

SURREY SLEEP PRODUCTS, INC., ET AL.

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

Docket 8695. Complaint, July 19, 1966—Decision, April 3, 1968

Order requiring a Long Island City, N.Y., manufacturer of mattresses and box springs to cease using deceptive guarantees in the sale of its mattresses and other articles of merchandise.

Complaint

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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 Surrey Sleep Products, Inc., a corporation, and Sol Kitain, individually and as an officer 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 Surrey Sleep Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 42-03 35th Street, Long Island City, New York.

Sol Kitain is an individual and an officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

Said individual respondent's address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the manufacturing, advertising, offering for sale, sale and distribution of mattresses, box springs and other sleep products to retailers for resale to members of the purchasing public.

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

PAR. 4. Respondents, in the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said products, have made certain statements and representations, directly or by implication, in catalogs, brochures, labels, and other media with respect to the design, construction, approval, prices and guarantees of said products.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

Made by the Manufacturers of Prescription Bedding.
Royal Prescription Bedding.

Prescription Bedding.
Culture Rest an Orthopedic Mattress.
Endorsed by Maryland Chiropractic Association.
Endorsed by Pennsylvania Chiropractic Society.
Custom Craft.
Custom Built Construction.
Rx Royal "400."
Mattress and Foundation \$199.00.
Guaranteed for 15 years.
Guaranteed for 20 years.
It offers you the protection of a full 20 years written unconditional Guarantee.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, respondents have represented and have placed in the hands of retailers and dealers, the means and instrumentalities of representing, directly or by implication:

1. Through the use of the words and terms "Custom Craft," "Custom Built Construction" and "Custom" that certain of respondents' mattresses have been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers and users of said mattresses.

2. Through the use of the word and term "Orthopedic" that certain of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to a body deformity or deformities and accord with recommendations of orthopedic authorities respecting design and construction of such product for the prevention, correction or relief of such deformity or deformities.

3. Through the use of the words and terms "Manufacturer of Prescription Bedding," "Prescription Bedding," "Prescription," and "Rx" that certain of respondents' mattresses have been specially designed and constructed to meet the requirements of a prescription by a member of the medical profession for the use of a particular individual.

4. Through the use of the statements "Endorsed by Pennsylvania Chiropractic Society" and "Endorsed by Maryland Chiropractic Association" that the design and construction of certain of respondents' mattresses have been approved by said Association and said Society and by reason thereof have preventive or therapeutic properties.

5. That said price amounts are respondents' good faith estimate of the actual retail prices of said mattresses and do not appreciably exceed the highest prices at which substantial sales were made in their trade area.

6. That respondents' merchandise was unconditionally guaranteed for the specified number of years.

PAR. 6. In truth and in fact:

1. Respondents' mattresses have not been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers or users of their mattresses.

2. None of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to body deformity or deformities nor do said mattresses accord with recommendations of orthopedic authorities respecting design and construction for prevention, correction or relief of such deformity or deformities.

3. None of respondents' mattresses have been specially designed and constructed to meet the requirements of a prescription of a member or members of the medical profession for the use of a particular individual.

4. No Chiropractic Association or Society has approved the design and construction of any of respondents' mattresses.

5. The represented prices are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area.

6. Respondents' guarantee is not unconditional but contains numerous conditions and limitations. Furthermore, the guarantor fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder.

PAR. 7. Respondents, by furnishing retailers and dealers with said advertising material and by placing said labels on its products, have thereby placed in hands of retailers and dealers the means and instrumentalities by and through which they may mislead and deceive the public.

PAR. 8. In the conduct of their business, at all time mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of mattresses, box springs and other bedding products of the same general kind and nature as those sold by respondent.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and

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of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William A. Somers supporting the complaint.

Mr. Harry Friedson, New York, New York, for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

FEBRUARY 24, 1967

PRELIMINARY STATEMENT

This is a proceeding under Section 5 of the Federal Trade Commission Act¹ in which complaint counsel seeks an order which would enjoin respondents, manufacturers and interstate vendors of bedding—box springs and mattresses—from certain alleged receptive acts and practices.

The complaint was issued July 19, 1966. Respondents' answer was filed September 7, 1966. Hearings were held in New York, New York, on November 7 and November 8, 1966. On November 10, 1966, the hearing record was closed. Counsel have filed their proposed findings, conclusions and order pursuant to § 3.19 of the Commission's Rules of Practice for Adjudicative Proceedings. Respondents filed a reply memorandum on January 24, 1967.

The complaint, *inter alia*, alleges:

PAR. 5. [R]espondents have represented and have placed in the hands of retailers and dealers, the means and instrumentalities of representing, directly or by implication:

1. Through the use of the words and terms "Custom Craft," "Custom Built Construction" and "Custom" that certain of respondents' mattresses have been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers and users of said mattresses.

2. Through the use of the word and term "Orthopedic" that certain of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to a body deformity or deformities and accord with recommendations of orthopedic authorities respecting design and construction of such product for the prevention, correction or relief of such deformity or deformities.

3. Through the use of the words and terms "Manufacturer of Prescription Bedding," "Prescription Bedding," "Prescription," and "RX" that certain of respondents' mattresses have been specially designed and constructed to meet

¹ 15 U.S.C.A. § 45 "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

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the requirements of a prescription by a member of the medical profession for the use of a particular individual.

4. Through the use of the statements "Endorsed by Pennsylvania Chiropractic Society" and "Endorsed by Maryland Chiropractic Association" that the design and construction of certain of respondents' mattresses have been approved by said Association and said Society and by reason thereof have preventive or therapeutic properties.

5. That said price amounts [preticketed prices] are respondents' good faith estimate of the actual retail prices of said mattresses and do not appreciably exceed the highest prices at which substantial sales were made in their trade area.

6. That respondents' merchandise was unconditionally guaranteed for the specified number of years.

PAR. 6. In truth and in fact:

1. Respondents' mattresses have not been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers or users of their mattresses.

2. None of respondents' mattresses have been specially designed and constructed so as to prevent, correct or afford substantial relief to body deformity or deformities nor do said mattresses accord with recommendations of orthopedic authorities respecting design and construction for prevention, correction or relief of such deformity or deformities.

3. None of respondents' mattresses have been specially designed and constructed to meet the requirements of a prescription of a member or members of the medical profession for the use of a particular individual.

4. No Chiropractic Association or Society has approved the design and construction of any of respondents' mattresses.

5. The represented prices are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area.

6. Respondents' guarantee is not unconditional but contains numerous conditions and limitations. Furthermore, the guarantor fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder.

These charges may be designated as the "labelling deception," "pricing deception," and "guarantee deception." Respondents defend by asserting, *inter alia*:

(1) The amount of respondents' merchandise deceptively labelled and advertised and shipped by respondents in interstate commerce is so small as to be *de minimis*. Therefore, the Federal Trade Commission has no jurisdiction because respondents' allegedly deceptive acts and practices are not in interstate commerce.

(2) Respondents' competitors make representations similar or identical to respondents' allegedly false and deceptive representations, and the Commission should not proceed against respondents unless it proceeds against all of respondents' competitors engaged in similar practices.

(3) The Maryland Chiropractic Association and the Pennsylvania Chiropractic Society in fact have approved respondents' products.

(4) Respondents own a trademark on the words "Prescription Bedding" from the United States Patent Office and are entitled to use the same on their products.

(5) Respondents' guarantee is unconditional for the period of years stated in said guarantee and requires only that the bedding be returned to the factory. This condition is set forth in the guaranty.

At the hearing respondents offered in evidence their trademark on "Prescription Bedding" (RX 8—reserved) and an assignment of the trademark (RX 9—reserved) and agreed to furnish copies for the record. Copies of those exhibits have not been furnished for the record (Tr. 243, 257). The record therefore does not show that respondents in fact do own the trademark "Prescription Bedding." Even though respondents may own the trademark "Prescription Bedding" such ownership will not exculpate, per se, a deceptive use of the trademark in marketing their products.

The Maryland Chiropractic Association and The Pennsylvania Chiropractic Society did approve in writing the "use" of respondents' products (CX 22, CX 23). It was not a false or deceptive act for respondents to represent this fact. The issue, however, is not whether such approval was obtained, but whether it was, and is, being used in a manner violative of Section 5 of the Federal Trade Commission Act.

Respondents' Memorandum of Law (page 9) seeks to exculpate respondents' deceptive labelling misrepresentations on the grounds that such misrepresentations are industrywide. *Universal-Rundle Corporation v. Federal Trade Commission*, 352 F. 2d 831 (C.A. 7, 1965) ² cited in support of this defense is distinguishable from this proceeding. There is no precise and specific evidence in this record as to who are respondents' competitors. There is no evidence in this record, other than Sol Kitain's generalizations, that the representations, which respondents make in selling their bedding or in advertising it, are industrywide or made by any specifically identified competitor or competitors of Surrey. The generalized unsupported testimony of Sol Kitain is not reliable, probative and substantial evidence of industrywide practices. The fact that an unlawful practice is industrywide does not make it any the less unlawful. See *Moog Industries v. Federal Trade Commission*, 238 F. 2d 43, 355 U.S. 411.

