IN THE MATTER OF

RADIATOR SPECIALTY COMPANY ET AL.

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

Docket 5790. Complaint, June 27, 1950—Decision, Dec. 4, 1952 [1]

Where a corporation and its two officers, engaged in the interstate sale and distribution of a gasoline additive designated as "Nu-Power" and "Nu-Power Upper Cylinder Lubricant"; and also of its "Nu-Power Tune-Up Solvent", supplied with a "Vacuumatic Injector"; in advertisements and pamphlets, leaflets, and copies of testimonial letters and on labels on containers—

(*a*) Falsely represented that "Nu-Power Upper Cylinder Lubricant", used as directed, would increase mileage obtained from gasoline and oil, add motor power and improve engine performance, create faster pick-up, and cause smoother motor idling;

(*b*) Falsely represented that it would keep spark plugs cleaner, free sticky valves, reduce gas knocks and ping, supply requisite lubrication for valves, valve stems, upper cylinders and piston rings; and keep valves and rings free;

(*c*) Falsely represented that it would lengthen the life of spark plug and valves, reduce friction and prevent wear, protect metal surfaces, cause quicker starting, and increase compression; and

(*d*) Falsely represented that it was a special combination of heat-resisting oils and would prevent wear and scuffing of cylinder walls;

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

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

As respects a formal stipulation executed by respondent Blumenthal, president of the corporate respondent, on May 12, 1944, and accepted by the Commission, namely, as Stipulation No. 03215, 38 F. T. C. 819, in which respondents admitted, among other things, that the fuel value or energy of gasoline was not affected by the addition of "Nu-Power", that tests had not conclusively demonstrated that a 25% increase in mileage might be obtained by its use, that it would not keep spark plugs clean or eliminate knocks from motor ping; and agreed, in the event of a future complaint and formal proceedings that such stipulation might be received as evidence of the prior use by respondent corporation of the acts and practices referred to: such stipulation was relevant and was received in evidence.

[1] "Decision", etc. announcing failure of appeal, and fruition of initial decision, dated June 9, 1953.

In the aforesaid connection, despite respondents' assertions that there had been no violations of said stipulation, partly because of the change in the formula of "Lubrizol", the asserted effective solvent ingredient of "Nu-Power", the weight of the testimony was to the contrary and to the effect that "Nu-Power" would have none of the qualities or virtues ascribed to it no matter what quantity or formula of "Lubrizol" was used in its composition.

In said general connection, it was realized that the proceeding was not brought specifically to enforce the terms of the stipulation, which was a link in the chain of evidence, pertinent to be considered in the premises and to receive the weight which was its due, especially concerning the admissions against interest therein contained.

In considering the test made by four experts of the Bureau of Standards, who testified at the instance of the Commission—without interest in the outcome of the proceeding, insofar as known to or observed by the examiner and the four witnesses who testified for respondents, the examiner noted that the latter were all officers or employees of the corporation which made the aforesaid patented product "Lubrizol"—the main and active ingredient of respondents' "Nu-Power"—and from which, as its sole supplier, respondent corporation had for years purchased the same, and the interest of respondents' witnesses in retaining the business of respondents' customer, as reflected in their testimony.

In further appraising the testimony of the experts of the Bureau and that of the witnesses testifying for respondents, involving tests which were highly technical in character and, as respects the latter, the absence of any allowance, in connection with various infinitesimal measurements, for many imponderables and for normal range of experimental errors; it was concluded that even under the selected conditions, reduced gasoline consumption was not significant, and that remaining conclusions were likewise not sufficient, on the basis of actual tests or otherwise, to justify to the public the broad, unequivocal and unqualified claims set out in behalf of the product.

As respects the charges of the complaint with regard to respondents' other product, namely its "Nu-Power Tune Up Solvent": there was a total failure of proof, no tests were made, and inconclusive expressions of opinion wholly failed to substantiate the same; and while the product was composed essentially of the same or similar active ingredients as the "Nu-Power Upper Cylinder Lubricant", the formulae differed as did the method of application and use.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Jesse D. Kash for the Commission.
Mr. Maurice A. Weinstein, of Charlotte, N. C., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that Radiator Specialty Company, a corporation, and I. D. Blumenthal, Herman Blumenthal, and Edward F. Morgan, individually and as officers of

Radiator Specialty Company, 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 Radiator Specialty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina and respondents I. D. Blumenthal, Herman Blumenthal and Edward F. Morgan, individuals, are President, Vice-President and Secretary, respectively, thereof. The individual respondents have dominant control of the advertising policies and business activities of said corporate respondent, and all of said 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 1700–1900 Dowd Road, Charlotte, North Carolina.

PAR. 2. Respondents are now and have been for more than a year last past engaged in the sale and distribution of a solution, for mixing or blending with gasoline when gasoline is to be used as a motor fuel, called Nu-Power and also called Nu-Power Upper Cylinder Lubricant, and another solution called Nu-Power Tune-Up Solvent with which is supplied a device called a Vacuumatic Injector.

The respondents cause, and have caused, each of their said products, when sold, to be shipped from their factory or said place of business in the State of North Carolina to the purchasers thereof at their respective residences located in various other States of the United States and in the District of Columbia. The respondents maintain, and at all times mentioned herein have maintained, a course of trade in each of said products, in commerce, among and between the various States of the United States and in the District of Columbia. Respondents' volume of business in each of said products in commerce is and has been substantial.

PAR. 3. (a) Respondents' directions for the use of Nu-Power are to add 4 ounces thereof to each 10 gallons or less of gasoline; to "Pour in Tank—It Mixes Itself." Directions for Nu-Power Upper Cylinder Lubricant are to "use regularly in proportion of 4 ounces to each 5 gallons of gasoline * * * particularly while breaking in a new car. If car is in excellent condition, use 4 ounces to each 10 gallons of gasoline."

The formula for Nu-Power is the same as the formula for Nu-Power Upper Cylinder Lubricant; viz, "Latus 22, 308 lbs., and Lubrizol 506, 82 lbs."

(b) Respondents' directions for applying Nu-Power Tune-Up Solvent with the Vacuumatic Injector are as follows:

Just attach the Injector to the carburetor throat, remove the spark plug and in its place insert the correct size Adaptor. (Three Adaptors are furnished to fit all spark plug openings). With the motor running at smooth idling speed, an accurately measured amount (2 ounces) of Nu-Power Tune-Up Solvent is slowly atomized, full strength, directly into the cylinder. Each cylinder is treated individually, thereby insuring results not possible with any other method. This treatment should be given every 5,000 miles.

The formula for Nu-Power Tune-Up Solvent is: "Drip Oil, 5 lbs.; Latus 22, 84 lbs.; Lubrizol, 10 lbs.; Shell Penetrating Oil, 1 lb.; and Black Dye."

PAR. 4. In the course and conduct of their said business and for the purpose of inducing the purchase of their said product called Nu-Power and Nu-Power Upper Cylinder Lubricant respectively, hereinafter referred to as Nu-Power, and their product Nu-Power Tune-Up Solvent, in commerce, respondents have made many statements and representations relative to their value and effectiveness by means of advertisements in the form of pamphlets, leaflets, copies of testimonial letters, and labels on the containers thereof. Among and typical of the statements and representations contained in said advertisements concerning the said product Nu-Power are the following:

Nu-Power * * * INCREASES Gasoline Mileage and Improves Engine Performance.
Create Faster Pick-Up.
Develop Better Pull.
Keep Spark Plugs Cleaner.
Free Sticky Valves.
Reduce Gas Knocks and "Ping".
Achieve Greater Economy of Operation.
INCREASE MILEAGE—PEP—POWER.
Nu-Power UPPER CYLINDER LUBRICANT * * * For A SMOOTHER, MORE POWERFUL MOTOR * * * with increased gasoline and oil mileage.
INSTANT LUBRICATION FOR VALVES, * * * valve stems, upper cylinders and piston rings—parts that motor oils can't reach.
Keeps Valves and Rings Free.
Lengthens Spark Plug and Valve Life.
Reduces Friction * * * Prevents Wear.
Protects Metal Surfaces.
Smoother Idling.
Improves Pick-Up.
Quicker Cold-Weather Starting.
Increases Power and Compression.
* * * assures easy starting. * * *

Nu-Power Upper Cylinder Lubricant is a special combination of heat resisting oils * * *.

