

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

IN THE MATTER OF
AROUND-THE-WORLD SHOPPERS CLUB TRADING AS
TRANS-WORLD SHOPPERS CLUB ET AL.

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

Docket 8460. Complaint, Jan. 16, 1962—Decision, Feb. 17, 1964

Order requiring operators of buying clubs—members of club receive monthly, in return for their so-called membership fees. an article of merchandise

Complaint

64 F.T.C.

from a foreign country—to cease making deceptive pricing, savings, and “free” claims for foreign made merchandise to its club members and prospective members.

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 Around-the-World Shoppers Club, a corporation trading as Trans-World Shoppers Club, and David W. Margulies, Don Haas, Joe Vine, and I. G. Margulies, 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 Around-the-World Shoppers Club trading as Trans-World Shoppers Club 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 833 Newark Avenue, in the City of Elizabeth, State of New Jersey.

Respondents David W. Margulies, Don Haas, Joe Vine, and I. G. Margulies, are individuals and are officers of said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent. Their address, as individuals and as officers, 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 business of advertising, offering for sale, and selling so-called subscriptions of membership in buying clubs, operated under the afore-mentioned names, to members of the purchasing public. In return for their so-called membership fees, the purchaser receives, monthly, an individual article of merchandise from a foreign country. Said articles of merchandise consist of candlesticks, scarves, lamps, statues and various other items purchased by the respondents in foreign lands and shipped to said purchasers.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the aforesaid subscriptions, certificates, and articles of merchandise to be shipped from their aforesaid place of business in the State of New Jersey, and from the various places of business of their suppliers located in the different states of the United States and foreign countries,

to said subscribers located in various states of the United States, and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said subscriptions, certificates, and articles of merchandise, 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 said subscriptions, certificates, and articles of merchandise, respondents now make, and have made, numerous statements and representations with respect to the regular retail selling price of the afore-mentioned articles of merchandise, and the savings afforded subscribers. Said statements and representations have been made in letters, leaflets, tear sheets, and other kinds of promotional material mailed to prospective customers and subscribers throughout the United States and the District of Columbia.

Typical and illustrative of the foregoing, but not all inclusive thereunder, are the following:

Yours for Only \$10

This exquisite silver-plated 5-pc. coffee & tea service * * * Guaranteed
* * * \$50 Value

WHY we offer this \$50 service for only \$10

You may wonder why we are making you this once-in-a-lifetime offer. Our purpose is to introduce you, through this fabulous Coffee & Tea Service, to the rich benefits of membership in the Trans-World Shoppers Club.

* * * * *

"Minolta-16 Retail Value * * * \$39.95

The world's most exciting camera yours for only \$10

* * * * *

Dear Friend,

Yes, it's true! Incredible as it seems, for only \$10, I want to send you the amazing Minolta-16 camera (sold everywhere for \$39.95) * * * as a demonstration of the fabulous values that members of the exclusive Trans-World Shoppers Club enjoy!

* * * * *

This magnificent 400 day clock FREE! with membership in the Deluxe Around-the-World Shoppers Club

Your free Heirloom Clock stands 12" high and 8" wide at the base
* * * and has a verified store price of \$30.

PAR. 5. Through the use of the aforesaid statements and representations, and others similar thereto, but not specifically herein set forth, respondents have represented, directly or indirectly, that:

a. \$50 is the usual and regular retail price of the coffee and tea service in all of the trade areas in which it is offered for sale;

b. \$39.95 is the usual and regular retail price of the Minolta-16 camera in all of the trade areas in which it is offered for sale;

Complaint

64 F.T.C.

c. \$30 is the usual and regular retail price of the 400 day anniversary clock in all of the trade areas in which it is offered for sale;

d. Such alleged usual and regular retail price of the coffee and tea service has been reduced to \$10 with consequent savings afforded to the purchasers thereof;

e. Such alleged usual and regular retail price of the Minolta-16 camera has been reduced to \$10 with consequent savings afforded to the purchasers thereof;

f. The said 400 day anniversary clock is a gift or gratuity given without cost to the recipient.