² Certiorari has been granted and the case is now pending in the Supreme Court of the United States, *Universal-Rundle Corp.*, No. 101, October, 1966 Term.

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Respondents allege they are not engaged in interstate commerce because their interstate shipments of deceptively labelled merchandise are small. The amount of a respondent's commerce that must be "interstate" in order to confer jurisdiction upon the Federal Trade Commission is not definable in precise dollar amounts or percentages. In their answer, respondents "admit that respondents caused their products to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States * * *."

In *Safeway Stores, Incorporated v. Federal Trade Commission*, 366 F. 2d 795 (C.A. 9, 1966), in rejecting a *de minimis* challenge to the Commission's jurisdiction, in a proceeding under Section 5 of the Federal Trade Commission Act, the court, *inter alia*, said (p. 798):

Petitioners contend, however, that we should ignore the Alaskan sales as a valid basis of jurisdiction by application of the doctrine of *de minimis non curat lex* * * *. We have recently held that only \$3,086.31 in interstate purchases was sufficient to sustain the jurisdiction of the NLRB over a local cemetery association. *NLRB v. Inglewood Park Cemetery Ass'n*, 355 F.2d 448 (9th Cir. 1966). In that case, we quoted the Seventh Circuit's response to an argument of *de minimis*, "The time has not yet arrived when \$2,000 is but a trifle." *NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (7th Cir. 1962). * * * The provisions of the respective statutes granting jurisdiction to the NLRB and the FTC are not identical. The labor statute probably is intended to be more extensive, but the question as to what is "*de minimis*" should not call for different answers. Assuming that the amounts of the Alaskan sales were "*de minimis*," it would not necessarily follow that the FTC was here without jurisdiction. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n. 59, 60 S.Ct. 811, 845, 84 L.Ed. 1129 (1940), it was written, "the amount of interstate or foreign trade involved is not material (*Montague & Co. v. Lowry*, 193 U.S. 38, 24 S.Ct. 307, 48 L.Ed. 608), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected." See also, *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310, 76 S.Ct. 937, 940, 100 L.Ed. 1209 (1956) (Footnote omitted.), wherein the Court stated,

"It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; *whether the amount of interstate commerce affected is large or small*; or whether the effect of the agreement is to raise or to decrease prices." (Emphasis added.)

See also, *Sun Oil Co. v. FTC*, 350 F.2d 624, 631-632 (7th Cir. 1965), *cert. denied*, 382 U.S. 982, 86 S.Ct. 559, 15 L.Ed. 2d 473 (1966).

Moreover, RX 1(a)-(b) and the testimony of Sol Kitain contradict the assertion that respondents' interstate sales are *de minimis*. Even though the dollar value of respondents' bedding shipped in interstate commerce is comparatively small in relation to the dollar value of all their sales, respondents admit that approximately \$30,000 worth was

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shipped in interstate commerce in 1964; \$30,000, in 1965; and \$20,000, from January 1, 1966 through August 30, 1966 (RX 1).

At the outset of the hearings, complaint counsel requested the hearing examiner to take official notice of the Federal Trade Commission's:

Trade Practice Rules for the Bedding Manufacturing and Wholesale Distributing Industry, as Promulgated November 14, 1950, amended January 14, 1955, to include Rule 20 (CX 27).

Guides Against Deceptive Advertising of Guarantees, adopted April 26, 1960 (CX 28).

Guides Against Deceptive Pricing, Effective January 8, 1964 (CX 29).

The hearing examiner requested complaint counsel to point out specifically the manner in which he wishes such official notice to be legally operative in this proceeding (Tr. 4). Complaint counsel has not done this. Upon the authority of the Federal Trade Commission's rulings and decisions in *Devcon Corporation et al.*, Docket C-607, ruling issued October 17, 1966, 70 F.T.C. 1780; *Arnold Constable*, 58 F.T.C. 49, 62 (1961); *Gimbel Brothers, Inc.*, 61 F.T.C. 1051, 1073 (1962), and *Lifetime Cutlery Corp. et al.*, 56 F.T.C. 1648, 1649 (1959), it is found that the Commission's Trade Practice Rules and Guides are "designed to be helpful guides to the various industries for which they have been promulgated, and were not intended to be regarded and recognized as substantive rules of law, or as factual conclusions which might be cited or accepted in an adjudicative proceeding as a substitute for evidence." (Emphasis supplied.) *Lifetime Cutlery Corporation, supra*.

Section 1.55 of the Commission's Rules, effective August 1963, asserts:

Guides are administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices. * * *

It is not within a hearing examiner's prerogatives to take official notice or to refuse to take official notice of the Commission's Trade Practice Rules and Guides. In this adjudicatory proceeding the Trade Practice Rules and the Guides must be given the effect which the Commission prescribes for them, not as "a substitute for evidence," but "as administrative interpretations having no force or effect as substantive law." "They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out." *Gimbel Bros., Inc., supra*, p. 1073.

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The Guides and Trade Practice Rules "are designed to convey * * * the idea that they have no binding force, with the result that anyone choosing to act counter to the announced Commission interpretation can be held accountable only after formal complaint and hearings conducted pursuant to the requirements of the Administrative Procedure Act." (See Commissioner Reilly's statement issued October 17, 1966, 70 F.T.C. 1786, in *Dercon Corporation et al.*, Docket C-607, p. 1789.) The complaint charges of deceptive advertising or labelling, deceptive pricing, and deceptive guarantees must be proven by reliable, probative and substantial evidence.³ "Counsel supporting the complaint shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."⁴ That conduct of respondents which is proven by reliable, probative and substantial evidence must be evaluated as to its deception according to criteria set forth in decisions of the Federal Trade Commission and the courts. "[T]he question for adjudication is not whether the advertising departed from criteria announced in the Guides but whether violation of the Act itself was shown." *Arnold Constable Corporation*, 58 F.T.C. 49, 62, *supra*.

The Commission can find deception, without evidence that the public was deceived, on the basis of its visual examination of exhibits. *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F. 2d 268, 270 (10th Cir. 1965), *cert. denied*, 384 U.S. 434, 1966. Surrey's catalogues are in evidence as CX 1, CX 2, CX 3, and CX 4, and specimens of the tags and labels attached to Surrey bedding are in evidence as CX 6, CX 7, CX 8, CX 9, CX 10, CX 11, CX 12, CX 13, CX 14, CX 15, CX 16, CX 17, CX 18, CX 19, CX 20, CX 21, and CX 22. The examiner may, by visual examination of these exhibits, ascertain what representations Surrey is making with reference to its bedding. "[C]apacity to deceive and not actual deception is the criteria by which practices are tested under the Federal Trade Commission Act." *Goodman v. Federal Trade Commission*, 244 F. 2d 584, 604 (C.A. 9 1957). "To tell less than the whole truth is a well-known method of deception: and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished," *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4 1950). "A statement may be deceptive even if the constituent words may be literally or technically construed so as to not constitute a misrepresentation. * * * The buying public does not weigh each word in an advertisement or a representation. It

³ § 3.21 (b) of the Commission's Rules of Practice for Adjudicative Proceedings.

⁴ *Idem* § 3.14 (a).

is important to ascertain the impression that is likely to be created upon the prospective purchaser. * * * *Kalwaity v. Federal Trade Commission*, 237 F. 2d 654, 656, *cert. denied*, 352 U.S. 1025. "Moreover, advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words," *Ward Laboratories, Inc., et al. v. Federal Trade Commission*, 276 F. 2d 952, 954 (C.A. 2, 1960), *cert. denied*, 364 U.S. 827. "It is clear that in determining the meaning of representations made by respondent the Commission must concern itself not only with the express language of the assertion in question but also with the overall impression which it conveys," *American Home Products Corporation*, Docket 8641, December 16, 1966 (70 F.T.C. 1610). As the court quoted in *P. Lorillard Co., supra*, p. 58, "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions."