* * * prevents wear and scuffing of cylinder walls * * *.

Among and typical of the statements and representations contained in said advertisements concerning Nu-Power TUNE-UP SOLVENT are the following:

Continually Raises Compression.
Insures Quicker Starting.

PAR. 5. By the use of the statements and representations hereinabove set forth and others similar thereto, not specifically set out herein, respondents have represented and now represent, directly or indirectly, that their product Nu-Power, when used as directed, increases the mileage obtained from gasoline and oil; causes a motor to be more powerful and improves engine performance; creates faster pick-up; causes smoother idling; keeps spark plugs cleaner; frees sticky valves; reduces gas knocks and ping; supplies the necessary lubrication for valves, valve stems, upper cylinders and piston rings, which are parts that oils do not reach; keeps valves and rings free; lengthens the life of spark plugs and valves; reduces friction and prevents wear; protects metal surfaces; causes quicker starting; increases compression; is a special combination of heat-resisting oils and prevents wear and scuffing of cylinder walls.

Through the use of the aforesaid statements and representations and others similar thereto, not specifically set out herein, concerning their product Nu-Power Tune-Up Solvent, respondents have represented, and now represent, that when used as directed, said product raises compression and insures quicker starting.

PAR. 6. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, the use of the product Nu-Power, as directed, or otherwise, will not increase the mileage obtained from oil or gas, will not increase the power or improve the engine performance or result in faster pick-up or smoother idling to any significant degree. In the ordinary sense spark plugs become fouled because of deposits accumulated in the operation of the engine and sticky valves are also ordinarily caused by these deposits. This product will not prevent the accumulation of such deposits and accordingly will not keep the spark plugs cleaner nor free sticky valves caused by such deposits. Its use will not reduce gas knocks or pings. Valves, valve stems, upper cylinders and piston rings are adequately lubricated by the oiling systems of automobile engines and the additional use of this product will not result in any benefit to such parts. Said product will not keep the valves and rings free nor will it lengthen the life of

spark plugs or valves. Friction and resulting wear on engine parts are caused by the rubbing of moving parts. This product added to gasoline enters the combustion chamber and is practically all burned during the power stroke of the engine. It consequently would have little effect as a lubricant in reducing friction and preventing wear. Nu-Power is not effective in protecting metal surfaces. The ease of starting an engine is ordinarily determined by the volatility range of the gasoline. The volatility of Nu-Power is such that it can have no effect upon the starting quality of gasoline and consequently its use will not cause engines to start easier or quicker. The heat resisting properties of the oils in this product are not as great as ordinary lubricating oil and from the standpoint of its lubricating value is not as great as lubricating oil. Scuffing and unusal wear of the cylinder walls are usually not caused by lack of lubrication and when they occur are generally caused by poor materials and methods of manufacture. Under these conditions this product would not be of value in preventing wear and scuffing of the cylinder walls.

The product Nu-Power Tune-Up Solvent, used as directed or otherwise, will not raise compression or insure quicker starting.

PAR. 7. The aforesaid false, misleading and deceptive statements and representations made by respondents have had and now have the tendency and capacity to deceive and mislead a substantial portion of the public into the erroneous belief that such representations were and are true and to induce a substantial portion of the public to purchase respondents' said products because of such erroneous belief.

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

Pursuant to "Decision of the Commission and Order to File Report of Compliance," dated June 9, 1953,[1] the initial decision in the instant

[1] Said Decision of the Commission, follows:

The initial decision of the hearing examiner having been filed in this proceeding on May 2, 1952, and counsel for respondents having seasonably filed a notice of respondents' intention to appeal therefrom and having filed in addition a motion for an extension of time within which to file an appeal brief; and

The Commission, on November 7, 1952, having duly entered an order the effect of which was to extend to December 3, 1952, the time within which an appeal brief may have been filed; and

No appeal brief having been filed within the time so provided and hence no matters having been presented for determination by the Commission:

Therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the initial decision of the hearing examiner, a copy of which is hereto attached, did on December 4, 1952, become the decision of the Commission; and, accordingly:

matter of hearing examiner James A. Purcell, as set out as follows, became on December 4, 1952 the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 27, 1950, issued and subsequently served its complaint in this proceeding upon respondents Radiator Specialty Company, a corporation, and I. D. Blumenthal, Herman Blumenthal and Edward F. Morgan, individually and as officers of the corporate respondent, 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 joint answers by the corporate respondent and two of the individual respondents, I. D. Blumenthal and Herman Blumenthal, hearings were held at which testimony and other evidence in support of the complaint 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 in support of the complaint and counsel for the respondents, oral argument thereon 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:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Radiator Specialty Company is a corporation, existing and doing business by virtue of the laws of the State of North Carolina; respondents I. D. Blumenthal and Herman Blumenthal, individuals, are President and Vice-President, respectively, of the corporate respondent, and as such have dominant control of the advertising policies and business activities of the said corporate respondent. All of said respondents have cooperated with each other and acted in concert in doing the acts and things hereinafter

It is ordered, That the respondent, Radiator Specialty Company, a corporation, and the respondents, I. D. Blumenthal and Herman Blumenthal 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 contained in said decision.

found. Respondent's office and principal place of business is located at 1700–1900 Dowd Road, city of Charlotte, North Carolina. Named as a respondent in the complaint was one Edward F. Morgan, individually and as Secretary of the corporate respondent, but approximately one year prior to issuance thereof he severed his connection as Secretary and one J. J. Duckworth now serves in his place and stead. Therefore, the order herein will provide for dismissal of the complaint as to said Morgan and, while J. J. Duckworth will not be mentioned *eo nomine* therein, said order will be effective as to all officers, present and future, of the corporate respondent.

PAR. 2. Respondents are now and have been for more than a year last past engaged in the sale and distribution of a solution for mixing or blending with gasoline, when gasoline is to be used as a motor fuel, designated as "Nu-Power" and also as "Nu-Power Upper Cylinder Lubricant," as also another solution called "Nu-Power Tune-Up Solvent" with which is supplied a device called a "Vacuumatic Injector," causing said products to be shipped from their place of business in the State of North Carolina to the purchasers thereof in various other States of the United States and in the District of Columbia, maintaining at all times herein mentioned a constant course of trade in commerce between the several States.

PAR. 3 (a) Respondents' directions for the use of Nu-Power are to add 4 ounces thereof to each 10 gallons or less of gasoline; to "Pour in Tank—It Mixes Itself." Directions for Nu-Power Upper Cylinder Lubricant are to "use regularly in proportion of 4 ounces to each 5 gallons of gasoline . . . particularly while breaking in a new car. If car is in excellent condition, use 4 ounces to each 10 gallons of gasoline."

The formula for Nu-Power is the same as the formula for Nu-Power Upper Cylinder Lubricant; viz, "Latus 22, 308 lbs., and Lubrizol 506, 82 lbs."

Prior to the year 1947 "Lubrizol 506" was changed to "Lubrizol 509" now currently in use, 30% or 40% thereof being the active ingredient described as a halogenated hydrocarbon, the remainder being a diluent vehicle of petroleum oil or solvent. "Lubrizol 509" comprises about 20% of Nu-Power and thus the active ingredient of "Lubrizol 509" constitutes approximately 8% of the Nu-Power product.

(b) Respondents' directions for applying Nu-Power Tune-Up Solvent with the Vacuumatic Injector are as follows:

Just attach the Injector to the carburetor throat, remove the spark plug and in its place insert the correct size Adaptor. (Three Adaptors are furnished to fit all spark plug openings.) With the motor running at smooth idling speed, an accurately measured amount (2 ounces) of Nu-Power Tune-Up Solvent is

slowly atomized, full strength, directly into the cylinder. Each cylinder is treated individually, thereby insuring results not possible with any other method. This treatment should be given every 5,000 miles.

The formula for Nu-Power Tune-Up Solvent is: "Drip Oil, 5 lbs.; Latus 22, 84 lbs.; Lubrizol, 10 lbs.; Shell Penetrating Oil, 1 lb.; and Black Dye."