PAR. 6. The foregoing representations are false, misleading, and deceptive. In truth and in fact:

a. \$50 is not the usual and regular retail price of the said coffee and tea service in all of the trade areas in which it is offered for sale;

b. \$39.95 is not the usual and regular retail price of the said Minolta-16 camera in all of the trade areas in which it is offered for sale;

c. \$30 is not the usual and regular retail price of the said 400 day anniversary clock in all of the trade areas in which it is offered for sale;

d. Savings in the amount herein above stated are not afforded to purchasers of said articles;

e. The said 400 day anniversary clock designated as "free" is not a gift or gratuity, or without cost to the recipient, but on the contrary, the prospective purchaser, before he is entitled to receive said clock, must purchase a membership in respondents' club or clubs, thus becoming obligated to purchase a minimum of six articles of merchandise over a period of six months or twelve articles of merchandise over a period of one year, the fulfillment of which obligation inures directly to the benefit of and profit to the respondents.

PAR. 7. 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 engaged in the sale of articles of merchandise of the same general kind and nature as those sold by respondents.

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 the said statements and representations were and are true and into the purchase of substantial quantities of respondents' articles of merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the 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 violations of Section 5(a)(1) of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

This is an appeal by complaint counsel from the initial decision of the hearing examiner, which dismissed the complaint on the grounds that the respondents had discontinued the challenged practices. The complaint, filed January 16, 1962, charged that respondents had engaged in "unfair or deceptive acts or practices in commerce" in violation of Section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C. § 45(a)(1).

Around-the-World Shoppers Club is a New Jersey corporation which has engaged for a number of years in the business of advertising and selling memberships in its buying club to the purchasing public. In return for a fee each member received a monthly article of merchandise selected by the respondent corporation. Such merchandise was obtained in various countries throughout the world and mailed directly to the consumer from abroad. The articles included such items as candlesticks, scarves, lamps and statues. Respondents David Margulies, Joe Vine, Don Haas, and I. G. Margulies were alleged to be officers of the corporation and responsible for its activities.

The record reveals that respondents sent subscriptions, advertisements and certificates from their place of business in New Jersey to members and prospective members all over the United States, and that articles of merchandise were also sent to members in various parts of the United States. In this manner a substantial amount of trade in commerce was maintained at all times.

In 1957, respondents began to make special "bonus" offers to attract new members. Respondents first represented that a "400 day" clock would be given free to each new member. When this offer was discontinued, they advertised a "\$39.95" Minolta camera would be sent to each new member for a payment of only \$10 in addition to the regular membership fee. The "camera" offer was replaced by a silver-plated coffee and tea service which was represented as having a retail value of \$50, but which new members would receive for \$10. The complaint charged that the representations made in connection with these campaigns were false and misleading in that the clock

was, in fact, not "free" since a charge was made therefor, and the usual and regular prices of the camera and coffee and tea service in all trade areas were not respectively \$39.95 and \$50 but were substantially less.

The hearing examiner held that the respondent corporation, David W. Margulies and Joe Vine falsely represented that the usual and regular retail price of the camera was \$39.95 and that the clocks were "free." However, since these representations were discontinued prior to March 1961, the hearing examiner held the matter was moot because of discontinuance. The examiner also held that there was insufficient proof that the respondents had falsely represented that \$50 was the usual and regular retail price of the coffee and tea sets. He further ruled that the complaint should be dismissed as to respondent Don Haas because there was a failure of proof of violation and also because his address was unknown and it would be difficult to serve an order against him.

There are two main issues on appeal. The first is whether the hearing examiner was correct in ruling that there was insufficient proof that respondents had falsely represented that \$50 was the regular and usual retail price of the coffee and tea sets. The second is whether his dismissal on grounds of mootness is proper.

