

Complaint

IN THE MATTER OF
CHRISTIAN BROKERAGE COMPANY ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (C) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCTOBER 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5643. Complaint, Mar. 2, 1949—Decision, Sept. 8, 1952

Where a corporation and three individuals, officers and stockholders thereof, engaged (1) as brokers, and (2) as buyers for their own account, in the business of buying, selling and distributing flour, sugar, dried and canned fruits, canned vegetables and fish, and other miscellaneous food products; In the second phase of their said business, in connection with which they transmitted their own purchase orders for food products directly to the sellers, and the sellers invoiced and shipped said products directly to them for their own account, they assumed all risks incident to ownership, stored the products in their own warehouse, insured them, and invoiced them to their customers in their own name at prices and on terms determined by them, with resulting profit or loss—

Received and accepted, directly or indirectly, brokerage fees and other compensation in lieu thereof from the sellers from whom they purchased such food products in commerce for their own account and for resale:

Held, That such receipt and acceptance of brokerage fees or other compensation in lieu thereof from sellers on purchases of food products in commerce for their own account and for resale were in violation of Section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. C. G. Miles and Mr. Edward S. Ragsdale for the Commission.
Mr. John Ackbar Darsey, of Atlanta, Ga., for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, have violated and are now violating the provisions of subsection (c) of section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Christian Brokerage Company, is a corporation organized and existing under the laws of the State of Georgia with its principal office and place of business located at 185 Spring Street, S. W., Atlanta, Georgia. The respondent corporation is now engaged, and for a substantial period of time since June 19, 1936, has

engaged in the business of buying, selling and distributing, flour, sugar, dried fruits, canned vegetables, canned fruits, canned fish, and other miscellaneous food commodities, all of which are hereinafter designated as food products. The stock in respondent corporation is wholly owned by respondent Gilmer A. Christian, Sr., and his wife, Mrs. Ann Mae Christian and their four sons, namely, respondent Gilmer A. Christian, Jr., respondent Bobby H. Christian, Jerry B. Christian and Wayne Christian.

PAR. 2. Respondent Gilmer A. Christian, Sr., is an individual residing at 3908 Tuxedo Road, N. W., Atlanta, Georgia. The respondent for a substantial period of time since June 19, 1936, has been engaged directly or indirectly with several firms and in various capacities in the purchase, sale and distribution of food products. For a period of time prior to June 19, 1936, he was an officer and active in the operation of Webb-Crawford Company of Athens, Georgia, and also since June 19, 1936, has owned and operated individually for a number of years a wholesale and retail grocery business which was conducted under the name and style of Athens Grocery Company of Athens, Georgia, which business and assets respondent transferred during 1940 to the name of his wife, Ann Mae (Mrs. Gilmer A.) Christian. The respondent in 1936 organized and conducted a mercantile brokerage business under the trade name of Christian Brokerage Company, with its principal office and place of business located in Atlanta, Georgia. This business was succeeded on June 5th, 1947, by a firm bearing the corporate name of Christian Brokerage Company, one of the respondents herein, of which corporation said respondent Gilmer A. Christian, Sr., is one of the principal stockholders and President of said respondent corporation. After becoming an officer, and at the present time and for some time past as President, respondent Gilmer A. Christian, Sr., has exercised and still exercises a substantial degree of authority and control over the business conducted by said corporation, including the direction of its purchasing, distribution and sales policies.

PAR. 3. Respondent Gilmer A. Christian, Jr., is an individual residing at 1206 Peachtree Street, N. E., Atlanta, Georgia, and is one of the principal stockholders and Vice President of respondent corporation Christian Brokerage Company. Prior to being elected to his present office he was associated in business with his father, respondent Gilmer A. Christian, Sr., who during such period of time owned and operated Christian Brokerage Company (not incorporated). After becoming an officer of respondent corporation and at the present time, and for some time past as Vice President of the respondent corporation, respondent Gilmer A. Christian, Jr., has exercised and still exercises a substantial degree of authority and

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control over the business conducted by said Company, including the direction of its purchasing, distribution and sales policies.

PAR. 4. Respondent Bobby H. Christian is an individual residing at 3908 Tuxedo Road, N. W., Atlanta, Georgia. Respondent is one of the principal stockholders and is secretary and treasurer of respondent corporation, Christian Brokerage Company. Prior to being elected to his present office he was associated in business with his father, respondent Gilmer A. Christian, Sr., who during such period of time owned and operated Christian Brokerage Company (not incorporated). After becoming an officer of respondent corporation, and at the present time, and for some time past as Secretary and Treasurer, respondent Bobby H. Christian has exercised and still exercises a substantial degree of authority and control over the business conducted by said Company, including the direction of its purchasing, distribution and sales policies.

PAR. 5. The corporate and individual respondents named in the caption hereof, and each of them, through said corporate respondent, for a substantial period since June 19, 1936, have been engaged, and are now engaged in the business of buying, selling and distributing food products by two separate and distinct methods, namely, and principally (1) as brokers, which is not challenged by the complaint herein, and (2) as buyers, for their own account who receive and accept brokerage payments on purchases made for their own account which is challenged by the complaint herein.

First: Respondent's principal business, as "Brokers" of food products may be described as follows:

Respondents, in such capacity, act as sales agents negotiating the sale of food products for and on account of seller-principals and respondents' only compensation for such services is a commission or brokerage fee paid by such seller-principals. The respondents solicit and obtain orders for such food products at the respective seller-principal's prices and on such seller-principal's terms of sale. Respondents, as brokers, transmit purchase orders to their several seller-principals who thereafter generally invoice and ship such food products directly to their customers and collect the purchase price from such customers.

Respondents, as brokers of food products, have no financial interest in the food products they sell. Their only financial interest is the commission or brokerage fee they receive and accept from their seller-principals for making the sale. Such commission or brokerage fees are customarily based on a percentage of invoice sales price of food products sold. The respondents, in this capacity, are brokers and not traders for profit. Respondents do not take title to, or have

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any financial interests in, the food products sold, and neither make a profit nor suffer a loss on the transaction. This phase of respondents' business is not challenged by the complaint.

Second: Respondents' business as buyers of food products, which is challenged by the complaint herein, is described as follows: Respondents transmit their own purchase orders for food products directly to the various sellers from whom they buy. Such sellers invoice and ship such food products directly to respondents, for respondents' account, and respondents receive and accept, directly or indirectly, from the respective sellers from whom they purchase such food products for their own account, brokerage fees, commissions, or other compensation or allowances or discounts in lieu thereof.

The respondents, in connection with such purchases, are direct buyers and, as such, are traders for profit, purchasing and reselling such food products for their own account, at their own prices and on their own terms, taking title thereto, and assuming all the risks incident to ownership. The respondents, upon receipt of such food products from the various sellers, warehouse such products in their own warehouse and insure said food products at their own expense and in their own name and for their own account against contingent loss or damage.

When the respondents sell such food products, they invoice the products to their customers in respondents' own name and for their own account and at prices and on terms they determine, either receiving a profit or accepting a loss thereon, as the case may be.

The respondents sell their food products to numerous buyers located principally in the State of Georgia. Such buyers are usually wholesalers and chain stores. Representative of respondents' buyers is the Athens Grocery Company, of Athens, Georgia. The respondents also sell substantial amounts of food products to buyers located in States other than the State of Georgia.

PAR. 6. Respondents, and each of them, have for a substantial period of time since June 19, 1936, made, and are now making, numerous and substantial purchases of food products from sellers located in States other than the State of Georgia, where respondents are located, and pursuant to which purchases such food products were and are shipped and transported in commerce by the various sellers thereof from the respective States in which they are located across State lines either to respondents or pursuant to respondents' instructions and directions to the respective purchasers to whom such products were and are sold by respondents. Respondents and each of them also sold, distributed and transported and continue to sell, distribute and transport a sub-

stantial quantity of food products in commerce to customers outside of the State in which said respondents are located.

PAR. 7. Respondents, and each of them for a substantial period of time since June 19, 1936, in connection with the purchase and sale of food products in commerce as hereinabove alleged and described, have received and accepted, and are now receiving and accepting, directly or indirectly, commissions, brokerage fees or other compensation or allowances or discounts in lieu thereof from the various sellers from whom they purchase food products in commerce for their own account and for resale in the manner and under the circumstances set out in the "second" or last part of paragraph five above."

PAR. 8. The foregoing acts and practices of the respondents and each of them in receiving and accepting commissions, brokerage or other compensations or allowances or discounts in lieu thereof from each of the various sellers in connection with their purchase of food products in commerce are in violation of subsection (c) of the Clayton Act as amended.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid Act, the Federal Trade Commission, on March 2, 1949, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging each of them with violation of the provisions of subsection (c) of section 2 of the aforesaid Clayton Act, as amended. After denial by the Commission of respondents' motion to dismiss the complaint, respondents filed their answer admitting all of the material allegations of the complaint and waiving all intervening procedure. The Commission having served upon the respondents its tentative decision herein, together with leave to show cause why such tentative decision should not be entered as its final decision, and the Commission, having denied respondents' motion for revision of said tentative decision, this proceeding regularly came on for final consideration before the Commission upon the aforesaid complaint and respondents' answer thereto; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Christian Brokerage Company is a corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business located at 185 Spring Street SW., Atlanta, Georgia. The respondent corporation is now engaged, and since June 5, 1947, has been engaged, in the business of buying, selling and distributing flour, sugar, dried fruits, canned vegetables, canned fruits, canned fish, and other miscellaneous food commodities, all of which are hereinafter designated as food products. The stock in respondent corporation is wholly owned by respondent Gilmer A. Christian, Sr., his wife, Mrs. Ann Mae Christian, and their four sons, namely, respondent Gilmer A. Christian, Jr., respondent Bobby H. Christian, Jerry B. Christian and Wayne Christian.

Respondent Gilmer A. Christian, Sr., is an individual residing at 3908 Tuxedo Road, N. W., Atlanta, Georgia. This respondent for many years has been engaged, in various capacities, in the purchase, sale, and distribution of food products. For a number of years immediately prior to 1940, this respondent owned and operated as an individual a wholesale and retail grocery business under the name and style of Athens Grocery Company, of Athens, Georgia, which business and assets he transferred during 1940 to the name of his wife, Ann Mae (Mrs. Gilmer A.) Christian. This respondent in 1936 organized and conducted a mercantile brokerage business under the trade name of Christian Brokerage Company, with its principal office and place of business located in Atlanta, Georgia. This business was conducted by said respondent in his individual capacity until June 5, 1947, at which time said business was transferred to the corporate respondent herein, Christian Brokerage Company. Respondent Gilmer A. Christian, Sr., is one of the principal stockholders and president of said respondent corporation. As president of respondent corporation, respondent Gilmer A. Christian, Sr., has exercised and now exercises a substantial degree of authority and control over the direction of the purchasing, distribution and sales policies of respondent corporation.

Respondent Gilmer A. Christian, Jr., an individual residing at 1206 Peachtree Street, N. E., Atlanta, Georgia, is one of the principal stockholders and vice president of respondent corporation, Christian Brokerage Company. Respondent Bobby H. Christian, an individual residing at 3908 Tuxedo Road, N. W., Atlanta, Georgia, is one of the principal stockholders and is secretary and treasurer of respondent corporation, Christian Brokerage Company. Prior to their present positions, both respondent Gilmer A. Christian, Jr., and respondent

Bobby H. Christian were associated in business with their father, respondent Gilmer A. Christian, Sr., who during such period of time owned and operated Christian Brokerage Company (not incorporated). In their capacities as officers of respondent corporation, both respondent Gilmer A. Christian, Jr., and respondent Bobby H. Christian for several years last past have exercised and now exercise a substantial degree of authority and control over the direction of the purchasing, distribution and sales policies of respondent corporation.

PAR. 2. Respondents for a substantial period of time have been and are now engaged in the business of buying, selling and distributing food products. Prior to the issuance of the complaint herein, respondents carried on their said business by two separate and distinct methods, namely, (1) as brokers, and (2) as buyers for their own account, upon which purchases they received and accepted brokerage fees and other compensation in lieu thereof. The complaint herein does not challenge any of respondents' practices in their capacities as brokers but does allege that their practice of receiving and accepting brokerage fees and other compensation in lieu thereof upon purchases for their own account is illegal.

PAR. 3. In connection with the respondents' business of buying for their own account as above described, they have made numerous and substantial purchases of food products from sellers located in States other than the State of Georgia, where respondents are located. The food products so purchased were shipped and transported in commerce by the various sellers thereof from the respective States in which they are located across State lines either to respondents or pursuant to respondents' instructions and directions to the respective purchasers to whom such products had been resold by respondents. Respondents also distributed and transported a substantial quantity of food products from their place of business in the State of Georgia in commerce to their customers located in other States of the United States.

PAR. 4. Respondents, for a substantial period of time immediately prior to the date of the issuance of the complaint herein, in connection with the purchase and sale of food products in commerce as hereinabove described, have received and accepted, directly or indirectly, commissions, brokerage fees or other compensation or allowances or discounts in lieu thereof from the various sellers from whom they purchased food products in commerce for their own account and for resale in the manner and under the circumstances set out as follows:

Respondents transmitted their own purchase orders for food products directly to the various sellers from whom they bought. Such sellers invoiced and shipped such food products directly to respond-

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ents, for respondents' account, and respondents received and accepted, directly or indirectly, from the respective sellers from whom they purchased such food products for their own account, brokerage fees, commissions, or other compensation or allowances or discounts in lieu thereof.

The respondents, in connection with such purchases, were direct buyers and, as such, were traders for profit, purchasing and reselling such food products for their own account, at their own prices and on their own terms, taking title thereto, and assuming all the risks incident to ownership. The respondents, upon receipt of such food products from the various sellers, warehoused said products in their own warehouse and insured said products at their own expense and in their own name and for their own account against contingent loss or damage.

When the respondents sold such food products, they invoiced the products to their customers in respondents' own name and for their own account and at prices and on terms they determined, either receiving a profit or accepting a loss thereon, as the case might be.

The respondents sold their food products to numerous buyers located principally in the State of Georgia. Such buyers were usually wholesalers and chain stores. Representative of respondents' buyers was the Athens Grocery Company, of Athens, Georgia. The respondents also sold substantial amounts of food products to buyers located in States other than the State of Georgia.

CONCLUSION

The acts and practices of respondents in receiving or accepting commissions, brokerage fees or other compensation or allowance or discounts in lieu thereof from sellers from whom they purchased food products in commerce for their own account and for resale, in the manner and under the circumstances hereinabove found, were in violation of subsection (c) of section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and respondents' answer admitting all of the material allegations of fact therein and waiving all intervening procedure, and the Commission having made

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its findings as to the facts and its conclusion that the respondents have violated the provisions of subsection (c) of section 2 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act):

It is ordered, That respondent Christian Brokerage Company, a corporation, and its officers, and the individual respondents Gilmer A. Christian, Sr., Gilmer A. Christian, Jr., and Bobby H. Christian and the representatives, agents and employees of each of the respondents respectively, directly or through any corporate or other device, in connection with the purchase of food products or other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase made for their own account.

It is further ordered, That the respondents 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
INTERNATIONAL PUBLISHERS SERVICE ET AL.

COMPLAINT, SETTLEMENT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 6006. Complaint, June 30, 1952—Decision, Sept. 9, 1952

Where a corporation and its president engaged in the magazine subscription business, who were charged under contracts with publishers or distributors of magazines with the obligation of forwarding to the latter subscriptions secured by their agents and the amount due—

- (a) Failed in many instances to forward subscriptions to publishers or distributors after obtaining full payment therefor;
- (b) Solicited and received subscriptions and payments therefor for magazines for which they had no authority to solicit;
- (c) Substituted magazines for those subscribed for without consent of the subscribers;
- (d) Solicited and received subscriptions and full payment therefor for magazines with full knowledge that delivery thereof either would not be made at all, or would be unreasonably delayed and intermittent;
- (e) Charged more than the regular subscription rate for magazines; and
- (f) Falsely represented, through statements by their representatives, that a survey was being conducted:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.

Mr. George M. Martin for the Commission.

Mr. Jesse M. Harris, of Washington, D. C., for respondents.

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 International Publishers Service, a corporation, and Ralph D. Slater, individually and as President of International Publishers Service, 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, International Publishers Service, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, and has its principal office and place of business at 707 South Broadway, Room 707, Los Angeles. Respondent Ralph D. Slater is President of the aforesaid corporation and has his principal office and place of business at the same address. Prior to the incorporation of International Publishers Service in December 1949 respondent Ralph D. Slater traded and was doing business under the name and style of International Publishers Service, with his principal office and place of business at the same address as that of corporate respondent. Acting individually and in his official capacity, respondent Ralph D. Slater directs and controls the policies, acts, practices and business affairs of said corporate respondent.

PAR. 2. Respondents are now, and have been for some time in the past, engaged in the magazine subscription business. Subscriptions are obtained by personal solicitation of agents or representatives employed by respondents in various States of the United States. When subscriptions are secured by said agents or representatives, they are transmitted by them, together with the payment therefor, from the states in which said agents or representatives are located to respondents at their place of business in the State of California. Under various contracts with publishers of magazines or the distributors thereof, as the case may be, respondents are charged with the obligation of forwarding said subscriptions with the amount due thereon to said publishers and distributors located in States other than the State of California, and except as hereinafter stated, comply with said obligations. In carrying on their said business as aforesaid, respondents engage in extensive commercial intercourse in commerce among and between the various states of the United States including the transmission and receipt of completed and uncompleted subscription forms, checks, letters, money orders, contracts and other instruments of a commercial nature.

PAR. 3. In the course and conduct of the business aforesaid, respondents have engaged in the following practices:

1. Failed in many instances to forward subscriptions to publishers or distributors of magazines after obtaining full payment therefor;
2. Solicited and received subscriptions and payment therefor for magazines for which they had no authority to solicit;
3. Substituted magazines for those subscribed for without obtaining prior consent of the subscribers;
4. Solicited and received subscriptions and full payment therefor for a magazine with full knowledge that delivery of said magazine

would either not be made at all, or if made, would be unreasonably delayed and then only intermittently;

5. Charged more for subscriptions for magazines than the regular subscription rate;

6. Represented through statements by its agents and representations that a survey was being conducted which was not the fact.

PAR. 4. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 30, 1952, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.
2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.
3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful,

¹The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on September 9, 1952 and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, International Publishers Service, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, and has its principal office and place of business at 707 South Broadway, Room 707, Los Angeles. Respondent Ralph D. Slater is President of the aforesaid corporation and has his principal office and place of business at the same address. Prior to the incorporation of International Publishers Service in December 1949 respondent Ralph D. Slater traded and was doing business under the name and style of International Publishers Service, with his principal office and place of business at the same address as that of corporate respondent. Acting individually and in his official capacity, respondent Ralph D. Slater directs and controls the policies, acts, practices and business affairs of said corporate respondent.

PAR. 2. Respondents are now, and have been for some time in the past, engaged in the magazine subscription business. Subscriptions are obtained by personal solicitation of agents or representatives employed by respondents in various States of the United States. When subscriptions are secured by said agents or representatives, they are transmitted by them, together with the payment therefor, from the States in which said agents or representatives are located to respondents at their place of business in the State of California. Under various contracts with publishers of magazines or the distributors thereof, as the case may be, respondents are charged with the obligation of forwarding said subscriptions with the amount due thereon to said publishers and distributors located in States other than the State of California, and except as hereinafter stated, comply with said obligations. In carrying on their said business as aforesaid, respondents engage in extensive commercial intercourse in commerce among and between the various States of the United States including the transmission and receipt of completed and uncompleted subscription forms, checks, letters, money orders, contracts and other instruments of a commercial nature.

PAR. 3. In the course and conduct of the business aforesaid, respondents have engaged in the following practices:

1. Failed in many instances to forward subscriptions to publishers or distributors of magazines after obtaining full payment therefor;

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2. Solicited and received subscriptions and payment therefor for magazines for which they had no authority to solicit;
3. Substituted magazines for those subscribed for without obtaining prior consent of the subscribers;
4. Solicited and received subscriptions and full payment therefor for a magazine with full knowledge that delivery of said magazine would either not be made at all, or if made, would be unreasonably delayed and then only intermittently;
5. Charged more for subscriptions for magazines than the regular subscription rate;
6. Represented through statements by its agents and representatives that a survey was being conducted which was not the fact.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent International Publishers Service, a corporation, its officers, and respondent Ralph D. Slater, individually and as an officer of International Publishers Service, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of magazines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to forward subscriptions for magazines to the publishers or distributors thereof after obtaining full payment for subscriptions from subscribers;
2. Soliciting and receiving subscriptions for magazines and payment therefor for which respondents have no authority to solicit;
3. Substituting magazines for those actually subscribed for by the subscriber without obtaining his prior consent;
4. Soliciting and receiving subscriptions and payment therefor for magazines knowing that delivery of said magazines will either not be made at all, or if made, will be unreasonably delayed and then delivered only intermittently;
5. Charging more for subscriptions for magazines than the established subscription rate;

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6. Representing, directly or by implication, that they are conducting or taking surveys.

It is further ordered, That respondents 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.

By (S) Jesse M. Harris,
JESSE M. HARRIS,
Counsel for Respondents.

Date: August 14th, 1952.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 9th day of September, 1952.

IN THE MATTER OF
THE NEW AMERICAN LIBRARY OF WORLD LITERATURE,
INC. ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5811. Complaint, Sept. 19, 1950—Decision, Sept. 19, 1952

The offering of a book for sale constitutes an implicit representation that the book contains the entire original text and that the title under which it is offered is the original title; and in the absence of a clear and conspicuous disclosure of the fact of abridgment or change of title, the offering of an abridged book or of an old book under a new title unquestionably has the capacity and tendency to deceive and mislead prospective purchasers.

In offering and selling abridgments of previously published books and books previously published under different titles, the use on covers of the phrase "A Special Edition" does not constitute adequate disclosure of the aforesaid facts since "special" is by no means synonymous with "abridged" or "condensed".

In the aforesaid connection two poor disclosures do not add up to one good one, and the fact that in addition to such disclosure as may have been made on the covers of books, there were further disclosures in small type on the copyright page, the title page, in the introduction, as a publisher's note or elsewhere, did not result in an adequate disclosure.

In the foregoing connection there can be no doubt that to prospective purchasers the titles of books are initially the subjects of greatest interest, and that even if nothing else on the cover is scanned, the title will be.

Where one of the leading corporate publishers of pocket-sized reprints of books, designated as "Signet" and "Mentor" to distinguish fiction and nonfiction, with annual sales of millions of copies, which were frequently published under changed titles, were marketed almost exclusively through a national distributor, and reached the public through bookstores, drugstores, newsstands, in railroad and bus stations, and otherwise; along with two officers thereof—

Failed adequately to disclose the facts concerning the abridgment and change of title of many of their books through such statements on the covers as "A Special Edition", and in small type, far removed from the new title, the words "original title" followed thereby, and through other small type disclosures inside the books;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such abridged books contained the complete original text, and that such newly titled books were new books, separate and different from the original publications from which they were copied:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices.

In giving consideration to the places in which disclosures necessary to avoid deception with respect to abridgment and change of title needed to be made in order to be adequate, and at the same time not to impose undue hardship upon respondents, the Commission considered that, while such disclosure, so far as averting deception was concerned, could be adequately made elsewhere than in immediate connection with the title, such a requirement would be at the expense of the respondents in distracting initial attention from the title; and was therefore of the opinion and found that such disclosures, in order to be adequate to avert deception of the public and not unduly burdensome to respondents, must be made on the front cover and on the title page in immediate connection with the title under which the book is offered for sale.