PAR. 4. In the course and conduct of their said business and to promote and induce the purchase of their Nu-Power and Nu-Power Upper Cylinder Lubricant in commerce, respondents have, by means of advertisements, pamphlets, leaflets, copies of testimonial letters and labels on product containers, made many statements and representations concerning these products, typical of which are the following:

Nu-Power * * * INCREASES Gasoline Mileage and Improves Engine Performance.
Creates Faster Pick-Up.
Develop Better Pull.
Keep Spark Plugs Cleaner.
Free Sticky Valves.
Reduce Gas Knocks and "Ping".
Achieve Greater Economy of Operation.
INCREASE MILEAGE—PEP—POWER.
Nu-Power UPPER CYLINDER LUBRICANT * * * For a SMOOTHER, MORE POWERFUL MOTOR * * * with increased gasoline and oil mileage.
INSTANT LUBRICATION FOR VALVES, * * * valve stems, upper cylinders and piston rings—parts that motor oils can't reach.
Keeps Valves and Rings Free.
Lengthens Spark Plug and Valve Life.
Reduces Friction * * * Prevents Wear.
Protects Metal Surfaces.
Smoother Idling.
Improves Pick-Up.
Quicker Cold-Weather Starting.
Increases Power and Compression.
* * * assures easy starting. * * *.
Nu-Power Upper Cylinder Lubricant is a special combination of heat resisting oils * * *.
* * * prevents wear and scuffing of cylinder walls * * *.

Among and typical of the statements and representations contained in said advertisements concerning Nu-Power TUNE-UP SOLVENT are the following:

Continually Raises Compression.
Insures Quicker Starting.

PAR. 5. By use of the foregoing statements respondents represent that Nu-Power and Nu-Power Upper Cylinder Lubricant, when used as directed, will: Increase the mileage obtained from gasoline and oil; add motor power and improve engine performance; create faster pick-

up; cause smoother motor idling; keep spark plugs cleaner; free sticky valves; reduce gas knocks and ping; supply requisite lubrication for valves, valve stems, upper cylinders and piston rings; keep valves and rings free; lengthen the life of spark plugs and valves; reduce friction and prevent wear; protect metal surfaces; cause quicker starting; increase compression; is a special combination of heat-resisting oils, and will prevent wear and scuffing of cylinder walls.

Referring to Nu-Power Tune-Up Solvent, respondents represent that such product, when used as directed, raises motor compression and insures quicker starting.

PAR. 6. At the outset of considering the testimony herein had concerning the truth or falsity of respondents' representations, the record shows that on May 12, 1944, a formal stipulation was tendered by the corporate respondent, executed by respondent I. D. Blumenthal, its president, accepted by this Commission and designated "Stipulation No. 03215," wherein respondents admit use of the following representations concerning their product "Nu-Power" manufactured according to the formula then in use:

* * * builds up your gasoline * * *.

Do not confuse Nu-Power with tune-up oils. It is a concentrate that increases mileage as much as 25% regardless of the quality of gas used.

Keeps spark plugs clean.

Nu-Power Eliminates Gas Knocks and "Ping."

Respondents therein admitted, among other things, that the fuel value or energy of gasoline is not affected by the addition of Nu-Power; that tests have not conclusively demonstrated that a 25% increase in mileage may be obtained by use of Nu-Power; that Nu-Power will not keep spark plugs clean or eliminate knocks or motor "ping," and agreed, upon the basis of their admissions, to forthwith cease and desist from use of the representations hereinabove recited and further:

* * * in the event the Commission should issue its complaint and institute formal proceedings against Radiator Specialty Company as provided herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence of the prior use by Radiator Specialty Company of the acts and practices herein referred to.

The Hearing Examiner ruled that the stipulation was relevant and received same in evidence. Respondents asserted there had been no violation of the stipulation, partly because of the change in formula of "Lubrizol," the asserted effective solvent ingredient of Nu-Power Upper Cylinder Lubricant as now in use, from "Lubrizol" as used in Nu-Power at the time the stipulation was executed.

(NOTE.—"Lubrizol" is a patented chemical product, rights to which are owned by the Lubrizol Corporation. In the past ten years its

formula has been changed two or three times by increasing the chemical constituents thereof to improve its solvent properties and, when such changes are effected, the name or designation of the product is changed. We deal here with "Lubrizol 506" as charged in the complaint, although "Lubrizol 509" is the designation used to indicate the product currently in use. However, the chemical constituents of the product have remained the same throughout its existence, the only changes being quantitative increases of such chemicals.)

Despite respondents' assertions that there have been no violations of said stipulation, the weight of the testimony is to the contrary and that Nu-Power would have none of the qualities or virtues ascribed it no matter what quantity or formula of "Lubrizol" was used in its composition, and, in fact, the claims would be false and misleading even though Nu-Power were used in its pure and unadulterated state, let alone as diluted in proportion of four ounces to each five gallons of gasoline, as recommended.

It is realized that this proceeding is not brought specifically for enforcing the terms of the stipulation or that the stipulation, without more, is sufficient to sustain all of the charges of the complaint. The stipulation is a link in the chain of evidence which is pertinent to be considered herein and to receive the weight which is its due, especially concerning the admissions against interest therein contained.

Reviewing the testimony and exhibits received during the course of the hearings:

Nu-Power and Nu-Power Upper Cylinder Lubricant are identical and the terms are used interchangeably herein.

Testimony was adduced in support of the charges of the complaint through experts from the U. S. Bureau of Standards and in opposition through several experts on behalf of the respondents. Such testimony, as to each group of experts, was based upon actual tests of Nu-Power and upon their independent expert knowledge. The tests were highly technical in character, and to conduct an exhaustive and detailed analysis thereof in this decision would entail unwarranted length and serve no good purpose, so therefore only the pertinent testimony and conclusions expressed by the witnesses will be considered and the examiner's appraisal thereof expressed.

These two groups of witnesses were made up of the following: The four witnesses who testified at the instance of the Commission were all experts in the employ of the U. S. Bureau of Standards who were not, so far as known to or observed by the examiner, in any wise interested in the outcome of this proceeding. The four witnesses who testified for respondents were all officers or employees of the Lubrizol Corporation and were, respectively, its Vice-President, its Chief Chemist, its

Head of Mechanical Testing Department and its Personnel Director in Charge of Sales Department. When it is borne in mind that Lubrizol Corporation is now, and has been from the time Nu-Power was first marketed, the sole supplier of the main and active ingredient of Nu-Power, to wit, "Lubrizol 506" and "Lubrizol 509," it is apparent that all of respondents' witnesses are, to a greater or lesser extent, interested that Lubrizol Corporation retain the business of its customer, Radiator Specialty Company, and to this end render such aid as was possible by attempting to substantiate the respondents' representations. As a fact, Lubrizol Corporation appeared to regard the charges of the complaint as a direct reflection on the product "Lubrizol," so much so that during his testimony on one occasion the examiner found it necessary to caution an officer of Lubrizol Corporation that it was not here on trial and that he was injecting himself and his company into the proceedings, to which admonition respondents' counsel tacitly agreed by observing:

I am sure Mr. Winch does not realize. His feeling is, of course, that the manufacturers of the main component of our product feel like they are (on trial).

While it is not found that any of respondents' witnesses have exceeded the bounds of propriety in giving their testimony, the examiner avails of his discretion to consider all of the surrounding circumstances in arriving at his decision.

Jesse T. Duck testified that he has a Bachelor of Science degree from Union University, Jackson, Tennessee, and that he has taken a number of graduate courses in automotive engineering, including the basic engineering course in automotive engines, courses in fuel, combustion. He is an automotive engineer. He has been engaged in testing fuels and engine components for the Bureau of Standards for eight years and previous to that, had been in other test work for the Bureau of Standards five years.

Nu-Power Upper Cylinder Lubricant was tested by this witness to determine its effect, if any, on power, gasoline mileage, acceleration and factors related thereto. The engine that he used to make these tests was a Ford V–8. It was coupled directly to an electric dynamometer, a device for measuring the torque and power output of an engine. A load was placed on the engine electrically, the amount of the load measured by means of a scale and, by use of appropriate formula, it was possible to transform its scale readings into power. The engine set up was also equipped with a volumetric fuel-measuring device by which the amount of fuel used during any specified time was measured.