Rule 5 of the *Trade Practice Rules for the Bedding Industry* (CX 27, pp. 4, 5) provides, *inter alia*:

In the sale, offering for sale, or distribution of bedding products, it is an unfair trade practice:

(a) To use the term "RX," or any term of similar import, as descriptive of any bedding product which has not been specially designed and constructed to meet the requirements of a prescription by a member of the medical profession for the use of a particular individual:

* * * * *

(c) To use the term "Custom Built," or any term of similar import, as descriptive of any bedding product which has not in fact been made in accordance with specifications furnished prior to manufacture by the individual purchaser and user of such product:

(d) To use the term "Orthopedic," or any term of similar import, as descriptive of any bedding product unless such product has been specially designed and constructed so as to prevent, correct, or afford substantial relief with respect to a specific body deformity or deformities and accords with recommendations of orthopedic authorities respecting design and construction for such deformity or deformities: *provided*, that the term shall in all cases be accompanied by specification of the kind or kinds of body deformities for which the product has been so designed and constructed:

* * * * *

(g) To cause any bedding product to be represented, directly or by implication, as being a product which is used in any hospital or clinic or is recommended by members of the medical profession or by a medical organization when such

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is not the fact, or as having been designed or made so as to afford special health, orthopedic, or therapeutic values, when such is not the fact.

In labelling and advertising their bedding, if respondents use the words "prescription," "custom," "custom built," "orthopedic," "osteopaths," "chiropractors," or terms of similar import, contrary to or in a manner violative of these Rules, complaint counsel need not have proven that the public was actually deceived in order to obtain an order proscribing such language. Moreover, if respondents represent their bedding as having "special health, orthopedic or therapeutic values, when such is not the fact," such representations constitute deceptive acts and practices.

Dorland's Illustrated Medical Dictionary, 24th Ed., 1965, contains, among others, the following definitions:

Chiropractic, page 291

A system of therapeutics based upon the claim that disease is caused by abnormal function of the nerve system. It attempts to restore normal function of the nerve system by manipulation and treatment of the structures of the human body, especially those of the spinal column.

Chiropractor

One who practices chiropractic.

Orthopedic, page 1062

Pertaining to the correction of deformities; pertaining to orthopedics.

Orthopedics, page 1062

That branch of surgery which is specially concerned with the preservation and restoration of the function of the skeletal system, its articulations and associated structures.

Osteopathy, page 1070

1. Any disease of a bone. 2. A system of therapy founded by Andrew Taylor Still (1828-1917) and based on the theory that the body is capable of making its own remedies against disease and other toxic conditions when it is in normal structural relationship and has favorable environmental conditions and adequate nutrition. It utilizes generally accepted physical, medicinal, and surgical methods of diagnosis and therapy, while placing chief emphasis on the importance of normal body mechanics and manipulative methods of detecting and correcting faulty structure.

Therapeutic

1. Pertaining to therapeutics, or to the art of healing. 2. Curative.

Therapeutics, page 1570

1. The science and art of healing. 2. A scientific account of the treatment of disease.

After this hearing record was closed, respondents moved on December 22, 1966, to amend their answer in order to reflect a sale, on Decem-

ber 20, 1966, of a one-half interest in the voting stock of the corporation to third parties. This motion was denied on December 29, 1966.

The hearing record consists of the exhibits; the testimony of respondent Sol Kitain, chief executive officer of Surrey Sleep Products, Inc.; five retail vendors of respondents' products, pricing witnesses; and the secretary-treasurer of the chiropractic association and society that approved "the use" of respondents' bedding.

The hearing examiner has carefully considered the entire record, including the proposed findings; conclusions; and legal memoranda; and replies thereto. Findings not hereinafter made in the form proposed, or in substantially that form, are hereby rejected. Motions heretofore made and not previously ruled upon are hereby denied. Based upon his examination and consideration of the entire record, the examiner makes the following:

FINDINGS OF FACT

1. Corporate respondent, Surrey Sleep Products, Inc., (Surrey) a New York corporation since 1946, with its principal office and place of business at 42-03 35th Street, Long Island City, New York (Tr. 8), manufactures and sells in interstate commerce—box springs, mattresses, sleep chairs and sofa beds. Respondent Sol Kitain and his wife were the officers and directors of the corporation during the relevant periods—and at the time of the hearing (Tr. 8). Mrs. Kitain did not participate actively in the business (Tr. 15). As the principal stockholder and principal officer, Sol Kitain "has complete charge" of Surrey Sleep Products, Inc. (Tr. 58). He formulates policy (Tr. 59).

2. Surrey buys raw materials, innerspring units, hair pads, cotton felt, ticking and other necessary components, box springs and cartons and processes them into finished products (Tr. 9). The company manufactures two separate lines of products: bedding—box springs and mattresses—and upholstered goods—sofa beds and sleep chairs. This proceeding involves only the bedding (Tr. 200).

3. Surrey has had a show room in Chicago, Illinois, for 15 years, where its merchandise was on display year round, and a show room at 196 Lexington Avenue, New York, New York.

4. Surrey does not use newspapers, television or radio to advertise its products (Tr. 189). It uses only catalogues such as are in evidence as CX 1, CX 2, CX 3 and CX 4.

5. At the time of the hearing the company employed 26 people, including its sales personnel (Tr. 10).

6. Most of Surrey's business is transacted with retail furniture stores (Tr. 10). A "healthy" percentage of its business is obtained

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through decorators and people in the trade coming into the company's show rooms in Chicago and New York. The company's factory is located at 42-03 35th Street, Long Island City, New York.

7. During 1964, 1965, and up to September 1, 1966, Surrey's sales and interstate shipments were:

Year	Total shipments	Shipments of upholstered goods	Shipments of bedding	Interstate shipments
1964-----	\$769,332.60	\$461,000	¹ \$308,000	\$30,000
1965-----	770,959.04	¹ 462,000	¹ 308,000	30,000
1966-----	538,752.00	¹ 269,376	¹ 269,000	20,000

(RX 1(a)-(b).)

¹ The breakdowns given for upholstered goods and bedding are approximations. When added they do not total the figure given for total shipments. However, the figures were supplied by respondents, and the discrepancy is not material.

Surrey bedding is not a mass produced item. Surrey does not sell any one customer a large amount of bedding. Surrey bedding is sold to small and medium sized customers, to decorators, to decorator type stores (Tr. 205). A big account for Surrey would be total annual sales to one customer between \$25,000 and \$30,000 (Tr. 206).

8. Respondent Sol Kitain, as an officer, director and one of the principal stockholders of the corporate respondent, formulates, directs and controls the acts and practices of the corporate respondent.

9. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their products to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States. During the relevant period respondents have maintained a substantial course of trade in their products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

10. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this proceeding. This proceeding is in the public interest.

11. During all the relevant period, in the conduct of their business respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of box springs, mattresses, sleep chairs, sofa beds, and other products of the same general kind and nature as those sold by Surrey Sleep Products, Inc.

12. The larger bedding manufacturers, such as the Simmons Company, Englander, Stearns and Foster, do not purchase component

parts for their products from outside sources—as Surrey does—but make the total product themselves. Mr. Kitain estimated that nationally, there must be “thousands” of bedding factories that run the gamut from a small firm with two or three employees to firms employing hundreds of persons, and a “few companies who employ thousands” (Tr. 16–17). He testified that Sealy and Serta are franchise arrangements under which many individually owned factories pay a royalty for the use of the names and get the benefits of national advertising (Tr. 17–18). “Basically, the industry is in the hands of a lot of small people” (Tr. 18).

13. Surrey’s bedding cannot, as a practical matter, be sold to dealers that are too far away from the Surrey factory because the shipping costs for such a large bulky item as a mattress would be so disproportionate as to make Surrey’s bedding noncompetitive, pricewise, with locally manufactured bedding. On the other hand, Surrey’s upholstered goods can be shipped great distances because its sofa beds and sleep chairs compete more on a style basis. Surrey’s upholstered line is styled in Italian Provincial, Spanish, Moorish, French Provincial, Modern, and Traditional decor (Tr. 20). Surrey sells only its higher priced bedding outside the trade area immediately surrounding its factory (Tr. 20–21).

14. Surrey sells, and during the relevant period has sold, its bedding under the following brand names, among others:

“Prescription Bedding” (CX 12, CX 20, CX 21, CX 22); “Sano Pedic” (CX 11); “Custom Craft” (CX 8); “Sano Craft,” “Sano Tex” (Tr. 21); “Allergo Pedic,” “Rx Royal ‘400,’” “Culture Rest” (CX 9); “Rest-O-Pedic” (CX 18); “Rest Form” (CX 1, page 41, CX 10); “Ortho-Flange—Orthopedic innerspring construction” (CX 7); “Rest O Lux” (CX 13); “Royal Prescription Bedding” (CX 15, CX 16, CX 17).

15. Surrey spends between \$1000 and \$1500 annually for advertising (Tr. 189). It does not use radio, television or newspaper advertising (Finding 4, *supra*), but depends chiefly upon its catalogue, and supplements which are in evidence as CX 1, CX 2, CX 3 and CX 4. Mr. Kitain’s testimony (Tr. 32–39) about the number of each of these catalogues and supplements that had been used, and the precise time when each was used, is a bit vague. A substantial number of each of these exhibits (CX 1, CX 2, CX 3 and CX 4) were sent by Surrey through the United States mails in interstate commerce, during the relevant period, for the purpose of advertising Surrey’s products and promoting sales for them.