As respects the charge in the complaint that respondents, as alleged, falsely stated upon the covers of certain books that they were "Complete and Unabridged": the single instance thereof, due to accident or inadvertence, shown by the record, was not regarded as sufficient to support the allegation.

With respect to the further charge in the complaint that respondents had represented all their books as complete and unabridged by statements on book covers and on display stands: such representations were voluntarily abandoned by respondents under circumstances of such a nature that there was no present public interest in further considering them.

Before *Mr. William L. Pack*, hearing examiner.

Mr. John M. Russell and *Mr. William L. Pencke* for the Commission.
Freidin & Littauer, of New York City, for respondents.

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 The New American Library of World Literature, Inc., a corporation, Kurt Enoch, and Victor Weybright, individually and as officers of The New American Library of World Literature, Inc., a 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 The New American Library of World Literature, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York and respondents Kurt Enoch and Victor Weybright, individuals, are presi-

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dent and secretary, respectively, thereof. The individual respondents have dominant control of the advertising policies and business activities of the corporate respondent and all of the respondents have cooperated with each other and have acted in concert in doing the acts and things hereinafter alleged. Respondents' office and principal place of business is located at 245 Fifth Avenue, New York 16, New York.

PAR. 2. Respondents are now, and for more than two years last past have been, engaged in the business of selling and distributing books.

Respondents cause their said books when sold to be transported from their place of business in the State of New York to the purchasers thereof located in various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained a course of trade in their said books in commerce between and among the various States of the United States and in the District of Columbia. Respondents' volume of business in such commerce is substantial.

PAR. 3. Respondents obtain from the publishers or authors of certain published books, the right to sell reprints thereof, and in reprinting or having them reprinted in many cases delete or cause to be deleted substantial portions of the text, so that such reprints are abridged editions. Respondents' said reprints of fiction are designated "Signet" and of nonfiction, "Mentor" books. The books respondents sell are usually condensed from about 90,000 words to about 180,000 words in the originals thereof to about 60,000 to about 120,000 words more or less.

In the course and conduct of their aforesaid business in connection with the sale and distribution of their said books in commerce, and as an inducement for the purchase thereof by members of the purchasing public, respondents cause to be printed on the front covers of certain of their said books, the following phrase or others similar thereto:

Complete and Unabridged

although said books in fact are not complete and unabridged reprints of the original books from which they were copied. Others of respondents' abridged books contain no disclosure that they are abridged; and others thereof have no adequate disclosure that they are abridged although on their copyright or title pages or back covers in small and inconspicuous type appear statements of which the following is typical:

This edition of *Now I Lay Me Down to Sleep* has been abridged with the author's approval to make possible its production in this form.

On the front covers of a number of said books, there is printed the ambiguous and uninformative expressions "A Special Edition," and "The Heart of a Great Novel" which do not indicate or state said books are abridged. Respondents have also published and sold certain books with new titles, without adequately disclosing that said books have been previously published under other titles. Typical of this is their book, the new title of which is "Dark Encounter," which was published originally under the title "Maelstrom." Respondents supply to the sellers of their books in various States of the United States racks and stands for the display of their said books on which the words "Signet Books—Complete and Unabridged—Mentor Nonfiction Books" appear, thereby representing that all of their said books are complete reprints of the original books from which they were copies, whereas certain of them are only abridgements or parts thereof.

Respondents have also recently caused to be printed on the front covers of certain of their Signet Books the statement: "Signet Books Complete and Unabridged," thus representing that all of their said books are unabridged, whereas they are not.

PAR. 4. The said disclosures on the covers and on the copyright or title pages of respondents' said books, that they are abridged and of the titles of the original books from which they were copied, do not constitute adequate notice thereof, as they appear in small, inconspicuous type not noticeable to the average purchaser and, as stated, the original titles on the covers are not printed near the new titles thereof.

PAR. 5. Through the use of the phrase "Complete and Unabridged" on certain of their abridged books, respondents have represented directly and by implication that such books are in fact complete and unabridged. Through the use of the phrases "Signet Books Complete and Unabridged" and "Signet Books—Complete and Unabridged—Mentor Books" respondents have represented directly and by implication that all of their Signet and Mentor books are complete and unabridged. Through the use of new titles in place of the original titles for certain of their reprints, respondents have represented directly and by implication that the said books are separate and different from the books from which they were copied.

PAR. 6. The statements and representations used and disseminated by respondents in the manner above described are false, misleading and deceptive. In truth and in fact, certain of the books upon which the phrase "Complete and Unabridged" appears are not complete and unabridged; all of respondents' Signet and Mentor books are

not complete and unabridged; the books to which respondents have given new titles are not separate and different from the books from which they are copied. The failure of respondents to disclose adequately that certain of their books are abridged has the tendency and capacity to induce the erroneous belief that said books are in fact complete and unabridged.

PAR. 7. The use by the respondent of the aforementioned false, misleading and deceptive statements and representations disseminated as aforesaid and their failure to disclose the true nature of certain of their books as abridgements has had, and now has the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of said representations are true and that books not stated to be abridgements are complete and induces a substantial portion of the purchasing public, because of said erroneous and mistaken belief, to purchase respondents' abridged books in said commerce.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 19, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, oral arguments of counsel and proposed findings as to the facts and conclusions presented by counsel, and said hearing examiner, on April 16, 1951, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, counsel for respondents filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came

on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal and oral arguments of counsel; and the Commission, having issued its order granting said appeal in part and denying it in part and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent The New American Library of World Literature, Inc., hereinafter sometimes referred to as the corporate respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with an office and principal place of business located at 501 Madison Avenue, City and State of New York. Respondent Kurt Enoch is president, treasurer and general manager of the said corporation. Respondent Victor Weybright is chairman of the board of directors and secretary of the said corporation and is also its editor-in-chief. The two individual respondents jointly formulate the policies of the corporation and direct and control its operation and practices.

PAR. 2. Respondents are now, and have been for more than two years last past, engaged in the business of publishing and selling small books, commonly referred to as pocket-size books. The said books are printed and warehoused in Chicago, Illinois, and are shipped therefrom to purchasers located in various other states of the United States and in the District of Columbia. Respondents maintain and have maintained a course of trade in the said books in commerce among and between the various states of the United States and in the District of Columbia. Respondents' volume of business in such commerce is and has been substantial.

PAR. 3. Practically all of respondents' books are reprints of books which have theretofore been published by others, and include both fiction and non-fiction. The books of fiction and non-fiction are designated by respondents as "Signet" and "Mentor," respectively. Respondents obtain from the original publisher the right to reissue the book and then proceed to publish and sell it in a small or pocket-size volume. The books are marketed by respondents almost exclusively through a national distributor and eventually reach the public through book stores, drug stores, newsstands in railroad and bus stations and otherwise. Respondents are one of the leading publishers of pocket-size books, with annual sales of many millions of copies.

PAR. 4. Since the latter part of 1947 a substantial percentage of the books published by respondents have been abridged. In 1948, 1949 and 1950 the percentages of abridgements were approximately 10%, 22% and 27%, respectively. The extent of the abridgement has varied from "5.5% or less" to 66 $\frac{2}{3}$ %. Out of forty-eight abridgements published by respondents in the years 1947-1950 (both inclusive), thirty-four were abridged from 20% to 66 $\frac{2}{3}$ %.

PAR. 5. While the original titles of the books reprinted by respondents have usually been retained, they have been not infrequently changed by respondents. These changes have been made in cases where respondents felt that the original title was lacking in popular appeal or failed to indicate correctly the type or subject matter of the book.

PAR. 6. The offering of a book for sale constitutes an implicit representation that the book contains the entire original text and that the title under which it is offered is the original title. In the absence of a clear and conspicuous disclosure of the fact of abridgement or change of title, the offering of an abridged book or of an old book under a new title unquestionably has the capacity and tendency to deceive and mislead prospective purchasers.

PAR. 7. In offering for sale and selling books which are in fact abridgements and books which have been previously published under different titles, respondents have in numerous instances failed to disclose adequately the facts of abridgement and change of title. For example, on the covers of many of their abridged books, respondents have placed the words "A Special Edition" which, they claim, was intended to signal to the reader that the book was unique in some way and that further information was contained inside the book. "Special" is by no means synonymous with "abridged" or "condensed."

In other instances, the respondents' efforts have been somewhat more frank. For example, a statement "Original Title: Horseshoe Combine" appeared on the cover of one of the exhibits on a narrow stripe of contrasting color. This statement was, however, removed about as far as possible from the new title "Gunsmoke," and in much smaller type. In immediate connection with the title on a broader stripe of the same contrasting color appeared the words "Six-Guns Settle a Range War."

In addition to such disclosure as was made on the covers of respondents' books, there was almost without exception a further disclosure inside the books on the copyright page, the title page, in the introduction, as a publisher's note or elsewhere, in small type. Such a disclosure was wholly inadequate by itself and its combination with another inadequate disclosure on the cover did not result in an

adequate disclosure; two poor disclosures do not add up to one good one.

It is apparent that the most conspicuous words on the covers of respondents' books are the titles. The titles are plainly intended to catch the eye, and there can be no doubt that to prospective purchasers they are initially the subjects of the greatest interest; even if nothing else on the cover is scanned, the title will be.

The Commission is of the opinion, and finds, that respondents have not disclosed adequately the facts concerning the abridgement and change of title of many of their books, and that the offering of said books for sale has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such abridged books contained the complete original text, and that such newly titled books were new books, separate and different from the original publications from which they were copied.

PAR. 8. The Commission has given consideration to the places in which the disclosures necessary to avoid deception with respect to abridgement and change of title must be made in order to be adequate, and at the same time not to impose undue hardship upon respondents. It may be that those disclosures could be made adequately, so far as averting deception is concerned, elsewhere than in immediate connection with the title, but this would be at the expense of the respondents in distracting initial attention from the title. Therefore, the Commission is of the opinion, and finds, that these disclosures, in order to be adequate to avert deception of the public and not unduly burdensome to respondents, must be made on the front cover and on the title page in immediate connection with the title under which the book is offered for sale.

CONCLUSION

(a) The acts and practices of respondents, as hereinabove found, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

(b) The complaint alleged that respondents had falsely stated upon the covers of certain books that such books were "Complete and Unabridged." The single instance of this, due to accident or inadvertence, which was shown by the record, is not regarded as sufficient to support this allegation.

(c) The complaint further alleged that respondents had represented all their books to be complete and unabridged by statements on book covers and on display stands. The representations in question were

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voluntarily abandoned by respondents under circumstances of such a nature that there is no present public interest in further considering them.

ORDER

It is ordered, That the respondent, The New American Library of World Literature, Inc., a corporation, and its officers, and the respondents, Kurt Enoch and Victor Weybright, individually and as officers of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgement," "condensed" or "condensation" appears upon the front cover and upon the title page thereof in immediate connection with the title and in clear, conspicuous type.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless, upon the front cover and upon the title page thereof, such substitute title is immediately accompanied, in clear, conspicuous type, by a statement which reveals the original title of the book and that it has been published previously thereunder.

It is further ordered, That the charges of the complaint hereinbefore referred to and considered in paragraphs (b) and (c) of the Conclusion be, and the same hereby are, dismissed without prejudice to the right of the Commission to take such further or other action in the future as may be warranted by the then existing circumstances.

It is further ordered, That the respondents, The New American Library of World Literature, Inc., Kurt Enoch and Victor Weybright, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Commissioner Carretta not participating for the reason that oral argument on respondents' appeal from the initial decision of the hearing examiner was heard prior to his appointment to the Commission.

Syllabus

IN THE MATTER OF
NUCLEAR PRODUCTS COMPANY

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5949. Complaint, Jan. 24, 1952—Decision, Sept. 20, 1952

It is essential, in connection with the offer and sale of devices which contain a potentially dangerous radioactive ingredient, and which are not only useful to adults but interesting and attractive to children, and the dismantling or careless use of which might result in serious injury, that such devices carry a conspicuous and adequate warning notice.

Where a corporation engaged in the manufacture and interstate sale and distribution of two devices which contained radioactive polonium, its "Static-Master" brushes for the removal of static electricity, dust and lint from photographic film and other appliances and its "Static-Master" wands or probes, for use in connection with the teaching of physics and chemistry and in industry for the elimination of static and dust from instruments—

(a) Represented that polonium was harmless and that its devices could be used safely without any danger of harmful effects upon those who might use or handle them, through such typical statements in periodicals, circulars, and folders as "Static-Master instantly destroys static-surface attraction with polonium, a harmless by-product of the Uranium-Radium series";

The facts being that polonium is extremely dangerous if inhaled into the lungs or ingested, and the mere touching of polonium by the hands can result in contamination and spreading it into the lungs or digestive tract, where tobacco smoked or food eaten has been in contact with the hands;

(b) Failed to give adequate warning as to the harmful effects which might follow the use or handling of the polonium elements contained in its brushes, and as to the conditions under which they might be safely used, through a difficult-to-read cautionary statement attached to the brush, or through certain matter set forth on the reverse side of a "Certificate" enclosed in the shipping carton in which the possibility of poisoning by ingestion or inhalation of said substance was indicated and warnings as to children and otherwise were included; and

(c) Similarly failed to give such warning, as respects its said probe or wand upon which there was no label, legend, or designation of any kind, through the inclusion of a cautionary label, similar to that attached to the bottom of the brush, upon the inside of the bottom of the plastic container, or, since issuance of the complaint, through the inclusion of a cautionary statement in the pasteboard carton in which the probe was shipped, containing warnings as to the danger of radiation from polonium through ingestion or inhalation and measures to be taken if accidentally touched or handled, and as to keeping the device away from children;

With tendency and capacity to mislead and deceive members of the purchasing public into the erroneous belief that said devices were safe or would not

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cause injury under any circumstances and thereby into the purchase and indiscriminate use thereof; and with result of placing in the hands of purchasers potentially dangerous devices without adequate warning:

Held, That such acts and practices were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

While the inadequate cautionary label on the brush was replaced since the issuance of the complaint by one with larger type and expanded spacing so that it could be read with comparative ease, it was still not distinctive or arresting, and like the original cautionary label, was not conspicuously placed thereon, was not sufficiently large to attract attention, and did not constitute a reasonable warning of the potential dangers that might follow the use or handling of the device.

As respects the probe or wand, the use of the same label attached to the bottom of the plastic box was even less adequate as a reasonable warning of the potential dangers involved, and it was noted that while the largest available surface for any cautionary legend on the device was 1 inch x $\frac{1}{4}$ inch in size, there appeared to be no reason why the handle of the probe could not be otherwise attached so as to make available for such a notice the larger top flat surface.

As respects the enclosure in the carton of the cautionary statements or certificates, such statements, while of benefit, and especially where, as on the brush, there was the statement, "See Instructions", such enclosures by themselves and in the absence of notice directing attention to their existence were inadequate as a warning, since there was no assurance that they would accompany either device after it had reached its destination and was unpacked for use.

Before *Mr. J. Earl Coe*, hearing examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

Hahn & Hahn, of Pasadena, Calif., for respondent.

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 Nuclear Products Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Nuclear Products Company, is a corporation, organized and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 2150 Newport Boulevard in the city of Costa Mesa, California.

Respondent is now and for more than one year last past has been engaged in the manufacture, sale and distribution of devices containing radioactive material designated "Static-Master" brushes for the removal of static electricity, dust and lint from photographic film and other appliances, and "Static-Master" wands for use in connection with the teaching of physics and chemistry.

Respondent causes and has caused its devices, when sold, to be transported from its place of business in Costa Mesa, California, to purchasers thereof located in various other States of the United States. There is now and has been for more than one year last past a course of trade by respondent in said devices in commerce between and among the various States of the United States. The volume of such trade has been and is substantial.

PAR. 2. In the course and conduct of its said business, and for the purpose of inducing the purchase of its said devices, in commerce, the respondent has made certain representations and statements with regard to the nature of the active ingredient in its devices by means of advertisements inserted in periodicals having a general circulation in the various States of the United States and in circulars and folders sent to prospective customers throughout the United States. Among and typical of such statements and representations are the following:

Static-Master instantly destroys static surface attraction with polonium a harmless by-product of the Uranium-Radium series.

PAR. 3. Through the use of the statements referred to in Paragraph Two above, respondent represents that polonium is harmless and that respondent's device can be used safely and is harmless to the user or those handling it.

PAR. 4. The aforesaid statements are false, misleading and deceptive. In truth and in fact, polonium is extremely dangerous if inhaled into the lungs or ingested. The slightest contamination of the hands by touching polonium might result in a person spreading the contamination to his digestive tract by smoking or by eating food which has been touched by the hand. The representation by respondent that polonium is harmless has the tendency and capacity to lead persons into the erroneous belief that both the Static-Master brush and wand may be dismantled or otherwise misused and the polonium handled without injurious effect. Such representation also has the tendency to cause persons to become careless and leave the device in places accessible to children and uninformed persons who might dismantle these devices, come into contact with the polonium and suffer severe injury thereby. While respondent attaches a decal to the Static-Master brush warning against the danger of coming into contact with the polonium, it is so

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small and the letters are so indistinct that it does not adequately disclose the danger. No warning whatsoever is placed upon the Static-Master wand.

PAR. 5. The representation by respondent in its advertising that the polonium in its said devices is harmless and the failure to place a clear and conspicuous warning on the devices themselves as to the conditions under which they may become dangerous has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that said devices are safe and will not cause injury under any condition or circumstance and into the purchase and indiscriminate use of said devices because of such erroneous and mistaken belief. As a result, respondent places in the hands of the purchasers devices which are potentially dangerous without any warning or adequate warning of such danger.

PAR. 6. The aforesaid practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated September 20, 1952, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 24, 1952, issued and subsequently served its complaint in this proceeding upon the respondent, Nuclear Products Company, a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After respondent filed its answer in this proceeding, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts signed and executed by counsel for respondent and J. W. Brookfield, Jr., counsel supporting the complaint, may be taken as the facts in this proceeding and in lieu of testimony in support of and in opposition to the charges stated in the complaint and that said statement of facts may serve as the basis for findings as to the facts and conclusion based thereon and order disposing of the proceeding. Respondent expressly requested the right to file proposed findings, conclusion and order. Thereafter, this proceeding

regularly came on for final consideration by said Hearing Examiner upon the complaint, answer thereto, stipulation and proposed findings, conclusions and orders submitted by counsel, oral argument not having been requested, said stipulation having been approved by the Hearing Examiner who, after duly considering the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Nuclear Products Company, is a corporation, organized and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 2150 Newport Boulevard in the city of Costa Mesa, California.

Respondent is now and for more than one year last past has been engaged in the manufacture, sale and distribution of two devices containing radio-active polonium designated "Static-Master" brushes for the removal of static electricity, dust and lint from photographic film and other appliances, and "Static-Master" wands or probes for use in connection with the teaching of physics and chemistry, and in industry for the elimination of static and dust from instruments.

Respondent causes and has caused its devices, when sold, to be transported from its place of business in Costa Mesa, California, to purchasers thereof located in various other States of the United States. There is now and has been for more than one year last past a course of trade by respondent in said devices in commerce between and among the various States of the United States. The volume of such trade has been and is substantial.

PAR. 2. In the course and conduct of its said business, and for the purpose of inducing the purchase of its said devices, in commerce, the respondent has, until September 1951, made certain representations and statements with regard to the nature of the active ingredient in its devices by means of advertisements inserted in periodicals having a general circulation in the various States of the United States and in circulars and folders sent to prospective customers throughout the United States. Among and typical of such statements and representations is the following:

Static-Master instantly destroys static surface attraction with polonium a harmless by-product of the Uranium-Radium series.

PAR. 3. Through the use of the statements referred to in Paragraph Two above, respondent represents that polonium is harmless and that

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respondent's devices can be used safely without any danger of harmful effects upon those who may use or handle them.

Such representations are false, misleading and deceptive. In truth and in fact, polonium is extremely dangerous if inhaled into the lungs or ingested, and the mere touching of polonium by the hands can result in contamination and in the spreading of such contamination to the lungs through smoking or to the digestive tract through eating where the tobacco smoked or the food eaten has been in contact with the hands. The devices are not only useful to adults but they are also interesting and attractive to children. Any dismantling or careless use of either device might result in serious injury. It is essential, therefore, that each device carry a conspicuous and adequate warning notice.

PAR. 4. The Static-Master brush consists of an inch wide brush with bristles extending approximately $1\frac{1}{8}$ inches beyond the inset which is encased in an irregular box-like stainless steel framework having unbroken exposed surfaces at the top and bottom and on each side. The dimensions of these surfaces are approximately as follows: the top is rectangular, $1\frac{3}{8}$ inches by 1 inch; the bottom is $1\frac{1}{4}$ inches by 1 inch; each side is a quadrilateral with a $1\frac{1}{4}$ inch base and a $1\frac{3}{8}$ inch top sloping from an end $\frac{3}{4}$ of an inch long to another end $\frac{3}{8}$ of an inch in length. The exposed part of the brush handle is of wood $3\frac{1}{2}$ inches long, $\frac{1}{4}$ of an inch thick, and from $\frac{3}{8}$ to $\frac{3}{4}$ of an inch wide; the polonium foil element, .006 of an inch thick, $\frac{1}{4}$ of an inch wide and 1 inch long, faces the brush tip and is recessed $\frac{1}{4}$ of an inch behind a three apertured grill.

The stainless steel framework bears two printed labels. The one pasted on the top contains the legend:

STATIC-MASTER
Nuclear Products Co.
Costa Mesa, California, U. S. A.

The words "Static-Master" appear to be in approximately 8 point type, all caps. The remainder of the legend is smaller but easily readable. The other label pasted on the bottom bears the legend:

CAUTION

Do not touch radioactive strip (under grid). Keep brush away from children. See instructions.

This Static-Master guaranteed until-----

Prior to the issuance of the complaint in this proceeding this label, except for the word "Caution" which might have been in 6 point type, was printed in 4 point or smaller type and was set up and spaced so

as to be difficult to read. Since the issuance of the complaint the size of the printing has been increased to approximately 5 point type and the spacing expanded so that the label can now be read with comparative ease although it is still not distinctive or arresting.

There is no other label, printed matter or legend of any kind upon or attached to any other part of the Static-Master brush but there is now used by the respondent and enclosed in the shipping carton with the brush a certificate which, among other things, indicates the possibility of poisoning by ingestion or inhalation of polonium, and states:

CERTIFICATE

All STATICMASTER units released to the public are hereby certified to be safe when used according to instructions printed on the reverse side of this certificate.

On the reverse side appears the following:

CAUTION

DO NOT take the STATIC-MASTER apart or touch the radio-active strip (under the grid). If strip is touched or handled, wash hands thoroughly before eating or smoking.

Keep away from children who might chew on or take the brush apart.

Polonium, the radioactive substance used in the STATIC-MASTER, is completely harmless externally, and the simple precautions are given to avoid the possibility of taking the metal internally.

The Static-Master probe or wand, hereinafter referred to as a probe, is a small stainless steel box-like device 1 inch by $\frac{1}{2}$ of an inch by $\frac{1}{4}$ of an inch, with a stainless steel handle $\frac{3}{16}$ of an inch in diameter somewhat flattened at one end and welded lengthwise to the middle of the 1 inch by $\frac{1}{2}$ of an inch top surface. The probe, like the stainless steel framework of the brush, contains a recessed polonium foil element behind a three apertured grill.

