasons given by such dissatisfied customers for such returns, included broken engagements, changed circumstances, and, according to the witness, the most common reason, "For the reasons that the merchandise does not live up to the expectation."

The witness further elaborated on the failure of the merchandise to live up to expectations:

Some people say it's too yellow, * * * and some people, come to think of it, say they have had the ring appraised from their local jeweler and have been convinced that they can do better in their local jewelry store.

The witness further testified to having eliminated the word "authentic" from respondents' advertising and to have substituted therefor the word "man-made" which did not previously appear therein. The word "brilliant" was also stated to have been eliminated and replaced with the words "more dazzling than diamonds". The product rating of $7\frac{1}{4}$ on the Mohs hardness scale was also stated to have been reduced in respondents' advertising to a rating of 7 on the said scale. This change in certain words and representations which perhaps standing alone might each be taken as literally true, would not appear to operate, however, to change the expected illusion in the prospective purchaser's mind created by the context of respondents' overall sales promotion and advertising plan.

Mr. Strauss stated he first became interested in marketing synthetic rutile because of articles he had read in various magazines, and that at such time, he had read no technical books or referred to any other books in such connection. Since then, the witness stated he had con-

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ferred "with people who cut this material" and read books which deal with synthetic rutile, but "I don't know the exact titles of them."

Respondents' exhibits marked for identification and offered in alleged support of the testimony of this witness and rejected, are 3-A and B, from Reader's Digest, October, 1950; 4-A-E, from Consumers' Reports, November, 1950; 5-A and B, from Consumer Research Bulletin, November, 1952; 6-A and B from Good Housekeeping, December, 1957; 7-A-D, from the Saturday Evening Post, November, 1948. Further offered and rejected as alleged proof of public understanding are respondents' exhibits marked for identification 8-A and B, from Science Digest, December, 1945; 9-A and B, from Science Digest, December, 1951; 10-A-D, from Science Illustrated, July, 1948; 11-A-F, from Popular Science Monthly, October, 1950; 12-A-G, from Business Week, January, 1949, 13-A and B, from Science Digest, October, 1947; 14 A-I, from Fortune Magazine, August, 1950; 15-A and B, from Time Magazine, February, 1951; 16 A-D, Jewelers Circular Keystone, July, 1949. Respondents' exhibit 17, being pages 943, 944, and 1992 of Webster's Third International Dictionary, 1961, and exhibit 18 being page 504 of the American College Dictionary, 1956, were received in evidence. Further marked for identification and offered and rejected are 19-A-F, from the Encyclopedia Britannica; 20-A-D, from the Encyclopedia Americana; and 21-A and B, from the World Encyclopedia. With reference to the foregoing exhibits 19, 20 and 21, official notice was requested and taken.

7. Mr. Victor A. Lambert, is the president of Lambert Brothers, Jewelers, Lexington Avenue and 60th Street, New York, New York. Mr. Lambert has been a jeweler and has examined gems since 1914. According to the witness, the word "gem" is a very elastic word, and as used by Lambert Brothers' staff, or people they associate with, a gem indicates a very rare specimen. It was stated that all sapphires, rubies, or diamonds are not gems. A gem would be a very occasional specimen, one that is far finer in quality than another specimen.

This description was said to depend on many years of experience and knowledge of the industry and the degree of honesty of description the particular merchant operates under in describing a specimen as a gem. During the course of his business over the years, the witness testified to having met with other members of the jewelry industry and discussed the word "gem", and their thinking was stated to correspond with that of the witness as to such meaning and application of the term or word "gem".

The witness stated it to be his opinion that the trade today is not governed by past dictionary definitions, and further, that he had not

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read for a long while various dictionary definitions and encyclopedia articles on use or defining of the word "gem", and that he was not certain the industry's opinion would coincide with such. The witness believed the industry position shows a more recent understanding of a confusing problem and if gemmologists were to describe synthetic stones as gems, the witness would not agree, nor would he agree if a dictionary contained such a definition. The witness stated he relied to a great extent on The Federal Trade Commission Trade Practice Rules for the Jewelry Industry for his position on the proper use of the word "gem".¹

The witness testified to operating a retail store and being there daily and regularly, and that to a great extent he dealt with the public personally, and, according to the witness:

I think the public is thoroughly confused. I think the public has been led to believe that many things are gems which are not gems. You asked me what the public thinks, and this covers the country, and from knowledge that I have around the country in addition to New York, I don't think the public knows, to a great extent, what a gem is. I think they depend a great deal on the place and how it is sold to them and described to them.

Gems, according to the witness, could include precious and semi-precious stones. A gem, however, according to the witness, must be "strictly a genuine stone", that is, "Produced by nature, not artificially or man made." It was the opinion of the witness that the public definitely would not accept synthetics as gems. The witness, upon

¹ Rule 39—MISUSE OF WORDS "GEM," "REPRODUCTION," "REPLICA," "SYNTHETIC," ETC.

(a) It is an unfair trade practice to use the word "gem" or similar terms to describe, identify, or refer to a pearl, cultured pearl, diamond, ruby, sapphire, emerald, topaz, or other product of the industry, which does not possess the beauty, symmetry, rarity, and value necessary for qualification as a gem.

(b) It is an unfair trade practice to use the word "gem" as descriptive of any synthetic industry product unless the product meets the requirements of paragraph (a) of this rule and unless such word is immediately accompanied, with equal conspicuity, by the word "synthetic," or by some other word or phrase of like meaning, so as clearly to disclose the fact that it is not a natural gem.