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16. A copy of one of the pages of CX 2 is as follows:

Surrey Sleep Products, Inc.

[Picture of mattress]

Prescription Bedding has the endorsement of the Pennsylvania & Maryland Chiropractic Society and hundreds of other Osteopaths and Chiropractors throughout the country.

- It is the most luxurious bedding in the world.
- It offers you the greatest selection of size and firmness.
- It is the most beautifully styled and carefully detailed bedding available.
- It offers you the protection of a full 20 year written Unconditional Guarantee.

PRESCRIPTION BEDDING made for your weight, made for your height, made for your sleep requirements, made in twenty-seven sizes. An exclusive patented mattress and box spring combination custom made for you. *WE SPECIALIZE IN ODD SIZE AND CUSTOM BEDDING.* (Italic supplied.)

Prescription Bedding and Sano-Pedic Prescription Bedding

PRODUCT GUARANTEE

We guarantee to the purchaser of a set of prescription bedding, that the construction is free from defects in materials and workmanship.

We further agree to replace without charge for 20 years from date of purchase, any prescription mattress returned to our factory and found to be defective.

This guarantee does not extend to cover fire or water damage, soiling, accident or misapplication.

Surrey Sleep Products, Inc., N.Y.C.

Page 8 of CX 4 is as follows:

Prescription Bedding has the endorsement of the Pennsylvania Chiropractic Society and hundreds of other Osteopaths and Chiropractors throughout the country.

- It is the most luxurious bedding in the world.
- It offers you the greatest selection of size and firmness.
- It is the most beautifully styled and carefully detailed bedding available.
- It offers you the protection of a full 20 year written Unconditional Guarantee.

PRESCRIPTION BEDDING

SANO-PEDIC PRESCRIPTION	ROYAL "400"
ROYAL PRESCRIPTION	THE "EMPRESS" CUSTOM CRAFT

PRODUCT GUARANTEE

WE GUARANTEE to the purchaser of a set of PRESCRIPTION BEDDING, that the construction is free from defects in materials and workmanship.

WE FURTHER AGREE to replace without charge for 20 years from date of purchase, any PRESCRIPTION mattress returned to our factory and found to be defective.

THIS GUARANTEE does not extend to cover fire or water damage, soiling, accident or misapplication.

SURREY SLEEP PRODUCTS, INC., N.Y.C.

Surrey Sleep Products, Inc., factory, Office & Showroom, 53 East 25th Street, New York 10, N.Y.; Chicago Showroom: 325 North Wells Street, Chicago, Ill. (*Italic supplied.*)

17. Surrey's catalogues, CX 1, CX 2, CX 3 and CX 4, emphasize, among other things, the "custom" or "customized" aspect of Surrey's manufacturing process. In addition, these catalogues are designed to, and do, convey to a prospective customer the impression that Surrey bedding has unique medical—orthopedic, osteopathic and chiropractic—virtues and that a Surrey mattress is a "prescription" mattress having special therapeutic qualities. Insofar as the evidence in this record shows, all such representations by Surrey are false, misleading and deceptive. Surrey bedding may, or may not, have special medical—orthopedic, osteopathic and chiropractic virtues. It may have special therapeutic qualities. There is no reliable, probative and substantial evidence in the record relating to such facts. The hearing Examiner finds, in the absence of evidence to the contrary, that Surrey's representations in these respects are false, misleading and deceptive within the purview of Section 5 of the Federal Trade Commission Act.

18. The *quality* of Surrey bedding is not in issue in this proceeding. Mr. Kitain testified (Tr. 209-221) that no one in the industry makes a better quality bedding than does Surrey; and that Surrey can make one of the "hardest" or "firmest" mattresses in the industry. Mr. Kitain and the two chiropractors, G. Harry Lewis (Tr. 156, *et seq.*) and Harold F. Carbaugh (Tr. 138, *et seq.*) testified that "hard" or "firm" mattresses are beneficial for *some* people. The advantages, if any, of a "hard" vis-a-vis a "soft" mattress are not delineated in this record.

19. On the basis of the chiropractors' testimony, the hearing examiner can find only that sometimes hard mattresses are desirable, and sometimes they are not desirable, in chiropractic.

Dr. Carbaugh testified: (Tr. 151-152)

HEARING EXAMINER GROSS: Well, what would cause the approval of the Surrey mattress?

THE WITNESS: I cannot answer that; I don't know.

HEARING EXAMINER GROSS: Well, what would be the interest of a professional man described as a chiropractor in a mattress? Specifically, what would be his professional interest in a mattress?

THE WITNESS: Definitely, for posture, for rest. *So many mattresses are soft. Some of them are too hard.* (*Italic supplied.*)

Dr. G. Harry Lewis, the other chiropractic witness, testified: (Tr. 160)

For certain cases, yes, you would want a hard mattress. (*Italic supplied.*)

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If firm or extra firm mattresses possess unique medical—orthopedic, osteopathic and/or chiropractic—virtues, the record contains no substantial evidence of this fact. In the absence of evidence, neither a positive nor a negative finding as to the virtues of a firm or extra firm mattress is justified.

20. On or about January 7, 1961, the Pennsylvania Chiropractic Society wrote a letter to Surrey Sleep Products, Inc., reading:

PENNSYLVANIA CHIROPRACTIC SOCIETY,
Harrisburg, Pa., January 7, 1961.

SURREY SLEEP PRODUCTS, INC.,
New York 10, N.Y.,

GENTLEMEN: The Pennsylvania Chiropractic Society, by its Board of Directors, having examined the Prescription Bedding of Surrey Sleep Products, Inc., of 53 East 25th Street, New York, New York, hereby approves the use of the aforesaid product.

Very truly yours,

PENNSYLVANIA CHIROPRACTIC SOCIETY.

During the year 1966, respondents received a letter from the Pennsylvania Chiropractic Association asking respondents to cease using its endorsement. Upon communicating with the Association, Mr. Kitain was informed that the Association did not wish to endorse Surrey bedding or any other set of bedding. Prior to the hearing in November 1966, Surrey had stopped representing that the Pennsylvania Chiropractic Association had endorsed its bedding (Tr. 55).

21. On or about September 23, 1962, The Maryland Chiropractic Association sent a letter to Surrey as follows:

MARYLAND CHIROPRACTIC ASSOCIATION INC.,
Hagerstown, Md., September 23, 1962.

SURREY SLEEP PRODUCTS, INC.,
New York, N.Y.

GENTLEMEN: The Maryland Chiropractic Association Inc., by its Board of Directors, having examined the Prescription Bedding of Surrey Sleep Products, Inc., of New York, New York, hereby approves the use of the aforesaid product.

Very truly yours,

MARYLAND CHIROPRACTIC ASSOCIATION INC.

22. There is considerable testimony in this record concerning the circumstances under which the above endorsements by the chiropractic societies were given (Sol Kitain, Tr. 194, *et seq.*; Dr. Harold F. Carbaugh, Tr. 141, *et seq.*; Dr. G. Harry Lewis, Tr. 154, *et seq.*). Most of this testimony is irrelevant to the issues presented here for adjudica-

tion. The endorsements were obtained—and were extensively advertised by Surrey (CX 2, CX 4, CX 6, CX 19). However, “words and sentences may be literally and technically true, and yet be framed in such a setting as to mislead or deceive,” *Rothschild v. Federal Trade Commission*, 200 F.2d 39, 40 (C.A. 7 1952) *cert. den.* 345 U.S. 941. Surrey’s representations that its bedding was approved by the Maryland Chiropractic Association and the Pennsylvania Chiropractic Society were literally true—but were used by Surrey in a misleading and deceptive manner.

There is no evidence in this record that Surrey bedding was endorsed by “hundreds of osteopaths and chiropractors throughout the country” (See CX 2, CX 4—Finding 16, *supra*). Such statement would appear to be completely false.

23. In addition to the representations that Surrey makes in its catalogues, as herein found (CX 1, CX 2, CX 3 and CX 4), Surrey affixes to its bedding labels, streamers, ribbons, and/or tags of which specimens are in evidence as CX 6–CX 22 inclusive. By means of these labels Surrey represents, *inter alia*:

Endorsed by Maryland Chiropractic Association with a seal of the association (CX 6).

Endorsed by Pennsylvania Chiropractic Society with a seal of the society (CX 19).

Ortho Flange, *Orthopedic* Innerspring Construction (CX 7).

Custom Craft scientifically constructed for natural *healthful* sleep and maximum comfort. factory guarantee against structural defects for 20 years (CX 8).