There is no label, designation or legend of any kind upon any part of the probe, and as presently constructed, the largest available surface for any caution or legend is the 1 inch by $\frac{1}{4}$ of an inch side. There appears, however, to be no reason why the handle of the probe cannot be attached to an end or to the sides rather than to the top of the probe thus making available for a cautionary notice the top flat surface which is 1 inch by $\frac{1}{2}$ of an inch. The probe is packaged in a plastic container upon the inside of the bottom of which is pasted a caution label the same as that attached to the bottom of the brush and described above. The probe then is shipped in a pasteboard carton in which, since the issuance of the complaint, there has been enclosed a printed cautionary notice bearing the following language:

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CAUTION

The radiation from polonium is dangerous if the solid material becomes lodged in the body by ingestion or inhalation. Protection from the possibilities of radiation poisoning is provided in STATICMASTER products as follows:

The radioactive polonium is made into a foil by sealing it between a silver base and a gold covering. The foil is mounted in a stainless steel housing behind a grid to prevent physical contact.

DO NOT take the STATICMASTER apart or touch the radioactive foil under the grid. If the foil is accidentally touched or handled, wash hands thoroughly before eating or smoking. Keep away from children who might put the Probe in their mouth.

Observance of these simple precautions will permit safe use of this new and modern tool for removing static electricity.

The reverse side of this cautionary notice carries instructions for use of the probe.

The cautionary label used on the Static-Master brush has not been and is not now conspicuously placed on said device. It has not been and is not now sufficiently large or printed in adequate size type to arrest the eye or attract attention and does not constitute a reasonable warning of the potential dangers that may follow the use or handling of said device. The use of the same label attached to the bottom of the plastic box in which the Static-Master probe is packaged is even less adequate as a reasonable warning of the potential dangers that may follow the use or handling of the probe.

The enclosure in the shipping carton of the "Caution" or "Certificate," hereinabove described, is of benefit, especially where, as on the brush, there is the statement "See instructions," but by itself and in the absence of notice directing attention to its existence, such an enclosure is inadequate as a warning. There is no assurance that such a notice will be preserved or will accompany either device after it has reached its destination and is unpacked for use.

PAR. 5. The representation by respondent that polonium is harmless and its failure to give adequate warnings as to the harmful effects which may follow the use or handling of the polonium elements contained in its devices and as to the conditions under which said devices may be safely used, has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that said devices are safe and will not cause injury under any condition or circumstance and into the purchase and indiscriminatory use of said devices because of such erroneous and mistaken belief. As a result respondent has placed and is placing in the hands of the purchasers devices which are potentially dangerous without any adequate warning of such danger.

CONCLUSION

The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Nuclear Products Company, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of devices containing the element polonium as an active ingredient, do forthwith cease and desist from:

1. Representing, directly or by implication, that such devices are safe for use, unless it is clearly and conspicuously disclosed, in immediate connection with the representation, that the polonium in said devices is dangerous to health if inhaled into the lungs or ingested.

2. Representing, directly or by implication, that polonium is harmless.

3. Offering for sale, selling or distributing such devices unless adequate cautionary or warning notices are clearly and conspicuously impressed or imprinted upon said devices or permanently attached thereto, indicating possible harmful effects of ingesting or inhaling polonium and directing the user not to touch the polonium element and to keep the device away from children; provided, however, that such warning or cautionary notices may be condensed if they clearly refer to and are amplified by adequate directions for safe use separately printed and enclosed in the carton or permanent container in which said devices are shipped and kept.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist [as required by said declaratory decision and order of September 20, 1952].

Complaint

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IN THE MATTER OF

BEE JAY PRODUCTS, INC., ET AL.

COMPLAINT, DECISION, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5736. Complaint, Jan. 25, 1950—Decision, Sept. 29, 1952

Where two corporations and three officers thereof, engaged in the manufacture and interstate sale and distribution of (1) push cards and punchboards, which, bearing explanatory legends or space therefor, were designed for and used only by ultimate purchasers in combination with other merchandise, under plans whereby customers who by chance selected certain specified numbers received articles without additional cost at much less than their normal retail price; and of (2) jar and spindle games for similar use and under similar plans whereby the concealed ticket number entitled the chance purchasers thereof to merchandise or nothing—

Sold and distributed such devices to dealers who incorporated the same in assortments of candy, cigarettes, clocks, razors, cosmetics, clothing and other articles of merchandise, which were exposed and sold or distributed to the purchasing public by means of said devices and in accordance with the aforesaid sales plans, by the direct or indirect retail purchasers thereof; and

Thereby supplied to and placed in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise, contrary to an established public policy of the United States Government, and means for engaging in unfair acts and practices;

With the result that many members of the public were induced to trade with retailers who thus sold or distributed such merchandise; many retailers were induced to deal with suppliers of such products; and gambling among members of the public was taught and encouraged:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Mr. F. W. James, of Evanston, Ill., for respondents.

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 Bee Jay Products, Inc., a corporation, and Joseph Berkowitz, Reuben Berkowitz and Maurcy M. Ball, individuals and officers of Bee Jay Products, Inc.,

and Universal Manufacturing Company, Mrs. Anna Berkowitz, Reuben Berkowitz and Miss Bertha Berkowitz, individuals and officers of Universal Manufacturing Company, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in regard thereto would be in the public interest, hereby issues its complain stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bee Jay Products, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 6320 South Harvard Street in the city of Chicago, Illinois. Respondent Joseph Berkowitz is president. Respondent Reuben Berkowitz is vice-president, and respondent Maurcy M. Ball is secretary of respondent corporation, Bee Jay Products, Inc., and said corporation is owned, dominated, controlled and directed by said individual respondents, Joseph Berkowitz, Reuben Berkowitz, and Maurcy M. Ball.

Respondent Universal Manufacturing Company is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 405 East 8th Street, in the city of Kansas City, Missouri. Respondent Mrs. Anna Berkowitz is president, respondent Reuben Berkowitz is vice-president, and respondent Bertha Berkowitz is secretary-treasurer of respondent corporation, Universal Manufacturing Company, and said corporation is owned, dominated and directed by said individual respondents and Joseph Berkowitz.

All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

Respondents are now and for more than 3 years last past have been engaged in the manufacture of devices commonly known as push cards and punchboards and jar games and spindle games, and in the sale and distribution of said devices to manufacturers of and dealers in various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, and to dealers in various articles of merchandise located in the various States of the United States and in the District of Columbia. Respondents cause and have caused said devices when sold to be transported from their places of business in the States of Illinois and Missouri to purchasers thereof at their respective points of location in the various States of the United States, other than Illinois and Missouri, and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices

by said respondents in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their said business as described in Paragraph One hereof, respondents sell and distribute, and have sold and distributed, to said manufacturers of and dealers in merchandise, push cards and punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondents sell and distribute, and have sold and distributed many kinds of push cards and punchboards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail.

Many of said push cards and punchboards have printed on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on said push cards and punchboards vary in accordance with the individual device. Each purchaser is entitled to one punch or push from the push card or punchboard, and when a push or punch is made a disc or printed slip is separated from the push card or punchboard and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card and punchboard devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards and punchboards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by the respondents on said push card and punchboard devices first hereinabove described. The only use to be made of said push card and punchboard devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove alleged.

The jar games and spindle games sold by respondents in the same manner as the punchboard devices above referred to are operated by purchasers in the same manner as above described except that these devices consist of jars containing a number of tickets or spindles to which a number of tickets are attached, the tickets being numbered from one to as many as there are in the jar or attached to the spindle and the numbers are concealed from the prospective purchaser until one of the tickets has been selected from the jar or spindle. A label is attached to said jar or spindle stating the winning numbers of the merchandise which is given to the persons selecting such numbers. Sales are made in the same manner as the sales of the punches in the punchboards and the purchasers of the tickets called for by the labels are awarded prizes in the same manner as the purchasers of punches from the punchboards, and the jar and spindle devices are otherwise operated in an entirely similar manner to the operation of the punchboard devices.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase and have purchased respondents' said push card and punchboard devices and jars and spindles and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together with said devices. Retail dealers who have purchased said assortments either directly or indirectly have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards and punchboards, jars and spindle devices in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punchboards, jars and spindles many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above alleged, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public,

all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push cards and punchboard, jar and spindle devices by respondents as hereinabove alleged supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. The respondents thus supply to, and place in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondents as hereinabove alleged are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 25, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of an answer to the complaint, a hearing was held before a hearing examiner of the Commission theretofore duly designated by it at which hearing counsel for all of the respondents except Maurcy M. Ball and Mrs. Anna Berkowitz requested leave to withdraw their answer to the complaint and to substitute therefor an answer admitting all of the material allegations of fact in the complaint and waiving all intervening procedure and further hearing as to the facts, the substitute answer reserving, however, the right of such respondents to appeal from any decision rendered in the proceeding by the hearing examiner and/or the Commission. The substitute answer was tendered upon condition that the initial decision of the hearing examiner in the proceeding be deferred until the determination by the Commission of another proceeding, that of Superior Products, Docket No. 5561. The request to file such substitute answer being granted by the hearing examiner, it was duly received and filed as a part of the record in the proceeding. At the

hearing testimony was received with respect to respondents Maurcy M. Ball and Mrs. Anna Berkowitz, the two respondents not joining in the substitute answer, and such testimony was duly recorded and filed in the office of the Commission. Thereafter, the Commission having rendered its final decision in the Superior Products case, the hearing examiner, on February 15, 1952, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, counsel for all respondents, other than Maurcy M. Ball and Mrs. Anna Berkowitz, filed with the Commission an appeal from said initial decision and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal (Respondents' application for oral argument of counsel before the Commission having been denied); and the Commission, having issued its order granting said appeal in part and denying it in part and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom and its order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Bee Jay Products, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 6320 South Harvard Street, Chicago, Illinois. Respondents Joseph Berkowitz and Reuben Berkowitz are president and vice president, respectively, of the corporation and dominate, control and direct its policies and practices. While respondent Maurcy M. Ball was at one time secretary and legal counsel and a member of the board of directors of the corporation, he severed his connection with it in the latter part of 1949 and now has no interest in the business other than as owner of one share of its capital stock, this one share constituting one-half of one percent of the total capital stock of the corporation. It appears that Ball did not at any time participate in the formulation of the policies of the corporation or the directing of its operations and practices. Moreover, on the merits of the case, the record fails to establish any of the charges in the complaint insofar as Ball is concerned.

Respondent Universal Manufacturing Company is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located

at 405 East 8th Street, Kansas City, Missouri. Respondents Reuben Berkowitz and Bertha Berkowitz are vice-president and secretary-treasurer, respectively, of the corporation and, together with respondent Joseph Berkowitz, dominate, control and direct its policies and practices. Respondent Mrs. Anna Berkowitz, who was formerly president of the corporation, died on March 2, 1950.

For the reasons indicated the complaint is being dismissed as to respondents Maury M. Ball and Mrs. Anna Berkowitz, and the term "respondents" as used hereinafter will not include these two individuals.

Respondents have cooperated and acted together in the performance of the acts and practices hereinafter set forth.

Respondents are now, and for more than three years last past have been, engaged in the manufacture of devices commonly known as push cards and punchboards and jar games and spindle games, and in the sale and distribution of such devices to manufacturers of and dealers in various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, and to dealers in various articles of merchandise located in the various States of the United States and in the District of Columbia. Respondents cause and have caused their devices, when sold, to be transported from their places of business in the States of Illinois and Missouri to purchasers thereof at their respective points of location in the various States of the United States, other than Illinois and Missouri, and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices by respondents in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business as described in Paragraph One, respondents sell and distribute, to such manufacturers of and dealers in merchandise, push cards and punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondents sell and distribute many kinds of push cards and punchboards, but all of them involve the same chance or lottery features when used in connection with the sale or distribution of merchandise, and vary only in detail.

Many of the push cards and punchboards have printed on the face thereof certain legends or instructions which explain the manner in which the devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on the push cards and punchboards vary in accordance with the individual device. Each purchaser is entitled to one push or punch

from the push card or punchboard, and when a push or punch is made a disc or printed slip is separated from the push card or punchboard and a number is disclosed. The numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of the articles. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from the card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of the push cards and punchboards have no instructions or legends thereon but have blank spaces provided therefor. On those push cards and punchboards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by respondents on the push cards and punchboards first described. The only use to be made of such push card and punchboard devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable such ultimate purchasers to sell or distribute such other merchandise by means of lot or chance as hereinabove set forth.

The jar games and spindle games sold by respondents are operated by purchasers in the same manner as above described except that these devices consist of jars containing a number of tickets, or spindles to which a number of tickets are attached, the tickets being numbered from one to as many as there are in the jar or attached to the spindle, and the numbers are concealed from the prospective purchaser until the ticket has been selected from the jar or spindle. A label is attached to the jar or spindle stating the winning numbers of the merchandise which is given to the persons selecting such numbers. Sales are made in the same manner as the sales of the punches on the punchboards, and the purchasers of the tickets called for by the labels are awarded prizes in the same manner as the purchasers of punches from the punchboards, and the jar and spindle devices are otherwise operated in a manner similar to the operation of the punchboard devices.

PAR. 3. Many persons, firms and corporations who sell and distribute candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase respondents' push cards, punchboards, jars and spindles and pack and assemble assortments comprised of various articles of merchan-

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dise together with such devices. Retail dealers who have purchased such assortments either directly or indirectly have exposed them to the purchasing public and have sold or distributed such articles of merchandise by means of such push card, punchboard, jar and spindle devices in accordance with the sales plan as described in Paragraph Two. Because of the element of chance involved in the sale and distribution of such merchandise by means of such devices, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing such merchandise by means thereof. As a result many retail dealers have been induced to deal with manufacturers, wholesale dealers and jobbers who sell and distribute such merchandise together with such devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of such devices in the manner above described involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof, and teaches and encourages gambling among members of the public. The use of such sales plan or method in the sale of merchandise and the sale of merchandise by and through the use thereof is a practice which is contrary to an established public policy of the Government of the United States.

The sale or distribution of such push card, punchboard, jar and spindle devices by respondents as hereinabove set forth supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. Respondents thus supply to and place in the hands of such persons, firms and corporations the means and instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The acts and practices of respondents as hereinabove set out are all to the prejudice of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Bee Jay Products, Inc., a corporation, and Universal Manufacturing Company, a corporation, and their respective officers, and Joseph Berkowitz, Reuben Berkowitz and Bertha Berkowitz, individually and as officers of either or both of said corporations, and their respective agents, representatives and

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employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punchboards, jar games, spindle games, or other lottery devices which are to be used or which, due to their design, are suitable for use in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That respondents Bee Jay Products, Inc., Universal Manufacturing Company, Joseph Berkowitz, Reuben Berkowitz and Bertha Berkowitz 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.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Mrs. Anna Berkowitz, deceased, and Maury M. Ball.

IN THE MATTER OF
FRED SCHAMBACH

COMPLAINT, FINDINGS, ORDER, AND DISSENTING OPINION IN REGARD TO
THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED
SEPT. 26, 1914

Docket 5405. Complaint, Nov. 27, 1945—Decision, Sept. 30, 1952

Where an individual engaged in the interstate sale and distribution of musical vanity chests; among other merchandise—

(a) Distributed to prospective purchasers form letters, together with advertisements depicting the merchandise involved, order blanks and push cards for use in the resale thereof by lot or chance under a plan whereby persons selecting by chance from 75 feminine names displayed on card the name concealed under the card's master seal became entitled to a musical vanity chest; those selecting four specified numbers concealed within the card's tabs received manicure kits; amount paid by customers for their chances was similarly determined by the numbers revealed; and purchaser-operator of the card and scheme, upon remittance of the money thus collected, was free to keep for himself a second musical chest included with the other merchandise sent him for distribution to the winners; and

Thereby supplied to and placed in the hands of purchasers the means of conducting lotteries or games of chance in the distribution and resale of his merchandise;

(b) Stated in certain of said form letters that the list price of the musical vanity chests was \$15, and in others made such statements as "Upon receipt of your order this musical treasure, (which cannot be bought anywhere for less than \$20) is yours"; notwithstanding the fact that he was selling said products directly to the public for \$13.50; and

(c) Represented that if the chest were ordered "within 15 days", there would be included "an additional Free Surprise Gift, an article you will be glad to have"; the facts being the so-called free gift consisted of an inexpensive item such as a manicure kit, which was always sent to each purchaser of his combination offer of two musical vanity chests and four manicure kits for \$29.80 regardless of when his order was received;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true and thereby induce its purchase of his said merchandise:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair acts and practices in commerce.

Commissioner Carretta, in a dissenting opinion in which Commissioner Mason joins, while agreeing that "respondent should be prohibited from using the word 'free' under the circumstances of this case", did "not feel that it is necessary in the public interest to limit so categorically the use of the word

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'free' as included in Paragraph 4" of the Commission's order in the instant matter, for the reasons there set forth, suggests a form that, in his opinion, the prohibition as to this matter might well take, and, among other things, quotes in support of his position from the brief filed in behalf of the Commission in 1937, under the signature of the then Solicitor General, now Mr. Justice, Stanley Reed, and the then Assistant Attorney General, now Mr. Justice, Robert H. Jackson in the *Standard Education case*, 302 U. S. 112.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. J. W. Brookfield, Jr. for the Commission.

Nash & Donnelly, of Washington, D. C., for respondent.

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 Fred Schambach, an individual, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fred Schambach is an individual, with his office and principal place of business located at 110 West 42nd Street, New York, New York. Respondent is now, and for more than six month last past has been, engaged in the sale and distribution of musical vanity chests, toiletries, fountain pens and other articles of merchandise, and has caused said merchandise, when sold, to be transported from his said place of business in the city of New York, to purchasers thereof at their respective points of location in the various States of the United States other than New York, and in the District of Columbia. There is now, and has been for more than six months last past a course of trade by respondent in such merchandise in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of his business, respondent is, and has been, in substantial competition with other individuals and with corporations and partnerships engaged in the sale and distribution of like or similar articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, as described in Paragraph One hereof, respondent, in soliciting the sale of, and in selling and distributing his said merchandise, furnishes and has fur-

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nished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is offered for sale, sold, and distributed to the purchasing public. The method or sales plan adopted and used by respondent is substantially as follows:

Respondent distributes, and has distributed, to operators and to members of the public, certain literature and instructions including, among other things, push cards, order blanks, illustrations of his said merchandise, and a circular letter explaining respondent's plan of selling merchandise and of allotting it as premiums or prizes to the operators of said push cards and to the purchasing and consuming public.

One of respondent's said push cards bears seventy-six feminine names with the same names printed on the back thereof for writing in the name of the customer opposite the feminine name selected. Said push card has seventy-six partially perforated discs; each of said discs bear the word "Push" and each disc also is printed in an individual frame labeled with one of the feminine names appearing on the list on the back of said cards. Concealed within each disc is a number which is disclosed only when the disc is pushed or separated from said card. The push card also has a large master seal, and concealed within said master seal is one of the feminine names appearing in the frames with the individual small discs. The person selecting the feminine name corresponding to the one under the master seal receives one of the musical vanity boxes as a prize. The push card bears the following legend or instructions:

MUSICAL VANITY CHEST
Lift the Lid and Hear it Play

Name under Seal receives
MUSICAL Vanity CHEST
Attractively Packed with Toiletries

1c to 35c—NO HIGHER
Nos. 1 to 35, Pay What you Draw
Nos. Over 35, Pay only 35c.

Sales of respondent's merchandise by means of said push cards are made in accordance with the above described legend or instructions. Said prizes or premiums are allotted to the customers or purchasers in accordance with the above described legend or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise or the chance to receive the merchandise, are thus determined wholly by lot or chance.

Respondent furnishes and has furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of his merchandise by means of a game of chance, gift enterprise or lottery scheme. The sales plan or method involved in the sale of all of said merchandise by means of said other push cards is the same as that hereinabove described, varying only in detail.

PAR. 3. The persons to whom respondent furnishes, and has furnished, the said push cards, used the same in purchasing, selling and distributing respondent's merchandise in accordance with the aforesaid sales plan. Respondent thus supplies to, and places in the hands of, others the means of conducting lotteries in the sale of his merchandise in accordance with the sales plan hereinabove set forth. The use by respondent of said sales plan or method in the sale of his merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public in the manner above alleged, involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons, firms and corporations who sell or distribute merchandise in competition with the respondent, as above alleged, are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance, or any other method that is contrary to public policy, and such competitors refrain therefrom. Many persons are attracted by said sales plan or method employed by respondent in the sale and distribution of his merchandise and the element of chance involved therein, and thereby are induced to buy and sell respondent's merchandise in preference to merchandise offered for sale and sold by competitors of respondent who do not use the same or an equivalent method. The use of said method by respondent, because of said game of chance, has a tendency and capacity to unfairly divert substantial trade in commerce between and among the various States of the United States and in the District of Columbia to respondent from his said competitors who do not use the same or an equivalent method.

PAR. 5. In literature distributed to the purchasing public by means of the United States mails, respondent makes the following representations:

Additional surprise gift.
Free surprise gift.

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thereby representing that the article referred to is given free or without cost to the recipient thereof. In truth and in fact, respondent gives no merchandise free or unconditional and the so-called "free surprise gift" is given only as compensation to the operators of respondent's sales plan and is not given without cost or without the rendering of service. Respondent also caused to be published in its circulars distributed to the purchasing public the statement: "List price \$15" and "List price \$20", referring to its musical vanity chests, thereby representing that these chests have a retail value of \$15 and \$20. In truth and in fact, the chests do not have a normal retail value of \$15 and \$20 and the so-called list price of \$15 and \$20 is a fictitious and exaggerated price.

PAR. 6. The use by the respondent of the foregoing false, misleading and deceptive statements has a tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and that said articles of merchandise are given without cost or free, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said merchandise.

PAR. 7. The aforesaid acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 27, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, Fred Schambach, charging him with unfair methods of competition in commerce and unfair acts and practices in commerce in violation of the provisions of that Act. No answer was filed to said complaint. Testimony and other evidence in support of the complaint were then introduced before a hearing examiner of the Commission, theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding came on for final consideration by the Commission on the complaint, testimony and other evidence, recommended decision of the hearing examiner and brief in support of the complaint (no brief having been filed by respondent and oral argument not having been requested); and the Commission, having duly

considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Fred Schambach is an individual, with his office and principal place of business located at 110 West 42nd Street, New York, New York. Respondent has been engaged for several years in the sale and distribution of various articles of merchandise including musical vanity chests. Respondent has caused said merchandise, when sold, to be transported from his said place of business in the City of New York to purchasers thereof at their respective points of location in the various States of the United States other than New York. There has been a course of trade by respondent in such merchandise in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his said business of selling merchandise in commerce, respondent mailed to prospective purchasers throughout the United States push cards designed for use in the resale of said merchandise, together with a form letter containing instructions for their use, advertisements containing illustrations of said merchandise, and order blanks. One such form letter urged the recipient to sell the chances on the enclosed push card to his friends. After completing the sale of the chances, the letter instructed him to send the enclosed order blank to respondent and thus purchase two musical vanity chests and four utility manicure kits at a cost of \$29.80. One of the musical vanity chests and the four manicure kits so purchased were to be distributed to the persons making the winning punches in accordance with the instructions on the push card. The purchaser could then retain the remaining musical vanity chest at no cost to himself, the proceeds from the sale of chances on the push card being sufficient to cover the purchase price of the merchandise from respondent.