The hearing examiner did not consider the evidence sufficient to establish misrepresentation with regard to the coffee and tea set. He felt the evidence clearly established that the respondent corporation had represented that the coffee and tea set had a "value" of \$50. But he stated:

The proof offered by complaint counsel to show that \$50 was not the usual and regular retail price of the set in all said areas, and that there was no saving of \$40, was completely insufficient. There was no evidence of any actual retail sale or sales of the set. No retailer of the set was introduced as a witness. The only witness was the manufacturer of the set, that is, its sales manager. * * * The witness testified that he knew the retail price was \$36, but to support this gave only two examples, both special sales at about \$28 * * *.¹

The witness referred to above, Mr. Cohen, was the sales manager of the Sheridan Silver Company, the manufacturer of the coffee and tea services. Mr. Cohen was in the silverware business as a sales representative for twenty-four years prior to spending six years with Sheridan as sales manager. He has about ten salesmen under him who cover the United States from "coast to coast." In addition, Mr. Cohen personally engages in selling in the company's New York showroom and at various shows and conventions.

¹ Initial decision, at page 13 (August 29, 1962).

Mr. Cohen testified that the coffee and tea set was generally sold in the New York trade area at \$36, with some special sales made at \$29.95. He also noted that the price list of the Sheridan Silver Company stated that the suggested retail price was \$36. He noted, furthermore, that in some instances special sales were made at \$29.95. The foregoing, of course, tends to support the Commission charge of fictitious pricing.

A similar issue as to the existence of substantial evidence arose in the *Gimbel Brothers, Inc.*, case.² That case also involved fictitious pricing claims with regard to merchandise sold in the New York area. A single witness testified that Hotpoint refrigerators generally were not sold at list price in the New York City area. In evaluating the testimony of this witness, the Commission stated:

* * * The foregoing facts were testified by the district manager of Hotpoint's New York District; a man with twenty-three years' experience who supervises four sales managers and eighteen wholesale salesmen; who personally, periodically contacts a cross-section of Hotpoint retail dealers; and who makes it his business to know the general level at which his customers sell Hotpoint products. Such a witness is, in our view, worthy of belief and his testimony should be afforded weight. Using this testimony as a basis, we find that the list prices suggested by Hotpoint and used by Gimbel's in the advertisement are not the "usual and customary" prices for Hotpoint refrigerators in the New York area.³

The evidence here is equally probative to that relied upon in *Gimbel Brothers, Inc.* The Commission feels that Mr. Cohen's testimony is adequate to support a finding that \$50. was not the usual and regular price of the coffee and tea set in the New York City trade area. It is immaterial that there was no evidence of "usual" price in terms of individual sales. We believe that there is sufficient evidence to sustain the conclusion that the respondents falsely represented the regular and usual retail price of the coffee and tea set and the hearing examiner's contrary finding will be set aside.

We are also of the opinion that respondent's representations as to "price" and "value" of the merchandise in question failed to meet the standards for truthful advertising set forth in our recently issued Guides Against Deceptive Pricing. The claim that the Minolta Camera "sold everywhere for \$39.95" would lead the reader to believe that the camera is sold at \$39.95 in all types of outlets in all communities throughout respondent's trade area. The showing that in New York City the camera was usually sold in discount houses for \$25 reveals that the claim is untrue. As to the representation that the silver-plated coffee and tea service has a \$50 value," the testimony that the manufacturer's suggested price for this item was \$36 and

² *Gimbel Brothers, Inc.*, Docket No. 7834, 61 F.T.C. 1051, Oct. 17, 1962.

³ *Id.* at page [61 F.T.C. 1051, 1070].

that sales were sometimes made at less than the suggested price supports the conclusion that the prevailing price of this merchandise was not \$50 (see Guides II and III).

We turn now to the issue created by the hearing examiner's dismissal of the complaint for mootness. The record clearly establishes that at the present time the respondents have ceased making the type of representations which is challenged in this proceeding. They stopped representing that the clock was "free" sometime in 1958. Representations as to the value of the cameras terminated in February 1960. Representations as to the value of the coffee and tea set ceased in January 1961. All such representations had ceased one year prior to the issuance of the complaint in January 1962. It was also established that respondent corporation is involved in Chapter 11 bankruptcy proceedings. On this basis the hearing examiner concluded that the proceeding was moot and no order to cease and desist was necessary.