Culture Rest, an *orthopedic* mattress scientifically constructed for normal *healthful* sleep and maximum comfort. Factory guarantee against structural defects for 15 years (CX 9).

* * * * *

Rest-form, *custom built* construction for sleep comfort, engineered for proper sleep (CX 10).

Sano Pedic, scientifically constructed for normal *healthful* sleep and maximum comfort. Factory guarantee against structural defects for 15 years (CX 11).

Prescription Bedding, scientifically constructed for natural *healthful* sleep and maximum comfort. Factory guarantee for 20 years in writing against structural defects (CX 12).

Rest-O-Lux; Reinforced Prebuilt Border; Heavy Insulation; Custom Type Construction; Built For Comfort; Made by the Manufacturers of *Prescription* Bedding (CX 13).

Sano Pedic

Scientifically constructed for natural *healthful* sleep and maximum comfort. Factory guarantee against structural defects for 15 years. \$179.00 (CX 14).

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Royal Prescription Bedding

Scientifically constructed for natural *healthful* sleep and maximum comfort. Factory guarantee for 20 years in writing against structural defects. \$199.00 (CX 15, CX 16, CX 17, CX 21).

Rest-O-Pedic

Scientifically constructed

for

Natural *healthful* sleep

and

Maximum comfort

Factory Guarantee against

structural defects for 15 years (CX 18).

(Italics in the above excerpts is supplied.)

24. The labels, streamers, ribbons and/or tags are used by Surrey to convey to the mind of a prospective customer and do convey the impressions, *inter alia*:

That Surrey mattresses have unique chiropractic virtues (CX 6, CX 19), unique orthopedic virtues (CX 8, CX 9) or therapeutic virtues—"healthful sleep" (CX 8, CX 9, CX 11, CX 12, CX 14, CX 15, CX 16, CX 17, CX 18, CX 20, CX 21).

Such representations are, within the framework of this record, false, misleading, and deceptive within the intent and meaning of Section 5 of the Federal Trade Commission Act.

25. The labels, streamers, ribbons and/or tags also are designed to and do convey the impression, contrary to the fact, that Surrey bedding is "custom built" or "customized" (CX 10) "custom built construction"; (CX 13) "custom type construction" and this also constitutes a false, misleading and deceptive representation within the intent and meaning of the Act.

26. One of Surrey's defenses is that the representations that it makes, as herein found, are identical or similar to representations made by a large number of bedding manufacturers. Respondents' proposed finding⁵ to that effect is rejected because there is no substantial probative evidence in this record to support it.

Moreover, even though the evidence should support such a finding (which it fails to do), such finding would not exculpate Surrey's

⁵ Respondents' Memorandum of Law, pp. 9, 10: "all firms in the bedding industry use the terms 'pedic,' 'ortho,' 'Rx,' 'posture' or their equivalents. The practice is open, flagrant, and notorious. There has been no enforcement of the provisions of the bedding code since its adoption in 1955."

wrongdoing. *Universal-Rundle* (page 529, *supra*) does not, in this examiner's opinion, hold that one wrongdoer may successfully defend his deceptive acts and practices by demonstrating that his competitors engage in identical or similar practices. See *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411.

27. In its brief in the Supreme Court, in *Universal-Rundle*, the Federal Trade Commission, *inter alia*, asserts: (p. 25)

It is the Commission's practice, prior to issuing any complaint, to consider whether the practice involved would more suitably be dealt with through some form of industry-wide proceeding. Pursuant to this practice, it has instituted or refused to institute such proceedings, depending on the particular circumstances. Even after the Commission determines that enforcement on a case-by-case basis is most appropriate, it carefully considers whether it should stay orders against particular respondents in the light of supervening decisions or evidence that competitors in an industry are engaging in similar practices. In some cases, it has granted such stays (see, e.g., *Atlantic Products, Inc.*, F.T.C. Docket No. 8513, Nov. 19, 1962; Rowe, *Price Discrimination Under the Robinson-Patman Act* 518-519 (1962 ed.), 159 (Supp. 1964)); in others it has denied them. (Footnotes omitted.)

28. Complaint counsel has proven by reliable, probative and substantial evidence in this record that respondents, in the interstate sale of their products, have represented and do represent, contrary to the fact:

That Surrey bedding possesses unique medical—orthopedic, osteopathic and/or chiropractic—virtues;

That certain of their mattresses have been specially designed and constructed in accordance with specifications furnished prior to manufacture by individual purchasers and users of said mattresses;

That certain of respondents' mattresses have been specially designed and constructed so as to afford orthopedic, osteopathic, chiropractic and/or other therapeutic relief to the users of said mattresses, or will prevent or correct undesirable orthopedic, osteopathic and chiropractic conditions in the users;

That Surrey mattresses are therapeutic for orthopedic, osteopathic and chiropractic pathology; and

That Surrey mattresses have been specially designed and constructed to meet the requirements of a prescription by a member of the medical profession for the use of a particular individual.

Such representations by respondent were and are to the prejudice and injury of the public and constituted and now constitute unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

The Pricing Deception

29. Complaint counsel called five retail vendors of Surrey bedding for the purpose of proving that the prices which Surrey pretickets on its bedding "are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area" (Complaint Par. Six (5)). These witnesses were: Arthur Getter, William Grady, Albert Berger, Anthony Englis, and Bernard Schnee.

30. The testimony of the pricing witnesses fails to prove that the prices which Surrey pretickets on its bedding are not respondents' good faith estimate of the prices at which respondents' bedding is sold at retail in respondents' trade areas:

Arthur Getter (Tr. 105-125), a member of the National Association of Interior Designers, president of M. Feigelman, Inc., 119 W. 24th Street, New York City, had been with that company for 18 years (Tr. 108), and testified that his company is in the business of "furniture retailing." The last purchase his company made of Surrey products was "more than a year ago" (Tr. 104). He was not certain which brand of Surrey bedding his company sold. He had been an interior decorator for 16 years (Tr. 122). The witness was unable to recall the price which Surrey had preticketed on the Surrey products he had sold (Tr. 106). M. Feigelman sells "maybe twenty or thirty" brands of bedding (Tr. 111). The witness testified that his company usually sold the bedding as part of a bedroom suite. The witness was unable to recall specifically the price at which his firm sold Surrey bedding. Mr. Getter's testimony will not support any finding as to the prices at which his firm sold Surrey bedding. The witness testified that one of his "primary functions" was that of a decorator (Tr. 120). "The largest part of my time is involved in doing decorating for our customers" (Tr. 120). The witness had been interviewed concerning his testimony more than a year prior to his appearance at the hearing. He had not, since that time, endeavored to refresh his recollection about the sale prices of Surrey bedding, nor had he been requested to do so. His testimony was so vague and uncertain that it must be disregarded as proof of the pricing charge in the complaint.

Albert Berger (Tr. 134-138), interior decorator and furniture salesman, conducts his own business, Advance Decorators, at 2166 White Plains Road, The Bronx, New York. He has been in business for 18 years and has been selling Surrey bedding for 8 or 10 years. He sells Surrey's Sano-Tex, Sano Craft, Prescription and Royal Prescription labels. "We sold our bedding for \$150.00 per set" (Tr. 137). Mr. Ber-

ger was unable to recall whether the Surrey bedding which he sold was preticketed (Tr. 138).

"In either case, the customer never saw it [any preticketed price]. The beds were always covered. Half the time we never bothered to show the customer the bedding.

"Let me point out that our operation is different from a regular furniture store. It is a small decorator showroom. Whenever we sold a bedroom set, we usually sold the bedding. We never had people walking in off the street, coming in to buy a set of bedding. We sold our bedding basically to our own customers who bought a bedroom set" (Tr. 138). ". . . to my recollection, I don't think we have ever had anyone walk in off the street and just buy a set of bedding" (Tr. 138A). Mr. Berger's testimony fails to prove that Surrey's preticketed prices on its bedding do not constitute a bona fide estimate of the prices at which the bedding is generally sold at retail in Surrey's trade area.

William Grady (Tr. 167, *et seq.*), the furniture manager for 30 years of Howell Brothers, a retail firm in Hoboken and West New York, New Jersey, testified that Howell sells Surrey's Prescription Bedding in the Hoboken store. The witness testified that he sold Surrey's Prescription Bedding for \$199.50 (Tr. 170); and that Howell Brothers has been quite successful in selling Surrey's bedding at the preticketed price. Mr. Grady's testimony not only fails to prove the pricing charges in the complaint, but actually proves the opposite of such charges.

Anthony Englis (Tr. 171-176), an interior decorator in the retail furniture business under the name Tal-Enge, Ltd., at 2 Park Avenue, New York, New York, sells Surrey's "Royal Prescription" and "Carriage Trade" labels. Mr. Englis sells the Royal Prescription bedding for \$199.50 or \$199 (Tr. 174). If there is another decorator involved "we get \$199 and give back the commission" (Tr. 174). If a customer walks in off the street, "they will have to pay \$199.50." The testimony of Mr. Englis not only fails to prove the pricing charges in the complaint, but proves just the opposite.