(Note: Use of the word "gem" with respect to cultured pearls and synthetic stones should be avoided since few cultured pearls or synthetic stones possess the necessary qualifications to properly be termed "gems." Imitation pearls, imitation diamonds, and other imitation stones cannot be described as "gems" under any circumstance. Not all diamonds or natural stones, including those classified as precious stones, possess the necessary qualifications to properly be termed "gems.")

(c) It is an unfair trade practice to use the words "reproduction," "replica," or similar terms, to describe, identify, or refer to a cultured or imitation pearl, or to any imitation of precious or semi-precious stones.

(d) It is an unfair trade practice to use the word "synthetic" as descriptive of cultured or imitation pearls, or to use the word "synthetic" with the name of any natural stone as descriptive of any industry product, unless such industry product has essentially the same optical, physical, and chemical properties as the stone named.

Promulgated by the Federal Trade Commission June 28, 1957.

examining respondents' product (CX-4D), stated it was definitely not a gem.

Precious stones, it was stated, would include the diamond, ruby, sapphire, emerald, and possibly several others, considered by the industry to be precious stones because of their origin and value. Semi-precious stones would include, among others, turquoise, aquamarine, topaz, alexandrite, garnet, and amethyst. Some semi-precious stones because of texture, color, rarity and value might evolve on occasion into the precious stone category. For example, certain fine quality topaz, according to the witness. While Lambert Brothers sold some synthetic stones such as amethyst and rubies, the witness testified, "we would never think of using the word 'gem' with anything synthetic or produced by man."

Lambert Brothers does not sell synthetic rutile and the witness does not feel that the public accepts synthetics as gems, and upon examining the respondents' product in evidence, it was stated, based on his trade experience, that it was definitely not a gem because it was synthetic and man made. Based further on his trade experience and contact with members of the public, the witness testified the public would not classify respondents' product as a gem, and "I can't imagine any jeweler with a reputation who would consider this a gem."

The witness could not recall the last time he sold a synthetic stone and stated he relied on general trade and industry experience and his retail store experience as to what public defines as a synthetic stone. The witness testified he did not think he knew what the public definition of the word "gem" would be, stating that "the public has been so confused by misleading descriptions over the years they don't know what they are looking for. I think they think a gem is something fine in most cases."

8. Mr. William P. Lusk, is the president of Tiffany & Company, Jewelers, 727 Fifth Avenue, New York, New York. Mr. Lusk has been a jeweler and has examined gems for the past 35 years. According to the witness, the following was necessary to qualify as a "gem":

Well, gems are very, very fine, unusual specimens of precious stones, and perhaps occasionally of semi-precious stones, and they are always a product of nature, but to be gems they have to be cut and polished by man. What I am saying here is that I would never consider a rough stone a gem because you don't know what it is going to be by the time you get it finished. I would say also that these gems have got to have certain qualities, certain factors about them, beauty, naturally, and durability, and they have got to be rare within the mineralogical class that they belong to. They have to have value in all currencies. In other words, they have to be recognized as having value all over the world.

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As to the definition of the term of word "gem" used by the jewelry trade, the witness testified not much reliance would be placed on text book and dictionary definitions, but a great deal of reliance would be placed on association with each other and individual experience. The witness further stated that he would consult trade or jewelers' dictionaries, as distinguished from lay dictionaries, when required in his dealings with the trade and the public. Whereupon a definition from a jewelers' dictionary was read to the witness by respondents' counsel and the witness was asked if such was a correct definition. To this the witness replied:

No, I don't think it is, because it omits one very important factor, and that is that the stone should be natural.

The witness testified he could cite no particular reliable source in writing for his disagreement with the definition read to him, and further in such regard that "My say-so is about all I can point to in this room, but I want to point out that my say-so is based on what I believe to be the opinions of the great majority of respectable people in the trade."

The witness testified to dealing with the public off and on over a period of 35 years and that the word "gem" would have more than one meaning to the public. With reference to the various meanings the public might ascribe to the word "gem", the witness stated, "It is very hard for me to answer this question, sir, because, frankly, I think the public's been had." The witness stated the term to have been used so loosely that many people would have no idea what it means, but that there is a section of the public which would have a pretty good idea what the term "gem" means. The witness explained that most people do not have occasion to think about the use of the term "gem", but that there are some people who did stop to think about it and would feel that a gem must be "not only a natural stone, but also one that has value and has all the other attributes of beauty, durability and so on."

As to the basis for the witness's opinion of what the public variously considers a "gem" to be, it was stated that "I think the public gets its ideas partly from dictionaries, but not to a very great extent, because the public doesn't dash to a dictionary every time they see a word they don't understand." According to the witness, "if you look at practically any definition of the word 'gem' in the dictionary, the genesis is that if you have five dictionaries you get five definitions." The witness added another source readily available to the public other than dictionaries and encyclopedias with reference to the meaning of the word "gem", would be to ask questions of people in the industry.

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With reference to the public understanding of the term "gem", the witness testified that in connection with sales at his store, that he had on some ten or twelve occasions over the past six months discussed such matter and found the understanding of "gem" to have been what he had previously stated with regard to the general public at large. With reference to the term "synthetic gem" the witness stated, "Well, this one I don't think I have ever discussed with many people, because to me it's so ridiculous I wouldn't bring it up."