He measured the power of the engine before any Nu-Power was added to the fuel and made tests for speed and load on the dynamom-

eter adjusted to simulate road operation, at various speeds at 30, 40, 50, and 60 miles per hour, and measured the fuel consumption by use of appropriate calculations. These readings were translated into the equivalent mileage of a car on the road.

After completing the tests on the engine not using Nu-Power in the fuel, he repeated the tests, using Nu-Power as directed on the bottle of Nu-Power, four ounces to ten gallons, and the directions on the bottle of Nu-Power Upper Cylinder Lubricant, four ounces to five gallons, and in these tests, he used three ounces to five gallons, which was halfway between the most and the least called for in the directions.

Upon completion of this step, the engine was run four days at the speed and load that was equivalent to 40 miles per hour and again repeated the test in which Nu-Power was used in the fuel. This test was run with six ounces to ten gallons. Using another sample of Nu-Power Upper Cylinder Lubricant, he used four ounces to ten gallons.

Before any tests were made it was determined that the engine was operating under steady conditions, that is, it was warmed up, so that it would give consistent results.

Horsepower was computed from the dynamometer scale readings and also specific fuel consumption was determined by use of appropriate formulas. The power of the engine was the same at each speed with and without Nu-Power added to the fuel.

These tests failed to disclose increased power or increased miles per gallon of fuel caused by the addition of Nu-Power over fuel without Nu-Power.

The tests further demonstrated that use of Nu-Power would not cause a quicker pickup; that there was no apparent difference in the idling characteristics of the engine with or without Nu-Power; that Nu-Power did not show an increase in the mileage obtained from gasoline when it was added thereto.

The witness considered, and so testified, that the use of but one engine for the making of comparative tests is recognized as acceptable procedure with respect to the results secured and testified to, and does not believe that additional tests could be performed which would show more conclusive results.

As a result the tests conducted by the Bureau of Standards experts showed:

(1) That power of the engine was not increased and the miles per gallon remained the same with or without the use of Nu-Power;

(2) Pick-up of an engine is dependent entirely upon power, *ergo*, increased pick-up could be occasioned only by increased power; that the use of Nu-Power does not increase power and therefore cannot impart a quicker pick-up or improve the pick-up of an engine in anywise;

(3) The engine used in the tests was a laboratory motor in good mechanical condition which had been run some 40,000 miles. The particular test, being to determine the motor's idling characteristics, disclosed that it idled smoothly both with and without Nu-Power, the addition of the latter showing no apparent difference.

(4) No economy was shown by the use of Nu-Power when used according to directions supplied by respondents.

(5) There was no apparent difference in the smoothness of operation during the tests.

(6) The tests disclosed no apparent difficulty in starting the motor, no difficulties in this particular were encountered and there were no differences in starting either with or without the use of Nu-Power. The celerity with which a motor starts is determined principally by fuel properties and proper vaporization thereof to engender an explosive mixture, a condition frequently adversely encountered in cold weather. The boiling point of the components of Nu-Power is so low that it will not evaporate in a cold engine and therefore is not an aid in starting. In fact, given an engine in good condition with clean upper cylinders, good fuel, carburetion, and hot spark, nothing additional is required to insure prompt starting.

(7) Speaking generally on the subject of motor lubrication: Although there are different systems in use, the majority have the same characteristics, and oil reaches the valves, valve stems, piston rings and upper cylinders. Oil from the crankcase lubricates the cylinder walls and oil vapor lubricates the lower parts of the valve stems, although some systems provide for direct forced lubrication of valve stems, but this is the exception. In the opinion of the expert so testifying it would be a disadvantage to introduce lubricant into the upper cylinder of a motor, and he knows of no manufacturer of automobiles who recommends this procedure.

(8) On the subject of carbon deposits: In the opinion of the witness who ran the tests at the Bureau of Standards, carbon deposits are of very minor importance in the average automobile. During the tests, which were of sufficient duration, said the witness, to accord Nu-Power a fair test on this phase, the engine accumulated a considerable deposit of carbon despite the fact Nu-Power was used as directed throughout the tests, and because of this had to operate the engine at high load to retrieve the power it had at the start of the tests. In other words, it was necessary occasionally to run the engine at high speeds to clear away carbon deposits and thus increase engine power. Witness further stated his opinion to be that, to the best of his knowledge and experience, no carbon deposits, whether new or old, can be removed by any solvent, which general statement applies to Nu-Power;

that once the gum, which binds the carbon deposit to any surface, becomes hardened and baked on by high temperatures, solvents are ineffective; that, referring to gum deposits, the average motor is not significantly affected thereby, the reason being that present-day gasoline is treated with gum inhibitors which retard formation of gum in sufficient quantity and concentration to cause valves or valve stems to stick, excepting only under unusual circumstances.

An examination and close analysis of the testimony and evidence offered on behalf of respondents (in connection wherewith attention is invited to comments appearing herein on page 7, first paragraph), it is found that the weight to be accorded thereto, insofar as supporting the respondents' representations is concerned, is negligible. Quite apart from the apparent partiality of these witnesses to respondents, the testimony as to results of tests, and testimony of the experts generally, aside from tests, is wholly inadequate to overcome the convincing array of evidence to the contrary. The record discloses that the main tests relied upon by respondents comprized such considerations as "Piston Ring Gap Increase," "Piston Ring Weight Loss," "Weight of Deposits on Valve," "Bearing Weight Loss," "Oil Consumption," "Weight of Deposits on Pistons," " Weight of Deposits in Combustion Chambers" and the like. All such were carried on under optimum laboratory conditions and such measurements as ".005 inch" were considered in piston ring gaps, ".031 gms." in piston ring weight loss, ".527 gms." in weight of deposits on valves and other infinitesimal measurements, to determine percentage of variation in reduction or increase of engine characteristics and conditions, without allowance for many imponderables and allowance for normal range of experimental errors, would appear to be delving into minutiae. Even under the selected conditions and protocol of these experiments the reduced gasoline consumption was not significant, nor were any of the remaining conclusions expressed on the basis of actual tests, or otherwise, sufficient to justify to the public such broad, unequivocal and unqualified claims as hereinabove set out.

The statements and representations hereinabove set forth in Paragraph Five are false, misleading and deceptive. It is found that the use of Nu-Power as directed or otherwise will not increase the mileage obtained from oil or gas; will not increase the power or improve engine performance; will not effect faster pick-up or smoother idling to any significant degree; will not prevent accumulation of deposits which foul spark plugs and will not free sticky valves caused by such deposits; will not reduce gas knocks or pings; that engine valves, valve stems, upper cylinders and piston rings are adequately lubri-

cated by the standard built-in oiling systems of automobile engines and Nu-Power will prove of no aid or benefit in rectifying any defects or deficiencies in said oiling systems; that said product will not keep the valves and rings free nor extend the life of spark plugs or valves. Inasmuch as Nu-Power, when added to gasoline, as directed, upon entering the combustion chamber is practically all burned during the power stroke of the engine, such product would have no significant effect as a lubricant to reduce friction and prevent wear; that the ease or celerity with which an engine starts is determined by the volatility range of the gasoline used and Nu-Power, having no ability to alter this volatility, hence has no effect upon ease of starting; that because the heat resisting properties of the oils contained in this product are not as great as ordinary lubricating oils, from the standpoint of its lubricating value Nu-Power is not as good a lubricant as ordinary lubricating oil, hence will not prevent scuffing and unusual wear of cylinder walls.

PAR. 7. Respecting the product Nu-Power Tune-Up Solvent, the representations concerning same and the charge of their falsity: There is a total failure of proof of these charges—no tests were made, and the inconclusive expressions of opinion thereon wholly fail to substantiate the charges. Assertions to the contrary may be urged to the effect that this Solvent compound, being composed essentially of the same or similar active ingredients as Nu-Power Upper Cylinder Lubricant, the same findings as to the latter should apply to the former. However, it is pointed out that the formulae of the two products are different as to proportional ingredients, in addition to which the Lubricant is added to the gasoline so that it reaches the combustion chamber in a highly diluted state, while the Solvent is mechanically introduced in its natural, full strength, directly into the combustion chamber of individual cylinders through the spark plug aperture.

PAR. 8. The aforesaid false, misleading and deceptive statements and representations made by respondents have had and now have the tendency and capacity to deceive and mislead a substantial portion of the public into the erroneous belief that such representations were and are true, and to induce a substantial portion of the public to purchase respondents' said products because of such erroneous belief.