PAR. 3. One of the push cards so mailed out by respondent carried the following legend and instructions:

MUSICAL VANITY CHEST
Lift the Lid and Hear it Play

Name Under Seal Receives
MUSICAL VANITY CHEST
Attractively Packed with Toiletries

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Nos. 15—30—45—60 Each Receive
A UTILITY MANICURE KIT
1¢ to 35¢—No Higher
Nos. 1 to 35, Pay what you draw
Nos. over 35, Pay only 35¢

Said card contained seventy-five squares in each of which was printed a different feminine name. Under each name was inset a small round detachable disc. Concealed within each disc was a number which was disclosed only when the disc was separated from the card. The card also had a large master seal which concealed one of the feminine names appearing on the card. On the reverse side of the card was another list of the feminine names. A purchaser of a chance selected a name and pushed out the adjoining disc. He then wrote his name on the reverse side of the card opposite the name he selected. The amount he paid for the chance was determined by the number concealed under the disc he punched out. If that number was either 15, 30, 45 or 60, he won one of the utility manicure kits. After all of the punches had been sold, the musical vanity chest was received by the person who had selected the name concealed under the large seal. Whether a purchaser of a chance received one of the articles of merchandise or received nothing for the amount paid, and the amount he paid for the chance itself, were both determined purely by lot or chance.

Respondent's practice was to make a mailing of such push cards and literature from two to three times a year. The number of letters in each mailing varied from ten to fifty thousand. Orders for such merchandise were received from approximately one per cent of the persons to whom such mailings were made. Respondent's gross income from sales of such merchandise was approximately \$200,000 in the year 1945.

PAR. 4. Respondent, in the manner above described, supplied to and placed in the hands of purchasers of his merchandise the means of conducting lotteries or games of chance in connection with the resale or distribution of such merchandise. The sale of merchandise by and through such means is a practice which is in contravention of an established public policy of the Government of the United States and this respondent, through the supplying of such means, in commerce, assisted and participated in the violation of such policy.

PAR. 5. The form letters mailed out by respondent in the manner above described contained the following statement:

If we receive your order within 15 days, we will include an additional Free Surprise Gift, an article you will be glad to have.

Order

Certain of said letters contained statements that the list price of the musical vanity chests was \$15.00. Others stated:

Upon receipt of your order this musical treasure, (which cannot be bought anywhere for less than \$20.00), is yours.

By such statements respondent represented that by so ordering the purchaser would receive something free, and that the musical vanity chests could not be purchased anywhere at retail for less than \$15.00 or \$20.00.

PAR. 6. In fact the so-called free gift was not free. It consisted of an inexpensive item of merchandise such as a manicure kit, which was given only upon the purchase of respondent's combination offer of two musical vanity chests and four manicure kits for \$29.80. Said "free" gift was always sent to each purchaser of said merchandise regardless of when his order was received.

Also respondent's representations that his musical vanity chests could not be purchased anywhere at retail for less than \$15.00 or \$20.00 are false. During the same period of time respondent was mailing out said statements, he was also selling said musical vanity chests directly to the public for \$13.50.

PAR. 7. The use by respondent of the foregoing false, misleading and deceptive statements had a tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and to induce a substantial portion of the purchasing public to purchase said merchandise because of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of respondent, as herein found, were all to the prejudice and injury of the public and constituted unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, testimony and other evidence and the recommended decision of the hearing examiner; and the Commission having made its findings as to the facts and conclusion that respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent Fred Schambach, an individual, his agents, representatives and employees, directly or through any

corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or other lottery devices, either with other merchandise or separately, which said push cards or other lottery devices are to be used, or which due to their design, are suitable for use in the sale or distribution of said merchandise to the public.

2. Selling or otherwise disposing of, any merchandise by means of a game of chance, gift enterprise or lottery scheme.

3. Representing, directly or by implication, that any of said merchandise has a retail or list price in excess of the actual price at which such merchandise ordinarily is sold to consumers.

4. Using the word "free," or any other word or words of similar import or meaning, in advertising to designate or refer to any article of merchandise which is not in fact a gift or gratuity or is not given without requiring the purchase of other merchandise or the performance of some service inuring, directly or indirectly, to the benefit of the respondent.

It is further ordered, That respondent Fred Schambach, an individual, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

Commissioners Mason and Carretta dissenting.

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA

In view of the fact that the record in this case was closed prior to my appointment to the Federal Trade Commission, I want to state at the outset that this dissenting opinion is based upon a careful reading of the complete record herein.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 27, 1945, issued and subsequently served its complaint in this proceeding upon the respondent, Fred Schambach, charging him with unfair methods of competition in commerce, and with unfair and deceptive acts and practices in commerce, in violation of the provisions of that Act.

The respondent offered various articles of merchandise for sale to the public. In the course and conduct of his business, he sometimes sold said articles directly to a certain line of accounts in the usual manner. However, it appears from the record that this respondent distributed most of his merchandise to the public through the use of "push cards," a form of lottery. There was no question raised in this

proceeding concerning respondent's sales made in the usual manner. If any unfair methods of competition, or if any unfair and deceptive acts and practices were engaged in by the respondent, they were in connection with his distribution of articles of merchandise via the "push card" lottery method. Let us, therefore, examine in some detail his method of operation. Incidentally, there is no doubt that this respondent was engaged "in commerce" as that term is defined in the Federal Trade Commission Act.

Mr. Schambach operated out of New York City. He assembled music boxes and offered for sale and sold or distributed them through direct mail advertising. His mailing lists were obtained in different ways ranging from telephone book listings to the purchase of lists from mail order houses. Two or three times a year, respondent mailed his literature and "push cards" to from 10,000 to 50,000 addressees per mailing. Orders for merchandise were received from approximately 1 percent of those addressed.

The initial mailing to an addressee usually consisted of: (1) a form letter outlining respondent's plan and showing photographic reproductions of the "Musical Vanity Chest"; (2) a "sales card" which has heretofore been referred to as push card; (3) a circular entitled either "A Musical Treasure" or "Musical Vanity Chest"; (4) an order blank; and (5) a business reply envelope addressed to Fred Schambach.

Now let us look at one of the form letters referred to above. The second paragraph reads as follows:

With very little effort and no cost to you, *YOU TOO* can own this dazzling, beautiful two tune musical treasure vanity and jewelry chest, fitted with excellent perfumes and toiletries, resting on a platform, gorgeously draped with rich colorful silk rayon.

The sworn testimony of Mr. Schambach who signed the form letter containing the above-quoted paragraph and who testified at the hearing held in this matter, was that the "dazzling, beautiful two tune musical treasure vanity and jewelry chest" referred to cost him \$7.00. He also testified that the "excellent perfumes and toiletries" contained in such chest cost him 62 or 63 cents.

Another paragraph in said form letter reads as follows:

Selling the enclosed sales card is not only amusing, but it affords you the opportunity of owning this musical beauty, without cost.

Then, after describing the manner in which the sales card is intended to be used, the respondent states in the same form letter:

After completing sales card, kindly use the enclosed order blank and send in the full amount (\$29.80) * * * and we will ship you via Railway Express pre-

paid two (2 tune) Musical Chests and four Utility Manicure Kits (consolation awards).

We should now determine whether the sale of the chances on the "sales card" actually afforded the seller the opportunity of owning this musical beauty, *without cost*. The card which accompanied this form letter contained one hundred squares, in each of which was printed a different feminine name. Under each name was inset a small round detachable disc. Concealed within each disc was a number which determined the amount of money to be paid by the purchaser of the chance. Those purchasers punching out numbers 11 to 20, inclusive, were not required to pay anything for their chance. All others were required to pay the same number of cents as the number drawn, except that no one would be required to pay more than 35¢. Thus, it is a simple matter to compute the total which would be collected by a seller of one of these cards if he followed the instructions printed on the card. He would collect \$27.50. The amount which the seller of the card was asked to remit to the respondent was \$29.80, a difference of \$2.30. Yet the respondent advised his customers that they could own the musical chest *without cost*.

This same form letter also contains the following paragraph:

Today is the day! Do it now! Upon receipt of your order this Musical Treasure (which cannot be bought anywhere for less than \$20.00) is yours.

Although the letter states that this musical treasure cannot be bought anywhere for less than \$20.00, the respondent, Fred Schambach, testified at the hearing held in this matter that he sold this same musical chest directly, without inclosing any literature, for \$13.50.

Now with respect to the "Free Surprise Gift" offered by the respondent. A footnote to the form letter accompanying that card reads as follows:

If we receive your order within 15 days, we will include an additional Free Surprise Gift, an article you will be glad to have.

The order, of course, would have to be accompanied by \$29.80 or a \$10.00 deposit with a balance of \$19.80 being paid at the time of delivery of the merchandise. As set forth in the form letter, the purchaser would receive for his \$29.80, two (2 tune) musical chests and four utility manicure kits, which latter kits were intended to be used as consolation awards for those purchasers of chances who pushed out numbers 40, 50, 60 and 70. As stated above, there was testimony that the 2-tune musical chests were sold at times by the respondent for \$13.50 each. These two items, therefore, had an established value of \$27.00. Mr. Schambach further testified that the utility manicure kits had a normal retail value of from 75¢ to \$1.00 each. Assuming that

these manicure kits were valued at only 75¢ each, the four would have a total value of \$3.00. This amount, plus the \$27.00, gives us a total established money value for the two 2-tune musical treasures and the four utility manicure kits of \$30.00. Summing this up, we come to the conclusion that the purchaser from Schambach would collect a total of \$27.50 from the sale of the chances; he would pay Schambach \$29.80 for merchandise which had a total value of approximately \$30.00. The purchaser of the merchandise would be paying to Schambach \$2.30 more than he collected from the sale of chances, but he would be receiving merchandise from Schambach having a value of 20¢ in excess of the amount he paid for such merchandise. Consequently, the purchaser would be out of pocket the net amount of \$2.10. As mentioned above, if the purchaser's order was returned within 15 days, the purchaser was promised a "Free Surprise Gift" (as a matter of fact, the record discloses that the respondent Schambach forwarded this Free Surprise Gift to his customers whether or not they returned their orders to him within the 15-day period). The record indicates that "for the most part" these Free Surprise Gifts consisted of "a little more elaborate manicure kit than the ones" enclosed with the musical chests. Since such latter manicure kits were said by the respondent to have a normal retail value of from 75¢ to \$1.00, it would appear that a very liberal value of this more elaborate manicure kit which was given to respondent's customers as a Free Surprise Gift would be \$2.00. But the purchaser, having already paid the respondent the net figure of \$2.10 over and above the amount collected by him from the sale of chances, it can hardly be said that the respondent was giving his customers any "free" gift at all.

The foregoing quotations and the procedure to be followed in using the "sales card" were taken from one particular form letter. The record in this case also includes *another form letter* used by respondent in merchandising his products, which had as an enclosure a 75-square push card instead of the 100-square push card described above. The amount which was to be remitted to respondent in connection with the 75-square push card was \$24.90. The actual amount which the seller of such card would collect from the sale of chances on such card would amount to \$20.30. The seller of the card would thus have to pay out of his pocket \$4.60 over and above the amount which he collected from the sale of chances. No mention was made in this form letter of the fact that the seller would have to remit an amount greater than that actually collected. Yet the respondent stated therein that such seller would be "*earning*" a musical chest. Respondent made the same "Free Surprise Gift" offer in this second form letter as was made in the form letter used in connection with

the 100-square push card, and, for the same reasons as set forth above, such "free" gift was not in fact a "free" gift at all.

There is no doubt in my mind that the respondent, Fred Schambach, should be ordered to cease and desist from selling merchandise through the use of games of chance or lottery schemes. That this practice is contrary to established public policy of the Government of the United States and that this practice is an unfair method of competition is well settled. Further, there is ample evidence in the record that by reason of the deception used by this respondent in the literature circulated by him to thousands of people throughout the United States, he has been engaged in a deceptive act in commerce in violation of section 5 of the Federal Trade Commission Act.

I also agree that the respondent should be ordered to cease and desist from representing that any of his merchandise has a retail price in excess of the actual price at which such merchandise is sold by him to other customers.

However, I cannot agree with the inhibition contained in Paragraph Four of the "Order to Cease and Desist" issued by the Commission herein, which orders the respondent to cease and desist from:

"Using the word 'free,' or any other word or words of similar import or meaning, in advertising to designate or refer to any article of merchandise which is not in fact a gift or gratuity or is not given without requiring the purchase of other merchandise or the performance of some service inuring, directly or indirectly, to the benefit of the respondent."

I agree that the respondent should be prohibited from using the word "free" under the circumstances of this case, but I do not feel that it is necessary in the public interest to limit so categorically the use of the word "free" as included in Paragraph Four of the order of the Commission. In my opinion, where advertisements or offers pertaining to "free" goods clearly and conspicuously set forth the terms and conditions under which the free goods may be secured; where the free goods are not distributed by lot or chance; where there is no deception or probability of deception through fictitious price marking of the goods sold, or through the substitution of inferior merchandise or otherwise, the free goods offer does not constitute an unfair method of competition or an unfair or deceptive act or practice. In the subject case, the free goods were not only offered in connection with a distribution thereof by lot or chance, but they were in effect paid for by the customer.

Based upon the facts in this case, the respondent might well be ordered to cease and desist from:

Using the word "free" or any other word or words of similar import or meaning in advertising or in offers to the public

(a) when such word is used in connection with the distribution of merchandise by lot or chance;

(b) when all of the conditions, obligations, or other prerequisites to its receipt and retention by the offeree are not so clearly and conspicuously explained or set forth as to leave no reasonable probability that the terms of the offer would be misunderstood;

(c) when there is an additional cost over and above the ordinary and usual price of the merchandise required to be purchased, or inferior merchandise has been substituted for that ordinarily and customarily sold at the designated price involved in the transaction; or

(d) when the price charged for the merchandise required to be purchased is not the same as that ordinarily and customarily charged for such merchandise but includes an additional hidden charge for the "free" article.

The word "Free" is susceptible of application according to either semantics or sense. In one sense nothing under the sun is "free"; certainly very few would pay to advertise anything that is really free in accordance with the present policy of the Commission.

In my opinion, what we should do is to put only such limitation on the use of the word "Free" as may be necessary to prevent its deceptive use.

In my consideration of this matter, I have read with interest the brief filed in behalf of the Federal Trade Commission in the Supreme Court of the United States in September 1937 in the matter of *Federal Trade Commission v. Standard Education Society*. Among other things, the Federal Trade Commission in that brief stated:

"Genuine offers to give something away free of charge in order to induce a person to buy something else are not unfair. It is a commonplace that persons may be induced to buy if they think they are getting a bargain. An opportunity to receive something free in addition to the article paid for is a powerful incentive to purchase. If a merchant thinks that his business will be benefitted by the distribution of gifts, prizes, or premiums to his customers, that is his affair. His customers may gain by his apparent generosity. They cannot lose, and they are not deceived. They know that the purpose of the gift is to induce them to purchase another article, and they assume that the donor expects ultimately to recover the cost of the gift in increased returns from sales."

In a footnote to this paragraph, the brief contains the following language:

"It is true that the cost of the premium is borne by the manufacturer or seller, and that this cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium the premium does not cost the customer anything. It is **FREE TO HIM** regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss." (Emphasis of words **FREE TO HIM** was included in footnote of brief.)

The brief also contains the following paragraph:

"When such an offer of a gift is made, the customer understands from the use of the word 'gift' that an article is to be received without payment being made for it. If he is told that it is to be received 'Free of Charge' if another article is purchased, the word 'free' causes him to understand that he is paying nothing for that article and only the usual price for the other. If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge."

The above quotations from a brief filed in behalf of the Federal Trade Commission are most interesting, especially in view of the fact that the brief was signed in 1937 by Stanley Reed, then Solicitor General, and by Robert H. Jackson, then Assistant Attorney General. The thoughts of these two eminent lawyers and jurists who now sit on the Supreme Court of the United States should be given considerable weight unless conditions have so changed since 1937 as to warrant a change of attitude on the part of the Federal Trade Commission. In my humble opinion, no such change of conditions has taken place, and what was expressed in 1937 is just as true today.

Consequently, it is with regret that I record this dissent to Paragraph Four of the order issued by the Commission in this matter, and trust that some day soon the Commission will adopt a more realistic approach to the use of the word "Free" if it continues to appear in advertising or in other offers to the public.

Commissioner Mason joins in the above dissent.

Syllabus

IN THE MATTER OF

RHODES PHARMACAL COMPANY, INC., J. SANFORD
RHODES AND JEROME H. RHODES

COMPLAINT, FINDINGS, ORDERS, AND OPINION OF THE COMMISSION IN
REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS
APPROVED SEPT. 26, 1914

Docket 5691. Complaint, Aug. 17, 1949—Decision, Oct. 3, 1952

As regards the characterization of a medicinal preparation as a new discovery, on the basis of the inclusion along with an ingredient which had been used for years by the medical profession, of other ingredients which had no beneficial effect: the fact, as contended, that the combination was unique did not make the resultant preparation a remarkable, amazing, sensational new discovery of scientific research.

With respect to the use of the word "temporary" in cease and desist orders having to do with the false advertisement of medicinal preparations: the Commission is of the opinion that advertising claims should always be so limited where only temporary relief is afforded unless, by the very nature of the claim, there is no real danger of deception.

The terms "arthritis" and "rheumatism" are general terms, sometimes used interchangeably, which refer to any of a number of diseases or pathological conditions including, among others, neuritis, sciatica, neuralgia, gout, fibrositis, rheumatoid arthritis, osteoarthritis, rheumatic fever and infectious arthritis, all of which are characterized by such symptoms as pain, stiffness, and inflammatory and destructive changes in the joints and tissues of the body, and which, as pathological conditions, are of known as well as unknown origin.

Where a corporation and two officers thereof, engaged in the manufacture and interstate sale and distribution of their "Imdrin" medicinal preparation; in advertisements through broadcasting stations and in various newspapers circulated throughout the United States, directly and by implication—

- (a) Falsely represented that said preparation, taken as directed, constituted an adequate, effective and reliable treatment for, and would arrest the progress and correct the underlying causes of, all forms of rheumatism and arthritis, including neuritis, sciatica, gout, fibrositis, and bursitis, and would cure all forms of such diseases or afflictions; and
- (b) Falsely represented that, thus taken, it constituted such a treatment for the symptoms and manifestations of all said diseases or afflictions and would afford complete, permanent relief for the aches, pains and discomforts thereof;

The facts being that there is no drug or combination of drugs which constitutes an adequate, effective or reliable treatment for any of the various forms of arthritis or rheumatism, or which can restore to normal the resulting pathological changes; delay of needed treatment in such cases may result in irreparable crippling, especially in those forms caused by specific infec-

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tions; any relief afforded by its salicylate content, as an analgesic and antipyretic, would have no significant effect upon severe pains, aches and discomforts but would afford temporary and partial relief of only minor ones, and, with said exception, it could not be depended upon to have any effect whatever upon the symptoms accompanying any arthritic or rheumatic condition;

- (c) Falsely represented that said preparation constituted a remarkable, amazing, sensational new discovery of scientific research;

When in fact the only beneficial ingredients contained therein were manganese salicylate and acetylsalicylic acid (or "aspirin"), use and effect of which as analgesics and antipyretics had been known for many years;

- (d) Falsely represented that by taking said preparation as directed persons suffering from any or all of the aforesaid diseases or afflictions would be enabled to resume their normal habits of life and their regular occupations;

The facts being, in addition to those above set forth, that while it is possible to restore to normal certain of such pathological changes as may have occurred due to vitamin deficiency, by administration in sufficient quantity of the appropriate vitamin, the vitamin thiamine chloride, contained in Imdrin, was insufficient in amount to have any beneficial effect in the treatment of a patient suffering from neuritis due to thiamine deficiency; and

- (e) Falsely represented that its taking as directed would correct any disturbance of the vital enzyme systems of the blood and bones and would insure their adequate functioning;

The fact being that the ingredient calcium succinate, when administered orally, does not reach the blood stream;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that such representations were true, and thereby into the purchase of substantial quantities of said preparation, and with capacity and tendency so to do:

Held, That such acts and practices, under the circumstances set forth, constituted false advertisements, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

As respects respondents' contention that their representations meant only that Imdrin would provide relief from pain of arthritis or rheumatism and not that they would provide treatment or cure in the sense of removing the basic causes: said contention was not tenable in view of their statements that it would do more than relieve pain, would reduce swelling, and act to uncork the joints, would find the poisons and toxins that caused the pain, and was a remarkable research discovery comparable to sulfa and penicillin—statements through which they represented and implied that it was a newly discovered drug which constituted an effective treatment and would cure arthritic and rheumatic conditions, in addition to representing that its use would afford relief from the aches and pains caused by such conditions.

In the aforesaid connection respondents, through such specific statements in their various advertisements as "no faster arthritic pain remover known", failed to qualify sufficiently the use of the word "remedy" and to qualify or restrict their other broader representations as to the product being an effective medication for rheumatic and arthritic conditions.

With respect to the results of a survey offered by respondents to show that their advertisements meant only that "Imdrin" would provide relief from the pain of said conditions: such survey was improperly designed to determine whether the advertisements represented that the preparation would provide both a cure and pain remover, since all of their advertisements claimed such relief and their survey implied by the form of their questions that the advertisements represented either that "Imdrin" would provide pain relief or would provide a cure.

As further respects the aforesaid survey which showed that 9% of those questioned stated that the advertisements represented that the preparation would provide a treatment and cure for arthritis and rheumatism: such a number alone, aside from the objections above noted, would constitute a sufficient showing of the deceptive nature of respondents' advertisements.

While it was claimed from testimony presented by respondents' witnesses as to improvement in their conditions upon taking said product: such testimony, due to the uncertainty of the proof as to the cause of said witnesses' original condition, and the proof that the use of "Imdrin" was the cause of their improvement, was not sufficient to offset that of outstanding experts to the effect that temporary and partial relief of less severe pain and fever are the only effects possible from its use, as directed, by persons suffering from arthritic or rheumatic conditions, since the salicylate, its only ingredient with any beneficial effect, has no therapeutic value in the treatment of such diseases, and no beneficial effect upon its symptoms other than to afford a temporary and partial relief from the less severe pains and fevers caused thereby.

Respondents' contention that they should not be restricted to representing that Imdrin's only therapeutic effect upon the symptoms of said conditions was temporary and partial relief of minor aches, pains and fever, since the prohibition was not supported by the facts of record, was not tenable in view of the fact that the expert medical testimony was unanimous that 20.4 grains of salicylate-containing compounds, the aggregate dosage provided by taking six tablets a day as directed, was not a sufficient daily dosage to relieve the more severe pains which result from the conditions in question; and the greater weight of such testimony, including that of respondents' witnesses, was that said amount constituted too low a daily dosage for complete relief from pains accompanying an average case.

Respondents' further contention in the same connection, that, in a prior case involving the preparation "Dolcin" (Docket 5692, in which order later issued on Dec. 2, 1952) where the quantity of salicylate in each tablet was comparable to that in Imdrin, the hearing examiner concluded that the dosage involved would provide complete but temporary relief from the minor pains accompanying the conditions involved, was not tenable in view of the fact that the dosage recommended for acute symptoms was double that recommended for Imdrin.

With respect to respondents' objection to the use of the word "temporary" in the hearing examiner's order as unnecessary and as uncertain in its mean-

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ing: respondents by limiting the type of pain relief involved in the instant matter implied that lasting effect would be achieved by eliminating the cause of the pain, and decisions of the court which have considered the question and permitted the use of the word in certain orders while eliminating it in others are in the main distinguishable by such permitted use in those cases in which the representations imply that the relief or removal of the symptoms would be effected by the elimination of its cause, in which event the courts have held that the requirement that the representations be limited to claiming temporary relief or removal of the symptoms constituted a proper prohibition.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Frank E. & Arthur Gettleman and *Mr. Edward Brodkey*, of Chicago, Ill., for respondents.