The witness considered the use of "synthetic" in connection with "gem" to be a contradiction in terms and a misuse of language. The witness testified that as a retail jeweler and from his experience in the trade, that there is a substantial part of the public that has a pretty positive idea as to what the term "gem" means, and that this substantial part of the public would definitely feel that no synthetic stone could be considered a gem, "Because the public feels that there is something essentially precious about a fine stone. And a precious stone is generally—I mean, people think of a precious stone as being a gem, people think the word precious and gem are apt to go together. I believe that there is a substantial part of the public that would feel, does feel, that a stone has got to be a product of nature if it is going to be considered a gem. It's precious, something that comes out of the earth. It's not something that was created in a laboratory, and I think a substantial part of the public understands this."

According to the witness, Tiffany's handles both precious and semi-precious stones, but does not sell synthetic rutile nor any synthetic or imitation stones. Upon examining respondents' product (Comm. Ex. 4-D) under a ten-power loupe, the witness stated it was not a gem: "Because of a lot of things. In the first place it's synthetic. In the second place, it hasn't got anything like the value that you would require of a gem. It's not a rare stone. It hasn't got the durability that a gem should have, and it hasn't got the beauty." The witness added, based on his experience and contact through the years with the public, "I think a substantial part of the public, who knew what it was, would consider it not a gem."

9. Mr. George Robert Crowningshield, Gemmologist, is the Director of the New York Office and the Gem Trade Laboratory, Gemmological Institute of America, 580 Fifth Avenue, New York, New York. Mr. Crowningshield is a fellow of the Gemmological Association of Great Britain; an honorary certified gemmologist with the certified Gem Society, and a fellow with distinction of the Gemmological Society of Great Britain; and a member of the board of directors of the Gemmological Association of Canada. The record in

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this proceeding contains a list of the professional writings of this witness.

The Gemmological Institute of America was stated to be a non-profit organization founded in 1931 for the education of the jewelry industry, and the Gem Trade Laboratory is a function of the Institute which serves to identify precious stones, pearls and their imitations for the public and said industry. Part of the laboratory's work was stated to be the examination of thousands of precious stones, pearls and their reproductions.

The witness stated, "The qualifications of a gem, which means that we don't see very many, would be extremely fine examples of natural stones which have, because of their beauty, rarity and, consequently, their value, make them outstanding from the ordinary run-of-the-mill stones of the same species or variety."

The witness had examined synthetic rutile and stated it did not qualify as a gem. Synthetic rutile was stated to be a very light yellow in color and made of crystallized titanium dioxide. According to the witness, it could not qualify as a "gem" because "it lacks the rarity, and the consequent cost which one associates with a gem, and it is also a synthetic material."

Synthetic rutile was stated to have more fire than a diamond, but not to be as brilliant as a diamond. According to the witness, the terms "fire" and "brilliance" are not interchangeable, and fire is not a part of brilliance. By fire is meant the return to the eye of light that has been broken into the colors of the spectrum, and brilliance is the return to the eye of white light, or light that has struck the stone, unaltered by diversion or refraction. Because of the fact that synthetic rutile is nearly doubly refractive with eight times as much dispersion as a diamond, it was stated to be not as brilliant as a diamond.

The Mohs hardness scale was described as a scale used by mineralogists to test relative hardness, and in lay language, it tests the relative scratchability of one material as compared with another. The scale was chosen on the basis of the ability of stones to scratch stones below, but not above it in the scale, and the scale runs from 10, accorded to a diamond, the hardest of all by far, down to 1, which the witness stated would be graphite and about as soft as a fingernail. Quartz, said to be the commonest of all minerals in the earth's crust, is rated at 7, and this rating is more or less the delineating line for ring stones, because stones softer than quartz tend to lose their polish when in contact with quartz dust particles found in the atmosphere. The witness testified that he had observed no synthetic rutile that

would scratch quartz and then proceeded to make a test demonstration on respondents' product (Comm. Ex 4-D) using a piece of quartz for the purpose. The test result, observed under a Gemmolite microscope, clearly showed, according to the witness, that quartz, number 7 on the Mohs hardness scale, would scratch respondents' product in its finished form as sold to the public. The witness further added that certain stones were mid-way in hardness and that he had observed that peridot, which is given $6\frac{1}{2}$ on the Mohs scale, at times will scratch synthetic rutile and at other times it will not.

The witness testified that he in part relied on other authors knowledgeable in the field of gemmology in the formulation of certain definitions, although there would be disagreement within any field, and also on the statements and rules of the Federal Trade Commission where applicable. With relation to use of the term or word "gem" in connection with synthetic materials, it was, according to the witness, the very lack of agreement in lay dictionaries as well as gem texts at the time the rules were formulated that prompted the Federal Trade Commission to ask for clarification. The witness further testified that he would not call a synthetic stone a gem, that he had never seen a synthetic stone that would qualify as a gem because it would lack rarity and be too easily duplicated, adding "I have not seen one which even the FTC regulations would qualify". According to the witness, "even if it was one of the finest synthetics ever seen, it would not have the true color of being a true gem. In accordance with the FTC regulations and in thinking about it in respect to being called as a witness, I have tried to recall if we have ever seen any man-made or man influenced product that you could call a gem, and about the only thing I can think of would be certain very, very fine cultured pearls."