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

It is ordered, That the respondent Radiator Specialty Company, a corporation, and its officers, I. D. Blumenthal and Herman Blumenthal, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their product designated "Nu-Power" or "Nu-Power Upper Cylinder Lubricant," or any product of substantially similar composition, whether sold under the same or any other name in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly representing:

1. That the use of their product "Nu-Power" or "Nu-Power Upper Cylinder Lubricant," used as directed or otherwise, will increase the mileage obtained from gasoline or oil;

2. That the use thereof will increase the power or improve the engine performance to any significant degree, or result in faster pick-up, or cause smoother idling;

3. That the use thereof will keep spark plugs cleaner or will free sticky valves caused by the residuum or by-products of combusion;

4. That the use thereof will reduce gas knocks and pings;

5. That said product supplies the necessary lubrication for valves, valve stems, upper cylinders and piston rings, or that the lubrication requirements of all or any of the parts named are not adequately supplied by the ordinary, conventional lubricating systems in general use;

6. That the use of said product keeps valves and rings free of gum, carbon or other deposits;

7. That the use of said product will lengthen the life of spark plugs or valves;

8. That the use of said product will reduce friction and prevent wear;

9. That the use of said product "protects metal surfaces";

10. That its use will cause quicker starting of automotive engines or increase the compression thereof;

11. That said product is composed of heat resisting oils different from, or more effective than, ordinary lubricating oil;

12. That the use of said product will prevent wear or scuffing of cylinder walls.

It is further ordered, That the charges of the complaint relating to respondents' product designated "Nu-Power Tune-Up Solvent," because of the absence of reliable, probative and substantial evidence to sustain such charges, be, and they hereby are, dismissed without

prejudice to the right of the Commission to institue further proceedings, should future facts warrant.

It is further ordered, That the charges of the complaint, insofar as they affect the named respondent, Edward F. Morgan, be, and they hereby are, dismissed.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent, Radiator Specialty Company, a corporation, and the respondents, I. D. Blumenthal and Herman Blumenthal 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 contained in said decision [as required by said decision and order of June 9, 1953].

IN THE MATTER OF

HYMAN KATZ ET AL. DOING BUSINESS AS PENN UPHOLSTERING COMPANY

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

Docket 5993. Complaint, May 21, 1952—Decision, Dec. 5, 1952

Where two partners doing as interstate business of more than $1,000,000 annually in the reupholstering of furniture and the furnishing of material therefor; in advertising through radio and television continuities, and in newspapers of general circulation—

(*a*) Falsely represented that their work was expertly done, notwithstanding the fact that furniture reupholstered by them was returned to the owners in a soiled condition, with hammer marks and split framework where tacks had been carelessly driven, with finish not renewed, with thread stitching of a color which did not blend with the upholstering materials, and slip covers that did not fit;

(*b*) Falsely represented that materials of superior quality were used in said work and that furniture reupholstered by them would be in a better condition than when new; the facts being that "highest quality materials" and "finest workmanship" were available to their customers only at substantially higher prices than those mentioned in their advertising; the quality of materials used varied with the prices and the uniformity of quality which the public might expect from their representations was lacking;

(*c*) Represented that the filling they used in reupholstering furniture would not become lumpy or lose its shape; the facts being that a latex-covered sheet filling advertised was not used in all their work; other fillings did become lumpy, and the cushions in which they were used did become out of shape and uncomfortable; and their advertising representations in the aforesaid respects were not limited to cushions in which the special sheet filling was used;

(*d*) Represented that the charge for foam rubber cushions was no greater than for cushions filled with any other material; the facts being that while they did furnish foam rubber cushions at no extra cost for a brief period, their said representations as to the availability and use of such cushions at no extra cost were general in nature and without any time limitation;

(*e*) Represented that their materials and workmanship were guaranteed; the facts being that while in some cases the guarantee was so worded as to be clearly applicable to the foam rubber sheet filling or the steel webbing used, many of their advertisements contained no such clear limitation or modification, and they did not comply with the ordinary interpretation, i. e., that the guarantee was applicable to all their workmanship and materials; and

(*f*) Falsely represented that they gave away slip covers and rugs "free" with certain advertised orders;

With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true and with effect of thereby causing it to purchase reupholstering and the materials used in connection therewith:

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.

As respects cases in which customers' furniture, after having been reupholstered by respondents, was returned to them in a soiled condition with hammer marks, etc., and respondents' insistence that such cases were isolated instances: they were sufficient to show an absence of finest workmanship which respondents advertised and to belie the representation that furniture reupholstered by them was in a better condition than when new.

Before *Mr. J. Earl Cox*, hearing examiner.
Mr. Jesse D. Kash for the Commission.
Mr. K. Michael Jeffrey, of Baltimore, Md., 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 Hyman Katz and Louis Ginsberg, individually and as copartners doing business as Penn Upholstering Company, 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. Respondents Hyman Katz and Louis Ginsberg are copartners doing business as the Penn Upholstering Company with their office and principal place of business located at 1103 North Washington Street, Baltimore, Maryland.

PAR. 2. The respondents are now and for several years last past have been engaged in the business, among other things, of selling materials for reupholstering and in reupholstering furniture for consumers in various States of the United States and the District of Columbia. All of respondents' work is done at the respondents' factory in the State of Maryland, and when particular work is completed, it is shipped to the consumer thereof located in other States of the United States and the District of Columbia.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said business in commerce between and among the various States of the United States and in the District of

Columbia. Their volume of trade in said business in such commerce is and has been substantial.

PAR. 3. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their reupholstering and the materials therefor, respondents have made and are now making certain statements and representations concerning the quality, value and nature of said materials and the reupholstering work done by them by means of advertisements in newspapers, radio and television continuities and other advertising media of general circulation in various States of the United States and the District of Columbia. Among and typical of said statements, representations and claims, but not all inclusive, are the following:

And when I think that all this expert workmanship and fine quality material costs as little as $89 * * *.

Penn can still give you the finest workmanship * * * highest grade materials * * * for just $89.

The filling * * * will not lose its shape * * * get lumpy * * * because IT'S CUT IN ONE PIECE TO FIT YOUR FURNITURE * * *.

Even after many years of rough use * * * your furniture will not sag.

* * * Will not stretch, sag or break down.

Delivered to you * * * BETTER THAN NEW.

* * * NEW FOAM RUBBER CUSHIONS * * * AT NO EXTRA CHARGE.

Other companies charge from $50 to $60 more for foam rubber cushions * * * but only Penn gives you foam rubber cushions at no extra charge.

* * * Penn gives you a three year written guarantee * * * believe me * * * It's iron clad. If anything doesn't meet with your approval * * * Penn will take care of it at no extra cost.

* * * the entire workmanship is guaranteed unconditionally for three years.

* * * washable slip covers that you receive * * * ABSOLUTELY FREE.

* * * Penn Uphostering Company will give FREE * * * a * * * rug.

PAR. 4. Through the use of the aforesaid statements and others of the same import but not specifically set out herein, respondents represented: that their work was expertly done and materials of superior quality were used in said work; that the filling used by them in reupholstering furniture would not become lumpy or lose its shape; that furniture reupholstered by respondents would not sag after years of hard use and would be in a better condition than when new; that the charge for foam rubber cushions was no greater than the charge for cushions filled with any other type of material that their materials and workmanship were guaranteed satisfactory to the customer and that respondents gave away slip covers and rugs "free."

PAR. 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact, in many instances, the work done by respondents was extremely poor, the materials used were of inferior quality, the filling used soon lost its shape and became lumpy, and the

furniture frequently sagged a short time after delivery. Not only was the furniture reupholstered by respondents not better than new but in many cases was returned in worse condition than when received by them. Foam rubber cushions were not furnished for the same price as other materials but on the contrary, a substantially higher price was charged. In many instances the materials and the workmanship were not satisfactory to purchasers and respondents refused to make satisfactory adjustments. Slip covers or rugs were not furnished free. In truth and in fact, it was necessary to pay for the upholstering of three pieces of furniture before the purchaser was entitled to receive the slip covers or a rug and the cost thereof was included in the price charged for the material and work.