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 Rhodes Pharmacal Company, Inc., and J. Sanford Rose and Jerome H. Rose, individually and as officers of Rhodes Pharmacal Company, Inc., 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 Rhodes Pharmacal Company, Inc. is a corporation organized under the laws of the State of Ohio, and having its office and principal place of business at 1814 East 40th Street, Cleveland, Ohio.

Respondents J. Sanford Rose and Jerome H. Rose are respectively the President and the Vice President and Treasurer of Rhodes Pharmacal Company, Inc. and have offices and places of business at 1814 East 40th Street, Cleveland, Ohio. The said individual respondents are now and at all times mentioned herein have been in control of the management, policies and operation of Rhodes Pharmacal Company, Inc., particularly in respect to the acts, practices and methods herein alleged.

PAR. 2. Respondents are now, and have been for more than six months last past, engaged in the business of manufacturing, selling and distributing a certain drug product, as "drug" is defined in the Federal Trade Commission Act.

The designation used by respondents for the said product, and the formula and directions for use thereof are as follows:

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Designation: Imdrin.

Formula: Each tablet contains—

Acetylsalicylic acid.....	1.9 grains
Manganese salicylate	1.5 grains
Calcium succinate (anhydrous).....	2.3 grains
Caffeine	0.16 grain
Thiamine chloride.....	1 mg.

Directions: Two tablets before each meal with water.

Respondents cause the said product, when sold, to be transported from their place of business in the State of Ohio to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained, a course of trade in the said product in commerce between and among the various States of the United States and in the District of Columbia. Respondents' volume of business in such commerce is substantial, sales for the last quarter of 1948 being in excess of \$250,000.00.

PAR. 3. In the course and conduct of their business the respondents, subsequent to March 21, 1938, have disseminated and caused the dissemination of certain advertisements concerning Imdrin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce its purchase.

Among their advertisements are the following:

Radio continuities which were placed subsequent to September 1, 1948, for respondents by their advertising agency with, and broadcast by various radio broadcasting stations, including, but not limited to, the following stations:

WJJD—Chicago, Ill.
 WHN—New York, N. Y.
 WPIX—New York, N. Y.
 WOV—New York, N. Y.
 KWTO—Springfield, Mo.
 KWKH—Shreveport, La.
 WWVA—Wheeling, W. Va.

Advertisements which were prepared subsequent to September 1, 1948, for respondents by their advertising agency, and published or caused to be published by said respondents in various newspapers, including, but not limited to the following newspapers and issues thereof:

Washington (D. C.) Times Herald—Issues of March 11, 24, and April 18, 1949.

Washington (D. C.) Daily News—Issue of March 15, 1949.

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Washington (D. C.) Post.
 Baltimore (Md.) Sun.
 Philadelphia (Pa.) Bulletin.
 Philadelphia (Pa.) Inquirer.
 Birmingham (Ala.) News Age Herald.
 Cleveland (Ohio) Plain Dealer—Issues of January 9, 16, 23,
 30, February 6, 13, 1949.
 Syracuse (N. Y.) Herald Journal—Issue of February 17, 1949.
 Rochester (N. Y.) Times—Issue of January 27, 1949.
 Bluefield (W. Va.) Daily Telegraph—Issue of April 1, 1949.
 Seattle (Wash.) Daily Times—Issue of March 11, 1949.
 Atlanta (Ga.) Constitution—Issue of March 10, 1949.
 Washington (D. C.) Star—Issues of April 26, 19, 1949.
 Indianapolis (Ind.) News—Issue of February 15, 1949.
 Baltimore (Md.) American—Issue of May 7, 1949.
 New Orleans (La.) States—Issues of November 18, 1948, and
 April 27, 1949.
 South Bend (Ind.) Tribune—Issues of February 13, 1949, and
 March 27, 1949.
 Shreveport (La.) Times—Issue of March 13, 1949.
 Baltimore (Md.) News-Post—Issue of January 14, 1949.
 Syracuse (N. Y.) Herald Examiner—Issue of January 16, 1949.
 St. Louis (Mo.) Globe Democrat—Issue of February 13, 1949.
 Clarksburg (W. Va.) Exponent-Telegram—Issue of March
 13, 1949.
 Rochester (N. Y.) Sun—Issue of April 14, 1949.
 Boston (Mass.) Daily Record—Issue of March 15, 1949.
 St. Paul (Minn.) Pioneer Press—Issue of January 23, 1949.
 New York (N. Y.) Sunday News—Issues of January 16, 30,
 1949, February 27, 1949, and May 15, 1949.
 Cedar Rapids (Iowa) Gazette—Issue of March 13, 1949.
 Springfield (Ill.) Illinois State Journal—Issue of January
 21, 1949.
 Louisville (Ky.) Times—Issue of February 11, 1949.
 Chicago (Ill.) Tribune—Issues of January 1, 19, 21, 26, 28, 31,
 February 4, 7, 9, 12, 13, 21, March 6, 13, 27, 30, and April 19, 1949.
 Counter cards and folders.

Respondents have also disseminated and caused the dissemination
 of the advertisements referred to above for the purpose of inducing
 and the said advertisements were likely to induce, directly or indi-
 rectly, the purchase of Imdrin in commerce, as "commerce" is defined
 in the Federal Trade Commission Act.

PAR. 4. Through the use of the said advertisements respondents have made, directly and by implication, the representations shown in the following sub-paragraphs identified as (A) to (F) inclusive. The said advertisements, by reason of the said representations, are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act by reason of the true facts which are set forth in sub-paragraphs (1) to (7) inclusive.

(A) That Imdrin is an adequate, effective and reliable treatment for all kinds of arthritis and rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis and bursitis.

(1) Imdrin, however taken, is not an adequate, effective or reliable treatment for any kind of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis or bursitis.

(B) That Imdrin will arrest progress of, correct the underlying causes of and cure all kinds of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis and bursitis.

(2) Imdrin, however taken, will not arrest the progress of, correct the underlying causes of, and will not cure any kind of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis or bursitis.

(C) That Imdrin is an adequate, effective and reliable treatment for the symptoms and manifestations of all kinds of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis, and bursitis, and will afford complete and immediate relief from the aches, pains, and discomforts thereof.

(3) Imdrin, however taken, is not an adequate, effective or reliable treatment for the symptoms or manifestations of any kind of arthritis or rheumatism, neuritis, sciatica, gout, neuralgia, fibrositis or bursitis; the aches, pains and discomforts incident to those ailments may be of such a nature that they will be in no way alleviated by the use of Imdrin, however taken, and in other cases the relief afforded will be limited to such degree of temporary and partial analgesic and anti-pyretic effects as its content of acetylsalicylic acid, commonly known as aspirin, and manganese salicylate may afford in the individual case.

(4) The effect of Imdrin when used in any of the ailments mentioned herein is limited to temporary and partial relief of minor aches and pains and fever.

(D) That Imdrin is a remarkable, amazing, sensational new discovery of scientific research.

(5) Neither the composition nor the effects of Imdrin is remarkable, amazing or sensational.

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(E) That by taking Imdrin those afflicted with the ailments mentioned herein will be enabled to resume their normal living and usual occupations.

(6) Persons afflicted with these ailments so severely as to interfere with their normal habits of life or their ability to carry on their regular occupations will not be enabled to resume such habits or occupations by taking Imdrin.

(F) That Imdrin will correct any disturbance of, and will insure adequate function of, the vital enzyme systems of the blood and bones.

(7) Imdrin, however taken, will not correct disturbances of, nor insure adequate function of, the enzyme systems of the blood or bones.

PAR. 5. The use by respondents of the said false advertisements with respect to Imdrin has had the capacity and tendency to mislead and deceive, and has misled and deceived, a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations and statements contained therein were true, and into the purchase of substantial quantities of Imdrin by reason of said erroneous and mistaken belief.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDERS AND DECISION OF THE COMMISSION

Order denying appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 5691, October 3, 1952, follows:

This matter having come on to be heard by the Commission upon respondents' appeal from the initial decision of the hearing examiner, briefs in support of and in opposition to said appeal and oral argument of counsel; and

The Commission, upon consideration of the entire record herein, having decided, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that all of the findings as to the facts contained in the initial decision are supported by reliable, substantial, and probative evidence of record; that the conclusion contained therein is correct; and that the order to cease and desist therein is proper upon this record and is required to provide proper relief from respondents' illegal practices; and

The Commission, therefore, being of the opinion that respondents' appeal from and exceptions to the hearing examiner's initial decision

are of no merit and that said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of respondents from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner shall on the 3rd day of October, 1952, become the decision of the Commission.

It is further ordered, That respondents, Rhodes Pharmacal Company, Inc., J. Sanford Rose and Jerome H. Rose, 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 the order to cease and desist contained in said initial decision, a copy of which is attached hereto.

Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 17, 1949, issued and subsequently served its complaint in this proceeding upon respondents Rhodes Pharmacal Company, Inc., a corporation, and J. Sanford Rose and Jerome H. Rose, individually and as officers of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

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FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Rhodes Pharmacal Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1814 East 40th Street, Cleveland, Ohio.

Respondents J. Sanford Rose and Jerome H. Rose, individuals, are now and at all times mentioned herein have been, respectively, the president, and the vice president and treasurer, of said corporate respondent, Rhodes Pharmacal Company, Inc., with their offices located at the principal place of business thereof, and are now, and at all times mentioned herein have been, in control of the management, policies, and operation of the said corporate respondent, including the acts, practices and methods herein found.

PAR. 2. The respondents are now, and for several years last past have been, engaged in the manufacture, sale and distribution in commerce, among and between the various States of the United States and in the District of Columbia, of a certain medicinal preparation designated "Imdrin," which is a "drug" within the meaning of the Federal Trade Commission Act, and for which the formula and directions for use are as follows:

Formula:

Each tablet contains:

Acetylsalicylic acid.....	1.9 grains
Manganese salicylate.....	1.5 grains
Calcium succinate (anhydrous).....	2.3 grains
Caffeine.....	.16 grains
Thiamine chloride.....	1 mg.

Directions:

Two tablets before each meal with water.

Respondents cause the said product, when sold, to be transported from their place of business in the State of Ohio to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in the said product in commerce between and among the various States of the United States and in the District of Columbia. Respondents' volume of business in such commerce is substantial, sales for the last quarter of 1948 being in excess of \$250,000.00.

PAR. 3. In the course and conduct of their business, respondents, subsequent to March 21, 1938, have disseminated and caused the dissemination, by the United States mails and by various means in com-

merce, as "commerce" is defined in the Federal Trade Commission Act, of certain advertisements of the drug preparation "Imdrin," for the purpose of inducing, and which were likely to induce, its purchase. Among such advertisements were radio broadcasts disseminated subsequent to September 1, 1948, by various broadcasting stations, and advertisements published subsequent to September 1, 1948, in various newspapers circulated throughout the United States. Typical of such advertisements are the following:

AMAZING NEW DISCOVERY FOR RHEUMATISM, ARTHRITIS

No Faster Arthritic Pain Relief Known

SAFE * * * HOSPITAL TESTED

Stops Swelling . Uncorks Joints . Contains

Sensational New Research Discovery

Picturization of
hand containing
tablet

New, Safe, Scientific Tablet

Not a Narcotic * * * Not Habit Forming * * *

AT LAST THE STORY CAN BE TOLD! Science has turned its attention to relieving the agonizing pains of rheumatism and arthritis. The result of extensive research is the remarkable preparation **IMDRIN**. Long-time sufferers from rheumatism, arthritis, neuritis and gout may find **IMDRIN** gives glorious relief amazingly fast. Contains no dope or harmful drugs. Ask for **IMDRIN** at drug stores.

Picturization of
scientist examining
test tubes

Developed after 3 Years of Extensive
Tests in Hospital Clinics

IMDRIN has been a closely guarded experimental secret before release for public use. Yes, medical men, after three years of extensive hospital tests, have proved conclusively that **IMDRIN** works internally toward amazing reduction of pain, heat, redness, and swelling in the joints. Every victim of rheumatism, arthritis, neuritis, sciatica, gout, neuralgia, etc., should investigate this new development of modern medicine. Ask for **IMDRIN** at drug stores.

Relieves Pain and Suffering After 20 Years of Torture!

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* Picturization of man in wheel-chair

"I call IMDRIN a miracle and you can understand why when I tell you that the pain which had tortured and crippled me was gone after I had taken IMDRIN. Now, for the first time in years, I can move about without pain and enjoy life once again. Surely the thousands of unfortunates like me should be happy to learn about the blessed, fast-acting IMDRIN." A. C., Chicago, Ill.

* Picturization of old woman invalid

"I had arthritis and rheumatism so bad I could hardly get around. In fact, I went to several doctors who told me that my case was hopeless and that they could do nothing for me. Well, I had about given up hope when I saw your ad in the paper and bought a bottle of IMDRIN. I really think it's a wonder. I feel better with every dose I take. It seems like a dream to be free of so much pain." Mrs. A. R. Webb 311 N. Bryan St., Amarillo, Texas.

* Picturization of woman apparently suffering

"Even though my daughter is a registered nurse she could not find anything to help her agonizing arthritic pains. She tried everything but nothing did her any good. Then she bought IMDRIN and she has had miraculous results. I am going to tell all my friends about the wonderful relief from IMDRIN. It really is an amazing remedy." Mrs. C. C., Kunkletown, Pa.

Picturization of anatomical chart with arrows showing location of joints and muscles

Where Rheumatism Strikes * * * And How to Detect It!

Rheumatic and arthritic pain and inflammation strikes any of the indicated areas. (See chart above.) But these diseases have many forms and symptoms.

All forms of arthritis and rheumatism are accompanied by pain, very often swelling and loss of function of the joints. Hospital test patients receiving IMDRIN were able to resume more happy active living once the pain subsided and their confidence grew. IMDRIN reduced joint swelling and eased pain rapidly. IMDRIN is your greatest hope. IMDRIN may give you the same blessed results. Get IMDRIN today!

How IMDRIN Helps You!

If you have suffered the tortures of rheumatic or arthritic pains, swelling and stiffness * * * if you get up mornings dreading the suffering the day may hold, and do it day after day, month after month, year after year * * * listen! IMDRIN may answer your problem of comfortable living. In case after case IMDRIN has proved its potency. IMDRIN is one of the fastest arthritic and rheumatic pain relievers known to medical science. Cases deemed almost hope-

*Posed by professional models.

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less * * * persons who suffered and waited and hoped for as long as twenty years were able to live happy comfortable lives once again. No other medication for rheumatism and arthritis can make this amazing statement * * * and back it up with proven hospital and clinical records. Amazing new IMDRIN brings new hope of a better life for you * * * and it is as close to you right now as your nearest drug store. Get IMDRIN today. Use only as directed. If you don't agree that amazing new, scientific IMDRIN is the greatest blessing you've ever discovered, return for your money back. Get IMDRIN today—resume comfortable living tonight!

TODAY—RESUME CONFIDENT, PAIN-FREE LIVING WITH AMAZING NEW, SAFE, AND SCIENTIFIC * * *

IMDRIN contains no dope or harmful drugs * * * is not habit forming. Hospital tests prove it is one of the fastest pain relievers for arthritic and rheumatic sufferers known to medical science. Start using IMDRIN today. Don't miss the chance to enjoy living once again.

(Picture and one additional testimonial omitted).

IMDRIN
No Faster
Arthritic Pain
Relief
or money
back

Picturization
of bottle of
IMDRIN

Mail this convenient
mail order coupon

Coupon

IMDRIN is a product scientifically designed to aid in the relief of nagging aches, pains, swelling, and stiffness accompanying arthritis and related illnesses, such as certain types of rheumatism, sciatica, bursitis, and neuritis. * * *

For aid in insuring adequate functioning of the vital enzyme systems (biochemical catalysts) of the blood and bones, manganese salicylate and calcium succinate have been scientifically combined with the other ingredients for maximum effect. * * *

IMDRIN is not habit forming—it does not contain narcotics. It is a reliable scientific remedy tested by doctors in famous hospitals, and offered to bring symptomatic relief to sufferers from arthritis, fibrositis, and certain forms of rheumatism, sciatica, and neuritis. To back up its claims, the distributors of IMDRIN stand ready to return your money if you do not get the relief you desire. All druggists have IMDRIN. Ask for it TODAY.

PAR. 4. In the first line of the first above-quoted advertisement, respondents represent the drug preparation "Imdrin" to be an "AMAZING NEW DISCOVERY FOR RHEUMATISM, ARTHRITIS," which will "Stop Swelling. Uncork Joints." From the quoted statements considered separately, and from the quoted statements considered in the light of the entire advertisement, it may reasonably be inferred that the preparation "Imdrin" is a newly discovered drug or substance effective in the treatment of rheumatic and arthritic conditions. To represent that such preparation "stops swelling" and "uncorks joints" is to represent that it possesses therapeutic properties curative of such conditions. Furthermore, the picturization of the

anatomical chart, accompanied by the statement, "Where Rheumatism Strikes And How To Detect It," logically warrants the inference that the drug preparation "Imdrin" is offered as a treatment for rheumatic and arthritic conditions.

Although the various advertisements carry such statements as "No faster arthritic pain relief known," "Relief of nagging aches, pains, swelling, and stiffness accompanying arthritic and related illnesses," "One of the fastest arthritic and rheumatic pain relievers known to medical science," and "It is a reliable, scientific remedy tested by doctors in famous hospitals, and offered to bring symptomatic relief to sufferers from arthritis, fibrositis, and certain forms of rheumatism, sciatica and neuritis," such statements, and others similar thereto relating to the relief of the symptoms and manifestations of arthritic and rheumatic conditions, do not qualify or restrict respondents' other, broader representations, nor limit their advertisements to the representation that the drug preparation "Imdrin" is offered only as an analgesic and antipyretic. The offering of said product as a "scientific remedy" implies that its use may effect cures. As used by respondents in their advertisements, the word "remedy" is not sufficiently qualified by any accompanying statement to modify or limit this significance of "cure."

The representation that "* * * Persons who suffered and waited and hoped for as long as twenty years were able to live happy, comfortable lives once again. No other medication for rheumatism and arthritis can make this amazing statement * * * and back it up with proven hospital and clinical records" clearly implies that such statement may truthfully be made with regard to the drug preparation "Imdrin," and, accordingly, that said preparation is an effective medication for rheumatic and arthritic conditions.

It is found that through the above-quoted advertisements and others similar thereto, respondents have represented, directly and by implication, as follows:

1. That the drug preparation "Imdrin," when taken as directed, constitutes an adequate, effective and reliable treatment for, and will arrest the progress and correct the underlying causes of all forms of rheumatism and arthritis, including neuritis, sciatica, neuralgia, gout, fibrositis and bursitis, and that said preparation will cure all forms of such diseases or afflictions;

2. That the drug preparation "Imdrin," when taken as directed, constitutes an adequate, effective and reliable treatment for the symptoms and manifestations of all of the above-named diseases or afflictions, and will afford complete, permanent relief from the aches, pains and discomforts thereof;

3. That the drug preparation "Imdrin" is a remarkable, amazing, sensational, new discovery of scientific research;

4. That by taking the drug preparation "Imdrin" as directed, persons suffering from any or all of the above-named diseases or afflictions will be enabled to resume their normal habits of life and their regular occupations;

5. That the taking of the drug preparation "Imdrin" as directed will correct any disturbance of the vital enzyme systems of the blood and bones, and will insure adequate functioning thereof.

PAR. 5. The terms "arthritis" and "rheumatism" are general terms, sometimes used interchangeably, which refer to any of a number of diseases or pathological conditions including, among others, neuritis, sciatica, neuralgia, gout, fibrositis, bursitis, rheumatoid arthritis, osteoarthritis, rheumatic fever and infectious arthritis, all of which are characterized by one or more of such symptoms or manifestations as pain, stiffness, and inflammatory and destructive changes in the joints and tissues of the body.

The term "neuritis" means inflammation of a nerve, which may be attended by pain, paralysis and degeneration of the nerve substance. This condition is produced by many causes, such as localized infection, creating toxic substances in the system; toxic acidity from the use of various drugs; deprivation of certain chemical substances or vitamins; metabolic disturbances connected with diabetes; and infection of a nerve by various germs, such as that which causes syphilis.

"Sciatica" is an ailment which is manifested by pain along the course of the sciatic nerve, and is one form of neuritis. It also results from various causes, such as pressure exerted on the nerve or its roots by a tumor or neoplasm or an over-growth of bone; irritation or inflammation of the sheath of the sciatic nerve; and many other causes.

The term "neuralgia" refers to a syndrome of pain, or violent spasms of pain, which occur along the course of various nerves.

"Gout" is a disease connected with a disturbance of the metabolic functions of the body, involving the absorption of uric acid, which may result in pathological changes in joints, bones, cartilages, and a number of internal organs, particularly the kidneys, which may be utterly destroyed thereby. In its early stages, the predominant symptoms of gout are recurring attacks of pain and swelling in the joints. Gout may cause deposits of crystalline material, with surrounding inflammation, in joints, resulting in the destruction of their function.

"Fibrositis" is a general term referring to an inflammation of the fibrous tissues of the body, arising from unknown causes, and manifested by symptoms of aching and stiffness about joints or in various muscle groups. It may result in sciatica.

The term "bursitis" refers to inflammation of a bursa, which is a sac, generally adjacent to a joint or a bony prominence of the body, containing fluid, the purpose of which is to act as a shock-absorber to provide for free movement of bones and joints. There are many types of bursitis, arising from known as well as unknown causes, such as gouty, tubercular, and gonorrheal bursitis.

Rheumatoid arthritis is a chronic, progressive, destructive disease affecting joints and organs of the body, characterized by pain, swelling, stiffness and limitation of motion in joints, and deterioration of the patient's general health. This disease is accompanied by pathological changes in the joints, such as thickening of the lining membrane; production of excessive fluid in the bursa in some instances, and absorption of fluid in others; atrophy of muscles, and sometimes destruction of portions of the bone ends, resulting in deformation of the joint. The cause of rheumatoid arthritis is unknown.

The term "osteoarthritis" refers to one of the chronic forms of joint diseases which has the pathological characteristic of a wearing away of cartilages and the production of excess bone at the margins of joints, which manifests itself as a painful stiffness, creaking of joints, and sometimes loss of motion. Osteoarthritis may result from externally-caused injury, or from unknown causes.

The term "infectious arthritis" refers to a form of arthritis caused by invasion of the joint by a germ.

PAR. 6. The various pathological conditions generally referred to as "arthritis" and "rheumatism" progress and develop differently. Likewise, they require different treatment, which will vary not only between different types of such ailments, but between different individuals suffering from the same ailment, and between different stages in the progress thereof. An adequate, effective, or reliable treatment for any kind of "arthritis" or "rheumatism" must, therefore, be predicated upon individual diagnosis, in order to determine whether the patient has arthritis or rheumatism, the particular kind of such ailment present, and whether it arose from a known or an unknown cause. Such a diagnosis may require any or all of the following determinations:

1. History of the patient, including information as to age, sex, marital status, occupation, chronology of the present ailment; family history, such as age and cause of death of parents and relatives; any illnesses from which the patient may have suffered previously, particularly rheumatic fever, scarlet fever and streptococcus infections;
2. Detailed physical examination of every part of the patient's anatomy; and

3. Laboratory examination, such as blood count, serological test for syphilis, urinalysis, and certain other tests as they may seem useful in the individual case, such as X-ray and analysis of fluids in individual joints.

PAR. 7. An adequate, effective, or reliable treatment for any of the various types of ailments included in the general terms "arthritis" and "rheumatism" may involve application of various therapeutic measures, including diet; rest or change of occupation; various types of physiotherapy, such as orthopedic or thermal procedures; surgery; and medication. Delay of needed treatment may result in irreparable crippling, especially in those forms of arthritis and rheumatism known to be caused by specific infections. There is no drug, or combination of drugs, regardless of how administered, which will constitute an adequate, effective, or reliable treatment for any of the various forms of arthritis or rheumatism, nor is there any drug or combination of drugs which can restore to normal the pathological changes which result from any arthritis or rheumatic ailment. It is possible, however, to restore to normal certain of such pathological changes which are due to vitamin deficiency, by administration in sufficient quantity of the appropriate vitamin.

PAR. 8. The thiamine chloride, which is a vitamin, contained in the drug preparation "Imdrin" is insufficient in amount to have any beneficial effect in the treatment of a patient suffering from neuritis due to thiamine deficiency. The calcium succinate content of such preparation has no significant therapeutic value in the treatment of arthritic or rheumatic conditions, nor does it affect the functioning of the enzyme system of the blood or bones, for the reason that, when administered orally, as specified in the directions for taking Imdrin, succinates are converted to sugar by the liver, and, as succinates, never reach the bloodstream. The caffeine content of Imdrin has no significant therapeutic value in the treatment of any form of arthritis or rheumatism. The only ingredients contained therein which possess active analgesic properties are manganese salicylate and acetylsalicylic acid, the use and effect of which, as analgesics and antipyretics, have been known for many years. Acetylsalicylic acid has for many years been sold throughout the United States as an analgesic under the name "aspirin." Accordingly, the drug preparation "Imdrin" does not constitute a new discovery of scientific research.

The analgesic effect of these salicylates, in the amount contained in the drug preparation "Imdrin," upon the aches, pains and discomforts of arthritic or rheumatic conditions is limited and temporary. Accordingly, such drug preparation is not remarkable, amazing, or sensational.

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PAR. 9. The drug preparation "Imdrin," however taken, will not constitute an adequate, effective, or reliable treatment for any arthritic or rheumatic condition, including neuritis, sciatica, gout, neuralgia, fibrositis, and bursitis, nor will said preparation arrest the progress, correct the underlying causes, or effect a cure of any such conditions. The drug preparation "Imdrin," however taken, will not ameliorate the aches, pains and discomforts of any arthritic or rheumatic condition to any extent beyond the temporary and partial relief thereof afforded by its salicylate content as an analgesic and antipyretic. The drug preparation "Imdrin," however taken, will have no significant effect upon severe aches, pains and discomforts accompanying any arthritic or rheumatic condition, and will afford temporary and partial relief of only minor aches, pains and discomforts. With the exception of such temporary and partial relief, the drug preparation "Imdrin" cannot be depended upon to have any effect whatever upon the symptoms accompanying any arthritic or rheumatic condition, including neuritis, sciatica, gout, neuralgia, fibrositis, and bursitis. Persons forced by such ailments to discontinue their normal habits of life or their regular occupations will not be enabled, by taking the drug preparation "Imdrin," to resume such habits or occupations.

The drug preparation "Imdrin," however taken, will not correct disturbances nor insure adequate functioning of the enzyme system of the blood or bones.

PAR. 10. Respondents' representations concerning the drug preparation "Imdrin," as hereinbefore found, are false and misleading in material respects; have had the capacity and tendency to mislead and deceive, and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true, and into the purchase of substantial quantities of said drug preparation as a result thereof; and constitute false advertisements within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The acts and practices of respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents Rhodes Pharmacal Company, Inc., a corporation, and J. Sanford Rose and Jerome H. Rose, in-

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dividually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug preparation "Imdrin," or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(a) that the taking of said preparation will constitute an adequate, effective or reliable treatment for neuritis, sciatica, gout, neuralgia, fibrositis, bursitis, or any other kind of arthritic or rheumatic condition;

(b) that said preparation will arrest the progress or correct the underlying causes of, or will cure, neuritis, sciatica, gout, neuralgia, fibrositis, or bursitis or any other kind of arthritic or rheumatic condition;

(c) that said preparation will afford any relief of severe aches, pains, and discomforts of neuritis, sciatica, gout, neuralgia, fibrositis, bursitis, or any other arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary and partial relief of minor aches, pains, or fever;

(d) that said preparation is remarkable, amazing, or sensational, or that it is a sensational new discovery of scientific research, or a new discovery;

(e) that persons afflicted with neuritis, sciatica, gout, neuralgia, fibrositis, bursitis, or any other kind of arthritic or rheumatic condition, so severely that such afflictions interfere with their normal habits of life or their ability to carry on their regular occupations will be enabled, by taking the drug preparation "Imdrin," to resume such normal habits or regular occupations;

(f) that the taking of said preparation will have any therapeutic effect upon the functioning of the enzyme systems of the blood or bones.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the drug preparation "Imdrin," which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That respondents, Rhodes Pharmacal Company, Inc., J. Sanford Rose and Jerome H. Rose, 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 the order to cease and desist contained in said initial decision, a copy of which is attached hereto [as required by aforesaid order and decision of the Commission].

OPINION OF THE COMMISSION

By MEAD, COMMISSIONER: This matter involves the truth or falsity of certain claims contained in respondents' advertisements of their medicinal preparation Imdrin. There is no contest as to the wording of the advertisements or the formula of the preparation. The contest is as to the meaning of the said advertisements, the value of said preparation and the appropriate form of order, if any, required herein.

Respondents contend that their representations mean only that "Imdrin" will provide relief of pain of arthritis or rheumatism and do not mean that it will provide treatment and cure of arthritis and rheumatism. Respondents do not contend that "Imdrin" will cure arthritic or rheumatic conditions in the sense of removing the basic causes of these conditions. They do contend, however, that the use of "Imdrin" as directed will relieve the pains, suffering, inflammation, stiffness and redness of persons affected with arthritis or rheumatism.

Certain of respondents' advertisements for Imdrin contained the following statements:

ARTHRITIS AND RHEUMATISM SUFFERERS

Don't needlessly suffer crippling pains—untold agony and torture experienced by sufferers of arthritis, rheumatism, lumbago, neuralgia and all of the other similar miserable ailments. Now blessed relief may be yours. IMDRIN Tablets—the wonder prescription—acts immediately—decisively—brings marvelous freedom from pain. IMDRIN is more than a so-called "pain-killer" or soothing balm. It's a combination of recognized medically tested ingredients that works internally * * * systematically! Yes. IMDRIN works effectively—safely—through the *blood stream*. Gets down deep—right where the trouble lies. Fights poisons and toxins that cause all the pain, misery and suffering.

You've read about the wonders of sulfa and penicillin! But you may never before have heard about I-M-D-R-I-N, IMDRIN, the brand-new, safe and reliable way to curb pain that is being prescribed by many doctors to bring quick, blessed relief from arthritic pain, stiffness and swelling. IMDRIN contains a remarkable research discovery! * * * that not only stops pain, helps reduce swelling, but acts to uncork the joints!

Cases deemed almost hopeless * * * persons who suffered and waited and hoped for as long as twenty years were able to live happy comfortable lives once again. No other medicament for rheumatism and arthritis can make this amazing statement * * * and back it up with proven hospital and clinical records.

By their statements in these advertisements that their preparation would do more than relieve pain, that it would reduce swelling and act to uncork the joints, that it would fight the poisons and toxins that cause the pain, that it was a remarkable research discovery comparable to sulpha and penicillin and by other statements of like import, respondents have represented and implied that Imdrin is a newly discovered drug which constitutes an effective treatment for and will cure arthritic and rheumatic conditions in addition to representing that its use will afford relief from the aches and pains caused by such conditions.

In an attempt to prove that their advertisements do not mean to the purchasing public that Imdrin will provide a treatment and cure of arthritis and rheumatism, respondents had a survey conducted. This survey consisted of showing three of respondents' advertisements to 300 members of the public and asking them whether those advertisements meant that Imdrin would provide relief from pain of arthritis or rheumatism or whether they meant that it would provide a treatment and cure of arthritis or rheumatism. Two of the advertisements shown were short and relatively free of any statements implying respondents' preparation would have any effect other than pain relief. The third advertisement prominently featured pain relief in bold faced type. By the form of their questions respondents' survey implied that the advertisements represented one or the other, either Imdrin would provide pain relief or it would provide a cure. As all of respondents' advertisements claim Imdrin will provide pain relief in addition to their other representations, a survey implying that the advertisement either represented a cure or it represented pain relief was improperly designed to determine if they did not represent both. But even under these conditions the results of the survey show that nine percent of those questioned stated that the advertisements represented that Imdrin would provide a treatment and cure for arthritis and rheumatism. This number alone would constitute a sufficient showing of the deceptive nature of respondents' advertisements. Upon this record the Commission is of the opinion that the hearing examiner correctly held that respondents represented Imdrin would provide a treatment and cure for arthritic and rheumatic conditions in addition to their claim that its use would provide relief from the pains accompanying these conditions.

The greater weight of the expert medical testimony is that, when taken as directed, the only ingredient in Imdrin which has any significant beneficial effect is the salicylate. This ingredient is present in each tablet in the form of 1.9 grains of acetylsalicylic acid (i. e. aspirin) and 1.5 grains of manganese salicylate. Salicylate in the amounts contained in Imdrin, when taken as directed, has no therapeutic value in the treatment of arthritic or rheumatic conditions and has no beneficial effect upon the symptoms of such conditions other than to afford a temporary and partial relief from the less severe pains and fever caused by such conditions, according to the greater weight of the expert medical testimony.

In an attempt to disprove this medical testimony respondents presented witnesses who testified as to the improvement in their conditions upon taking Imdrin. From their testimony it is clear that improvement occurred. However, due to the uncertainty of the proof as to the cause of their original condition and the proof that the use of Imdrin was the cause of their improvement, this testimony is not sufficient to offset the testimony of outstanding experts in the field of arthritis and rheumatism to the effect that temporary and partial relief of less severe pain and fever are the only effects possible from the use of this preparation, as directed, by persons suffering with arthritic or rheumatic conditions.

Respondents particularly except to the provision in the order contained in the hearing examiner's initial decision prohibiting them from advertising that Imdrin will have any therapeutic effect upon any of the symptoms of any arthritic or rheumatic condition in excess of affording temporary and partial relief of minor aches, pains or fever or that Imdrin is a remarkable, amazing, sensational new discovery of scientific research or that it will enable users to resume their normal habits or regular occupations.

In support of their contention that Imdrin was properly described as a new discovery, respondents point out that it does contain a unique combination of ingredients. However, the greater weight of the expert medical testimony shows that, in the dosage prescribed, the only beneficial ingredient is the salicylate which has been known and used for years by the medical profession for the relief of pain and the reduction of fever. The combining of other ingredients, which have no beneficial effect in the quantities used, with commonly known and used drugs does not make the resultant preparation a remarkable, amazing, sensational new discovery of scientific research. The use of such false and misleading representations was properly prohibited.

In support of their contention that they should not be restricted to representing that Imdrin's only therapeutic effect on the symptoms of

arthritis and rheumatism is temporary and partial relief of minor aches, pains and fever, respondents contend (1) that this prohibition is not supported by the facts of record, (2) that the hearing examiner in another case involving a similar preparation, Dolcin, omitted the word partial from his order thus permitting representations that said preparation would provide complete relief for minor aches, pains and fever, temporarily, and (3) that the courts have held that the use of the word "temporary" in the manner used in this order is improper as it is uncertain in its meaning and unnecessary for the protection of the consuming public.

The greater weight of the expert medical testimony is that the only ingredients in respondents' preparation which have any significant beneficial effect, when taken as directed, are the 1.9 grains of acetylsalicylic acid and the 1.5 grains of manganese salicylate. Taken as directed, six tablets per day, Imdrin provides a daily dosage of 20.4 grains of salicylate containing compounds. Salicylates provide temporary relief from pain, the extent of the relief varying, within limits, according to the amount of the dosage. The expert medical testimony is unanimous that 20.4 grains is not a sufficient daily dosage to relieve the most severe pains resulting from arthritic and rheumatic conditions, and the greater weight of the expert medical testimony, including that of respondents' witness, Dr. Black, is that this constitutes too low a daily dosage for complete relief from pains accompanying an average case.

In the case referred to by respondents involving Dolcin, a similar preparation, while the quantity of salicylate in each tablet was comparable to that present in Imdrin, the dosage recommended for acute symptoms was double the dosage recommended for Imdrin. On the basis of that record the hearing examiner concluded that such a dosage would provide complete but temporary relief from the minor pains accompanying arthritis and rheumatism. The Commission is of the opinion that the daily dosage directed for the use of Imdrin was sufficient to afford only partial relief from minor pains accompanying arthritis and that respondents' advertisements offering complete relief from such pains are unfair and deceptive.

Respondents raise two objections to the use of the word "temporary" in the hearing examiner's order. One, that it is unnecessary, and two, that it is uncertain in its meaning. The Commission is of the opinion that advertising claims should always be so limited where only temporary relief is afforded unless by the very nature of the claim, there is no real danger of deception. The danger of deception in this case lies particularly in the fact that respondents desire to represent that their preparation will afford relief from pains due to a particular

cause, namely, pains of arthritis and rheumatism. By limiting the type of pain relief claimed, respondents imply that a lasting relief will be achieved by eliminating the cause of the pain. Advertisements offering relief from arthritic pain and suffering thus imply a lasting relief to a much greater extent than would be implied by claims for relief from underarm perspiration or odor or relief from itching. It is in the same class as those representations which state that the use of a preparation will relieve delayed menstruation or remove dandruff, which unless qualified imply that the symptom will be permanently eliminated by removing its cause.

The decisions of the courts which have considered this question and permitted the use of the word temporary in certain orders while eliminating it in others, in the main, are distinguishable on this basis. In those cases involving a preparation which provides only temporary symptomatic relief where the representations implied that the relief or removal of the symptom would be effected by eliminating its cause, the courts have held that the requirement that such representations be limited to claiming temporary relief or removal of the symptom constituted a proper prohibition. Such a requirement, although indefinite as to the duration of the effectiveness of the preparation, can be satisfied by any representation which shows that lasting relief is not claimed. The Commission, therefore, is of the opinion that the inclusion of the word "temporary" as used in the order contained in the hearing examiner's initial decision is necessary and proper in all respects.

The Commission is of the further opinion that all of the findings as to the facts contained in the initial decision are supported by reliable, substantial, and probative evidence of record; that the conclusion contained therein is correct; and that the order to cease and desist is proper upon this record and is required to provide proper relief from respondents' illegal practices. We, therefore, are of the opinion that respondents' appeal is of no merit and that it should be denied.

Commissioner Carretta did not participate in the decision of this matter for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

Syllabus

IN THE MATTER OF

TILLER-FAITH PIANO COMPANY, INC. ET AL.

COMPLAINT, SETTLEMENT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5967. Complaint, Mar. 17, 1952—Decision, Oct. 3, 1952

Where a corporation and two officers thereof, engaged in the interstate sale and distribution of pianos; in carrying on their business under a plan whereby in their advertising in rural newspapers, over such names as "Finance Manager", "Collection Department", and "Finance Department", they made such typical statements as "FORCED TO SELL SPINET PIANO LIKE NEW. We are forced by circumstances over which we have no control to sell in this section Gorgeous little spinet piano. Party with good credit can pay minimum down payment and assume few monthly payments. Considerable has already been paid. Write to Manager Collection Department", etc.; and sent to those replying an agent who, after placing on a truck a new piano, to which a price tag, usually in the amount of \$795, had been attached, proceeded to the residence of the inquirer—

(a) Represented through statements in their said advertisements and orally through their said agents that they were forced to sell the pianos involved, which they had previously sold to a purchaser for the usual price of \$795 and had repossessed due to financial difficulties of the purchaser, etc.; that the pianos were not new and substantial amounts had been paid on their purchase price by others; and that they were being offered at a substantial discount from the usual price in order to save time and expense of transporting them back to the store;

The facts being that they were not in any manner forced to sell said products, which had not been repossessed but were new and had been acquired through ordinary purchase from their suppliers; the \$795 or such other sums as were shown on the price tags or stated by their agents to be usual prices were fictitious; and the prices actually charged under their aforesaid plan were those at which the pianos were usually and regularly sold;

With tendency and capacity to mislead and deceive members of the purchasing public into the erroneous belief that such statements and claims were true, and with the result that a substantial number purchased said pianos, and trade in commerce was thereby unfairly diverted to them from their competitors, to the injury of the latter and the public:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce, and unfair methods of competition therein.

Before *Mr. John Lewis*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Warren, Merrell & Combs, of Evansville, Ind., for respondents.

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 Tiller-Faith Piano Company, Inc., a corporation; B. T. Faith Piano Company, Inc., a corporation; and Benjamin T. Faith, Armand A. Tiller, Mary Woodburn Faith, and Mona Frances Tiller, individually and as officers of said corporations, 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 Tiller-Faith Piano Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 16 N. W. Second Street, Evansville, Indiana.

B. T. Faith Piano Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Tennessee with its office and principal place of business located at 911 Church Street, Nashville, Tennessee.

Respondents Benjamin T. Faith, Armand A. Tiller, Mary Woodburn Faith and Mona Frances Tiller are individuals and officers of corporate respondents Tiller-Faith Piano Company, Inc., and B. T. Faith Piano Company, Inc., with their office and principal place of business the same as that of corporate respondent, Tiller-Faith Piano Company, Inc.

The individual respondents formulate, direct and control, the business acts and policies of the corporate respondents named herein, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now and for more than two years last past have been engaged in the sale and distribution of pianos. Corporate respondents cause and have caused their pianos to be transported from the aforesaid places of business in the States of Tennessee and Indiana to purchasers thereof located in various other States of the United States.

Respondents maintain and have maintained at all times mentioned herein a course of trade in said products among and between various States of the United States. Respondents' business in said commerce has been substantial.

PAR. 3. Respondents' plan of operation in selling their pianos is in substance as follows: Respondents advertise in rural newspapers in the midwest in the trade territory in which their business extends

over such names as "Finance Manager," "Collection Department," and "Finance Department." Typical but not all inclusive of said advertisements are the following:

Spinnet piano bargain. Circumstances beyond our control force us to offer for sale in your community a lovely Spinnet piano. Standard make and keyboard. Fully guaranteed. Some lucky party with good credit can make small down payment and assume monthly payments. Quick action necessary. We will tell you where to see Spinnet. Write Finance Manager, 16 N. W. Second Street, Evansville, Indiana.

FORCED TO SELL SPINET PIANO

like new. We are forced by circumstances over which we have no control, to sell in this section Gorgeous little spinet piano. Plays and looks like new. Party with good credit can pay minimum down payment and assume few monthly payments. Considerable has already been paid. Write to Manager Collection Dept. P. O. Box 543 and we will notify where to see Spinnet. Quick action necessary. Tiller-Faith Piano Co., Inc., Evansville, Ind.

WANTED party with good credit interested in buying extra nice little Spinnet piano. Standard make and keyboard. Condition of case and interior AA1. Require small down payment and assume several monthly installments. Write Collection Dept. Window "B" 16 N. W. Second Street, Evansville, Ind. We will notify where to see instrument.

When an inquiry or reply is received from the rural advertisement, an agent or representative of the respondent takes from the stockroom, either at Nashville, Tennessee, or Evansville, Indiana, a new piano, places same on a truck and proceeds to the residence of the inquirer, located in many instances in States other than the States of Tennessee and Indiana. Some of these pianos have price marks or tags attached, usually in the amount of \$795.00.

In furtherance of their scheme to sell and dispose of their product, the representative makes certain oral statements to the prospective purchaser, among them being that said piano had been previously sold to a purchaser for \$795.00, which was the regular price; that said purchaser, on account of financial difficulties or other matters beyond his or her control, was unable to continue payments on the piano and said piano had been repossessed; that in order to save the time and expense of transporting from the territory at which it was located to respondent's stores, either in Evansville or Nashville, that same would be sold at the reduced price of \$500.00 or some other figure considerably less than \$795.00.

PAR. 4. By means of the statements contained in the aforesaid advertisements, respondents represented that they were forced to sell the pianos mentioned therein; that they had come into possession of said pianos through repossession or in some other manner other than through normal channels of purchase; that the pianos were not new

Consent Settlement

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and substantial amounts had been paid on the purchase price by others, and for these reasons said pianos were offered for sale at a substantial discount from \$795.00 or some other figure which was the price usually and regularly charged.

PAR. 5. The aforesaid representations made by respondents in their newspaper advertising and by means of oral statements made by their agents or representatives were false, misleading and deceptive. In truth and in fact, respondents were not in any manner forced to sell their pianos and the sales made were not forced sales. In most instances the pianos offered for sale had not been repossessed but came into the possession of respondents through ordinary purchases made from their suppliers and were new pianos. The sum of \$795.00 or such other sums as may have been shown on price tags or stated by respondents' agents or representatives to be the usual and regular prices were fictitious and were not the usual and regular prices at which said pianos were ordinarily sold. Actually the prices charged were the prices at which said pianos were usually and regularly sold.

PAR. 6. In the course and conduct of their business respondents have been and are now engaged in substantial competition in commerce with other corporations and with partnerships and individuals likewise engaged in the sale and distribution of pianos in commerce.

PAR. 7. The use by respondents of the acts, practices and methods aforesaid in connection with the offering for sale and selling of pianos have had and now have the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and claims were true.

As a result of such erroneous and mistaken belief a substantial number of the purchasing public have purchased said pianos in commerce thereby unfairly diverting trade in said commerce to the respondents from their competitors to the injury of said competitors and the public.

PAR. 8. The acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on the 17th day of March, 1952, issued

¹The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on October 3, 1952 and ordered entered

and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act. The respondents, Tiller-Faith Piano Company, Inc., Armand A. Tiller, and Mona Frances Tiller, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding and review thereof and enforcement of the order consented to and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint filed April 18, 1952, hereby:

1. Admit all of the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents named in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the said respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Tiller-Faith Piano Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Indiana with its office and principal place of business located at 16 N. W. Second Street, Evansville, Indiana.

Respondent B. T. Faith Piano Company, Inc., is a corporation organized and existing under and by virtue of the laws of Tennessee, with its office and principal place of business located at 911 Church Street, Nashville, Tennessee.

of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

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Respondents Armand A. Tiller and Mona Frances Tiller are individuals and officers of corporate respondents Tiller-Faith Piano Company, Inc., and B. T. Faith Piano Company, Inc., with their office and principal place of business in Louisville, Kentucky.

Individual respondent Benjamin T. Faith was, prior to his death on October 29, 1951, the President and General Manager of the corporate respondents and as such President and General Manager, he formulated, directed, and controlled the business, acts, and policies of the corporate respondent.

Respondents Armand A. Tiller and Mona Frances Tiller assisted in formulating, directing, and controlling the business, acts and policies of the corporate respondent Tiller-Faith Piano Company, Inc.

In December 1951, individual respondent Mary Woodburn Faith, widow of Benjamin T. Faith, deceased, sold her stock in said respondent corporations to said corporations pursuant to the terms of stock purchase agreements, and since said date, has not been engaged in or connected in any manner with the sale and distribution of pianos or other musical instruments, either individually or as an officer, stockholder, or employee of respondent corporations or any other corporations.

Subsequent to the death of Benjamin T. Faith, Phillip Manfre purchased 50% of the outstanding stock of corporate respondent Tiller-Faith Piano Company, Inc., and is now President and General Manager of said corporate respondent and formulates, directs, and controls the business, acts and policies of said corporate respondent.

PAR. 2. Respondents, Tiller-Faith Piano Company, Inc., a corporation, Armand A. Tiller, and Mona Frances Tiller, hereinafter referred to as respondents are now and for more than two years last past have been engaged in the sale and distribution of pianos. Said respondents cause and have caused their pianos to be transported from their aforesaid place of business in the State of Indiana to purchasers thereof located in various other States of the United States.

Said respondents maintain and have maintained at all times mentioned herein a course of trade in said products among and between various States of the United States. Respondents' business in said commerce has been substantial.

PAR. 3. Respondents' plan of operation in selling their pianos is in substance as follows: Respondents advertise in rural newspapers in the Midwest in the trade territory in which their business extends over such names as "Finance Manager," "Collection Department," and "Finance Department." Typical, but not all-inclusive, of said advertisements are the following:

Spinnet piano bargain. Circumstances beyond our control force us to offer for sale in your community a lovely Spinnet Piano. Standard make and keyboard. Fully guaranteed. Some lucky party with good credit can make small down payment and assume monthly payments. Quick action necessary. We will tell you where to see Spinnet. Write Finance Manager, 16 N. W. Second Street, Evansville, Indiana.

FORCED TO SELL SPINET PIANO

like new. We are forced by circumstances over which we have no control, to sell in this section Gorgeous little spinnet piano. Plays and looks like new. Party with good credit can pay minimum down payment and assume few monthly payments. Considerable has already been paid. Write to Manager Collection Dept. P. O. Box 543 and we will notify where to see Spinnet. Quick action necessary. Tiller-Faith Piano Co., Inc., Evansville, Ind.

WANTED party with good credit interested in buying extra nice little Spinnet piano. Standard make and keyboard. Condition of case and interior A+1. Require small down payment and assume several monthly installments. Write Collection Dept. Window "B" 16 N. W. Second Street, Evansville, Ind. We will notify where to see instrument.

When an inquiry or reply is received from the rural advertisement, an agent or representative of the respondents takes from the stock-room in Evansville, Indiana, a new piano, places same on a truck and proceeds to the residence of the inquirer, located in many instances in States other than the State of Indiana. Some of these pianos have price marks or tags attached, usually in the amount of \$795.00.

In furtherance of its scheme to sell and dispose of its product, the representative makes certain oral statements to the prospective purchaser, among them being that said piano had been previously sold to a purchaser for \$795.00, which was the regular price; that said purchaser, on account of financial difficulties or other matters beyond his or her control, was unable to continue payments on the piano and said piano had been repossessed; that in order to save the time and expense of transporting same from the territory at which it was located to respondents' store in Evansville, Indiana, that same would be sold at the reduced price of \$500.00 or some other figure considerably less than \$795.00

PAR. 4. By means of the statements contained in the aforesaid advertisements, respondents represented that they were forced to sell the pianos mentioned therein; that they had come into possession of said pianos through repossession or in some other manner other than through normal channels of purchase; that the pianos were not new and substantial amounts had been paid on the purchase price by others, and for these reasons said pianos were offered for sale at a substantial discount from \$795.00 or some other figure which was the price usually and regularly charged.

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PAR. 5. The aforesaid representations made by respondents in their newspaper advertising and by means of oral statements made by their agents or representatives were false, misleading, and deceptive. In truth and in fact, respondents were not in any manner forced to sell their pianos and the sales made were not forced sales. In most instances, the pianos offered for sale had not been repossessed but came into the possession of respondents through ordinary purchases made from its suppliers and were new pianos. The sum of \$795.00 or such other sums as may have been shown on price tags or stated by respondents' agents or representatives to be the usual and regular prices were fictitious and were not the usual and regular prices at which said pianos were ordinarily sold. Actually, the prices charged were the prices at which said pianos were usually and regularly sold.

PAR. 6. In the course and conduct of their business, respondents have been and are now engaged in substantial competition in commerce with other corporations and with partnerships and individuals likewise engaged in the sale and distribution of pianos in commerce.

PAR. 7. The use by respondents of the acts, practices and methods of aforesaid in connection with the offering for sale and selling of pianos has had and now has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and claims were true.

As a result of such erroneous and mistaken belief, a substantial number of the purchasing public have purchased said pianos in commerce thereby unfairly diverting trade in said commerce to the respondents from their competitors to the injury of said competitors and the public.

CONCLUSION

The acts and practices of respondents, as herein stated, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered. That respondent Tiller-Faith Piano Company, Inc., a corporation, Armand A. Tiller, and Mona Frances Tiller, individually and as officers of said corporate respondent, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the solicitation or the offering for sale, sale, and distribution of pianos in commerce, as "commerce" is

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defined in the Federal Trade Commission Act, do forthwith cease and desist from representing:

1. That they are forced to sell their pianos;
2. That pianos offered for sale have been repossessed from the purchasers thereof or obtained in any manner other than through normal channels of purchase when such pianos have not in fact been so repossessed or obtained;
3. That any amount has been paid by others on the purchase price of said pianos;
4. That prices at which their pianos are offered for sale are special or reduced prices when such prices are in fact the regular and customary prices at which such pianos are sold by respondents;
5. That the customary or regular prices at which their pianos are sold by the respondents are in excess of the prices at which such pianos are advertised or offered for sale.

It is further ordered, That the complaint, insofar as it affects B. T. Faith Piano Company, Inc., a corporation, Benjamin T. Faith, and Mary Woodburn Faith, be, and it hereby is, dismissed.

It is further ordered, That the respondent, Tiller-Faith Piano Company, Inc., a corporation, and Armand A. Tiller, and Mona Frances Tiller, individually and as officers of said corporation, 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.

TILLER-FAITH PIANO COMPANY, INC.,

A CORPORATION,

By PHILLIP MANFRE, *President*.

S Armand A. Tiller,
ARMAND A. TILLER.

S Mona Frances Tiller,
MONA FRANCES TILLER.

Dated: September 5, 1952.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 3rd day of October, 1952.

IN THE MATTER OF
HATO COMPANY, INC., ET AL.

COMPLAINT, DECISION, FINDINGS, ORDER, AND OPINION IN REGARD TO THE
ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT.
26, 1914

Docket 5087. Complaint, Sept. 6, 1950—Decision, Oct. 6, 1952

Diabetes is incurable and cannot be self-diagnosed or self-treated by the layman, and the sale of a preparation therefor to the lay public under representations and claims which are false is a public danger to the several million diabetics in the United States.

As respects the treatment of such conditions as retinopathy or retinitis, and increased capillary fragility, which accompany diabetes, treatment of the former is still in the research field, and cause or cure of the latter is unknown, so that it is inimical to the health of a large and unfortunate segment of the public to offer relief for such conditions through the purchase of a preparation calculated to lull the taker into a false sense of security which may, notwithstanding the wrapper and its directions, lead him to throw off the onerous diet restrictions and use of insulin, and thus inevitably hasten his death.

With regard to the authority of the Commission in a proceeding under Section 5 to direct its orders to the officers, agents, representatives, and employees of a named corporate respondent in the absence of any findings other than those directed solely at the corporate respondent: the Commission was of the opinion that the decision in *R. J. Reynolds Tobacco Co. v. F. T. C.*, 192 F. (2d) 535, 539-540, to the effect that the Commission was without such authority was erroneous in the light of that of the Supreme Court in *Regal Knitwear Co. v. N. L. R. B.*, 325 U. S. 9, there relied on, and in the light of other pertinent holdings of the courts including those in six other circuits, and that the earlier decision of the same court, overruled by it in the *Reynolds case*, in *Sebrone Co. et al. v. F. T. C.*, 135 F. (2d) 676, 678, was right.

It has long been the practice of the Commission to make its orders run against the officers, agents, representatives, and employees of corporate respondents and against their agents, etc., as individual respondents, such phrasing being regarded by it as a proper method of advising respondents that they are forbidden to undertake the interdicted act indirectly through some representative or subordinate, and the Commission has always understood that it not only had the right but the duty of making such inclusion in its orders.

A representation in an advertisement that a certain medicinal preparation would relieve "certain conditions often accompanying diabetes" was false, misleading and deceptive in its breadth and lack of qualification where it appeared that there was no claim that the product would relieve any except two of said conditions, and there was indirect evidence that the product would not relieve any of the others including acidosis, leg ulcers, cataracts, kidney complications and gangrene.

Where a corporation and its president, engaged in the offer and sale of a drug tablet designated "Celparux", in advertising in newspapers—

Falsely represented that said "Celparux" would control diabetes and would relieve certain conditions and complications thereof;

The facts being that no drug or combination of drugs presently known will cure or remedy diabetes; and neither said product, taken as directed, nor its ingredient rutin, will prevent the development, arrest the progress of, or serve as an adequate, competent treatment, remedy, or cure for diabetic retinitis or retinopathy; or prevent the development or increase of, or diminish, restore to normal, or correct increased capillary fragility in diabetics; or prevent, cure, treat, remedy, or relieve any symptom or complication of diabetes per se:

Held, That said acts and practices were false, misleading, and deceptive, and were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

In reviewing and appraising the expert medical testimony of both parties in the foregoing proceeding, the Commission was of the opinion that the greater weight of the evidence in the record as to the therapeutic value of rutin for increased capillary fragility or retinitis resulting from or concomitant with diabetes, or hypertension, was that it had none.

In so deciding the determinative fact was not the greater number of the experts who so testified, but an analysis of the testimony as a whole, including the facts that respondent's expert did not specialize in diabetes, and that the benefits of rutin therapy for hypertensive retinitis and increased capillary fragility which he found may be accounted for by a difference in causation, namely, that while capillary fragility accompanying diabetes and hypertension is the same, the cause and treatment are different, and hypertensive retinitis is quite different from diabetic retinitis, and there is no relationship between increased capillary fragility and retinopathy in diabetes.

As respects public interest involved in respondent's advertising and selling to the lay public, it was significant that said expert testified that correction of increased capillary fragility would not aid or repair hemorrhage which had already taken place, that capillary fragility is certainly not the sole cause of retinal hemorrhage and may not even be a contributing part, that patients who had suffered said conditions had passed the point of no return so far as their retinal blood vessels are concerned, and that treatment of retinal hemorrhage is still in the research field and that neither rutin nor anything else can be offered to the general clinician as a remedy, cure, or relief therefor.

The reopening of the proceeding in question as a result of which additional evidence of qualified experts, including actual experience with rutin, the techniques employed, and the results obtained were detailed, and the standards of judgment and professional opinion were set out, largely cleared up prior uncertainties in the record and thus furnished a broader and sounder basis on which to judge and decide, weigh the evidence, and resolve conflicts and draw conclusions.

As respects the offer of the aforesaid preparation, whether the seller might make a profit out of the operation or give it away was beside the point.

In the aforesaid proceeding it was immaterial that reputable and leading drug houses offered the rutin compound for sale to the medical profession, since

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that was no evidence of its therapeutic value; and the deduction therefrom that a substantial number of physicians were prescribing it for the very "conditions" advertised by respondents was likewise immaterial, and certainly so as any defense or justification; and the fact that a segment of the medical profession may be misleading diabetics is no excuse for respondents' likewise doing so, and no evidence on the record that neither of respondents' claims was misleading.

Before *Mr. Frank Hier*, hearing examiner.

Mr. R. L. Banks and *Mr. Jesse D. Kash* for the Commission.

Henican, James & Cleveland, of New Orleans, La., for respondents.

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 Hato Company, Inc., a corporation, and Charles W. Thomas, individually and as an officer of Hato Company, Inc., hereinafter referred to as respondents, have violated the provisions of the 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, Hato Company, Inc., is a corporation chartered and existing under the laws of the State of Louisiana, having its office and principal place of business at 150 Baronne Street, New Orleans, Louisiana.

Respondent, Charles W. Thomas, is president of Hato Company, Inc. The said Charles W. Thomas is responsible for and has control of and formulates the advertising policies and practices of the said corporate respondent, including the acts and practices hereinafter described. The address of the said individual respondent is the same as that shown for the corporate respondent.

PAR. 2. The respondents are now and have been for more than one year last past, engaged in the business of offering for sale and selling a drug preparation, as "drug" is defined in the Federal Trade Commission Act. The said preparation is compounded and sold as a tablet.

The designation used by respondent for the said drug, its formula and directions for use thereof are as follows:

Designation: "Celparux"

Formula: Each tablet contains:

Rutin.....	20 MG.
Parsley.....	180 MG.
Celery.....	60 MG.
Ascorbic Acid	20 MG.

Directions :

One tablet three times a day and one at bed time.

Use : Diuretic.

The labeling for said preparation sets out certain suggestions with respect to diet.

PAR. 3. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said drug, Celparux, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce directly or indirectly, its purchase, including, but not limited to advertisements in the "New Orleans Item" issues of December 18, 21, and 31, 1948; the New Orleans "Times Picayune" issues of December 8, 12, 15, 19, 22, 26, and 29, 1948; the "New Orleans States" issue of December 8, 1948; and the Monroe, Louisiana "News Star" issues of May 1 and 2, 1949; and respondents have disseminated and caused the dissemination of advertisements including, but not limited to those referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, its purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the statements and representations contained in said advertisements, disseminated and caused to be disseminated, as hereinabove set forth, are the following:

Do you have diabetes? Celparux tablets are especially compounded to control your diabetes.

DO YOU HAVE DIABETES MELLITUS? CELPARUX TABLETS—
Especially compounded as an aid in the relief of certain conditions often accompanying DIABETES MELLITUS.

PAR. 5. Through the use of the advertisements containing the statements and representations hereinabove set forth, respondents have represented, directly and by implication, that the use of said preparation "Celparux" will control diabetes, and relieve certain conditions and complications of diabetes.

PAR. 6. The said advertisements are misleading in material respects and are "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the use of the said preparation, as directed or otherwise, will not control diabetes, relieve any condition or complication of diabetes or have any therapeutic or other value in the treatment of said disease or its symptoms or complications.

PAR. 7. The use by respondents of the said advertisements has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that

the statements and representations are true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said preparation.

PAR. 8. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on September 6, 1950, issued and subsequently served its complaint in this proceeding upon respondents Hato Company, Inc., a corporation, and Charles W. Thomas, individually and as an officer thereof, charging them with the use of unfair and deceptive acts and practices in commerce by disseminating false advertisements in violation of said Act. After the issuance of said complaint and the filing on October 25, 1950, of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, on April 9, 1951, the hearing examiner filed his initial decision, which was duly served upon the parties. Thereafter, counsel in support of the allegations of the complaint moved the Commission to order the proceeding reopened and remanded to the hearing examiner for the taking of additional evidence, which motion, though opposed by respondents, was granted by the Commission on August 23, 1951. Pursuant to such order, hearings were held for the receipt of additional evidence tendered by counsel in support of the complaint and for the receipt of evidence in opposition thereto tendered by respondents. Neither side having anything further to offer, the taking of evidence was closed by the hearing examiner on April 9, 1952. Thereafter, the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, answer thereto, testimony and other evidence, before and since prior decision, and proposed findings of fact and conclusions presented by counsel for respondents; and said hearing examiner, on May 14, 1952, filed his initial decision therein.

Within the time permitted by its Rules of Practice, the Commission, having reason to believe that said initial decision did not constitute an adequate disposition of this proceeding, issued an order placing this

case on its docket for review, and served on all parties its tentative order to cease and desist proposed in lieu of the order contained in the initial decision, together with an order granting respondents leave to file any objections they might have to the proposed changes in the initial decision as embodied in said tentative order. The Commission having denied respondents' objections to said tentative order, this proceeding regularly came on for final consideration by it upon the record herein; and the Commission, being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusions drawn therefrom and order based thereon, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Hato Company, Inc., is a corporation chartered and existing under the laws of the State of Louisiana, having its office and principal place of business at 150 Baronne Street, New Orleans, Louisiana.

Respondent Charles W. Thomas is, and since its organization has been, president of Hato Company, Inc., and is and has been responsible for and in control of the advertising policies and practices of the corporate respondent, he having formulated such policies and practices, including the acts and practices herein described. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and since 1948 have been engaged in offering for sale and selling a drug tablet, as "drug" is defined in the Federal Trade Commission Act. Such tablet is designated Celparux and its formula is:

Rutin.....	20 mg.
Parsley.....	180 mg.
Celery.....	60 mg.
Ascorbic Acid.....	20 mg.

Directions for use are one tablet three times a day and one at bedtime as a diuretic. The labeling of said preparation sets out certain dietary suggestions.

PAR. 3. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, advertisements of Celparux, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, its purchase, including advertisements inserted in the "New Orleans Item," "New Orleans States," "Times Picayune" news-

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papers in 1948 and the Monroe, Louisiana, "News Star" newspaper in 1949; and respondents have disseminated and caused the dissemination, by various means, of advertisements for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the statements and representations in said advertisements, disseminated and caused to be disseminated as hereinabove found, are the following:

Do you have diabetes? Celparux tablets are especially compounded to control your diabetes.

Do you have diabetes mellitus? Celparux tablets—especially compounded as an aid in the relief of certain conditions often accompanying diabetes mellitus.

PAR. 5. Through the use of the advertisements containing the statements and representations hereinabove set out in Paragraph Four, respondents have represented that Celparux tablets will control diabetes, and will relieve certain conditions and complications of diabetes.

PAR. 6. Diabetes to the public is synonymous with diabetes mellitus, and is an incurable disease of metabolism in which the pancreas fails to produce and pour into the blood stream enough of the hormone insulin to metabolize glucose sugar in the blood to substances which can be utilized by the tissues. This failure results in an excess of sugar in the blood stream, which spills over into the urine. Uncorrected or uncompensated acidosis, vascular disease, leg ulcers, retinitis, cataracts, kidney complications, increased capillary fragility, and gangrene may ensue, resulting in death. At least several million people in the United States have diabetes.

PAR. 7. Diabetes is characterized symptomatically at the onset by increased thirst and appetite, loss of weight, excessive urination, itching of the skin, often infections of the skin and weakness. While all of these are objectively discernible to the patient himself, they are not indicative of diabetes alone, but characterize other physical disturbances or diseases also. Furthermore, they are merely the outward manifestations of the metabolic fault which is undeterminable without facilities and the knowledge of their use, not possessed by a layman. Self diagnosis of diabetes is impossible. The victim must be given a thorough physical examination by a competent and experienced physician including extensive laboratory tests, such as urinalyses, glucose blood level and glucose tolerance tests. While urinalyses may be performed by an instructed layman or patient, the other tests cannot be. From these tests the physician must determine the extent of metabolic fault—just how much blood sugar the impaired pancreas

can metabolize. If the breakdown be slight, restriction of sugar and starches in the diet may be adequate to prevent complications and death. If the breakdown be extensive, then in addition to diet restriction, insulin must be injected parenterally at various intervals. Fifty percent of diabetics need insulin as well as diet restriction. Victims of diabetes vary greatly in their ability to utilize blood sugar, diets must be fitted to the individual exigency, and dosages of insulin vary widely as to the kind of insulin, the unit dose and frequency of the injection. Self-treatment, in the sense of halting or delaying the disease, is therefore impossible also.

PAR. 8. There exists no drug or combination of drugs, presently known, which will cure, correct or remedy diabetes. Since there likewise exists no drug, or combination of drugs, presently known, which, when taken by mouth, will control or adequately and effectively treat diabetes, the question of whether the disease can be controlled or treated at all by diet and/or insulin, in one sense of those verbs, is immaterial. Respondents' representation, therefore, that Celparux tablets "are especially compounded to control your diabetes," is misleading and deceptive on its face and false in its implication that they will control the disease.

PAR. 9. The evidence on respondents' second representation: "Celparux tablets—especially compounded as an aid in the relief of certain conditions often accompanying diabetes," is in conflict on one point. The "conditions" accompanying diabetes are hereinabove set out in Paragraph Six. There is no claim by respondents that their product will relieve any of these conditions except retinitis and increased capillary fragility. There is indirect evidence in the record that Celparux will not. Therefore, the representation is false, misleading and deceptive in its breadth and lack of qualification as to the other conditions which frequently accompany diabetes—acidosis, leg ulcers, cataracts, kidney complications, gangrene. The only serious dispute in this proceeding is whether rutin, with or without ascorbic acid, in the amounts contained in Celparux, taken as directed, will relieve retinitis and increased capillary fragility. Forty percent of all diabetics have increased capillary fragility, of which seven to eight percent have retinitis.

PAR. 10. On this issue, two specialists in internal medicine, the orbit of which includes diabetes, who had treated many diabetics and who were currently doing so, testified that neither Celparux tablets, nor any of the ingredients therein, alone or in combination, in the dosage prescribed, or in any dosage, would "relieve," treat, cure, or alleviate either diabetes or its accompanying retinitis or increased capillary fragility. Neither had had any experience with Celparux

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or rutin, experimental or clinical. Both were aware of reported research and experimental and clinical work done by others with rutin on both animals and humans in the treatment of retinitis and increased capillary fragility, whether concomitant to diabetes, hypertension or some other disorder, and were aware that some of this work indicated success. They testified that other work done produced neutral or negative results. Both rejected the findings of success, on the ground that the results were inconclusive.

PAR. 11. One of these experts was of the opinion that rutin was not absorbed into the blood stream in appreciable amounts, with or without the other ingredients of Celparux; that insulin does not cure increased capillary fragility or retinitis but that diet restriction will limit and prevent retinitis; that the clinical reports on the use of rutin in decreasing increased capillary fragility and retinitis have been equivocal, that is, that there have been comparatively as many failures as successes; that the tests for increased capillary fragility are not completely satisfactory but open to a number of valid criticisms; that the work of others on this subject has shown positive, neutral and negative results (some of it shows rutin does decrease capillary fragility and retinitis, some of it shows rutin to have no effect whatever and some of it shows increased capillary fragility and retinitis in spite of rutin therapy). Therefore, she rejects it all as inconclusive and does not believe that rutin in the dosage of Celparux, with or without the other ingredients, will relieve increased capillary fragility or retinitis.

PAR. 12. The second of these experts was of the opinion that Celparux is not an adequate treatment for diabetes; that there is no conclusive proof that Celparux, taken as directed, will prevent or relieve any symptom, condition or complication of the disease; that there is evidence that rutin will, and evidence that it will not, but that it is in the experimental stage at this time and, therefore, he did not believe that it would. He had great doubt that rutin was absorbed through the intestinal tract when taken orally and was not aware of any research showing that combining ascorbic acid with rutin increased the absorbency of the latter. He was of the opinion that there was conclusive evidence that rutin would not relieve increased capillary fragility in the majority of patients treated with it, although he had never used it himself, experimentally or clinically; that there is evidence that rutin will relieve increased capillary fragility in a few cases but that such evidence was inconclusive in his opinion; that there were some experts in the field who believe that rutin deserves further clinical trial, who advocate its use and believe it to be effective. He was further of the opinion that ascorbic acid has an effect on

increased capillary fragility where associated with scurvy; that the tests to discover increased capillary fragility are all subject to criticism for validity; that his acceptance of experiments with rutin would depend upon how well the experiments and the increased capillary fragility were controlled and how long the experiments were run; that he knew of no experiments with rutin where these factors were satisfactorily demonstrated. He testified that insulin does not decrease capillary fragility and does not correct or control retinitis, that diabetes may be under control but the patient will still have increased capillary fragility. He testified he was reluctant to recommend, accept or use a drug until it is proved to his satisfaction to be and to do what it is supposed, because he is not sure it will do the patient the good it is supposed to, because some harm may befall the patient from taking it and because of the added expense to the patient.

PAR. 13. Opposing this medical opinion evidence, respondents produced a medical expert in the field of hypertension. Hypertensives, however, frequently have increased capillary fragility as a concomitant to their hypertension. This witness had first used rutin, experimentally and clinically. He was the author or co-author of some eight published articles describing its use and the results thereof. He was of the opinion that rutin is of definite value in correcting increased capillary fragility and retinitis in the amount contained in, and the dosage directed for, Celparux, with which product as such he was entirely unfamiliar. He did not know whether ascorbic acid increased the effect of the rutin but testified that rutin therapy was successful in reducing increased capillary fragility to normal in 88 percent of 300 to 500 patients, all of whom were the patients of the witness, all of whom he treated himself, and all of whom he saw. Very few of them had diabetes. His experience with rutin therapy for increased capillary fragility and retinitis covers eight years. He was of the opinion that a tablet containing the rutin in Celparux would have therapeutic value in the treatment of capillary fragility and retinitis, but would not testify as to the other ingredients in Celparux since he was unfamiliar with the product. He was of the opinion that diabetes was not due to a deficiency of ascorbic acid, that celery and parsley would have no therapeutic value in the treatment of diabetes.

PAR. 14. There was no dispute in the medical opinion testimony that increased capillary fragility and retinitis cannot be discovered or diagnosed by a layman; that Vitamin C, celery and parsley have no therapeutic effect whatever on diabetes or any symptom or condition thereof; that rutin preparations are sold by leading pharmaceutical houses for the treatment of increased capillary fragility, usually

under the supervision of a physician; that Celparux is not dangerous to the human body in many times the dosage recommended by respondents.

PAR. 15. Celparux never has been and is not sold or given away except with a pamphlet prepared by respondents containing express directions to the user to follow his diet and see his physician. Selparux is sold in bottles of 100 tablets formerly for \$3.50 each, now for \$2.50 at the rate of from 150 to 300 bottles per month, twenty-five per cent of which are given away by respondents to those who can't afford to pay for them.

PAR. 16. In addition to the medical testimony it was stipulated that if a pharmacologist were called, he would testify that he had made an extensive study of rutin, was familiar with the bibliography on the subject, and had prepared a thesis thereon; that in his opinion, it was of definite therapeutic value in treating increased capillary fragility and retinitis in the dosage recommended by respondents; that it is sold by reputable drug manufacturers for this purpose; that its effectiveness is increased by the addition of ascorbic acid. Such were the facts as revealed by the record when the proceeding was first closed and decided. After being reopened and remanded by the Commission, the following facts were adduced.

PAR. 17. Four specialists in internal medicine, which specialty includes diabetes mellitus, hypertension and their complications—two in Cleveland, Ohio, one in New York City and one in Philadelphia—all conferees of numerous academic and scientific degrees, all having served as instructors in medicine, both graduate and undergraduate, all of them authors of scientific articles, all of them having held hospital and clinical appointments of importance and responsibility and all of them having actively practiced medicine with private patients and in clinics for from 15 to 25 years and otherwise well qualified as experts in their field, testified they had administered rutin to patients suffering from retinopathy or retinitis, whether caused by or a concomitant of diabetes mellitus or hypertension, with completely negative results. One of these specialists had taken a group of 19 diabetics with retinopathy, all of whom were tested for increased capillary fragility by standard methods, and had given half of them placebos and the other half rutin in a dosage of 60 milligrams three times a day for a period of from 1 month to 3 months. He had also taken another group of 12 with hypertension and had similarly divided this group and treated one-half thereof with a similar dosage. Results were completely negative for both groups. Some of the patients in the control group showed improvement in capillary fragility; some in the treated group showed a worsening. There was no distinguishable

change in the retinopathy. The second expert had made a study of the use of rutin for the relief of capillary fragility, retinitis or retinopathy in conjunction with a leading ophthalmologist, giving a dosage of 50-60 milligrams three times a day to 75 patients who were observed over a period of from 6 months to a year, and he was unable to detect any objective evidence of improvement. The third specialist had treated more than 100 diabetics with a dosage of 20 milligrams three times a day which was increased up to 80 milligrams three times a day over a minimum period of 2 to 3 months and a maximum of 6 months without evidence of improvement. In fact, two patients developed blindness due to hemorrhage while on the rutin therapy. The fourth specialist prescribed it in dosages ranging from 20 milligrams to 100 milligrams four times a day to 150 to 200 patients over a period of from 3 months to 3 years and he has not seen a single patient where rutin had any effect on the progress of the retinitis. All of these men were of the professional opinion that the periods of time over which they administered the drug were amply sufficient to demonstrate whether it had any therapeutic effect on the disorder for which it was administered. In addition to the above, an equally well qualified ophthalmologist testified that he had tried rutin in dosages of from 20 milligrams three times a day to 400 milligrams daily over a period of from 6 months to 2 years on 50 diabetics and 25 to 30 hypertensives having retinopathy without beneficial result.

PAR. 18. Based on their experience, as detailed, and their scientific knowledge and experience as a whole, these men gave it as their collective expert opinions that rutin does not and will not arrest the progress of, correct, relieve or cure retinitis or retinopathy in either diabetics or hypertensives; nor does it diminish or restore to normal the increased capillary fragility from which diabetics or hypertensives frequently suffer; and that it is not an adequate, competent or effective treatment or remedy for diabetic or hypertensive retinitis or increased capillary fragility. They were further of the unanimous opinion that the respondents' preparation Celparux, when taken as directed, would not prevent the development of diabetic retinitis or retinopathy nor arrest the progress of these disorders; that it will not prevent capillary fragility from increasing nor will it correct or restore to normal increased capillary fragility in diabetics; that it will not correct, prevent or relieve any symptoms, conditions or complications of diabetes, nor will it cure diabetes, diabetic retinitis or increased capillary fragility, nor would the drug rutin alone accomplish any of these desired results.

PAR. 19. Respondents thereupon recalled as a witness the same specialist in hypertension who had previously testified, as set out

supra, in Paragraph Thirteen hereof. This witness, as well qualified to testify as an expert on hypertension as any in this proceeding, criticized the testimony of the first of the Cleveland, Ohio, internists on two principal grounds: that the tests used to determine increased capillary fragility were neither medically established nor reliable, and that too few patients were tested over too short a time to determine whether rutin has or has not any therapeutic value. It was conceded that where a drug is toxic, 3 months is an adequate time, but he insisted that rutin is nontoxic and is allied to vitamins where results are frequently not demonstrable for many more months. Further criticism was made of the selection of patients with retinal hemorrhages already occurred on the ground that this amounted to restricting the testing to the worst cases where calamity had already occurred, and the negative results from such a restricted field did not necessarily indicate a drug had no beneficial or preventative effect on patients who had not retrograded so far. He testified further that some 11 reputable drug houses make and sell rutin under license from the U. S. Government, which holds the patent for its manufacture. He admitted that this is no evidence of the therapeutic value of rutin but simply evidence that there is a demand for it and use of it by the medical profession. As to the other testifying experts, he was of the opinion that their conclusions were too sweeping. He testified that he was convinced that correcting capillary fault would not help a hemorrhage which has already occurred; that capillary fragility is certainly not the sole cause of retinal hemorrhage and may not even be a contributing cause; that those who have had retinal hemorrhage have passed the point of no return so far as their retinal blood vessels are concerned; and that treatment of retinal hemorrhage is still in the research field and neither rutin nor anything else can be offered to the general clinician as a fait accompli. He did not know whether diabetics got any benefit from rutin dosage, having had too many diabetics suffer progressive failure of vision during the past few years while on adequate rutin therapy, frequently with normal capillary fragility, to have any illusions that rutin is the final answer for diabetic retinopathy and he had never claimed that it was. He was of the opinion that it had a subsidiary place, however.

PAR. 20. The greater weight of the evidence in this record as to the therapeutic value of rutin for increased capillary fragility, retinitis or retinopathy resulting from or concomitant with diabetes mellitus or hypertension is that it has none—not because there were a greater number of experts expressing such opinion but for the following reasons. It is most significant that identical results were obtained from usage of rutin, experimentally and clinically, by a

number of well qualified specialists in different parts of the country, unanimously opposite to the results obtained by respondents' experts. If the other experimenters or users had obtained varying or spotty results, the extensive and positive results of respondents' expert might well prevail because of the number of cases and the number of years followed. Opposing results were not all obtained in just 3 months—two observers followed patients taking rutin for 2 and 3 years, respectively. It seems impossible for five well qualified specialists, anxious to find some drug which would relieve or help the distressing conditions of their patients, separately to try out this drug without a single positive result, if the substance has the value and produces the results described by respondents' expert. There is no animus to discredit reflected on this record—the urge would naturally be to the contrary. Furthermore, there is credible and uncontradicted testimony in the record that, although the capillary fragility accompanying diabetes and hypertension is the same, the cause is different and the treatment is different, that hypertensive retinitis is quite different from diabetic retinitis or retinopathy, and there is no relationship between increased capillary fragility and retinopathy in diabetes. Respondents' expert does not specialize in diabetes, has limited experience with it, makes no claim to expertise in that field. The benefits of rutin therapy for hypertensive retinitis, retinopathy and increased capillary fragility which he found may, for all any expert testified, be accounted for by this difference in causation. This deduction is supported by his statement that he had seen too many diabetics suffer progressive failure of vision, although on adequate rutin therapy and frequently with normal capillary fragility, to have any illusions that rutin is the final answer for diabetic retinopathy. He admits he does not know whether diabetics get any benefit from rutin therapy. Rutin could be effective for vascular and retinal degenerative conditions accompanying hypertension and yet be entirely ineffective for the same conditions accompanying diabetes because of different causation. In any event, it is incorrect to assume, as was done on the previous record, that beneficial results claimed for rutin dosage on hypertensive concomitant indicated relief for the same conditions accompanying diabetes with the same treatment. Respondents' advertising, under attack in this proceeding, is confined to diabetes or "certain conditions often accompanying diabetes mellitus," for the relief or control of which respondents' nostrum is offered for sale.

PAR. 21. Accordingly, the finding of fact is that neither respondents' product Celparux, taken as directed, nor its ingredient, rutin, in any dosage, will prevent the development, arrest the progress of,

or serve as an adequate, competent, or effective treatment, remedy or cure for diabetic retinitis or retinopathy; nor prevent the development or increase of, nor diminish, restore to normal, or correct increased capillary fragility in diabetics; nor prevent, cure, treat, remedy, or relieve any symptom, condition or complication of diabetes, nor of diabetes per se. Respondents' representation, therefore, that its product Celparux, per se, or because of any ingredient, is "especially compounded as an aid in the relief of certain conditions often accompanying diabetes mellitus" is false, misleading and deceptive.

PAR. 22. On the question of the public interest in respondents' so advertising and selling to the lay public, it is significant that respondents' expert testified that correction of increased capillary fragility will not aid or repair a hemorrhage already taken place, that increased capillary fragility is not the sole, and may not even be a contributing cause of retinal hemorrhage, that patients who have had retinal hemorrhage have passed the point of no return so far as aid to their retinal blood vessels is concerned and that the treatment of retinal hemorrhage is still in the research field, and neither rutin nor any other substance is a reliable cure, remedy or relief therefor. According to another expert, diabetic retinopathy is a most serious complication, blinding one out of every six diabetics in spite of insulin, and increased capillary fragility occurs in 25 to 50 percent of all diabetics.

CONCLUSIONS

1. The uncertainties existing in the record in this proceeding prior to its having been reopened for the reception of additional evidence have been largely cleared up by the additional testimony of qualified experts. Actual experience with rutin has been presented, the techniques employed and results obtained have been detailed and the standards of judgment and professional opinion have been set out, thus furnishing a broader and sounder basis on which to judge and decide, weigh the evidence, resolve the conflicts and draw conclusions.

2. The sale of respondents' product to the lay public, under the representations and claims made is a public danger to the several million diabetics in the United States. Diabetes is incurable, cannot be self-diagnosed or self-treated by a layman. Even insulin and diet restriction do not prevent, control, arrest or relieve various degenerative "conditions" accompanying it, such as retinopathy or retinitis, which blinds one out of six, or increased capillary fragility, which attacks 25-50 percent of the unfortunate. With the treatment of the former condition still in the research field, and the latter unknown as to cause or cure, it is certainly inimical to the health of this very large

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and unfortunate segment of the public to offer relief for these conditions through the purchase of respondents' pills, and lull the taker into a false sense of security which may, in spite of the wrapper around the pill bottle, lead him to throw off the onerous diet restriction and insulin treatment, thus inevitably hastening his death. Whether the respondents make a profit out of the operation or give the pills away is beside the point. It is likewise immaterial that reputable and leading drug houses offer the rutin component for sale to the profession. That is no evidence of its therapeutic value. The deduction therefrom that a substantial number of physicians are prescribing it as a treatment for the very "conditions" advertised by respondents is likewise immaterial, certainly as any defense or justification to respondent. That a segment of the medical profession may be misleading diabetics is no excuse for respondents' likewise doing so, and no evidence on this record that neither is misleading.

3. The acts and practices of respondents as herein found to be false, misleading and deceptive, are all to the injury and prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Hato Company, Inc., a corporation, its officers, representatives, agents, and employees, and Charles W. Thomas, individually and as an officer thereof, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of Celparux, or any product of substantially similar composition, or possessing substantially similar properties, whether sold under the same or any other name, do forthwith cease and desist from directly or indirectly—

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement, which represents, directly or through inference, that Celparux does or will control diabetes or does or will relieve or have any therapeutic value in the treatment of any symptoms, complication or condition of diabetes, including retinitis, retinopathy and increased capillary fragility.

2. Disseminating, or causing to be disseminated by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of Celparux, any advertisement

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which contains any of the representations prohibited in Paragraph 1 of this order.

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

Commissioner Mason not participating.

OPINION OF THE COMMISSION

SPINGARN, COMMISSIONER: The Commission's complaint in this matter charges that respondents' advertising of their drug preparation Celparux as possessing therapeutic value in the treatment and control of diabetes and its symptoms is false, misleading and deceptive and constitutes unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

After consideration of testimony and other evidence in the matter, the hearing examiner issued an initial decision in which he sustained the material allegations of the complaint and ordered respondents to cease and desist from the practices challenged by the complaint.

No appeal from the initial decision was filed. However, the Commission, being of the opinion that the hearing examiner's initial decision did not constitute an appropriate disposition of the matter, placed the matter on its own docket for review and has issued its findings as to the facts, conclusion, and order to cease and desist substantially as issued by the hearing examiner, except for adding to the order language making the order applicable to "officers, representatives, agents, and employees" of the corporate respondent Hato Company, Inc., and to "representatives, agents, and employees" of the individual respondent, Charles W. Thomas. Such alterations of the initial decision present the sole issue in this matter.

For years it has been the practice of the Commission to make its orders run against the officers, agents, representatives, and employees of corporate respondents, and also against the agents, representatives, and employees of individual respondents. The Commission has always understood that it not only had the right but the duty to make such inclusion in its orders. It regarded this phrasing as a proper method of advising respondents that they were forbidden to undertake the interdicted act indirectly through some representative or subordinate. Authority apparently sustained this inclusion. *Regal Knitwear Co. v. National Labor Relations Board*, 325 U. S. 9 (1945); *Southport Petroleum Co. v. National Labor Relations Board*,

315 U. S. 100 (1942); *Sebrone Co., et al. v. Federal Trade Commission*, 135 F. (2d) 676, 678 (C. A. 7, 1943). The Commission feels that the inclusion serves a worthwhile purpose because, as a practical matter, it tends to prevent and discourage evasion.

The present question was squarely raised by the Court of Appeals for the Seventh Circuit in its decision in *R. J. Reynolds Tobacco Co. v. Federal Trade Commission*, 192 F. (2d) 535, 539-540 (1951). That Court held the Commission was without authority in a proceeding under section 5 of the Federal Trade Commission Act to direct its order to the officers, agents, representatives and employees of the named corporate respondent in the absence of any findings other than those directed solely at the corporate respondent. In the course of its opinion the Court did concede that "under the cases there may be room for differences of opinion" but, nevertheless, overruled its own prior decision on the precise point as expressed in *Sebrone Co., et al. v. Federal Trade Commission*, 135 F. (2d) 676, 678 (C. A. 7, 1943), because it felt "the opinion discloses the question received scant consideration."

In *Regal Knitwear Co., supra*, the Supreme Court had refused to strike from the Labor Board's order the somewhat broader phrase "officers, agents, successors and assigns." In the *R. J. Reynolds Tobacco Co.* case the Seventh Circuit Court found it necessary to distinguish that decision. It pointed out that violations of Commission orders, unlike those of the Labor Board, might be the subject matter of civil penalty actions instituted in the district courts, 15 U. S. C. § 45 (1). It understood that the Supreme Court's approval of the inclusion of "officers, agents, successors and assigns" in Labor Board orders rested on the premise that enforcement of such orders "was lodged with a court of equity, which had ample facilities on a citation for contempt for protecting a person or party improperly brought before the court." And further said with regard to Commission orders:

"Thus, the unnamed 'officers, agents, representatives and employees' are not only subject to a contempt proceeding for the violation of a court's enforcement decree *where equitable considerations prevail*, but they are likewise subject to a severe penalty, to be recovered in a civil action." [Emphasis supplied.]

The Commission does not understand that the Supreme Court's approval in *Regal Knitwear Co., supra*, rested on the premise that enforcement of Labor Board orders was lodged with a court of equity. Instead it notes that in the course of the opinion the court pointed out that Rule 65 (d) of the Federal Rules of Civil Procedure provides that:

"Every order granting an injunction and every restraining order * * * is binding upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The Court then stated:

"* * * This is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence, it is that defendants may not nullify a decree by carrying out prohibited acts by aiders and abettors, although they were not parties to the original proceeding."

The reasoning of the Seventh Circuit Court would be persuasive if the propriety of including the phrase in question rested on some power peculiar to and inherent in an equity court, or if the force and effect of such inclusion was to fix and determine responsibility for future acts without adequate notice and hearing, but since neither alternative appears correct, the Commission is of the opinion that the distinction sought to be made is unwarranted and not within the current of authority.

The Commission well recognizes that its orders cannot be "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudicated according to law." *Regal Knitwear Co.*, *supra*, at p. 13. However, orders directed to the "officers, agents, representatives and employees" of a named corporate respondent do not seek any such result, nor is the Commission appropriating any powers peculiar to courts of equity for, "* * * no court can make a decree which will bind anyone but a party; a court of equity is as much limited as a court of law. * * *" *Alemite Mfg. Corporation v. Staff*, 42 F. (2d) 833 (C. A. 2, 1930).

The common law has long sanctioned the inclusion of "officers, agents, representatives and employees" of a named party. This inclusion has never been considered to be in derogation of the rights of the members of the class to have their day in court, because to the extent they are bound by the order they have had complete and adequate representation. It is well established that no restraint is laid on such "officer, agent, representative and employee" personally but merely as the "officer, agent, representative and employee" of the named party. Notwithstanding the order and notice of it, he, upon ceasing to be the officer, agent, representative or employee is free to act for himself in the protection of his own rights and the prosecution of his own interest even though it may involve his doing the very thing prohibited his former master. The order is a personal matter to the

party against whom it is directed and to those persons who occupy a subordinate relation to such party while they occupy that relationship. The object of the generalization is to advise the named party that he may not do indirectly, through representatives and subordinates, the act which he is directly forbidden to do. The act prohibited by the order is the act of the respondent and if respondent is not involved in the violation, the officer, agent, representative and employee could not be involved. *Chase National Bank v. Norwalk*, 291 U. S. 431 (1934); *Alemite Mfg. Corporation v. Staff*, 42 F. (2d) 832 (C. A. 2, 1942); *Dadirrian v. Gullian, et al.* 79 Fed. 784 (Circuit Court, D. New Jersey, 1897); *Kean v. Bailey, et al.*, 82 F. Supp. 260-262 (D. C. Minn., 1949); *Harvey v. Bettis, et al.*, 35 F. (2d) 349, 350 (C. A. 9, 1929); *Sweetland v. Curry*, 188 F. (2d) 841, 843 (C. A. 6, 1951). See also 28 Am. Juris. Injunctions, sec. 331, 332

For further reasons, close study of the *Regal Knitwear Co.* decision affords small comfort for the Seventh Circuit's decision on this question in the *R. J. Reynolds Tobacco Co.* case. The *Regal Knitwear Co.* case involved a National Labor Relations Board order running against "officers, agents, successors and assigns" of a particular respondent. The issue seems to have been confined to the propriety of including "successors and assigns" in the order. Both the court and appellant apparently assumed that inclusion of "officers" and "agents" was entirely proper.

In delivering a 6 to 3 decision of the Court, Justice Jackson pointed out that the Seventh Circuit has consistently disagreed with other Circuits on this issue (pages 10-11):

"* * * Not only have circuit courts of appeals, except the Seventh Circuit, generally enforced orders containing this provision, but this Court has several times done so."

Then, after a discussion as to legal precedent for inclusion of the words in question (pages 12-15) it is stated that respondents' objection to the words of the order is "merely as words" and that:

"* * * No successor or assign appears before us complaining that these words put him in jeopardy. No one can be punished for contempt because of these words until after a judicial hearing in which their operation could be determined on a concrete set of facts" (page 16).

Finally, most significant to the determination of the issue in the instant matter and future similar Commission matters, is the fact that the Supreme Court noted with approval and as precedent for its decision in the *Regal Knitwear Co.* case that this Commission had long incorporated similar provisions in its orders. The Court stated:

“* * * Before the enactment of the Labor Relations Act, the Federal Trade Commission issued orders containing these familiar provisions” (page 12).

A footnote to this last statement cites in support thereof three Commission cases: *Matter of Superior Woolen Mills*, 8 F. T. C. 283, 288 (1924); *Matter of American Snuff Co.*, 11 F. T. C. 144, 160 (1927); and *Matter of Sherwin-Williams Co.*, 36 F. T. C. 25, 72, 74 (1943). The first two cases involve orders for violations of section 5 of the Federal Trade Commission Act, enforceable alternatively through contempt proceedings or penalty actions. The third case involves an order for violations of section 2 of the amended Clayton Act, enforceable only through contempt proceedings. It thus appears that the Supreme Court intended no such distinction as was made by the Seventh Circuit in the *Reynolds Tobacco Co.* case and that there is a fundamental disagreement between the two courts on the issue herein. If the Commission should follow the Seventh Circuit's decision, it would find itself in the somewhat inconsistent position of inserting the questioned words in Clayton Act orders, as authorized by the Seventh Circuit's interpretation of the *Regal Knitwear Co.* decision, but being expressly forbidden by the Seventh Circuit to use similar phraseology in Federal Trade Commission Act orders.

There are other considerations which have moved the Commission to follow the course outlined in this matter. As the Seventh Circuit has stated in *Steelco Stainless Steel, Inc., et al. v. Federal Trade Commission*, 187 F. (2d) 693, 697 (1951):

“* * * A corporation can act or speak only through its authorized officers or agents.”

The Supreme Court was unmoved by the consideration that unnamed officers and agents might some day find themselves named and at bar for violations of orders of administrative agencies, so long as they then had their day in court. The Commission recognizes that it must both plead and prove before the appropriate courts any violations alleged against offenders, whether such violations be adjudicated in contempt proceedings or in penalty actions. In this connection, it may be observed that a possible advantage accrues to offenders in the penalty actions for the reason that such actions involve the right of trial by jury rather than trial by the court as in contempt proceedings.

The Commission is of the opinion that the Seventh Circuit's decision in the *Sebrone Co.* case was right, as are similar decisions emanating from six other circuits. The Commission is of the further opinion that the Supreme Court's decision in the *Regal Knitwear Co.* case fully disposes of the issue in this matter, until such time as the Supreme Court shall speak further on the question.