The witness further testified that he could cite no author or any source which made the specific statement that a synthetic stone is disqualified by being synthetic from being also a gem. As to the propriety of the use of the term "synthetic" with the term "gem" the witness testified to having read a great number of definitions of the word "gem" and to have found them in conflict, and in this confused situation before the Federal Trade Commission rules, the witness stated it to be his opinion that this combination could have been proper. The witness went on to say, however, relative to the Federal Trade Commission rules defining the term "gem", that, "Without the rules it's a free-for-all" and "The rules, as I have said before, are an attempt to clarify a word which, misused, could glorify something in the eyes of the public."

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10. Mr. Mitchell P. Rosnov, operates a wholesale importing and exporting, and a retail jewelry business, at 719 Sampson Street, Philadelphia, Pennsylvania. The witness received a political science degree from the University of Pennsylvania in 1955, and in 1960 graduated from a correspondence course on the techniques of appraising diamonds and the identification of gem stones conducted by the Gemmological Institute of America. The witness maintains a laboratory for such purpose at his place of business and does appraisal work on a fee basis for various banks, estates and auctioneering companies, as well as on a no-fee basis as an accomodation to fellow jewelers bringing in stones for identification and appraisal.

The witness testified to discussing the matter of gem stone identification and applicable terminology both with members of the jewelry trade and the customers who come to his place of business. The witness stated the trade to consider the definition of the term "gem" to be a very "loose definition" and that the jewelers coming to his establishment "term synthetics as well as genuine stones as gem stones, with that prefix or suffix attached to the word." With reference to any difference between the terms gem and gem stones, the witness stated "Well, I can't for certain say how the whole trade sees it, but a good bit of the trade do not make too much differentiation between the two."

As to the general consuming public, the witness stated he had occasion to explain to customers the difference between a synthetic stone and a natural stone and the properties of each. It was the testimony of the witness that the term "gem" was here again "a very loose term" and that "The public considers a proper use of the term 'gem' any material used as an ornament in jewelry, cut and fashioned," and further "They use this term in dealing with synthetics." Upon being asked whether there were members of the public that would not consider synthetic rutile to be a gem, the witness further answered, "Yes, I would say there are people who would not consider it to be a gem."

The witness examined respondents' synthetic rutile stone (Resp. Ex. 2) and stated it to be made of a synthetic material, titanium oxide, and to have a slightly yellowish cast, and to be cut very much similar to that of a brilliant cut diamond. The witness further testified that, based on what he had read in various books, dictionaries, and his prior lessons, he would consider respondents' synthetic rutile stone to be a "synthetic gem stone", stating "It has practically all the factors except the fact that it's a rare stone, in my opinion". The witness later equated rarity with value, and stated that some people would not consider such a stone a gem in the absence of such value.

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With relation to whether or not the public would consider the use of the word "gem" with reference to a synthetic rutile stone as being proper, the witness finally stated his opinion on this point: "There is always some that do and some that don't." Adding, in response to further questioning, that it would be correct that there would be some that have all sorts of definitions as to the meanings of the word "gem", and that some people would feel that a "gem" would be a very rare and valuable stone.

11. While not having the force of substantive law, the guidance of Rule 39 of the Federal Trade Commission Trade Practice Rules for the Jewelry Industry, promulgated June 28, 1957, is not to be ignored. Compare, *In the Matter of Gimbel Brothers, Inc.*, Docket No. 7834, Opinion of the Commission, issued July 26, 1962 [61 F.T.C. 1051, 1061].²

Rule 39 of the above Jewelry Industry Trade Practice Rules of which official notice has been requested and taken, states it to be an unfair trade practice to use the word "gem" to describe, identify, or refer to any product of the industry in the absence of the beauty, symmetry, rarity, and value necessary for the product to qualify as a gem. Further, a synthetic product cannot qualify unless it meets such requirements, and the rule notes that the use of the word "gem" should be avoided in describing synthetic stones as few such stones possess the necessary qualifications to be termed "gems". The rule also states that the word "synthetic" cannot be used with the name of any natural stone as descriptive of any industry product, unless such industry product has essentially the same optical, physical, and chemical properties as the stone named.

Consistent with the above rule no finding could be herein made that respondents synthetic stones are "gems" or "synthetic gems". The testimony and evidence of record in this proceeding is to the contrary and unequivocally establishes that respondents synthetic stones do not possess the rarity and value necessary for qualification as a gem. Further, and as respondents' answer both admits and alleges, said synthetic stones are "manufactured rather than mined or found in nature" and are not a "version of any stone found in nature". As stated by respondents' counsel in the prehearing conference herein, "Rutile of gem quality is not found in nature. Rutile found in nature is usually a dark black and of no use for gem purposes."

Further, and as shown in finding number 6, *supra*, the testimony of the respondent witness establishes respondents' cost of a 1-carat

² See also, *Northern Feather Works, Inc. v. Federal Trade Commission* (1956) 234 F. 2d 335.

unset synthetic rutile stone as being from but \$6.50 to \$7, with the cost of the ring mounting being some 40% more, or about \$10 in the example therein cited. It is also noted in such connection, that the respondent witness, in relating some of the reasons given by numerous customers for returning respondents' merchandise, because it was stated not to live up to expectations, further testified in part, " * * * And some people, come to think of it, say they have had the ring appraised from their local jeweler and have been convinced they can do better in the local jewelry store."

For purchasers of respondents' products not so convinced, this admission by the witness would appear to establish both the existence of substantial competition and the unfair diversion of probable trade in similar or other products from local jewelry stores which might have been patronized by such purchasers, in the absence of respondents' hereinbefore described advertising and sales promotion plan.