Bernard Schnee (Tr. 176-179), president of Zaretsky and Schnee Furniture Corporation, 476-480 Rockaway Avenue, Brooklyn, New York, testified that his company sells Surrey's Prescription Bedding for \$199, the preticketed price. Mr. Schnee's testimony proves that the price which is preticketed upon Royal Prescription bedding (CX 15, CX 16, CX 17) is the price at which Mr. Schnee's company sells it.

31. Commission Exhibit 5, an advertisement by the Sage-Allen Department Store of Hartford, Connecticut, in the Hartford Times of September 10, 1963, for Surrey Prescription Bedding at a "Special! Introductory Price \$159.00—Mattress, Box Spring Set," is not reliable,

probative and substantial evidence of Surrey's alleged pricing deception, when considered with the other evidence on this issue.

32. Complaint counsel has failed to prove by reliable, probative and substantial evidence in this record that the prices which Surrey pre-ticketed upon its bedding "are not respondents' good faith estimate of the actual retail prices of their mattresses and appreciably exceed the highest prices at which substantial sales have been made in respondents' trade area." This charge in the complaint should be, and it hereby is, dismissed.

The Guarantee Deception

33. As previously found, Surrey spends between \$1000 and \$1500 per year for advertising (Tr. 189, Finding 15, *supra*). It does not advertise by newspaper or by radio, or television (Finding 4, *supra*). Surrey's guarantee is mentioned in its catalogue (CX 1), the supplements to the catalogue (CX 2, CX 3 and CX 4), and on some of the tags or labels attached to its bedding (CX 6-CX 22, inclusive). Surrey's guarantee certificates (CX 25-CX 26) are enclosed in the cartons in which its bedding is packaged and are reproduced *in facsimile* in its supplements, CX 2 and CX 4 (Finding 16, *supra*). There is no discrepancy between Surrey guarantee certificates and the guarantee as advertised, such as was found by the Federal Trade Commission in *Montgomery Ward & Co.* (Docket 8617, opinion issued July 26, 1966. [70 F.T.C. 52, 61]).⁶

34. Surrey's catalogue (CX 1) and the supplements to its catalogue (CX 2, CX 3 and CX 4) are sent to Surrey dealers. The guarantee as set forth in these exhibits (CX 1, CX 2, CX 3 and CX 4) is not made directly to the ultimate beneficiary⁷ of the guarantee, the retail customer-user. Such ultimate beneficiary receives the guarantee certificates (CX 25, CX 26) which, as above stated, is enclosed in the carton in which Surrey bedding is delivered to the user. Surrey's guarantee certificates read:

We guarantee to the purchaser of a set of the above listed bedding that the construction is free from defects in materials and workmanship.

We further agree to replace without charge for [15] 20 years from date of purchase any above listed mattress returned to our factory and found to be defective. (Emphasis supplied.)

This guarantee does not extend to cover fire or water damage, soiling, accident or misapplication. Surrey Sleep Products, Inc., N.Y.C. (CX 25, CX 26.)

⁶ This was a 3-2 decision, with Commissioners Elman and Reilly dissenting, and is now on appeal to the Court of Appeals for the Seventh Circuit.

⁷ A Surrey dealer is, of course, also beneficiary of the guarantee to the extent that he is able to use it to sell Surrey bedding.

Complaint Counsel's position is that the guarantee is deceptive because the Surrey bedding must be returned to the factory (see Tr. 224-226). On page 14 of his proposed findings complaint counsel states:

The worst feature of the respondents' guarantee, which is not disclosed, is that the purchaser must return the mattress to respondents' factory for a determination by them as to whether or not the product is defective.

Surrey's guarantee does disclose that its bedding must be returned to its factory. What would complaint counsel have Surrey state in its guarantee that is not stated? Bedding is the type of product which must be examined at the factory or by a Surrey dealer in order to ascertain whether it has any *structural* defects.

35. Unlike *Montgomery Ward*⁸ Surrey does not sell directly to the user. Mr. Kitain's uncontradicted testimony is that Surrey's dealers relieve their customers, the retail purchasers, of the necessity of returning Surrey bedding to the factory, and, in the few instances where there have been complaints, the dealer has assumed the burden of returning the bedding to the factory.

36. Under Surrey's guarantee, if anything goes wrong with the workmanship of Surrey bedding the company replaces the bedding without charge (Tr. 222). Surrey makes good on damage to its bedding which is inflicted in the process of delivering such bedding to the user (Tr. 222-223). Construction complaints are rare except in those instances where a user finds a mattress is firmer or softer than he likes, or thought it would be. This is *not* a construction defect—cannot be—and is not covered by Surrey's guarantee against “structural defects.”

37. Mr. Kitain testified, and there is no evidence to the contrary, that Surrey performs on its guarantee unconditionally (Tr. 228). “We always upheld our guarantee a hundred percent, with every dealer” (Tr. 256).

38. Surrey's guarantee states “returned to our factory” as a condition to replacement under the guarantee. Mr. Kitain's testimony is uncontradicted in this record, and the examiner finds, that when a claim under the guarantee is presented, Surrey's local dealer replaces the bedding at the user's home—and later returns the bedding to the Surrey factory, at the dealer's or Surrey's expense.

⁸ The instant case is also distinguishable from *Sibco Products Co.*, Docket 8628, Commission's opinion dated November 22, 1965, affirmed 367 F. 2d 364 (C.A. 2 1966) in which the Commission found that respondents' advertisements for a water filtration unit did not adequately disclose the conditions of the guaranty.

Mr. Kitain testified: (Tr. 224)

Q. Other than those situations of delivery [any damage during delivery] and taking time to become accustomed to the mattress, [because it is harder or softer than the user is accustomed to] have you ever had complaints, or have you ever been sued?

A. No, Sir.

Q. Have you ever had any complaints?

A. Over the years, once in—occasionally there might be a complaint, but if there is such, there is no problem or argument. We do whatever has to be done. Not only do we have to keep the consumer happy, but the customer from whom the consumer bought the mattress, too (Tr. 224).

39. The Commission's Guides Against Deceptive Advertising of Guarantees adopted April 26, 1960 (CX 28), *inter alia*, provide:

In general, any guarantee in advertising shall clearly and conspicuously disclose—

(a) *The nature and extent of the guarantee.* This includes disclosure of—

(1) What product or part of the product is guaranteed,

(2) What characteristics or properties of the designated product or part thereof are covered by, or excluded from, the guarantee,

(3) What is the duration of the guarantee,

(4) What, if anything, any one claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; and

(b) *The manner in which the guarantor will perform.* This consists primarily of a statement of exactly what the guarantor undertakes to do under the guarantee. Examples of this would be repair, replacement, refund. If the guarantor or the person receiving the guarantee has an option as to what may satisfy the guarantee this should be set out; and

(c) *The identity of the guarantor.* The identity of the guarantor should be clearly revealed in all advertising, as well as in any documents evidencing the guarantee. Confusion of purchasers often occurs when it is not clear whether the manufacturer or the retailer is the guarantor.

These guides are not a "substitute for evidence." (See p. 531, *supra*.) There is no evidence in this record that Surrey has ever failed or refused to perform under the terms of its guarantee, as advertised; nor is there any evidence of any deceptive discrepancy between Surrey's advertised guarantee and Surrey's performance thereunder.

40. Surrey's guarantee does disclose:

(a) *The nature and extent of the guarantee*

* * * * *

(b) *The manner in which the guarantor will perform*

* * * * *

(c) *The identity of the guarantor.*

41. Complaint counsel has failed to prove by reliable probative and substantial evidence, as charged in the complaint, that:

Respondents' guarantee is not unconditional but contains *numerous conditions and limitations*. Furthermore, the guarantor *fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder*. (Italic supplied.)

This charge in the complaint should be, and it hereby is, dismissed.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties to and the subject matter of this proceeding. This proceeding is in the public interest.

2. Respondent, Surrey Sleep Products, Inc., a New York corporation, since 1946, manufactures and sells bedding—box springs and mattresses—sleep sofas and chair beds, in commerce, as “commerce” is defined in the Federal Trade Commission Act.

3. Respondent, Sol Katatin, during the relevant period involved in this proceeding was an officer, director and principal stockholder of the corporate respondent. He formulated, directed and controlled the acts and practices of the corporate respondent as herein found.

4. In the conduct of their business during all of the relevant period respondents were in substantial competition, in commerce, with other corporations, firms, and individuals who made and/or sold products of the same general kind and nature as the products sold by respondents.

5. Complaint counsel has proven by reliable, probative and substantial evidence the charges in Paragraphs Five (1), (2), (3) and (4), and Six (1), (2), (3) and (4) of the complaint. Respondents have failed to establish any defenses in law or in fact to these charges as proven.

6. Complaint counsel has failed to prove by reliable, probative and substantial evidence the charges in Paragraphs Five (5) and (6), and Six (5) and (6) of the complaint, and these charges should be dismissed.

7. In the conduct of their business during the relevant period respondents engaged in false, misleading and deceptive acts and practices as herein found.

8. Respondents' false, misleading and deceptive acts and practices herein found were and are to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in

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commerce, in violation of Section 5 of the Federal Trade Commission Act.

9. Respondents' unfair and deceptive acts and practices herein found to violate the Federal Trade Commission Act should be enjoined.

ORDER

It is ordered, That respondents Surrey Sleep Products, Inc., a corporation, and its officers, and Sol Kitain, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of mattresses, box springs 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. Using the words or phrases "Custom Craft," "Custom Built Construction," or any other words or phrases of similar import or meaning as descriptive of stock merchandise; or representing, directly or by implication, that their products have been specially designed and constructed in accordance with specifications furnished prior to manufacture by purchasers or users;

2. Using the word or term "Orthopedic" or any other terms, words or phrases of similar import or meaning as descriptive of mattresses or any other bedding product not specially designed and constructed so as to prevent, correct or afford substantial relief to a body deformity or deformities, and not in accord with recommendations of an orthopedic authority or authorities respecting the design or construction of such product for the prevention, correction or relief of a body deformity or deformities;

3. Using the words, terms, phrases or symbols, "Manufacturers of Prescription Bedding," "Prescription" or "RX," or any other words, terms, phrases or symbols of similar import or meaning as descriptive of stock mattresses or bedding products; or representing in any manner that stock mattresses have been specially designed and constructed to meet the requirements of a prescription by a member or members of the medical profession for the use of a particular individual;

4. Representing, directly or by implication, that the design and construction of their products have been approved by a practitioner or practitioners of medicine, osteopathy, orthopedics or chiropractic: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for the respondents to establish the fact of such representation;

5. Representing in any manner, directly or by implication that respondents' bedding has unique medical, orthopedic, osteopathic, or chiropractic virtues: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish the facts in such representation or representations;

6. Furnishing or otherwise placing in the hands of dealers in or retailers of respondents' products the means and instrumentalities by and through which such dealers or retailers may mislead or deceive the public in the manner or as to the things herein expressly prohibited; and

It is further ordered, That the charges in subparagraphs 5 and 6 of Paragraph Five and subparagraphs 5 and 6 of Paragraph Six of the complaint be, and hereby are, dismissed.

OPINION OF THE COMMISSION

APRIL 3, 1968

BY ELMAN, *Commissioner*:

This case comes before the Commission on cross appeals by respondents and complaint counsel from the examiner's initial decision sustaining some of the allegations of the complaint and dismissing others. The parties having waived oral argument, the case was submitted to the Commission on the record and briefs.

Respondents are a New York corporation, Surrey Sleep Products, Inc., and one of its officers, Sol Kitain. Surrey manufactures mattresses, sofa beds, and sleep chairs which it sells to retail furniture stores and decorators. Surrey maintains a showroom in Chicago, and solicits orders through salesmen and through catalogues which describe its various products. The complaint, which relates only to mattresses, charged respondents with engaging in unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act.

The charges in the complaint may be summarized as follows:

(1) That respondents falsely preticketed their mattresses with prices that exceeded those normally charged for them.

The examiner dismissed this charge, and complaint counsel has not appealed.

(2) That respondents falsely advertised that their mattresses were unconditionally guaranteed, when in fact the guarantees contained numerous conditions and limitations.

The examiner dismissed this charge, and complaint counsel has appealed.

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(3) That "for the purpose of inducing the purchase" of their mattresses, respondents made false and misleading representations in their "catalogs, brochures, labels, and other media with respect to the design, construction [and] approval" of their mattresses. As illustrative of respondents' deceptive representations, the complaint set out the following:

Made by the Manufacturers of Prescription Bedding.
Royal Prescription Bedding.
Prescription Bedding.
Culture Rest an Orthopedic Mattress.
Endorsed by Maryland Chiropractic Society.
Endorsed by Pennsylvania Chiropractic Society.
Custom Craft.
Custom Built Construction.
RX Royal "400." (Complaint, Par. Four.)

The examiner sustained these charges, and respondents have appealed from his findings and proposed order.

I

Respondents' main argument, urged repeatedly throughout the proceeding, is that the Commission lacks jurisdiction.

The complaint alleged, and the examiner found, that deceptive representations were made in regard to several brands of Surrey mattresses, among them Prescription Bedding, Custom Craft, Sano Pedic, and Rest-O-Pedic. Respondents argue that the record shows that only one brand of Surrey mattresses—Prescription Bedding¹—was sold in interstate commerce, and that the Commission lacks jurisdiction over representations regarding Surrey's other brands of mattresses that were not sold in interstate commerce. And as to Prescription Bedding, respondents argue that the Commission lacks jurisdiction because the volume of sales in interstate commerce was only about \$5,000 annually (RX 1A-B), an amount which they characterize as *de minimis*.

The record shows the following: Complaint counsel introduced no evidence of any sales in commerce, and instead relied on respondents' admission that Surrey's catalogues were disseminated in interstate commerce. The catalogues contain advertising for all of Surrey's mattresses and include reproductions of the labels used on the various brands (CX 1). Respondent Sol Kitain testified that although various types of mattresses were advertised in Surrey's catalogues (as well

¹ Surrey markets a mattress labeled Royal Prescription Bedding, which is the same as Prescription Bedding, but with blue instead of brown ticking (Tr. 54). According to the record, Royal Prescription Bedding was also sold in interstate commerce (Tr. 166-68). We shall use the term Prescription Bedding to refer to both brands, since the charges relating to them are the same.

as sofa beds and sleep chairs, which are not involved in this proceeding), the only mattresses sold outside the State of New York were those labeled Prescription Bedding. He emphatically denied that any other Surrey mattresses were sold in commerce² (Tr. 187-88; RX 1A-B). Only one out-of-State customer was called as a witness and his testimony corroborated Mr. Kitain's (Tr. 166-68).

Respondents' contention as to Prescription Bedding that \$5,000 of interstate sales is *de minimis* is clearly without merit, and requires no further discussion.³ Their further contention that proof of sales in interstate commerce is a jurisdictional prerequisite is also erroneous, and misconceives the nature of both the Commission's jurisdiction and the charges in the complaint.

The relevant fact overlooked by respondents is that the complaint relates not only to the sale of Surrey mattresses but also to Surrey's advertising. As noted above, the complaint charged respondents with making misrepresentations "in catalogs, brochures, labels, and other media" (Complaint, Par. Four). Since the catalogues and brochures (CX 1-4) containing the alleged misrepresentations were admittedly sent to dealers in various States (Tr. 32-40, testimony of Mr. Kitain), it is irrelevant whether respondents did or did not succeed in selling their mattresses to out-of-State customers. Since the challenged representations appear in Surrey's interstate advertising, such acts and practices are clearly subject to the Commission's jurisdiction.

This is not a new question. It was fully considered by the Commission in *S. Klein Dept. Stores, Inc.*, Docket No. 7891. The complaint in that matter related solely to advertisements disseminated in interstate commerce. It contained no specific allegations that any sales were made to out-of-State customers or that the purpose of the advertisements was to induce interstate sales. In an interlocutory ruling dealing expressly with the jurisdictional question, the Commission held that:

* * * interstate disseminations of advertisements * * * constitute "methods of competition in commerce" and "acts or practices in commerce" within the pur-

² According to Mr. Kitain's testimony, the high cost of shipping mattresses generally limits their sale to an area near the place of manufacture. Surrey's Prescription Bedding, which is assertedly of high quality, is an exception to this rule (Tr. 19-21).

³ *Safeway Stores, Inc. v. F.T.C.*, 366 F. 2d 795, 798 (9th Cir. 1966):

"We have recently held that only \$3,086.31 in interstate purchases was sufficient to sustain the jurisdiction of the NLRB over a local cemetery association. *NLRB v. Inglewood Park Cemetery Ass'n*, 355 F. 2d 448 (9th Cir. 1966). In that case we quoted the Seventh Circuit's response to an argument of *de minimis*, 'The time has not yet arrived when \$2,000 is but a trifle.' *NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (7th Cir. 1962). * * * The provisions of the respective statutes granting jurisdiction to the NLRB and the FTC are not identical. The labor statute probably is intended to be more extensive, but the question as to what is '*de minimis*' should not call for different answers."

view or coverage of Section 5(a)(1) of the Federal Trade Commission Act. The jurisdiction alleged thus rests solely on the interstate disseminations alleged.

