

CERTIFICATION OF RECORD

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IN THE MATTER OF

DEVCON CORPORATION ET AL.

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

Docket C-607. Complaint, Oct. 11, 1963—Decision, Feb. 6, 1968

Order modifying a consent order of October 11, 1963, 63 F.T.C. 1034, by allowing the respondent company to use the trade name "Plastic Steel": *Provided*, That its use in advertising or on labels has qualifying language that it is "A Steel-Filled Epoxy Resin" and will not withstand extreme heat nor conduct electricity.

Mr. Frank P. Dunn for the Commission.

Mr. William Warfield Ross, of Wald, Harkrader and Rockefeller,
Washington, D.C., for respondents.

CERTIFICATION OF RECORD BY WILLIAM K. JACKSON, HEARING EXAMINER

MAY 12, 1967

Preliminary Statement

This proceeding derives from a Consent Order issued by the Commission on October 11, 1963 [63 F.T.C. 1034], requiring in pertinent part that respondents cease and desist from:

1. (a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product that consists principally of non-metallic ingredients: *Provided, however*, That if a product contains a metallic substance in some form, the percentage thereof may be stated.

On October 25, 1965, the Commission issued its order to show cause why the October 11, 1963, cease and desist order should not be modified so that the thrust of the order provision is to the metallic properties of the products rather than to their metallic content and thus in pertinent part should read as follows:

1. (a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product which, after application, does not have the same physical and chemical properties of metal and of any particular metal represented: *Provided, however*, That nothing herein contained shall prohibit truthful representations in advertising and labeling of the percentage of content of any metallic substances in such products.

Thereafter on February 21, 1966, respondents filed their answer requesting a full evidentiary hearing on the issues raised by the Commission's order to show cause, and on April 7, 1966, the Commission issued an order directing hearings "* * *" for the purpose of receiving evidence in support of and in opposition to the question whether the public interest requires that the Commission's order to cease and desist of October 11, 1963, be altered, modified, or set aside in accordance with the Commission's order to show cause dated October 25, 1965." It was further ordered that the hearing examiner, "* * *" upon conclusion of the hearings, certify the record together with his recommendation to the Commission for final disposition of this matter."

Evidentiary hearings were conducted in accordance with Part 3, Subparts C, D, E, and F of the Commission's Rules of Practice as specified in the Commission's Order Directing Hearings dated April 7, 1966, and the record has been closed by the hearing examiner. At the close of the hearings, the hearing examiner permitted the parties to file proposed findings of fact, conclusions, and proposals, if any, for modification of the order, which would be made a part of the record in this proceeding and certified to the Commission with the transcript of proceedings and exhibits received in evidence.

Summary of the Proceedings

The record in this proceeding consists of 867 pages of testimony, one (1) exhibit for the Commission (CX-1A through 1L) and twenty-four (24) exhibits for respondents (RX-1-RX-24 inclusive). Counsel for the Commission called one witness:

Dr. Robert D. Stiehler (Tr. 59-64) : formerly Chief of the Polymer Evaluation Section and since 1964 Chief of the Evaluation Criteria Section, National Bureau of Standards, recipient of Ph. D. degree in chemistry from Johns Hopkins University in 1933, author of numerous publications in technical and scientific journals dealing with original research on the development of methods for the evaluation of materials or the physical properties of materials, and a member of numerous scientific societies including the American Society for Testing Materials. Respondents stipulated that the witness "is certainly well qualified as an expert in this general area" (Tr. 63-64). Dr. Stiehler conducted laboratory tests of respondents' products, the results of which are included in the record as CX-1A through CX-1L.

Respondents called five witnesses whose backgrounds and qualifications are as follows:

1. *Mr. Constant Sakakini* (Tr. 178-180): a marine engineer employed at the Norfolk Naval Shipyard, Design Division, Portsmouth, Virginia, for over 30 years. A graduate of Maury High School, he served an apprenticeship as a blacksmith at the Norfolk Naval Shipyard from 1935 to 1938, transferred in 1938 to the Design Division and proceeded through the steps of drafting to marine engineer in 1941. He attended night school at VPI and the University of Virginia Extension taking courses in engineering, mathematics, metallurgy, engineering design and diesel engines. In 1949 he was qualified by the Civil Service Commission as a master forger in the smith shop of the shipyard. His present duties are concerned with the installation, testing and operation of main propulsion and auxiliary machinery in Naval vessels and in the integral design features of internal combustion engines and their repair.