We cannot agree with this conclusion. The mere fact that all false representations ceased one year before the issuance of the complaint does not mean such practices have been permanently abandoned. *Deer v. Federal Trade Commission*, 152 F. 2d 65 (2d Cir. 1945). Nor can such an inference be drawn from the fact that the respondent is now involved in Chapter 11 bankruptcy proceedings. Cease and desist orders have issued against corporations undergoing dissolution or bankruptcy proceedings. *Neo-Mineral Co., Inc., v. Federal Trade Commission*, 48 F.T.C. 487, 498 (1951). It is possible that the corporate respondent will perfect an arrangement in bankruptcy which will allow it to resume its business operations later.⁴

In cases of asserted abandonment, the Commission is vested with broad discretion in determining whether a practice has been surely stopped and whether an order to cease and desist is proper. *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321 (7th Cir. 1944). The burden of proof is on the defendant to establish the defense of abandonment; it must establish that there is no likelihood that these practices will be resumed in the future. Dismissal of complaints in abandonment cases is not the usual procedure and should be limited to truly unusual situations. *Ward Baking Company*, 54 F.T.C. 1919, 1922 (1958).

We conclude that the respondents have failed to establish that they have permanently discontinued the challenged practices. In fact, they have failed to offer any assurance whatsoever that they will not re-

⁴ Respondent corporation has liabilities of \$500,000 against assets of \$100 in cash and \$10,000 in merchandise. However, \$200,000, or two-fifths of its total liabilities, consists of a debt owed to Damar Products, Inc. David Margulies is the president of Damar and also owns a majority share of its stock.

sume these practices in the future. *Galter v. Federal Trade Commission*, 186 F. 2d 810, 813 (7th Cir. 1951). If the respondents' corporate entity is reconditioned in the bankruptcy proceedings, the false representations could be resumed, either in conjunction with the same shopping club business, or through some similar mode of merchandising. Since the respondent corporation has failed to sustain its burden of proving that there is no likelihood that the challenged practices will be resumed, issuance of a cease and desist order is proper.

A cease and desist order to cover the two individual respondents, David Margulies and Joe Vine, is required for several reasons. These individuals were shown to exercise control over the activities and policy of the corporate respondent. If the corporation can continue false and misleading advertising practices in the future, so, of course can its offices. In addition, the record indicates that Margulies is president of and owns a substantial portion of the stock in Damar Products, Inc., another mail order house located at the same address as respondent corporation. Thus it would appear that respondent David Margulies has other avenues through which he may continue fictitious pricing practices.

Counsel supporting the complaint argues that the cease and desist order should also cover respondent Don Haas.⁵ However, it seems clear that Mr. Haas did not have control over the advertising and merchandising activities of Around-the-World Shoppers Club. Although he was vice president of the corporation for a substantial period of time, his domain was "operations." There is no evidence that he had any control whatsoever over the advertising functions; decisions in that area were made solely by David Margulies and Joe Vine. Thus there appears to be no record basis for an order against respondent Haas.

An order setting aside the initial decision will issue. The Commission will make its own findings, conclusions and order to cease and desist.

Commissioner Elman dissents.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND FINAL ORDER

FEBRUARY 17, 1964

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision filed August 29, 1962, and the Commission, for the reasons stated in

⁵ Respondent I. G. Margulies was dismissed by stipulation.

Findings

64 F.T.C.

the accompanying opinion, having determined that the initial decision should not be adopted as the decision of the Commission but should be vacated and set aside, now makes in lieu thereof these, its findings as to the facts, conclusions and final order.

FINDINGS AS TO THE FACTS

1. Respondent Around-the-World Shoppers Club, also doing business as Trans-World Shoppers Club, 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 833 Newark Avenue, in the City of Elizabeth, State of New Jersey.

2. Respondents David W. Margulies and Joe Vine are individually responsible, along with the corporate respondent, for the acts and representations referred to herein. Margulies directs and controls the acts of the respondent corporation, both as its president and dominant stockholder. He approved the stated value representations as to the "bonus" items prior to dissemination among prospective new members. Joe Vine, as vice president in charge of advertising and merchandising, approved the stated value representations. Furthermore, he had the power to hire and fire employees, and to enter into contracts in behalf of the corporation.