12. In *Haskelite Manufacturing Corporation v. Federal Trade Commission* (1942) 127 F. (2d) 765, the court stated with particular respect to the deceptive appearance of the product itself:

The process used by the petitioner to simulate woods does great credit to the ingenuity of the petitioner, and is so skillfully carried out that the physical exhibits shown us in court were distinguishable from the real wooden trays only after the most careful scrutiny. The trays themselves were the best evidence of the possibility of confusion. Without some warning, the trays of themselves are almost certain to deceive the buying public. The Commission had a right to consider this fact, so forcefully apparent upon an examination of the physical exhibits.

In *Charles of the Ritz Dist. Corp. v. Federal Trade Commission* (1944) 143 F. 2d 676, the court held:

That the Commission did not produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown in Federal Trade Commission proceedings. * * * Likewise it is not material that there was no consumer testimony as to the meaning of petitioner's representations.

In *Benton Announcements, Inc. v. Federal Trade Commission* (1942) 130 F. 2d 254, the court stated:

This is a petition to review an order of the Federal Trade Commission which directed the petitioner to "cease and desist" from using the words "engraved," "engraving," or "engravers" to describe their stationery or the process by which they make it. * * * The process is much cheaper than ordinary engraving, which the Commission described in the following finding.
* * *

As to this finding the testimony was in conflict; but the Commission produced witnesses familiar with the craft who swore that to the ordinary buyer the word, "engraved," which the petitioner used to describe its stationery, meant the older process. The petitioner does not assert that these

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witnesses did not give any support to the finding; it merely says they were not reliable because they disagreed among themselves, because the Commission should have accepted the more dependable testimony of the petitioner's own witnesses; and because in any event the meaning of the word must be determined by recourse to dictionaries. It is too well settled to require the citation of authority that the Commission's decision on conflicting evidence is final. As for dictionaries, words mean what people understand them to mean, and dictionaries are only one source; persons whose business carries them among the buyers of a product are certainly qualified sources of information as to the buyers' understanding of the words they hear and use.

In *Positive Products Co., et al. v. Federal Trade Commission* (1942), 132 F. 2d 165, the court stated:

Advertisements are intended not "to be carefully dissected with a dictionary at hand, but rather to produce an impression upon "prospective purchasers" (citing cases).

Prior to the above holding from the *Positive Products* case, the court had stated:

But the buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression on the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.

In *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, *supra*, the court further stated:

There is no merit to petitioner's argument that, since no straight-thinking person could believe that its cream would actually rejuvenate, there could be no deception. Such a view results from a grave misconception of the purposes of the Federal Trade Commission Act. That law was not "made for the protection of experts, but for the public—the vast multitude which includes the ignorant, the unthinking and the credulous," and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. * * * The important criterion is the net impression which the advertisement is likely to make upon the general populace. * * * And, while the wise and the worldly may well realize the falsity of any representations that the present product can roll back the years, there remains "that vast multitude" of others who, like Ponce de Leon, still seek a perpetual fountain of youth. As the Commission's expert further testified, the average woman, conditioned by talk in magazines and over the radio of "vitamins, hormones, and God knows what," might take "rejuvenescence" to mean that this "is one of the modern miracles" and is "something which would actually cause her youth to be restored." It is for this reason that the Commission may "insist upon the most literal truthfulness" in advertisements, and should have the discretion, undisturbed by the courts, to insist if it chooses "upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "way-faring men, though fools, shall not err therein."

Commission's exhibit No. 4-D and respondents' exhibit No. 2 in evidence are physical specimens of respondents' unset and finished

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synthetic rutile stones sold by mail direct to the purchaser either alone or set in a ring mounting. Respondents' said stones are not seen by the purchaser prior to receipt, and under visual observation by the untrained eye, they are imitative of and simulate the appearance of a commonly known and precious natural stone, the diamond. Such untrained visual observation will not disclose, however, that they are not natural stones, and further that upon being worn, they will not maintain the luster nor have the durability and resistance to damage inherent to a diamond.

Respondents advertising of said product such as exemplified by the advertisement in finding number 4(a), *supra*, in no way discloses to the prospective purchaser that the so-called Capra Gem is not a natural stone, but to the contrary it asserts "the glamour, the look, the romance of real diamonds." In addition, as further shown by the advertisement in finding number 4(b), *supra*, respondents affirmatively represent that Capra Gems are authentic.

Further as shown in finding number 5, *supra*, various follow-up statements and representations are contained in respondents sales brochures and catalogs sent to purchasers responding to the aforesaid advertisements. These statements and representations directly and indirectly compare and imply that the qualities of respondents' stones are such as to approach, or even to exceed, those of the natural precious stone, the diamond, and that such qualities can be obtained at a lesser bargain price upon purchasing respondents' products. The origin of respondents' stones are compared to those of the said natural precious stone, the diamond, in such a manner as to allege or imply, that by research and the development of a scientific technique of heat, a somewhat comparable counterpart stone can now be created by man.

In addition and on the cover of respondents' sales brochure or catalog which is Commission exhibit number 5 set forth in finding number 5, *supra*, there is pictured, in color, the apparent representation of a round, brilliant cut blue-white unset diamond emitting a blue-white light. This pictured implication invokes and strengthens the expected illusion in the purchaser's mind that Capra Gems, offered at allegedly 1/30th the cost of diamonds, are still comparable and substantially worth-while counterpart stones for, as is averred in the respondents' answer, the term blue-white has the connotation of a particular grading classification of diamonds. Said exhibits show the respondents further to claim:

It is a tribute to the years of research and scientific development which has resulted in the purification and re-crystallization of a natural mineral, extracted from the earth. It is the belief of many scientists that diamonds

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were formed thousands of years ago by the intense heat of the earth which crystallized carbon. Thus, the Capra Gem, a radiant man-made gem of unequalled brilliance, is created by a scientific technique of heat, crystallizing to a superior radiance.