2. *Mr. Walter Fischman* (Tr. 246-262): for the past six months one of the principals and editorial director of Projects Publications, a specialty publication house putting out a line of program teaching courses and technical magazines; for a little over a year prior to that, editorial director of Popular Mechanics magazine; and for fourteen years before that, a free-lance writer specializing in articles on do-it-yourself material, building, fixing, repairing, modeling, remodeling, housekeeping, crafts and hobbies. As a free-lance writer his articles appeared in such consumer magazines as Good Housekeeping, American Home, House and Garden, Better Homes and Gardens, Colliers, Saturday Evening Post, True, and Argosy. He is also the author of five books dealing with these subjects and has acted as a consultant to such companies as U.S. Plywood, Du Pont, Reynolds Aluminum, and Borden on the subject of consumer merchandising and marketing of products. He has appeared on numerous radio and television shows as an expert in the do-it-yourself and home repair fields, and for 12 years wrote a newspaper column entitled, "You Can Do It" appearing in the New York Daily News on Sundays. During this period he used a procedure which came to be known as "in-use testing" of the products he wrote about: that is, he distributed such products to homeowners, craftsmen, hobbyists, etc., who were on the staff of the New York Daily News or the various magazines for which he wrote, to be used and evaluated by them. He has attended trade shows, the National Association of Home Builders show, houseware shows, and followed closely the home repair product field and was on the mailing list of several thousand companies manufacturing various home repair and do-it-yourself products. On cross-examination, it was brought out he does not hold a college or university degree and had conducted no

laboratory tests of Devcon's Plastic Steel, Liquid Aluminum or Devcon Steel (Tr. 255).

3. *Dr. Paul Bruins* (Tr. 323-327) : presently a Professor of Chemical Engineering, Polytechnic Institute of Brooklyn, received a Ph. D. in chemical engineering from Iowa State University, Ames, Iowa, in 1930, taught chemical engineering from 1926 to 1930 at Iowa State, from 1930 to 1935 was employed in private industry as a chemical engineer and since 1935 has been on the staff of Polytechnic Institute of Brooklyn. He has specialized in the field of materials; teaching plastics, chemistry of epoxy resins and metallurgy. His writings appear in about 25 technical publications, and he has written a book entitled, "Plasticizer Technology." He does consulting work for numerous corporations in the field of materials and considers himself an expert in the field of "thermoset plastics." He is also familiar with epoxy resins and filled epoxy resins including metal-filled epoxies, but has done no research on metal-filled epoxy resins. His familiarity with metal-filled epoxy resins is based on seeing them used in industry, reading in the field and teaching. His familiarity with epoxy resins commenced in 1953 when they first came on the market. Since that time he has been studying the literature produced by epoxy resin manufacturers, working with epoxy resins in the laboratory and serving as a consultant for several companies. His familiarity with metals is based in large part on his industrial experience, both full time and as a consultant. On cross-examination, Dr. Bruins stated he had never conducted any laboratory tests of Devcon's Plastic Steel, Liquid Aluminum or Devcon Steel (Tr. 327).

4. *Mr. Albert M. Creighton, Jr.* (Tr. 400, 406-410) : president of Devcon Corporation and one of the respondents herein. A 1941 graduate of Harvard University, he spent his summers during college going through various factories, textile mills, chemical plants, etc. During World War II he worked for the Office of Production Management (War Production Board) for three years serving for a time in the Boston office as manager of the Plastic and Rubber Section, and later served in the Office of Strategic Services in China advising on various factories in North China and Manchuria which might be important for strategic bombing. He also took night courses while he was with the War Production Board at Massachusetts Institute of Technology on polymer chemistry and colloids. He is the inventor of plastic steel and did much of the basic laboratory work in its development.