PAR. 6. The use by respondents of the foregoing false, misleading and deceptive statements and representations, has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to enter into contracts with respondents for the purchase of, and to purchase, reupholstering of furniture and the materials used in connection therewith.

PAR. 7. 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

Pursuant to Rule XXII of the Commission's Rule of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated December 5, 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; Commissioners Carretta and Mason dissenting as to paragraph 6 of the initial decision order as set forth on page 678, following the "Order to File Report on Compliance".

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 21, 1952, issued and subsequently served its complaint upon the respondents Hyman H. Katz, referred to in the complaint as Hyman Katz, and Louis Ginsberg, individually and as copartners doing business as Penn Upholstering

Company, 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, a hearing was 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, answer thereto, testimony and other evidence, and 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:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents Hyman H. Katz and Louis Ginsberg are copartners doing business as the Penn Upholstering Company, with their office and principal place of business located at 803 North Washington Street, Baltimore, Maryland.

PAR. 2. Respondents are now and since January 1949 have been engaged in the business, among other things, of reupholstering furniture and of furnishing the materials used in connection therewith. The volume of their business has amounted to more than one million dollars annually of which 80 or 85 percent has been with customers located in Maryland and the balance of 15 or 20 percent with customers located in Virginia and in the District of Columbia. The reupholstering work is done at respondents' place of business in Baltimore, Maryland.

Furniture which is reupholstered for customers living in Virginia and in the District of Columbia is picked up by respondents at the homes of such customers, transported to respondents' place of business in Maryland and when finished returned by respondents from Maryland to those customers at their respective places of abode in Virginia and the District of Columbia.

PAR. 3. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said business in commerce between and among various States of the United States and in the District of Columbia. Their volume of trade in said business in commerce is and has been substantial.

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their reupholstering and the materials therefor, respondents have made, and are now making, certain statements and representations concerning the quality, value and nature of said materials and the reupholstering work done by them by means of radio and television continuities over broadcasting facilities whose field of effectiveness extends beyond the boundaries of the State of Maryland, and by advertisements in newspapers of general circulation in various States of the United States and in the District of Columbia. Among and typical of said statements, representations and claims are the following:

For a limited time ONLY * * * Penn can still give you the finest workmanship * * * and highest grade materials in Reupholstering for just $89.

ONLY PENN gives you NEW FOAM RUBBER CUSHIONS * * * AT NO EXTRA CHARGE! Penn uses genuine Rubber Tulatex filling. The filling that will not lose its shape * * * get lumpy * * * because IT'S CUT IN ONE PIECE TO FIT YOUR FURNITURE.

Other companies ask from $59 to $60 more for foam rubber cushions * * * but only Penn gives you foam rubber cushions at no extra charge.

Every Penn Upholstering job includes use of genuine foam rubber oversprings. NO EXTRA CHARGE for this valuable feature.

Liberal Terms! Lifetime Guarantee.

Your furniture is rebuilt with patented lifetime guaranteed resilient steel bottom webbing. Even after many years of rough use * * * your furniture will not sag.

Penn gives you a three year written guarantee. And believe me * * * it's iron-clad. If anything doesn't meet with your approval for the next three years * * * Penn will take care of it at no extra charge.

This is your great chance to have your suite made over so that it's better than new.

This set of beautiful * * * adjustable * * * washable slip covers comes to you * * * ABSOLUTELY FREE * * * with your job.

FREE! A beautiful 27" x 48" wool-face AXMINSTER RUG with every three piece order.

PAR. 5. Through the use of the aforesaid statements and others of the same import but not specifically set out herein, respondents have represented that their work is expertly done; that materials of superior quality are used in said work; that the filling used by them in reupholstering furniture will not become lumpy or lose its shape; that furniture reupholstered by respondents will be in a better condition than when new and will not sag after years of hard use; that the charge for foam rubber cushions is no greater than the charge for cushions filled with any other type of material; that their materials and workmanship are guaranteed to customers; and that respondents give away slipcovers and rugs "free."

PAR. 6. The aforesaid representations, excepting that the furniture reupholstered by respondents will not sag after many years of hard use, are false, misleading and deceptive.

There is no reliable, probative, and substantial evidence in this proceeding to substantiate the charge that furniture reupholstered by respondent sagged after any period of years or after any kind of usage.

As to workmanship, the record shows that furniture upholstered by respondent has been returned to its owners—respondents' customers—in a soiled condition, with hammer marks and split framework where tacks have been carelessly driven, with finish not renewed, with the thread used in stitching of a color which did not blend with the upholstering materials, with lumpy, hard cushions, and with slip covers that did not fit. Respondents urge that these were isolated instances but they are sufficient to show an absence of the "finest workmanship" which respondents advertise and belie the representation that furniture reupholstered by the respondents is in a better condition than when new.

"Highest grade materials" are available to respondents' customers but at substantially higher prices than those mentioned in their advertising. As is reasonably to be expected the quality of materials used varies with the price and hence there is not the uniformity of quality the public might expect from the representations made by respondents.

Foam rubber cushions were not furnished by respondents at no extra cost except for a brief period of time although the representations as to the availability and use of foam rubber cushions at no extra cost have been general in nature and without any time limitation.

Respondents have advertised use of Tulatex, a latex covered sheet filling which, when cut to fit the cushions in which it is placed, lays flat and does not become lumpy. However, this type of filling is not used in all of respondents' work and the other fillings do become lumpy and the cushions in which they are used become out of shape and uncomfortable. Respondents' advertisements with respect to cushions not becoming lumpy and not losing their shape have not been limited to those in which the special sheet filling is used.

It is urged that the guarantee mentioned in their advertising refers specifically to the foam rubber, sheet filling or steel webbing used by respondents. In some advertisements the guarantee was worded so as to be clearly applicable to one or more of these particular materials but in many of the advertisements there was no such clear limitation or modification and the ordinary interpretation would be that the guarantee is applicable to all phases of the workmanship and mate-

rials furnished by respondents. Such a general and complete guarantee was not complied with by the respondents.

Respondents have advertised that slipcovers and rugs are given "free" with certain upholstering orders. The use of the term "free" to designate articles of merchandise made available to customers, presumably without extra cost, in connection with certain upholstering jobs has been discontinued permanently according to statements made by the respondents but, in view of the past activities of respondents and their active advertising campaigns, it cannot be taken for granted that sometime in the future they may not desire to resume this type of representation.

PAR. 7. The use by respondents of the aforementioned false, misleading and deceptive statements and representations, has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to enter into contracts with respondents for the purchase of, and to purchase, reupholstering of furniture and the materials used in connection therewith.

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

It is ordered, That the respondents, Hyman H. Katz and Louis Ginsberg, individually and as copartners doing business as Penn Upholstering Company or under any other name, their representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation of orders for the reupholstering of furniture shipped or transported in commerce, as "commerce" is defined in the Federal Trade Commission Act, and in the distribution of respondents' upholstering materials in such commerce, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondents' reupholstering is expertly done when such is not the fact or that materials of inferior quality are of superior quality, or misrepresenting, in any manner, the quality of materials or workmanship afforded by respondents;

2. Representing, directly or by implication, that the filling used by respondents will not become lumpy or lose its shape unless filling is used which has qualities and characteristics which will in all cases and under all circumstances prevent it from becoming lumpy or losing its shape;

3. Representing, directly or by implication, that furniture reupholstered by respondents will be in better condition than when new;

4. Representing, directly or by implication, that foam rubber cushions are furnished at the same price as other materials, unless such is the fact;

5. Representing, directly or by implication, that the materials or workmanship afforded by respondents in their reupholstering of furniture are guaranteed satisfactory to the purchaser unless respondents in all instances comply with such representations; or misrepresenting in any manner the nature of respondents' guarantee of workmanship or materials;

6. Using the word "free," or any other word or words of similar import or meaning, to designate, describe or refer to articles of merchandise which are not in truth and in fact a gift or gratuity or are not given to the recipient thereof without requiring the purchase of other merchandise, or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondents.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of December 5, 1952].