Capra Gems are $7\frac{1}{4}$ on the "Mohs" hardness scale (a diamond has the hardness of 10 on the "Mohs" scale) making it most suitable for ring wear.

The Capra Gem is processed just like a diamond of the finest quality. It is individually hand-cut and oriented with full 58 facets—the exact number found in fine, full-cut diamonds.

No need to wait any longer to enjoy the prestige that goes with owning a brilliant Capra Gem ring creation.

equal the beauty and surpass the brilliance of diamonds

The prospects are exciting for women who like rare jewels because when cut and polished the gem becomes more brilliant than a diamond * * * as radiantly colorful as the most rare of precious gems.

In addition to the above, Commission exhibit No. 4-B sent to prospective purchasers recites "Your precious Capra ring" and respondents' Capra Gem guarantee states "Treat your Capra Gem like a diamond."

In *Federal Trade Commission v. Real Products Corporation, et al.* (1937) 90 F. 2d 617, the court held:

The existence of a public interest here may rest either on the deception suffered by the public * * * or the prejudice occasioned to competitors * * *. On either ground the public is entitled to be protected against unfair practices and its interest in such protection is specific and substantial. * * * Nor is it necessary that the product misrepresented be inferior or harmful to the public. The deceptive misrepresentation suffices. * * *

The principle * * * that potential competitors are equally to be protected with actual competitors, is an integral part of the law of unfair competition.

In *C. Howard Hunt Pen Co. v. Federal Trade Commission* (1952) 197 F. 2d 273, the court, citing *Federal Trade Commission v. Algoma Lumber Co., et al.* (1934) 291 U. S. 67, stated:

"The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."

With regard to the defense of a secondary public meaning attached to the challenged term alleged to be misused, the court further stated:

A high degree of proof was essential in establishing the defense of secondary meaning before the Commission. The very wording of petitioner's answer recognizes that, in the words of Mr. Justice Cardozo, it had to show that " * * * by common acceptance the description, once misused, has acquired a secondary meaning as firmly anchored as the first one." * * * It could not prevail if its evidence was of a quality " * * * short of establishing two meanings with equal titles to legitimacy by force of common acceptance." * * * We think that petitioner failed to establish the fact of secondary meaning under those governing principles.

Following a complete review and consideration of the entire record, it is unequivocally clear that the substantial weight of the probative acceptable testimony and evidence of record in this proceeding establishes that prior to the advent of the synthetic production by man of certain natural stones, the purchasing public of necessity could only have understood and accepted precious and semi-precious stones as being nothing other than natural stones. A substantial part of this public also would understand and have accepted the word "gem" as being descriptive only of a precious or semi-precious natural stone, and many would have understood and accepted the term "gem", when used as descriptive of any named natural stone, to mean a specimen of such stone of rarity or of particular or substantial value.

Capra Gems are not precious or semi-precious natural stones and could not qualify as "gems" under a requirement that they be natural stones of rarity and of particular or substantial value, or under a lesser requirement for such qualification that they must only be precious or semi-precious natural stones. The record herein does not establish a secondary meaning for the term "gem" to include the purchasing public's general understanding and acceptance of a "synthetic" stone as able of being or being a gem, nor does the record establish a secondary meaning for the term "synthetic" to include the purchasing public's general understanding and acceptance of a "synthetic" stone as able of being, or being a precious or semi-precious stone.

The record herein does establish, however, that Capra Gems are not blue-white in color and do not emit a blue-white light, which is a grade of quality ascribed to a natural precious stone, the diamond. Further, Capra Gems are not $7\frac{1}{4}$ on the Mohs hardness scale as respondents represent in comparing their stones to the rating of 10 on the Mohs scale accorded to the diamond, and Capra Gems do not, as respondents claim, equal or surpass the brilliance of a diamond upon comparison. Capra Gems are not stones of rarity or of particular or substantial value, and, while imitative of and simulating the appearance of a diamond, are not, as implied by respondents, a somewhat comparable synthetic counterpart stone created by a scientific technique of heat having values approaching those known and accepted by the purchasing public for the natural precious stone, the diamond. Respondents trading as Capra Gem Company are not engaged in the business of selling and distributing genuine gems or genuine precious or semi-precious stones as such are commonly known to and accepted by the purchasing public. The purchasing public has a preference

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for the genuine over and above the imitation or simulation thereof as having a greater prestige and value.

In short and in final summary, it is found that the purchasing public has a preference for the genuine and unless adequately informed does not expect to obtain an imitation or ersatz substitute in exchange for its money. Further, and as to respondents' claim of discontinuance of certain representations made in the sale of their products, such claim in the full light of the complete context of respondents' advertising and sales promotion plan as hereinbefore shown, does not warrant the non-issuance of an order to cease and desist herein looking to and insuring an adequate guarantee of their future non-use. As regards respondents' protestation of business hardship if certain named mail-order seller competitors allegedly using like or similar advertising and sales tactics are not simultaneously also subjected to an order to cease and desist, such a pre-judgement of said seller competitors is not herein available and further is regarded as being without legal merit, in particular with reference to respondents' retail jewelry store competitors not herein shown to be engaged in the use of such misrepresentations in the sale of like, similar or alternative competitive products. See, *Clinton Watch Company v. Federal Trade Commission* (1961) 291 F. 2d 838, and the cases therein cited.

13. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the retail sale to the public of diamonds, imitation and synthetic stones, both unset and set in ring mountings.

14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and acts and practices as hereinbefore found and set forth in paragraphs 1 through 13, *supra*, 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' synthetic stones, both unset and set in ring mountings, by reason of said erroneous belief.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The complaint herein states a cause of action, and this proceeding is in the public interest.
3. The aforesaid acts and practices of respondents, as hereinbefore

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found and set forth in Paragraphs One through Fourteen of the Findings of Fact, 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 of the Federal Trade Commission Act.

ORDER ³

It is ordered, That Harry E. Strauss and Frank E. Luckenbach, individually and as partners trading as Capra Gem Company, or any other name or names, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of synthetic stones now designated as Capa Gems, or any imitation stone, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "authentic" to describe the aforesaid product or representing in any other manner that said synthetic stones are natural stones.

2. Representing directly or by implication that such stones are 7 $\frac{1}{4}$ on the Mohs hardness scale or misrepresenting in any manner the hardness of said stones.

3. Representing directly or by implication that such stones are equal to or surpass the brilliance of diamonds or misrepresenting in any manner the quality of said stones with regard to brilliance.

4. Representing directly or by implication, pictorially or otherwise, that such stones are blue white or emit a blue white color, or misrepresenting in any manner the color of said stones.

5. Using the word "gem" as a part of their trade name, corporate name, trade-mark or in any other manner implying that they are engaged in the sale and distribution of precious or semi-precious stones.

6. Using the word "gem" as descriptive of such stones; using the name of any precious or semi-precious stone in such context as to imply said stones are in any way a counterpart of the named stone; or using the name of any precious or semi-precious stone as descriptive of such stones unless such word or name is immediately preceded with equal conspicuity by the word "imitation".

³ In accord with the dictate of *Korber Hats, Inc., et al. v. Federal Trade Commission*, U.S.C.A., 1st Circuit, decided December 31, 1962.

OPINION OF THE COMMISSION

DECEMBER 18, 1963

By HIGGINBOTHAM, *Commissioner*:

This case is before us on exceptions to an initial decision by a hearing examiner that the respondents have violated § 5(a) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(a), in making certain representations in connection with the sale of their synthetic stones designated as "Capra Gems." The principal issue raised before us was the proper scope of the cease and desist order, specifically paragraph 5 thereof, which required the respondents to cease and desist from their use of the word "gem", a part of their trade name. The respondents' counsel made a number of concessions at oral argument before us,¹ and in the light thereof submitted a proposed order, under Rule 3.22(b), 16 CFR. § 3.22(b), providing for all of the relief against the respondent which the public interest calls for. We have determined to issue our own order, which constitutes a modified version of the order proposed by the respondent², in lieu of the order recom-

¹ The respondents opened oral argument as follows:

MR. SULLIVAN: This is before the Commission on a petition to review the initial decision of Hearing Examiner Eldon Shrup which, in general, forbids the Capra Gem Company from using the term "gem" in connection with either its corporate name or the product in which it deals. This appeal presents really only one question, and that is whether the respondent may use the word "gem". * * *

COMMISSIONER ELMAN: Does that mean that you are not objecting to the order insofar as it does not involve the use of the word "gem"?

MR. SULLIVAN: That is correct, sir. We could not at this stage of the game.

COMMISSIONER MACINTYRE: Would you have any objection to the order at all in connection with the use of the word "gem" if it required you to use the words "synthetic" or "man-made gem"?

MR. SULLIVAN: I don't believe that we would have an as serious objection to "man-made gem" as we would to the complete excision of this, and particularly whether or not to the corporate name, which is a terrible thing for a company, which has been in business for ten years, to be deprived of.

We have no objection to an order which requires a disclosure of the fact that this product is not * * * natural. That is quite clear, and to that we could not object and do not object. We are rather proud of that. We claim it to be a miracle of modern science, a man-made gem.

COMMISSIONER ELMAN: * * * use the word "gem" so long as it was clearly disclosed that it was not a natural stone.

MR. SULLIVAN: That is correct.

COMMISSIONER ELMAN: You would have no objection to that?

MR. SULLIVAN: No sir.

COMMISSIONER ANDERSON: You are opposed to excision of the word "gem" but are not opposed to qualification of the word "gem" so that it would say, as the several Commissioners have indicated, a "synthetic", or a "man-made", not a natural?

MR. SULLIVAN: Yes, sir. We have no objection whatever to an order that would be limited to compel us to disclose the fact that this is not a natural stone. There is no objection to that. Never has been.

² The first four paragraphs of the order are the same as those in the initial decision, and no objection to them is made. We have deleted paragraph 5, as proposed by the respondent, and modified paragraph 6 (now Paragraph 5) to permit other words of qualification than "imitation", in conformity with the applicable trade practice rules.

mended by the hearing examiner. We therefore vacate that order and the accompanying findings and initial decision. In lieu thereof we substitute our own findings of fact and conclusions of law as follows:

1. Harry E. Strauss and Frank E. Luckenbach, as individuals and partners trading as Capra Gem Company, are now and for some time have been engaged in the advertising, offering for sale, sale and distribution of synthetic stones to the public, in commerce.