5. *Mr. Robert B. Russell* (Tr. 449-454) : a patent and trademark attorney and a senior partner in the firm of Russell, Chittick and Pfund, Boston, Massachusetts. He graduated from Harvard with an

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A.B. degree in 1941 and Harvard Law School in 1948 and has lectured at Harvard Business School, Suffolk Law School, and while it existed, at Northeastern Law School. From 1948-1952 he served on the staff of MIT in the Division of Industrial Cooperation dealing with metallurgy, steel fabrication, steel alloying for the preparation of gas turbine rotor blades, etc. In his patent law practice he has gained an intimate knowledge of steel fabrication in steel mills, of the plastics industry particularly from Devcon, of sprayed steel in connection with work for the D. S. Kennedy Company, a manufacturer of radio antennas, of powdered steel for Perryman Company, and of molds made of filled epoxy resins. He is an inventor holding patents in the fields of engine starting and thermographic copying and has published an article on trademarks.

Recommendation

In accordance with the Commission's Order Directing Hearings dated April 7, 1966, and pursuant to Part 3, Subpart H, Section 3.28(b) (3) of the Rules of Practice, the hearing examiner makes the following recommendation:

That the Commission's Order of October 11, 1963 [63 F.T.C. 1034], in the instant matter be altered to clarify the intent, meaning and purpose of Paragraph 1(a), and be modified to set aside Paragraph 1(b) thereof, and as so altered and modified, read:¹

It is ordered, That respondent Devcon Corporation a corporation, and its officers, and Albert M. Creighton, Jr., and E. Leslie Hall, 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 "Plastic Steel," "Devcon Steel," "Devcon Liquid Aluminum," "Devcon '2 Ton' The Epoxy 'Super Glue'" or any other products in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product which, after application, does not have the same physical and chemical properties of metal and of any particular metal represented: *Provided, however*, That nothing herein contained shall prohibit truthful representations

¹ Respondents, in their brief at pages 1-2, "do not contest the applicability of the proposed order to two of the three products herein involved: 'Devcon Steel' and 'Devcon Liquid Aluminum'". In addition, they state at page 2 of their brief "that the only product now in issue in this proceeding is 'Plastic Steel'".

in advertising and labeling of the percentage of content of any metallic substances in such products.

2. Representing, directly or by implication, that:

(a) The product designated "Plastic Steel" or any other product of similar composition or characteristics forms a hardened metal or a substance that has the effectiveness or intrinsic characteristics of a hardened metal or of steel or that is not adversely affected by heat or chemicals;

(b) The products designated "Devcon Steel" and "Devcon Liquid Aluminum" or any other product of similar composition or characteristics are liquid metals or that when used they form hardened metals or substances that have the effectiveness or intrinsic characteristics of hardened metals;

(c) One drop of the product designated "Devcon '2 Ton' The Epoxy 'Super Glue'" has an adhesive strength of 2 tons or an adhesive strength in any amount in excess of the true facts.

3. Misrepresenting in any manner the nature, composition, effectiveness or characteristics of their products.

4. Furnishing or otherwise placing in the hands of others means and instrumentalities by and through which they may mislead the public as to any of the matters and things herein prohibited.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Reasons for Recommendation

1. The public interest requires that the Commission's Order of October 11, 1963, be altered and modified.

2. "Plastic Steel," "Devcon Liquid Aluminum," and "Devcon Steel" do not after application have the same physical and chemical properties of metal or of the particular metal represented.

3. The use of the brand or trade names "Plastic Steel," "Devcon Liquid Aluminum," and "Devcon Steel," by respondents has the capacity and tendency to mislead and deceive consumers into the belief that such products after application have the same physical and chemical properties of metal or of the particular represented metal.

4. The capacity and tendency of such trade names to deceive consumers cannot be adequately cured by any remedy other than excision.

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The qualifying language or affirmative disclosures proposed by respondents are limited in scope, incomplete and would not suffice to render harmless otherwise deceptive trade names. Enumeration of all the significant differences in the physical and chemical properties of "Plastic Steel" and "Steel" cannot be meaningfully achieved by a few qualifying words and any such remedy would not be feasible in this case.

5. The trade names "Plastic Steel," "Devcon Liquid Aluminum," and "Devcon Steel," have not acquired a secondary meaning.

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The record consisting of 867 pages of testimony, exhibits CX-1A through CX-1L for the Commission, RX-1 through RX-24 for the respondents, together with the briefs, proposed findings and conclusions submitted by the parties are hereby certified to the Commission.

OPINION OF THE COMMISSION

By ELMAN, *Commissioner*:

The question before the Commission is whether a consent order issued on October 11, 1963 [63 F.T.C. 1034], is inadequate to protect consumers against deception and should be modified in the public interest.