3. Respondents have engaged for some years in the business of advertising, offering for sale, and selling subscriptions of "membership" in a so-called buying club or clubs, to members of the purchasing public. In return for the membership fee each member received monthly an individual article of merchandise selected by the corporation in various countries throughout the world and mailed directly to the member from abroad. The articles included such items as candlesticks, scarves, lamps, and statues. Membership for six months generally costs \$18. A twelve-months membership cost \$33.

4. In the course and conduct of their business, respondents caused the aforementioned subscriptions and certificates, as well as solicitations for new memberships, to be sent from their place of business in the State of New Jersey to members and prospects located in various states of the United States and the District of Columbia. They also caused the monthly articles of merchandise to be sent from foreign countries to members in various states.

5. In an attempt to increase flagging membership, respondents in about 1957 commenced offering "bonus" items of merchandise to new members. The first such item was a "free" clock. The second was a camera for \$10, and the third, a silver-plated coffee and tea set for \$10.

6. In offering these "bonus" items—the clock, camera and coffee and tea set—the respondents represented that the clock was "free"; that the coffee and tea set was a \$50 value; and that the camera had a retail value of \$39.95.

7. In 1957-58 respondents mailed out on a nationwide basis about two million brochures with other papers, offering a "free" clock as an inducement for club membership, as aforesaid.

8. The clock was not "free." The membership application shows that membership for six months, without the clock, was \$18. With the clock in addition, the same membership cost \$23. The latter figure was stated, on the membership application, to include "special handling and shipping charge of \$5 on the clock." In fact, the special handling and shipping charges were not \$5. The postage for mailing one of these clocks from Germany to the United States was \$1.49. The balance, \$3.51, went towards the cost of the clock itself. Thus, the club member enrolling for six months did not receive the clock free, and the aforesaid representations were false, misleading and deceptive.

9. Early in 1960 respondents mailed out, on a nationwide basis, 12,000 brochures, offering to new members a "Minolta-16 camera for \$10," plus the regular membership fee. In these brochures, it was stated that the camera "sold everywhere for \$39.95."

10. Through the use of such statements respondents represented that \$39.95 was the usual and regular retail price of the Minolta-16 camera in all trade areas where the representation was made. In fact, \$39.95 was not the usual and regular retail price of said camera in all such trade areas. The record shows that in New York City the camera was usually sold by camera stores of the "discount" variety for about \$25. Accordingly, the aforesaid representations were false, misleading and deceptive.

11. Commencing in 1960 and continuing into 1961 the respondents mailed out quantities of brochures offering new members a "\$50 Value" silver-plated coffee and tea service for \$10, plus the regular membership fee. Through the use of such statements respondents represented that \$50 was the usual and regular retail price of the set in all of the trade areas in which respondents' representations were made.

12. The record indicates that \$50 was not the usual and regular retail price of the set in all said areas. The manufacturer's suggested retail price and the usual retail price of the set in the New York area was \$36. Therefore, the aforesaid representations were false, misleading and deceptive.

13. There is no substantial evidence in the record to indicate that respondents Don Haas and I. G. Margulies are responsible for the unlawful acts above found.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and over these respondents.

2. The aforesaid acts and practices of respondents are to the prejudice and injury of the public.

3. The false, misleading and deceptive representations constitute unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

FINAL ORDER

It is ordered, That respondents, Around-the-World Shoppers Club, a corporation trading under that or any other trade name or names, and David W. Margulies and Joe Vine, 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 coffee and tea service sets, cameras, clocks or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that said merchandise is being offered for sale at a price lower than the price charged by others for the same merchandise when the represented higher price appreciably exceeds the highest price at which substantial sales of the merchandise are being made in the trade area in which respondent is doing business.

2. Using the word "free," or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe articles of merchandise, when a charge is made for such merchandise.

It is further ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Don Haas and I. G. Margulies.

It is further ordered, That respondents Around-the-World Shoppers Club, a corporation, David W. Margulies and Joe Vine shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail

