

Complaint

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IN THE MATTER OF

CLARENCE SOLES TRADING AS MIDWEST SEWING
CENTERORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8602. Complaint, Nov. 1, 1963—Decision, Dec. 3, 1964*

Order vacating initial decision and dismissing—insufficient evidence—complaint charging a St. Paul, Minn., retail dealer engaged in selling new and used sewing machines with “bait” advertising to obtain leads to potential purchasers, and falsely stating usual selling price of its new machines, thereby misrepresenting the amount of savings available to customers.

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 Clarence Soles, an individual, trading and doing business as Midwest Sewing Center, hereinafter referred to as respondent, has 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 Clarence Soles is an individual trading and doing business as Midwest Sewing Center, with his principal office and place of business located at 504 North Prior Street in the city of St. Paul, State of Minnesota.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new and used sewing machines to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said product, when sold, to be shipped from his place of business in the State of Minnesota to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as “commerce” is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business as aforesaid, and for the purpose of inducing the purchase of his said products, respondent has made various statements in advertisements in news-

papers of general circulation. Among and typical, but not all inclusive, of such statements are the following:

Singer electric sewing machine in beautiful console cabinet. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs.

Take over seven monthly payments of \$6.10, or will discount for cash. Write Credit Manager, 504 Prior Ave. No., St. Paul 4, Minnesota.

Singer electric sewing machine in beautiful three drawer desk. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs. Can be seen in your area.

Take over nine monthly payments of \$6.55 or will discount for cash.

Write Credit Manager, 504 Prior Ave. No. St. Paul 4, Minnesota.

PAR. 5. By and through the use of said statements in said advertisements and others of similar import but not specifically set out herein, respondent represented that he was making a bona fide offer to sell used electric sewing machines at the prices specified in the advertising.

PAR. 6. In truth and in fact, respondent's offers were not bona fide offers to sell the said used sewing machines at the advertised prices but were made for the purpose of obtaining leads and information as to persons interested in the purchase of new sewing machines. After obtaining leads through response to said advertisements, respondent's salesmen called upon such persons but made no effort to sell said sewing machines at the advertised prices. Instead, they exhibited the advertised used sewing machines, or ones similar to them, in demonstrating that they were manifestly unsuitable for the purpose intended and disparaged the advertised products in such a manner as to discourage their purchase, and attempted to and frequently did sell much higher priced products.

Therefore the statements and representations as set forth in Paragraphs Four and Five hereof were false, misleading and deceptive.

PAR. 7. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his sewing machines, the respondent's salesmen have made numerous oral statements with respect to prices of his sewing machines and the savings resulting to purchasers.

Typical and illustrative of the aforesaid statements are the following:

The regular retail price is \$269.00

Our price to you is \$150.00

The machine usually sold for \$199.00

Our price to you is \$150.00

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PAR. 8. By and through the use of the above-quoted statements, and others of similar import not specifically set out herein, the respondent represented that the higher stated prices were the prices at which the merchandise had been usually and customarily sold by respondent at retail in the recent regular course of business in the trade area or areas where such representations were made and that the differences between the higher and lower prices represented savings to purchasers from respondent's usual and customary retail prices.

PAR. 9. In truth and in fact, the higher prices stated orally by respondent's salesmen were in excess of the prices at which the merchandise had been usually and customarily sold by respondent in the recent regular course of business in the trade area or areas where the representations were made, and the differences between the higher and lower prices did not represent savings to purchasers from respondent's usual and customary retail prices.

Therefore, the statements and representations as set forth in Paragraphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sewing machines of the same general kind and nature as that sold by respondent.

PAR. 11. The use by respondent 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 respondent's products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's 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. James J. Lewis supporting the complaint.

Mr. Thomas M. Murphy of *Kempe & Murphy*, West St. Paul, Minn., for the respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

APRIL 16, 1964

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on November 1, 1963, issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act in the interstate sale and distribution to the public of new and used sewing machines.

The complaint charges the respondent with false newspaper advertising in the offering for sale of repossessed sewing machines with small payments owing for the alleged purpose of securing leads to prospective purchasers of new sewing machines. Said sales offers are stated not to have been bona fide but, to the contrary, respondent's salesmen are alleged to have so disparaged the advertised machines as to discourage their purchase and to have then further induced the prospective buyers to purchase other of respondent's sewing machines by false statements and representations as to the respondent's usual and customary higher and regular retail selling prices for the same.