The consent order, in pertinent part, requires respondents to cease and desist from:

Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product that consists principally of non-metallic ingredients: *Provided, however*, That if a product contains a metallic substance in some form, the percentage thereof may be stated.

On October 25, 1965, the Commission issued an order directing respondents to show cause why this provision should not be modified to read as follows:

Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product which, after application, does not have the same physical and chemical properties of metal and of any particular metal represented: *Provided, however*, That nothing herein contained shall prohibit truthful representations in advertising and labeling of the percentage of content of any metallic substances in such products.

On April 7, 1966, the Commission referred this matter to a hearing examiner to receive evidence on the question whether the public interest requires modification of the consent order. The record has now been

certified by the hearing examiner to the Commission, together with his recommendation that the consent order be modified.

It is clear, as the examiner has found, that respondents' products, "Plastic Steel," "Devcon Liquid Aluminum," and "Devcon Steel," do not, after application, have the same physical and chemical properties as these metals. Nor do respondents have any quarrel with the examiner's recommendation for excision of the trade names of the latter two products, "Devcon Liquid Aluminum" and "Devcon Steel," both of which are single-stage filled vinyl products. The controversy, in its present posture, has been narrowed to the single question whether respondents should be required to excise the trade name of "Plastic Steel," which is a two-stage filled epoxy product.

The issue before us is, thus, one of determining the proper remedy. In dealing with such a question, the public interest comes first. Whatever private loss may be suffered through excision of a trade name, paramount consideration must be given to the need for protecting consumers against deception. While excision should not be ordered if a less drastic remedy will accomplish the same result, it cannot be avoided where "a clear and unambiguous false representation [is] implicit in the product's name, and, because of this, the addition of a qualifying phrase denying the truth of that representation would lead to a confusing contradiction in terms * * *." *Continental Wax Corp. v. F.T.C.*, 330 F. 2d 475, 479-80 (2d Cir. 1964). See *F.T.C. v. Royal Milling Co.*, 288 U.S. 212, 217 (1933); *Country Tweeds, Inc., v. F.T.C.*, 326 F. 2d 144, 148 (2d Cir. 1964).

There is no substantial dispute as to the performance characteristics of "Plastic Steel." As its name suggests, the product contains both plastic and steel. To be precise, it is a steel-filled epoxy resin, containing 20 percent epoxy resin and 80 percent powdered steel by weight. Metal-filled epoxy resins like "Plastic Steel" were developed following World War II. "Plastic Steel" was the first such product to go on the market, and respondents assert that it is probably the world's largest selling steel-filled epoxy.

Since 1953, "Plastic Steel" has been sold in large volume to industrial users and do-it-yourselfers for use in bonding, sealing, and filling rigid materials, including metals, wood, plastics, and glass. According to the testimony of respondents' experts, which is substantially uncontradicted, "Plastic Steel" does in fact possess, on application, those characteristics of steel which are important and significant to consumers in the uses for which the product is recommended and sold. Upon application, it has a tensile or breaking strength of 2500 to 3000 pounds per square inch. Unlike steel, however,

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"Plastic Steel" does not conduct electricity and cannot withstand the heat of a direct flame.

"Plastic Steel" has unquestionably found widespread consumer acceptance. The Navy Department, which has evaluated "Plastic Steel" in laboratory and use tests, has approved it for use in the construction of naval vessels. The Department also uses it in a great variety of metal-to-metal repair applications, including the repair of high-speed cam shafts in diesel engines. In some of its applications, "Plastic Steel" is superior to a metal weld and can be used where welding would be impossible. Approximately one-half of respondents' sales of "Plastic Steel" are to the United States Government and industrial users.

We readily agree with the hearing examiner that the term "Plastic Steel," standing alone, could confuse or mislead some consumers, especially those not knowledgeable in matters of chemistry, engineering, and the like. A housewife shopping in a hardware store may be misled where an expert technician would not; and it is for her protection, no less than his, that "truth-in-labeling" must be strictly enforced. Conceivably, the trade name "Plastic Steel" might mislead some people into believing that the product consists entirely of steel which has somehow been reduced to plastic form. In other words, such people—if there be any—would read "Plastic" as an adjective, qualifying "Steel"—and not, as is the case, that the product is a mixture of plastic (epoxy resin) and steel.