DISSENT OF COMMISSIONERS CARRETTA AND MASON

As noted in the "Decision of the Commission and Order to File Report of Compliance" Commissioner Carretta, Commissioner Mason joining, dissents only as to paragraph 6 of the Order which is part of the Initial Decision of the hearing examiner herein because said paragraph orders the respondents to cease and desist from using the word "free," in advertising, to designate articles of merchandise which are given without additional charge to customers of the respondents when orders are placed with the respondents. The cost of the "free" gift herein was not included in the cost of the reupholstering job to be done by the respondents, and the public was not deceived in any way.

Syllabus

IN THE MATTER OF

WARD S. AND JESSIE A. HILL TRADING AS GEPPERT STUDIOS

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

Docket 5180. Complaint, June 16, 1944—Decision, Dec. 12, 1952

Where two partners engaged in the production, sale and distribution of plain and colored photographic enlargements; in conducting, in connection therewith, a mail-order business by means of advertisements in which they stated that, to get acquainted with new customers, they would beautifully enlarge free a snapshot or negative to make an 8 x 10 picture, that information on hand-tinting in natural colors would be sent immediately, and that the customer's picture would be returned with the free enlargement;

In follow-up material which they mailed the customer, following receipt of his name and address along with the print or negative submitted for free enlargement, which included a return postal card for ordering a hand-tinted, framed second enlargement of the print or negative submitted—

(*a*) Implied that they would not send the free enlargement or return the original picture unless the hand-tinted enlargement was ordered through statements that they could not find the original picture (often of great sentimental value to the customer) without the order number on the postal card order blank, that they were waiting to recheck the address, that nothing could be sent out until the customer was heard from, and that pictures were not kept after they were finished and might be destroyed if the customer delayed sending in the postal card order blank;

With tendency and capacity through such coercive practices to cause the customer to order a hand-tinted enlargement which he would not otherwise have ordered through fear of loss of his original valued picture (which, failing to receive such order, they returned together with the promised free enlargement after a twenty-day period);

(*b*) Represented that their black-and-white 8 x 10 inch enlargement of any submitted picture would be beautifully done in the sense that it would be a sharp, clear reproduction of the subject matter originally photographed;

The facts being that the said black-and-white enlargements were made without retouching, spotting, or any other treatment other than enlargement by photographic process, in the course of which, lacking an excellent original, any defects were magnified and made more apparent than they were in the original; many of the photographs submitted were defective and could not be beautifully enlarged without retouching, spotting, or other treatment by skilled persons; and certain of the enlargements produced by them from such photographs were blurred and indistinct and not beautifully enlarged by any standards;

(*c*) Falsely represented that their colored enlargements were of exceptional quality, were sharp and clear in detail, had realism, naturalness and sparkle, and were flattering to the subject; and

(*d*) Falsely represented that their colored enlargements were comparable to those costing from $10 to $14 elsewhere;

The facts being that at best they were of no more than average quality and typical of hand-tinted enlargements made by inexpensive quantity production methods; their employees merely spotted certain blemishes and rubbed on thin transparent paint mixed with oil, at the expenditure of a few minutes' time only; and the great care and attention to detail and skilled artistry exercised in producing high-quality oil colored enlargements were not present;

(*e*) Falsely represented that inherent defects such as lack of photographic detail in their black-and-white enlargements were remedied in their colored enlargements; and

(*f*) Falsely represented that their colored enlargements were superior in quality and appearance to the four-color lithographed picture they displayed in their illustrated folder;

With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true and thereby induce purchase of their said enlargements, divert to them from their competitors substantial trade in commerce, and injure the mail-order photographic enlargement industry generally through loss of public confidence in the integrity of the members:

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

As respects the charge of the complaint that respondents falsely and misleadingly implied that their "get-acquainted" offer of a "free" enlargement was available for only a limited period of time and was free: the record showed that in fact said offer, while not limited in point of time, was limited to one enlargement per customer.

With regard to respondents' alleged misleading free offers, including those in which the offer was made without qualification and those in which the inclusion of 10¢ for handling and return mail was suggested: it appeared that respondents did furnish such an enlargement without cost to all who replied, irrespective of the inclusion of the suggested 10¢.

In regard to the alleged false representation that respondents gave a picture frame free: it appeared that respondents discontinued the use of such representations about one month prior to the issuance of the complaint and stated that they did not intend to resume said practice, and the Commission, under the circumstances, was of the opinion that the public interest did not require any further corrective action with respect thereto.

Other allegations of the complaint in the aforesaid matter to the effect that respondents falsely represented (1) that the customer by replying to the "get-acquainted" advertisements had requested information on hand-tinting, and (2) that the frame for the colored enlargement was handsome, were not sustained by the evidence of record.

Before *Mr. Clyde M. Hadley*, hearing examiner.

Mr. Marshall Morgan and *Mr. William L. Taggart* for the Commission.

Rice, Miller & McDowell, of Kansas City, Kans., and *Hextell, Mitchell & Beving*, of Des Moines, Iowa, 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 Ward S. Hill and Jessie A. Hill, copartners trading as Geppert Studios, 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. Respondents Ward S. Hill and Jessie A. Hill, hereinafter referred to as respondents, compose as individuals a partnership trading under the firm name of Geppert Studios, with its principal office and place of business located at 210 East Locust Street, Des Moines, Iowa.

Respondents are engaged in the production, sale and distribution of plain and colored photographic enlargements and of frames therefor. Respondents operate a mail-order business. The business conducted by them also includes the development of Kodak film.

PAR. 2. In the course and conduct of their said business, operated as Geppert Studios, as aforesaid, respondents cause and at all times mentioned herein have caused their said products when sold to be transported from their place of business in the said State of Iowa to the purchasers thereof located in various States of the United States other than the State of Iowa, and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a course of trade in said products in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of their said business respondents are now, and at all times mentioned herein have been, in substantial competition with various other firms and with corporations, partnerships and individuals likewise engaged in the sale of plain and colored photographic enlargements and of frames therefor.

PAR. 3. Customers and prospective customers are now and have been variously contacted by respondents through the medium of newspaper, magazine, and trade-paper advertising, by the use of radio continuities, and through the medium of United States mails. In the

course and conduct of their said business in connection with and for the purpose of inducing the sale and distribution of their said products in commerce, respondents for more than six years last past have made, and have continued to make, and are now making, various false and misleading, advertising and sales representations and have engaged in and still employ various unfair and deceptive acts and practices in commerce, and various unfair methods of competition in commerce, of which the following are typical but are not all-inclusive:

(1) In numerous magazines and trade journals of general circulation respondents have run a one-inch display advertisement reading as follows:

FREE ENLARGEMENT

Just to get acquainted with new customers, we will beautifully enlarge one snapshot, print or negative, photo or picture to 8 x 10 inches—FREE—if you enclose this ad with 10¢ for handling and return mailing. Information on hand tinting in natural colors sent immediately. Your picture returned with your free enlargement. Send it today.

By radio continuities and by circulars disseminated in the various States of the United States respondents have referred to, and have made various representations concerning, said so-called "get-acquainted" advertisement. The sum of 10¢, it is represented, is to pay "the actual cost of mailing the enlargement out to you"; "to pay for packing, handling and mailing the finished enlargement." At other times it is and has been represented that the 10¢ is "only about paying for the paper the picture is printed on," or "will help cover the cost of handling and return postage."

Respondents represent and have represented to customers and prospective customers that this is "only an introductory offer" made to show the fine quality of Geppert Studios' work and that "it will be discontinued before long"; that this "may be the last time Geppert Studios will offer a 8 x 10 deluxe enlargement." The offer is and has been described as a "Special offer" made "for a limited time only," and it is represented that it "may be withdrawn immediately." Prospective customers are and have been assured in radio continuities that "in just a day or two you can hear from them (Geppert Studios) as to when you can expect your enlargement," and as to "when it will be ready"; and "that you will hear from them just as soon as they receive your copy," and that they will also get at that time "information regarding other photographic work."

Customers in submitting their orders to respondents for an 8 x 10 enlargement are and have been urged to "think of your father or mother, nieces or nephews, children or others near and dear to you, of whom you treasure photos or snapshots"; to "* * * get out the

snapshot, print, negative, photo or picture that means everything in the world to you," and to "think of having a beautiful lifelike 8 x 10 inch enlargement of any snapshot, print or negative FREE, a big 8 x 10 picture of someone near and dear to you—if you will merely enclose 10¢ in coin to help cover cost of handling and return postage * * *."