Answer admitting and denying the various allegations of the complaint was filed on December 5, 1963. Said answer further averred that respondent's newspaper-advertised sales offers were bona fide, that an undetermined number of such machines were sold as represented, and that respondent and his agents acted in accord with generally accepted business practices. Based on respondent's accompanying petition to hold the hearing at a site close to respondent's business activities, a certificate of necessity was certified to the Commission on December 20, 1963, recommending the granting of permission to hold a non-continuous hearing for the presentation of the case-in-chief in Madison, Wisconsin, and the defense in St. Paul, Minnesota.

By Commission order issued December 26, 1963, such leave was granted and a hearing was held in Madison, Wisconsin, on February 3, 1964, and in St. Paul, Minnesota, on February 5, 1964, and the case closed of record. The record consists of 135 pages and 11 Commission exhibits. Four purchasers of respondent's sewing machines¹ and the respondent were called to testify during the case-in-chief, and

¹By stipulation of record between counsel (Tr. 101-103), it was agreed that four additional purchasers from the respondent proposed to be called in support of the complaint's allegations could be dispensed with, and that the evidence of record they would further add, if called, was to be considered as being substantially the same and supplementing that already made of record by the four preceding purchasers from the respondent.

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the respondent called but one witness to testify in the presentation of the defense.² Respondent did not testify as a witness in his own behalf and offered no exhibits.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Proposed findings of fact, conclusions, brief and proposed order to cease and desist were filed by counsel supporting the complaint. Counsel for the respondent filed only a short brief relative to the legal interpretation to be given the testimony and evidence of record. 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. Respondent Clarence Soles is an individual trading and doing business as Midwest Sewing Center, with his principal office and place of business located at 504 North Prior Street in the city of St. Paul, State of Minnesota.³ Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new and used sewing machines to the public.⁴

In the course and conduct of his said business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of Minnesota to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.⁵

2. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his said products, respondent has made various statements in advertisements in newspapers of general circulation. Among and typical of such statements are the following:

² This testimony (Tr. 126-130) was confined to the nature of respondent's banking and financing arrangements with the bank employing the witness.

³ Admitted, paragraph 1 of answer; respondent's testimony (Tr. 109-110).

⁴ Admitted, paragraph 2 of answer; respondent's testimony (Tr. 110-119).

⁵ Admitted, paragraph 3 of answer. Respondent made sales of sewing machines in the gross volume of \$350,000 in 1962, of which from \$100,000 to \$150,000 were sold outside the State of Minnesota. (Tr. 111-112)

(a) Singer electric sewing machine in beautiful console cabinet. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs.

Take over seven monthly payments of \$6.10, or will discount for cash. Write Credit Manager, 504 Prior Ave. No., St. Paul 4, Minnesota.⁶

(b) Singer electric sewing machine in beautiful three drawer desk. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs. Can be seen in your area.

Take over nine monthly payments of \$6.55 or will discount for cash.

Write Credit Manager, 504 Prior Ave., No., St. Paul 4, Minnesota.⁷

3. By and through the use of the said statements in the aforesaid newspaper advertisements,⁸ respondent represented that he was making a bona fide offer to sell used electric sewing machines at the prices specified in the advertising.⁹

In truth and in fact, respondent's offers were not bona fide offers intended and made for the purpose and in the expectancy of selling the said used sewing machines at the advertised prices, but were made for the different purpose of obtaining leads and information as to persons interested in the purchase of sewing machines. After obtaining leads through response to said advertisements, respondent's salesmen called upon such persons for an intended different purpose than as set forth to prospective purchasers in respondent's foregoing advertisements, and made no real effort to sell the advertised used sewing machines at the advertised prices. Instead, they exhibited the advertised used sewing machines, or ones similar to them, and showed or demonstrated not only that they were manifestly unsuitable for the purpose intended but further disparaged the advertised machines in such a manner as to discourage their purchase, and, in lieu thereof, attempted to and frequently did exhibit, demonstrate, offer for sale and then sell respondent's higher-priced machines.¹⁰ The statements and representations as set forth in said advertisements were, therefore, false, misleading and deceptive to prospective purchasers.¹¹

Respondent's answer to the complaint in this proceeding avers that his newspaper-advertised sales offers of repossessed sewing machines

⁶ CX No. 1 and Tr. 114-115.

⁷ CX No. 2 and Tr. 114-115.

⁸ CX No. 3 shows such advertisements to have been inserted and published in approximately 157 differently located newspapers in the State of Wisconsin alone. (Tr. 8-9)

⁹ Admitted, paragraph 5 of answer as to the meaning to be attributed to the said advertising statements.

¹⁰ Witness Bohmsach at Tr. 12-14, 23-24; witness Blaschka at Tr. 34-35, 45, 50-51; witness Drinkwine at Tr. 59-60, 62-63, 68, 74, 78-80; witness Stippich at Tr. 83-84, 93-94, 99-100; witness Soles at Tr. 109-119, testifying as to his sales methods.

¹¹ In *Carter Products, Inc. v. Federal Trade Commission* (1951) 186 F. 2d 821, it was held: "The law is violated if the first contact or interview is secured by deception even though the true facts are made known to the buyer before he enters into the contract of purchase (citing cases)."

were bona fide and that an undetermined number of such sewing machines were sold as represented in said advertisements. Respondent offered no proof to such effect and the record contains none.¹² Respondent was present during the entire trial of this matter, heard all the witnesses and viewed all the offered exhibits, but remained silent and made no effort to, and did not, present any witnesses or exhibits to contradict the testimony and documentary evidence herein of record in support of the allegations of the complaint. This evidence of record is substantial and supports a finding that respondent's newspaper advertisements were not, in reality, bona fide offers of sale, but, to the contrary, said advertisements, in actuality, were used to obtain leads to prospective purchasers of other of respondent's higher-priced machines. Such is made clearly evident by the record testimony herein concerning the type and apparent old age of the sewing machine first shown¹³ by respondent's salesman to the prospective purchasers responding to respondent's newspaper advertisements. This machine was supplied by the respondent¹⁴ and not expected to be sold, and the respondent's newspaper advertisements were but a ruse to obtain entry and give the opportunity to respondent's salesman of selling respondent's more modern, higher-priced machines, aided by the sales gimmicks hereinafter set forth and described.

4. Further false, misleading and deceptive, in addition to the content of the respondent's foregoing newspaper advertisements, were state-

¹² Respondent's only witness, a bank official, testified to his bank's having outstanding about \$130,000 of respondent's installment sales contracts of which in 1962 only from 50 to 100 had defaulted, and, as to even this comparably negligible number, it was indicated that all such defaults did not eventually result in repossessions by the respondent. (Tr. 127-129.) No record showing was made that any of this comparably negligible number of used machines which might have been repossessed were ever the subject of respondent's newspaper sales offer advertisements.

¹³ Witness Blaschka at Tr. 50-51:

"Q. And the appearance of the machine and the apparent age of the machine, did this influence your decision not to have any interest in it?

"A. Yes, I believe it did.

"Q. Did it appear to be an old or new machine?

"A. It looked old.

"Q. How old, would you say, if you can, within your experience?

"A. Well, I would say it was in the neighborhood of 30 years old.

"Q. Quite an old machine.

"A. Yes, I would say it was pretty close to 30 years old.

"Q. Marked and marred?

"A. Well, I wouldn't say it was marked. It looked good. Either they put a new paint job on it or it was polished up nice.

"Q. But it was an old machine?

"A. You could tell it was real old.

"Q. Then the salesman, when you told him you were not interested in this machine, did he attempt then to continue to demonstrate the old machine, or what did he do?

"A. No, he says, 'I have another machine out in the car', and he walked right out and brought it in."

¹⁴ Tr. 83; 118.

ments and representations herein shown of record to have been made by respondent's salesmen as to claimed usual and customary higher and regular retail list selling prices for other of respondent's sewing machines attempted to be offered for sale in lieu of the said newspaper-advertised machines. Said statements and representations were intended to and did induce prospective purchasers to buy respondent's said other sewing machines. The indicated regular retail list selling prices of the said other machines, when such were described by respondent's salesmen as being new machines, were stated and represented by respondent's salesmen to be substantially higher than the respondent's present asking price for said machines, and it was claimed that respondent usually and customarily sold such new machines to the public at these indicated higher and regular retail list selling prices. Prospective purchasers were thus led to believe that the monetary differences existing between the respondent's said lower asking prices and the claimed indicated usual and customary higher and regular retail list selling prices at which such machines were otherwise sold by the respondent were, in fact, a real savings in such amounts, and prospective purchasers were thereby induced to buy such machines from the respondent.

In other of the sales transactions of record wherein the sewing machines were represented by the respondent's salesmen as being repossessed, much the same inducements to buy from the respondent were present. The purchaser witnesses in this proceeding testified that these allegedly repossessed machines gave the appearance of being new and as having had but little, if any, use other than that which would have accompanied their normal demonstration, and, in the light of the monetary differences between respondent's lower asking prices and the represented and indicated substantially higher and regular retail list prices at which respondent was claimed to usually and customarily sell the new machines, their purchase was a seeming bargain apparently as good as if the machines had been classified as new. Further, and whether the machines being sold in such transactions were stated to be either new or repossessed machines, respondent's salesmen or agents employed still another sales gimmick to induce the purchase of these sewing machines from the respondent. In addition to stating to prospective purchasers that the asking price for a seemingly new machine was reduced because allegedly it had been repossessed, the asking price for such machine was again substantially reduced by a so-called "trade-in allowance" given for the prospective purchaser's old machine, even where the prospective purchaser possessed no old machine to trade in.

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Illustrative of the foregoing are the following testimonial excerpts of record:

Q. Did he tell you what the usual and ordinary price of that machine was as charged by Midwest Sewing Center?

A. Well, the only thing—they sell at \$269.

Q. And your contract so states?

A. Yes. And that is what is in the direction book, I mean the book I got with the sewing machine, it is printed right in the book.

Q. The \$269.

A. Yes.¹⁵

* * * * *

Q. I hand you Exhibit 11, which is the contract for the purchase of the sewing machine from Midwest Sewing Center, and ask you if you can state how much money was paid for the machine you did purchase from Midwest?

A. We paid \$50 cash—down by check, and we sent them \$100 a month later.

Q. And you paid in full \$150 for the machine?

A. Yes.¹⁶

Q. Was any statement made to you as to the usual value of that machine, the machine you purchased?

A. I know there was a price stated. I can't remember what it was exactly. It is written in the Domestic book I have at home, I know that. It was more than what we wanted to pay for it, anyway.

Q. Was it \$10 more than \$150?

A. Yes, at least.

Q. It was more than that?

A. I am sure much more.

Q. Over \$200?

A. Yes, I am positive of that.

Q. Did the salesman say the machine you bought was repossessed?

A. Yes. He said he had just picked it up, and he said this, that her husband wouldn't let her keep it—didn't say any names—so he had to pick it up—well, it would be repossessed then.

Q. Did it show signs of heavy use?

A. No. None of the attachments were unwrapped or anything.

Q. Still in—

A. (Interposing.) In tissue paper, as they should have been if it were new.¹⁷

* * * * *

Q. You had read the advertisements of this used sewing machine, then, in your local paper?

A. Yes.

Q. What then happened after you read it in regard to this machine?

¹⁵ Witness Bohmsach at Tr. 17 and CX No. 6, with reference to a sewing machine stated to be a new machine.

¹⁶ No trade-in used machine was involved in this transaction.

¹⁷ Witness Stippich at Tr. 88-90. The record shows this witness to have been given the factory warranty by the respondent as being the original purchaser of a new machine. The warranty (CX No. 10) states: "We warrant to the original purchaser of this new Domestic Sewing Machine * * *," and bears the stamp of respondent Midwest Sewing Center as an authorized dealer.

A. We wrote a letter and sent it in and waited a matter of days, I just don't rightly remember——

Q. (Interposing.) Did you send the letter to the Midwest Sewing Center at the address in the advertisement?

A. Yes.

Q. Then what happened?

A. Quite a few days later a young fellow showed up one night and he brought this Singer sewing machine in, and it was quite oldish, I would say it was an old Singer with a motor mounted on it, so it would be electric, and it had its attachments for, as they say there, sewing zig-zag and button holes and what have you. She didn't like it because you had to put all these extra gadgets on there to make it work. So he sewed through the material and showed us how it would work and we saw what we had to do to put these attachments on, and she didn't like that. So then he says, "Well, I have another one out in the car, it is a domestic, and it is supposed to be a repossessed one that somebody couldn't pay for." and he went out and got it and showed it to us, and he plugged it in and sewed with it. It was a portable job, and these people were supposed to have used it just as a portable job.

Q. In demonstrating the machine, what finally happened during the demonstration or after the demonstration? What was the conversation between you two and the salesman preceding what happened? Tell us in your own words.

A. We wanted to know how much it was and he said it sold for \$269.95, I guess, and he says, "Seeing that it is a repossessed one that we can get it down pretty lower." So he gave us a trade-in offer of \$104.95, which we didn't have any trade-in.

Q. You had no machine?

A. No machine.

Q. And you were told, I believe, the value of the machine you were buying was \$269.95?

A. Yes.

Q. And then when you received the machine, did you examine it closely? The salesman, I believe you testified, made a statement that the machine had been repossessed.

A. Yes.

Q. Did it show signs of having been subjected to—had it been used?

A. Well, I would say you couldn't tell too much. It had a little lint maybe down underneath by the hobbin, but outside of that you couldn't tell, there was no scratches or anything on it, it looked pretty good. It was used some, but how much I wouldn't know. It could have been a demonstrator for all I know.¹⁸

CX No. 7, the conditional sales contract entered into between the respondent and this purchaser witness, discloses on its face that the machine in question, despite being represented as a repossessed machine, was actually sold as a new machine upon which the purchaser was allowed a trade-in of \$104.95 on a non-existent used machine. This fictitious trade-in allowance, together with the cash payment of \$165 by the purchaser, totaled the so-called "usual and customary regular retail list selling price" of \$269.95, claimed by the respondent's salesman.

¹⁸ Witness Blaschka at Tr. 34-39.

By such a manipulation, this purchaser was led to believe he was getting the illusory bargain and a saving of the monetary difference between the cash payment of \$165 made and the asserted usual and customary regular retail list selling price of \$269.95 claimed to be normally obtained by the respondent for a new like machine. In the sale to the witness Stippich described herein at preceding page 8, it will be noted that even this "cover-up" trade-in allowance was not used to reach respondent's claimed usual and customary higher regular selling price for a new like machine.

5. The respondent herein does not contend that the eight witnesses testifying (four by stipulation) in support of the allegations of the complaint are not a fair representative number of respondent's interstate customers located in the State of Wisconsin,¹⁹ but asserts rather that the contentions in this matter must rise or fall with the testimony of the said witnesses.²⁰ Respondent further does not contend that the alleged practices of "bait and switch" as set forth in the complaint are not violations of the Federal Trade Commission Act but denies that the respondent engaged in such practices.²¹ The uncontradicted testimony of the witnesses herein of record is to the contrary of respondent's contentions and amply supports a finding that respondent did engage in the illegal "bait and switch" practices alleged in the complaint.²²

With regard to the complaint's further allegations that false, misleading and deceptive statements and representations were made by the respondent's salesmen as to the usual and customary regular retail list selling prices for the "switch" merchandise sold the witnesses herein, respondent's contentions relative to the proof of record in such connection are inappropriate. The usual and customary regular retail list prices at which the same or like or similar quality sewing machines were offered for sale and sold by retail sellers other than the respondent in the State of Wisconsin, or any particular trade area therein, is not an issue in this proceeding. The charge of the instant complaint is not that the manufacturer's suggested regular retail list selling prices for the merchandise concerned were not usually and customarily correspondingly obtained by a substantial number of the retail sellers in the relevant market area, but that respondent has falsely inflated his claimed usual and customary regular retail list selling prices and represented them to correspond to and be the same as the manufacturer's suggested regular retail selling prices for the said merchandise.

¹⁹ Tr. 102.

²⁰ Respondent's brief, page 6, filed herein on March 19, 1964.

²¹ Respondent's brief, again at page 6.

²² Finding No. 3, footnotes 10 and 11, *supra*.

The thrust of the allegations in the instant complaint are that the respondent thus implemented his "bait and switch" practices in order to sell the "switch" merchandise and induced its purchase from the respondent because of the seeming bargain and the believed savings to the purchasers of the monetary differences existing between the selling prices being asked and the represented higher manufacturer's suggested retail list selling prices for the said merchandise claimed to be usually and customarily obtained by the respondent. Respondent's further claim made in many instances that the lower asking prices offered were because the merchandise had been repossessed was designed to appeal to the credulity of the prospective purchasers as being but a legitimate reason for such lower price offers, with the seeming bargains made all the more inviting by the still further lower asking prices provided by the trade-in allowances given for the prospective purchasers' used vintage machines. The fact that some prospective purchasers actually had no used trade-in machines did not deter the giving of respondent's asking prices as again lowered by fictional trade-in allowances for non-existent machines.

The record herein discloses that three out of the four witnesses purchasing from the respondent (six out of eight by stipulation) or 75% of the representative number of Wisconsin purchasers were told by respondent's salesmen that the like-new appearing machines being offered for sale were repossessed machines.²³ Notwithstanding this supposed reason for the represented price reduction, all the said purchasers were given a new machine factory warranty expressly limited to the original purchaser of a new machine.²⁴ Further, two out of three of these purchasers had no trade-in machines, the trade-in allowances for which might be said to have been added to respondent's asking prices to show that such total reflected a sum corresponding to the respondent's claimed usual and customary higher manufacturer's suggested retail list new machine selling prices.²⁵ The testimony of respondent's banking witness would also preclude and discredit the possibility that 75% of respondent's Wisconsin customers could have been offered a repossessed machine as stated by respondent's salesmen.

Respondent, through nine salesmen, sold only in the States of Minnesota and Wisconsin during the 1962 sample year, with retail sales in Wisconsin approximating \$100,000 to \$150,000.²⁶ Respondent's banking witness testified:

²³ Tr. 35; 61; 89.

²⁴ CX No. 10 and Tr. 52-53; 67; 90.

²⁵ Tr. 35-36; 88.

²⁶ Tr. 112-115, 118-119.

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Q. Do you have any approximation as to the amount of outstandings you have at this time with Midwest Sewing Center?

A. Approximately \$130,000.

Q. During the year of 1962 do you have any idea of approximately how many of these contracts for sales of sewing machines were turned back to Mr. Soles?

A. They were in the neighborhood of between 50 and 100, to my recollection.

Q. Has he ever told you what he does with these machines—with these contracts?

A. After he receives the contracts he has mentioned that he tries to keep the contract and put the contract back into current condition with the customer, continue the payments with the customer, carry them as his own receivable. In failing to do this he mentions he retakes the machine, repossesses the machine and puts it back into his inventory.

HEARING EXAMINER SCHRUP. One point, Mr. Martin. On these contracts, are the customers out-of-state people or are they all local Minnesota people?

The Witness. No, they are both Minnesota and out-of-state.²⁷

Based on the four representative (eight by stipulation) interstate sales transactions in Wisconsin in the respective net sales amounts of \$179, \$165, \$155 and \$150, respondent's Wisconsin sales transactions were in the average amount of \$162.25 per transaction.²⁸ With retail sales volume during 1962 in Wisconsin ranging from \$100,000 to \$150,000, according to the respondent's testimony,²⁹ this would represent approximately from in excess of 600 to 900 different sales transactions. Again based on the representative sales transactions in Wisconsin, the record discloses that in three out of four (six out of eight by stipulation) or in 75% of such sales transactions, respondent's salesman represented that the "switch" merchandise offered for sale was repossessed. Seventy-five percent of the aforesaid total number of from 600 to 900 sales transactions in Wisconsin would permit a range of from 450 to 675 transactions in which, according to the hereinbefore described representative sample sales transactions of record, respondent's salesman offered the "switch" machines purchased as being repossessed machines. This was manifestly numerically impossible, and the testimony of respondent's banking witness belies any such possibility even if all the respondent's repossessions stated by this banking witness as being from 50 to 100 for both the States of Minnesota and Wisconsin had been offered for sale by the respondent in the State of Wisconsin alone during 1962.

6. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sewing machines of the

²⁷ Tr. 127-130.

²⁸ Tr. 16-17; 35-36; 61-62; 88.

²⁹ Tr. 112, 118-119.

same general kind and nature as that sold by respondent.³⁰ The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices set forth and described in preceding findings 1 through 5 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 respondent's products by reason of said erroneous and mistaken belief.³¹

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The aforesaid acts and practices of the respondent, as herein found in the foregoing Findings of Fact, were, and are, all to the prejudice and injury of the public and of respondent's 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

It is ordered, That respondent Clarence Soles, individually and trading and doing business as Midwest Sewing Center, or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machines or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, by newspaper advertisements or otherwise, that any of the foregoing merchandise is being offered for sale when such sales offer is not a bona fide offer to sell said merchandise.

2. Using in any manner a sales plan, scheme or device in the offering for sale of any of the foregoing merchandise wherein false, misleading or deceptive statements or representations as

³⁰ Tr. 72: 92-93.

³¹ "Nor was the Commission obliged to prove injury to the public or loss of business to competitors: when it finds, as it reasonably did here, that unfair practices have been employed by a respondent, it may infer that trade will be diverted from competitors who do not employ such practices." *Deer, et al. v. F.T.C.*, (1945) 152 F. 2d 65.

Opinion

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to the quality, condition, usage, age, utility, selling prices or the reason for such selling prices are made, directly or by implication, to sell any of said merchandise or to obtain leads or prospects for the sale of any of the said merchandise.

3. Discouraging the purchase of, or disparaging, any of the foregoing merchandise advertised and offered for sale in order to sell other of the respondent's said merchandise.

4. Representing the usual and customary retail selling prices of the respondent for any of the foregoing merchandise to be in any amount in excess of the actual prices at which it was openly offered for public sale and generally sold by the respondent in the recent, regular course of business.

5. Falsely representing respondent's usual and customary actual retail selling prices, or by any other means misrepresenting the amount of savings supposedly available to purchasers of any of the foregoing merchandise from the respondent.

OPINION OF THE COMMISSION

DECEMBER 3, 1964

By DIXON, *Commissioner*:

This matter is before the Commission on respondent's appeal from the hearing examiner's initial decision, in which respondent was found to have violated section 5 of the Federal Trade Commission Act.¹ Specifically, the examiner found that respondent employed the "bait and switch" promotion scheme by advertising for sale repossessed sewing machines at low prices for the purpose of obtaining names of potential purchasers for newer, higher priced machines, and by effectively persuading customers who responded to its advertisements to purchase higher priced machines. In addition, the examiner found that respondent falsely stated the usual and customary selling price of its new machines, thereby misrepresenting the amount of savings available to customers who purchased these machines at respondent's prices. On this appeal, respondent asserts that the evidence is not sufficient to support either conclusion.

The transcript reveals that respondent inserted advertisements similar to the following in the classified sections of various newspapers in Wisconsin and Minnesota:

Singer electric sewing machine in beautiful console cabinet. Sews forward and reverse with all attachments for making buttonholes, zig-zagging, sewing monograms and fancy stitch designs. Can be seen in your area. Take over seven

¹ 15 U.S.C. 45.

monthly payments of \$6.10, or will discount for cash. Write Credit Manager, 504 Prior Ave., No., St. Paul 4, Minnesota.

Complaint counsel produced four witnesses who responded to this or to similar advertisements.² Each witness stated that several weeks after writing for information, they were visited by a salesman who identified himself as a representative of respondent. In every instance, the salesman had in his possession an old Singer sewing machine. One witness thought the machine appeared older than one his mother had owned and estimated its age at thirty years. This machine appeared to be an old "foot pedal" type which had been converted to an electric machine by the addition of a motor. Another witness thought the machine shown her was over twelve years old. All witnesses agreed that the machines were not late models, and some referred to them as "older models."

The various salesmen followed the practice of demonstrating the old machines. Although their performance was disappointing to the witnesses, the machines would nevertheless perform the functions detailed in the advertisements. When the witnesses voiced their displeasure with the age or capabilities of these machines, the salesmen offered to show them another model. In all instances, the salesmen then demonstrated a machine manufactured by the White Sewing Machine Company of Cleveland, Ohio. All of the witnesses purchased either the second machine shown to them or a third machine also manufactured by White. These machines appeared to be new and the witnesses were charged an average of \$150 for them. Two of the witnesses indicated that they were reasonably satisfied with their purchases, one stated that she would have preferred a Singer, and one was so dissatisfied that she disposed of the machine shortly after purchasing it.

It is the opinion of the Commission that respondent's practice closely resembles the classic "bait and switch" technique,³ but that there are certain deficiencies in the evidence which prevent an affirmance of the examiner's finding of a violation. In past cases, we have always found that the advertisement in question did not present a bona fide offer of sale of the product therein described. The evidence in this case fails to establish that respondent was not making a genuine effort to sell the

² It was stipulated that four additional witnesses, if called, would testify in substantially the same manner as those who actually testified (tr. 102-104).

³ E.g., *Earl Scheib, Inc.*, Docket No. 8483 63 F.T.C. 1049 (October 22, 1963); *Pati-Port, Inc.*, 60 F.T.C. 35 (1962), *aff'd* *Pati-Port, Inc. v. Federal Trade Commission*, 313 F. 2d 103 (4th Cir. 1963); *Luxury Industries, Inc.*, 59 F.T.C. 442 (1961); *Clean-Rite Vacuum Stores, Inc.*, 51 F.T.C. 887 (1955).

old Singer machines. To the contrary, the evidence is consistent with the theory that the respondent was making a bona fide offer to sell these machines and that only when it became apparent that no sale of one of them could be consummated was an attempt made to demonstrate other models. There was positive testimony that respondent was in the business of selling, *inter alia*, used Singer machines. There is nothing in the record to show that respondent did not sell these machines whenever possible or that the number sold was insubstantial. Further, the evidence is silent on the question of whether or not these old machines had, as represented in the advertisements, been repossessed. Since it affirmatively appears that these machines had been reconditioned and would perform the functions detailed in the classified advertisements, there has been no showing that the advertisements were not literally correct. Although the advertisements failed to disclose a fact which might be considered material—the age of the machines—this omission standing alone is not a sufficient predicate for a finding that the offer to sell the old machines was not genuine. Moreover, as respondent points out, its salesmen did not disparage or downgrade the old machines in an attempt to “switch” the customer’s interest to other models and in fact did not even offer to demonstrate other machines until after the witnesses had voluntarily expressed their displeasure with the older machines.

With the evidence in this posture, we may only conclude that dismissal of the charge is appropriate. However, we wish to emphasize that this decision is not to be interpreted as indicating approval of the practice here described or as a determination that such a practice can never constitute a violation of Section 5 of the Federal Trade Commission Act. For example, an advertisement that fails to disclose a fact which, if brought to the attention of a prospective purchaser, might adversely affect his interest in the article advertised could well be attacked as false and misleading because of the absence of the disclosure (a charge not included in the complaint here) ; or if the circumstances are such as to support an inference that the offer to sell the product is not bona fide, it could be held to be a part of the “bait and switch” technique. We have reached our conclusion here solely because the evidence was not of sufficient proportions to support such an inference.

In addition, we do not feel that the evidence sustains the examiner’s finding that respondent misrepresented the usual and customary selling price of the White machines purchased by the witnesses. The purchasers testified that respondent’s salesmen represented that price as \$269.50. A “discount” was granted because the machines allegedly were

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repossessed,⁴ or because the witnesses were permitted to "trade-in" their old machines in exchange for the newer models. However, the record is devoid of other evidence showing the usual and customary price of the newer machines, and there is no persuasive evidence from which we may make a finding that the discounts granted were greatly inflated or were fictitious. Under these circumstances, the examiner's conclusion that respondent misrepresented the usual sales price of its products cannot be affirmed.

For the aforementioned reasons, an order will issue vacating the initial decision of the examiner and dismissing the complaint.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner, dated April 16, 1964, and upon briefs in support thereof and in opposition thereto, and the Commission having concluded for the reasons stated in the accompanying opinion that the evidence of record is insufficient to prove the allegations of the complaint:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated.

It is further ordered, That the complaint be, and it hereby is, dismissed.

IN THE MATTER OF

FALSTAFF BREWING CORPORATION ET AL.