2. In their advertising, the respondents have described their synthetic stones as "authentic," a term which to most members of the public carries the connotation that said synthetic stones are natural stones. The respondents have represented directly or by implication that such stones are $7\frac{1}{4}$ or harder on the Mohs hardness scale, which in fact they are not, and have otherwise misrepresented the hardness of said stones. The respondents have represented that their stones are equal to or surpass diamonds in brilliance, which in fact is untrue, and have otherwise misrepresented the quality of their stones with regard to their brilliance. The respondents have also falsely represented that their stones are blue-white or emit a blue-white color.

3. Respondents have used the word "gem" as descriptive of their product without clearly disclosing, at the same time, that their stones are not natural stones or natural gems, thereby implying that their stones are a counterpart of natural, precious or semi-precious gems or stones.

4. The acts and practices described in paragraphs 2-3 have tended to divert trade to the respondents from more scrupulous competitors, who refrained from the use of such misrepresentations in the sale of their goods.

5. The aforesaid practices constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce. The public interest required that an order be entered prohibiting their continuance.

In the course of the hearings, the examiner excluded from evidence excerpts from various books and magazine articles which referred to synthetic stones as "gems." He also prevented respondents' counsel from cross-examining the Commission's expert witnesses on the basis of such material. In both cases the examiner rested the exclusion on the hearsay rule. Even on the examiner's erroneous premise that the hearsay rule applies to administrative proceedings, see *John Bene & Sons, Inc., v. Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924); 2 Davis, *Administrative Law*, ch. 14 (1958), these evidentiary rulings constituted error, since the respondents' evidence was material and competent, even under the hearsay rule. The examiner failed to distinguish between (1) third-party statements offered in evidence to

prove the truth of what they state and (2) third-party statements offered in evidence as verbal acts, where what is significant is whether they were in fact made, not their "truthfulness," which is hardly material in the verbal act context. See generally *Labor Board v. G. W. Thomas Co.*, 206 F. 2d 857 (9th Cir. 1953); *Paddock v. United States*, 79 F. 2d 872, 874 (9th Cir. 1935); *Bausch Machine Tool Co. v. Aluminum Co. of America*, 79 F. 2d 217, 220, 224 (2d Cir. 1935); *McCormick*, Evidence, § 226 (1954).

We have therefore considered the rejected evidence, and as indicated in Finding 3 we conclude that it is not inherently deceptive to style the respondents' products "gems," but whether the public is deceived depends on the entire context in which the term is used. The term is innocuous when accompanied by sufficient language of explanation that the product is a synthetic, man-made gem; it is deceptive when unqualified by some word or phrase which clearly discloses the fact that the product is not a natural gem. We therefore adopt the respondents' order as fully protective of the public interest, rephrasing it, however, as previously noted, to make it conform to the language of the trade practice rules. This order requires the respondents to use the word "gems" only in a manner consistent with our trade practice rules for the industry. Rules 37(b), 39(b), Federal Trade Commission Trade Practice Rules for the Jewelry Industry, 16 C.F.R. § 23.37(b), § 23.39(b). That is, whenever respondents refer to their products as "gems," they must place in conjunction thereto notice that the stones are synthetic. Such notice will protect the public and the respondents' competitors from deception and at the same time permit the respondents to market their goods in what they consider an effective merchandising manner. The latter, of course, must be subordinated to the former in cases of conflict, but none exists here. We see no need to damage whatever good will has accrued through respondents' advertising techniques to its trade name and find no necessity to excise "gems" from respondents' name.

The examiner's recommended order is vacated; a modified order will issue in lieu thereof.

Commissioner Anderson concurred in part and dissented in part.

By ANDERSON, *Commissioner*, concurring in part and dissenting in part:

I concur in the result reached by the majority except that I would not permit respondents to use the word "gem" as descriptive of their product or as part of their trade name.

FINAL ORDER

DECEMBER 18, 1963

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision, filed by the respondents, and on briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision ruling on said exceptions, and having determined that the initial decision should be vacated for the reasons expressed in the accompanying opinion, and the order modified accordingly:

It is ordered, That Harry E. Strauss and Frank E. Luckenbach, individually and as partners trading as Capra Gem Company, or any other name or names, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of synthetic stones now designated as "Capra Gems," or any imitation stone, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "authentic" to describe the aforesaid product or representing in any other manner that said synthetic stones are natural stones.

2. Representing directly or by implication that such stones are 7 $\frac{1}{4}$ on the Mohs hardness scale or misrepresenting in any manner the hardness of said stones.

3. Representing directly or by implication that such stones are equal to or surpass the brilliance of diamonds or misrepresenting in any manner the quality of said stones with regard to brilliance.

4. Representing directly or by implication, pictorially or otherwise, that such stones are blue-white or emit a blue-white color, or misrepresenting in any manner the color of said stones.

5. Using the word "gem" as descriptive of such stones unless it is clearly disclosed that such stones are not natural stones or natural gems; using the name of any precious or semi-precious stone in such context as to imply said stones are in anyway a counterpart of the named stones; or using the name of any precious or semi-precious stone as descriptive of such stones unless such word or name is immediately preceded with equal conspicuity by the word "synthetic" or "imitation", or by some other word or phrase of like meaning, so as clearly to disclose the fact that it is not a natural stone.

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Complaint

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It is further ordered, That the respondents, Harry E. Strauss and Frank E. Luckenbach, individually and as partners trading as Capra Gem Company, shall within sixty (60) days after service upon them