

instrument of indebtedness executed by a purchaser, and with such conspicuousness and clarity as is likely to be observed and read by such purchaser, that:

Any such instrument, at respondents' option and without notice to the purchaser, may be discounted, negotiated or assigned to a finance company or other third party to which the purchaser will thereafter be indebted and against which the purchaser's claims or defenses may not be available.

8. Failing to clearly and fully reveal, disclose and inform customers of all terms and conditions of a sale and of any installment contract or promissory note or other instrument to be signed by any customer.

9. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That after the acceptance of the initial report of compliance, respondents shall submit a report to the Commission once every year during the next three years describing all complaints respecting unauthorized representations, all complaints received from customers respecting representations by salesmen which are claimed to have been deceptive, the facts uncovered by respondents in their investigation thereof and the action taken by respondents with respect to each such complaint.

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.

IN THE MATTER OF

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.

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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.