We think the proper, and a sufficient, remedy for any possible deception arising out of the trade name "Plastic Steel" is for respondents to make clear, both on labels and in advertising, exactly what their product is and does. Respondents have offered to make whatever disclosures the Commission believes to be necessary as a safeguard against confusion or deception of the consuming public. At the oral argument before us, respondents agreed to use, in the same or larger size type and in close proximity therewith, the words, "A Steel-Filled Epoxy Resin," wherever and whenever they use the trade name "Plastic Steel." They also agreed that the labeling of their product should plainly disclose its limitations, *i.e.*, that it does not conduct electricity and cannot withstand a direct flame or prolonged heat in excess of 300° F. In view of these stipulations, as well as the other unique circumstances of this case, the Commission does not believe that the public interest requires excision of a long-established trade name for what appears to be a useful and inexpensive household product.

The attached final order embodies the views set forth in this opinion.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his taking the oath of office.

FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER

The Commission having reopened this proceeding and having issued its order of October 25, 1965, to show cause why the consent order issued on October 11, 1963 [63 F.T.C. 1034], should not be modified, and

The hearing examiner pursuant to Commission direction having conducted hearings and having certified the record of said hearings to the Commission together with his recommendation that the consent order of October 11, 1963, be modified, and

The Commission having determined, for the reasons stated in the accompanying opinion, that the public interest requires modification of the consent order of October 11, 1963, in the respects described in the opinion, now enters its Findings of Fact, Conclusions, and Final Order.

FINDINGS OF FACT AND CONCLUSIONS

1. "Plastic Steel," "Devcon Liquid Aluminum," and "Devcon Steel" do not, after application, have the same physical and chemical properties of metal or of the particular metal represented.

2. There has been no showing that "Devcon Rubber" does not possess the essential characteristics of rubber.

3. Respondents have agreed to the entry of an order requiring discontinuance of their trade names "Devcon Liquid Aluminum" and "Devcon Steel."

4. Use of the trade name "Plastic Steel," standing alone, to describe respondents' steel-filled epoxy product may have the capacity and tendency to deceive. Any such reception, however, may be remedied by the use, in the same or larger size type and in close proximity therewith, of the words "A Steel-Filled Epoxy Resin," wherever and whenever the trade name "Plastic Steel" appears in respondents' labeling or advertising, together with a disclosure of the product's limitations in comparison to steel.

5. The public interest requires modification of the consent order of October 11, 1963 [63 F.T.C. 1034], in accordance with the above findings of fact.

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FINAL ORDER

It is ordered, That respondent Devcon Corporation, a corporation, and its officers, and Albert M. Creighton, Jr., and E. Leslie Hall, 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 "Plastic Steel," "Devcon Steel," "Devcon Liquid Aluminum," "Devcon '2 Ton' The Epoxy 'Super Glue,'" or any other products in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product which, after application, does not have the same physical and chemical properties of metal and of any particular metal represented: *Provided, however,* That nothing herein contained shall prohibit truthful representations in advertising and labeling of the percentage of content of any metallic substances in such products: *And provided, further,* That respondents' continued use in advertising and labeling of their trademark "Plastic Steel" to designate their steel-filled epoxy resin product shall not be deemed a violation of the requirements of this paragraph so long as the qualifying language "A Steel-Filled Epoxy Resin," and "will not conduct electricity or withstand a direct flame or prolonged heat in excess of 300° F." appears clearly and conspicuously in conjunction therewith.

2. Representing, directly or by implication, that

- (a) The product designated "Plastic Steel" or any other product of similar composition or characteristics forms a hardened metal or a substance that has the effectiveness or intrinsic characteristics of a hardened metal or of steel or that is not adversely affected by heat or chemicals;

- (b) The products designated "Devcon Steel" and "Devcon Liquid Aluminum" or any other product of similar composition or characteristics are liquid metals or that when used they form hardened metals or substances that have the effectiveness or intrinsic characteristics of hardened metals;

- (c) One drop of the product designated "Devcon '2 Ton' The Epoxy 'Super Glue'" has an adhesive strength of 2 tons or an adhesive strength in any amount in excess of the true facts.

3. Misrepresenting in any manner the nature, composition, effectiveness or characteristics of their products.

4. Furnishing or otherwise placing in the hands of others means and instrumentalities by and through which they may mislead the public as to any of the matters and things herein prohibited.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Commissioner Nicholson not participating for the reason that oral