Conclusions that the statute's coverage so extends have sound basis in law and public policy. The Act's specified targets are unfair or deceptive activities which are in commerce. It is well established that commerce among the states is not confined to transportation, but comprehends all commercial intercourse between different states and all component parts of such intercourse.⁴

Thus, under the established precedent of the *S. Klein* case, there is no question that the Commission has jurisdiction over unfair or deceptive advertising in interstate commerce, and it is not necessary to allege or prove that the advertisements resulted in interstate sales.⁵ While *S. Klein* settles the legal question of jurisdiction, it leaves open other and perhaps more difficult questions in particular cases as to whether the Commission should exercise jurisdiction and whether it is in the public interest to initiate a proceeding.

II

We need not dwell long on the substantive charges relating to the design, construction, and approval of respondents' mattresses. Upon consideration of the record, the Commission has concluded that the allegations of the complaint in such regard should be dismissed. In view of this determination, it would serve no useful purpose to review here the evidence in the record bearing on these charges.

III

We turn now to complaint counsel's appeal from the examiner's dismissal of the charge that respondents deceptively advertised their

⁴ 57 F.T.C. 1544. Part of the Commission's opinion in that appeal is incorrectly printed in the Federal Trade Commission Decisions. Correctly, the carry-over paragraph on pp. 1543-44 of volume 57 should read:

"Section 5(a)(1) of the Federal Trade Commission Act declares unlawful unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, and Section 5(a)(6) empowers and directs the Commission to prevent their use. Section 4 of the Act defines commerce as meaning 'commerce among the several States * * *.' Counsel for respondent and counsel supporting the complaint join in contending that the hearing examiner erred in concluding that paragraph three implicitly included a charge that the challenged advertising was disseminated to induce interstate sales. We agree with counsel. The correct construction of that charge is that interstate disseminations of advertisements for inducing purchases of merchandise constitute 'methods of competition in commerce' and 'acts or practices in commerce' within the purview or coverage of Section 5(a)(1) of the Federal Trade Commission Act. The jurisdiction alleged thus rests solely on the interstate disseminations alleged." [Footnote omitted.]

The complaint was later dismissed by the Commission, without opinion (60 F.T.C. 388); but such dismissal did not, and was not intended to, overrule the prior ruling on jurisdiction.

⁵ See also *Bankers Securities Corp.*, 57 F.T.C. 1219, 1225, aff'd 297 F. 2d 403 (3d Cir. 1961), citing *S. Klein* as an alternative ground for jurisdiction.

guarantees. The facts concerning the guarantees are undisputed. Surrey's guarantee certificates are all identical except for the number of years, which differs among Surrey's brands. The guarantee certificate for Prescription Bedding reads:

We Guarantee to the purchaser of a set of Prescription Bedding, that the construction is free from defects in materials and workmanship.

We Further Agree to replace without charge for 20 years from date of purchase, any Prescription mattress returned to our factory and found to be defective.

This Guarantee does not extend to cover fire or water damage, soiling, accident or misapplication. (CX 26.)

The guarantee certificate is enclosed in the carton in which the mattress is wrapped, so a customer does not see it until after he has purchased and unwrapped the mattress. Prior to purchase, the customer's only knowledge of the terms of the guarantee comes from Surrey's description in its catalogues and on the mattress cartons. In Surrey's catalogue, the guarantee is described as follows:

It offers you the protection of a full 20 year written Unconditional Guarantee. (CX 2.)^o

And the label on the carton of Prescription Bedding states:

Factory guarantee for 20 years in writing against structural defects. (CX 12, 15, 16, 17, 21.)

Complaint counsel alleges that these descriptions of Surrey's guarantee are deceptive because they fail to disclose two material limitations that are stated in the guarantee certificate: (1) that a claimant under the guarantee must return the mattress to Surrey's factory at his own expense and (2) that the mattress is not guaranteed against wear or use, but only against defects in materials and workmanship.

The sole evidence of Surrey's performance of its guarantee was the testimony of respondent Kitain who stated that despite the limitations in the guarantee certificate, Surrey, in fact, honored its guarantees as if they were unconditional. He stated unequivocally that Surrey would replace any mattress, regardless of the nature of the customer's complaint, and that Surrey did not require the customer to return the mattress to its factory, but would replace a mattress at its expense whenever a customer lodged a complaint with the dealer from whom he had bought it (Tr. 228-29).

^o In addition to the quoted description of the guarantee, Surrey's catalogues include a facsimile of the guarantee certificate. However, this print is too small to be easily read.

On the basis of the testimony that Surrey did not enforce the limitations stated in the guarantee certificate, the examiner concluded that the description of the guarantees was not deceptive and he dismissed that charge in the complaint.

We disagree. The issue here is essentially the same as that involved in *Montgomery Ward & Co. v. F.T.C.*, 379 F. 2d 666 (7th Cir. 1967), where the court of appeals held that a respondent charged with deceptive advertising of a guarantee cannot defend on the ground that it honors the advertised guarantee and does not enforce the more restrictive terms of the guarantee certificate. The examiner distinguished the two cases on the ground that Montgomery Ward sells its merchandise directly to the ultimate consumer, while Surrey sells its products through dealers. (Finding 35.) The Commission does not agree that this distinction calls for a different holding. Although Surrey's mattresses are sold through dealers, the dealers play no part in the guarantee aspect of the transaction. It is Surrey, not the dealer, that makes the guarantee, supplies the certificate and the cartons bearing the description of its terms, and it is Surrey on whom the purchaser must rely for its performance. The reasoning in *Montgomery Ward* is equally applicable to this case. As stated by the court:

Assuming Wards has a policy of honoring guarantees as advertised, the issue is yet not one of performance, but one of advertising, of what a prospective purchaser is likely to think on the basis of advertising alone. The delivery of limiting guarantee certificates with the product purchased might mislead customers notwithstanding Wards' policy. Given such a certificate, customers are not likely to ignore its limitations when seeking satisfaction under its guarantee, particularly in view of the certificate language, "the obligations assumed under this warranty are in lieu of all warranties express or implied." (At 670-71.)

Accordingly, the Commission holds that the examiner erred in dismissing this charge, and we shall enter an order prohibiting respondents from making representations concerning Surrey's guarantees that do not disclose all of the conditions and limitations contained in the guarantee certificate.

IV

Respondents also request that the complaint be dismissed as to respondent, Sol Kitain, in his individual capacity, but cite no persuasive reasons therefor. The record shows that Mr. Kitain "has complete charge" of Surrey Sleep Products, Inc." and that "he formulates policy" (Finding 1). Accordingly, the request is denied.

In sum, we are granting both complaint counsel's appeal and respondents' appeal except as it relates to dismissing the complaint against the individual respondent. Accordingly, we are dismissing all charges in the complaint, except those relating to respondents' guarantees. The findings and conclusions of the hearing examiner, to the extent that they conflict with this opinion, are rejected, and the hearing examiner's order is set aside. An appropriate order will be entered.

FINAL ORDER

This matter has been considered by the Commission on the cross-appeals of complaint counsel and respondents from the hearing examiner's initial decision. The Commission has rendered its decision granting respondents' appeal except as it relates to dismissing the complaint against the individual respondent, granting complaint counsel's appeal, and adopting the findings of the hearing examiner to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be set aside, and the following order should be issued in its place. Accordingly,

It is ordered, That respondents Surrey Sleep Products, Inc., a corporation, and its officers, and Sol Kitain, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of mattresses, box springs or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that their products are guaranteed unless all of the terms and conditions of the guarantee, including its nature and extent, the name and address of the guarantor, and the manner in which the guarantor will perform thereunder, are clearly and conspicuously disclosed in immediate conjunction therewith.

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 of their compliance with this order.

Complaint

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IN THE MATTER OF

TOBIAS, FISCHER & CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1317. Complaint, April 3, 1968—Decision, April 3, 1968

Consent order requiring a New York City corporation which auctions merchandise to cease falsely advertising, deceptively invoicing, and misbranding its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Tobias, Fischer & Co., Inc., a corporation, and Charles H. Tobias, individually and as an officer of said corporation, and Jack C. Stein, individually and as fur adviser to Tobias, Fischer & Co., Inc., a corporation, and Charles H. Tobias, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Tobias, Fischer & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Charles H. Tobias is the sole officer of the corporation, and respondent Jack C. Stein is fur adviser to the corporation and Charles H. Tobias.

Respondent Tobias, Fischer & Co., Inc., is an auctioneer of all types of merchandise including fur products. Charles H. Tobias controls, formulates and directs the acts, practices and policies of the corporation and acts under the advice of Jack C. Stein in marketing fur products. The office and principal place of business of the respondents is 6 East 46th Street, New York, New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and