In later magazine advertising the language reading "FREE—if you will enclose this ad with 10¢ for handling and return mailing" was changed to read: "FREE—if you will enclose this ad. (10¢ for handling and return mailing appreciated.)"

Respondents' original offer of an 8 x 10 inch enlargement of a photographic snapshot or negative "FREE" is not and does not constitute and has not constituted the offer of a "free" picture or product. While customers are not so informed, and do not so understand, the sum of 10¢ which the customer is directed or requested to remit to help pay the expense of "handling and return mailing," in truth and in fact covers the entire cost of producing and delivering such enlargement, or in any event constitutes a substantial payment on or toward the total expense incurred in producing and delivering said enlargement.

Further, in truth and in fact, the so-called "get-acquainted" offer of respondents is not and never has been any "special offer" or one made "for a limited time only" that may be "withdrawn soon" or "withdrawn immediately," or any offer of short duration, but on the contrary is the identical, first approach advertising offer which has been made by respondents in the usual course of their business since 1938.

(2) In radio advertising employed in connection with said initial or "introductory offer," respondents represent that they will "beautifully enlarge" a picture to 8 x 10 inches "FREE," * * * that they will turn out "a big 8 x 10 enlargement, professional quality, clear, sharp and beautiful for only 10¢." The offer is described as a "once in a lifetime offer"; "a beautiful permanent enlargement." The offer is also described as "sensational" and "amazing."

Said enlargements do not, in fact, possess the quality, merit, or value ascribed to them as represented by respondents.

In truth and in fact the said 8 x 10 black and white enlargement represented by respondents as "beautifully enlarged" and of "splendid quality," and "a beautiful permanent enlargement" is nothing more than a quickly and cheaply made photographic enlargement which respondents use later to compare unfavorably and disparagingly with a colored enlargement, as hereinafter related, in order to effect the sale of the more expensive and profitable colored enlargement.

(3) Respondents' said original offer, as hereinafter alleged and shown, is not and never has been a bona fide offer to give away or to sell a plain 8 x 10 inch black and white enlargement of a photograph or snapshot, but is and has been known in the picture industry as a "come-on" or "bait" offer in which respondents pretend to give away or sell one article, a plain enlargement, until they obtain a customer's name and address and a treasured family photograph, plus 10 cents. Then by carefully operated deception and duress respondents force the customer into buying, or induce the customer to buy, at much greater expense a tinted or colored enlargement the customer had not originally ordered or contemplated ordering. Respondents, as more fully hereinafter related, by deception, disparagement of the plain enlargement, and by falsely representing that the customer's original order number and the family photograph submitted therewith can only be located by returning an enclosed postal card, practically force the customer into buying a colored enlargement costing from 50 to 75 cents, plus postage. Respondents carefully refrain from disclosing to the customer by radio or otherwise that their real purpose in submitting said original offer was and is to sell the customer something he did not intend purchasing, namely, a colored enlargement on which respondents make and have made a substantial profit.

(4) Upon the receipt of the customer's name and address, the 10 cents, and a copy of the advertisement offering the "free" 8 x 10 enlargement, respondents immediately transmit to the customer, (a) a printed circular, (b) an illustrated four-color lithographic circular, and (c) a return postal card.

Respondents represent, and have represented, in said circular that a plain black and white picture is "unfinished"; that the colored enlargement is "more life like," is "much better"; that it is in fact "a beautiful work of art," "the last word." Superiority of hand-tinting over four-color lithographing is claimed. The customer is invited to refer to one of the circulars to "compare" the black and white picture with the "finished in color," and to "see the difference."

Through the medium of these and similar disparaging representations and comparisons not herein set forth, respondents endeavor to induce and have induced and are inducing customers and prospective customers to believe that the black and white enlargement theretofore ordered by him, and not yet delivered, is an inferior product, thoroughly inadequate, and undesirable, and that he should have a different product, namely, a colored enlargement.

In one of said circulars a colored enlargement, 8 x 10 inches in size, has been offered for 50 cents, together with a "free" 5 x 7 black and white enlargement. In a latter circular the price of the colored

enlargement was increased from 50 cents to 75 cents. Respondents withhold and have withheld the preparation and delivery of the black and white "get acquainted" enlargement for as much as twenty days pending their persistent effort, by disparaging the black and white enlargement, to induce the customer to buy the more expensive "special offer" colored enlargement. Respondents advise the customer that the "special offer" made in the circular letter "can only be made when we have your enlargement here."

The said 8 x 10 inch "free" black and white enlargement to be made by respondents in connection with their original offer, upon the remittance of 10¢ by the customer, instead of being delivered to the customer in pursuance of his order, is thus withheld from the customer by respondents, and not completed, pending the result of respondents' efforts to cause the customer to become dissatisfied with the disparaged black and white enlargement he had ordered and to induce him to purchase the colored enlargement instead. All of said disparagement of the black and white enlargement occurs after the customer has ordered such product, but prior to the making of the product and delivery of the same to him.

In truth and in fact customers have not understood, and respondents have carefully concealed from them, that the real purpose of respondents in making their so-called "get acquainted offer" was not to sell a plain black and white enlargement but to sell instead a colored enlargement on which, as heretofore alleged, respondents make a substantial profit.

Further, in truth and in fact, respondents' subsequent offer respecting a colored enlargement designated as a "special offer" is not and never has been a "special offer" in any sense but is and has been the regular offer made by respondents for such product in the regular course of business over a long period of years.

(5) In emphasizing the expensive quality and expert finish of their said tinted or colored enlargements, respondents have represented in their said circulars that such "quality tinting" as that found in their work might cost as much as $10 elsewhere; that pictures made by others for $10 were not as "nice" as one enlarged and colored by them for 75 cents; were "more clear and natural looking by far" than those pictures costing as high as $12 and $14 elsewhere.

In truth and in fact the said tinted or colored enlargements sold by respondents at 75¢ do not have and never have had any $10, $12, or $14 sales price or any price remotely approximating any of said sums, but, on the contrary, said products are cheaply made, inexpensively tinted or colored enlargements for which 75¢ is a good price and on which respondents realize a substantial profit.

(6) Through the medium of a further circular disseminated by respondents in commerce, a customer who had sent in 10 cents and a picture in order to obtain a "beautiful enlarged black and white picture" is placed in the attitude of having inquired regarding hand-painting, and in order to locate and recover the original photograph or snapshot which had been transmitted by him to respondents, the customer is compelled to sign a postal card order for a hand-tinted enlargement costing 75 cents, plus postal charges.

In the advertisement which had been answered by the customer it was merely stated that: "Information on hand-tinting in natural colors sent immediately." In the latter circular employed by respondents the customer is represented as having requested information on hand-tinting and he is informed that a colored picture is being made for him. Says this circular:

I was certainly pleased to receive your order for a plain 8 x 10 inch enlargement this morning. You may rest assured that our expert workmen will do their very best.

Since you requested information on hand-tinting, I will also make a second 8 x 10 inch enlargement from your treasured picture and have our experienced skillful artist hand-tint it in natural, true lifelike colors, then place it in a handsome frame of your own choice.

* * *

I want to please you in every way and have told our art department that you will probably want this extra work done.

In truth and in fact the customer had not requested information on hand-tinting, had not ordered any hand-tinted picture and had not ordered any frame in which to place the picture he had not ordered.

Respondents in this circular again disparage the black and white enlargement the customer had originally ordered, with a view to inducing the customer to buy the more expensive hand-tinted picture.

In return postal card enclosed with this circular, the following representation is made:

FREE

Handsome Frame

Your choice of either the beautiful Black and White or Ivory and Gold Frame is given with your hand colored enlargement.

The principal text of the return postcard reads:

Please rush my free 8 x 10 enlargement, and my second hand-tinted 8 x 10 enlargement in a FREE Frame. I am sending no money. When the two enlargements arrive (one 8 x 10 inch plain and one 8 x 10 inch colored enlargement in a Free Frame) I will pay only 75¢ plus a few cents for handling and postage to my mailman for the second hand-tinted enlargement. The first plain 8 x 10 inch enlargement and the frame are free.

In truth and in fact the said frame is in no sense a fine or handsome frame, but, on the contrary, it is a cheap insubstantial affair made of paper composition, costing only a few cents at most, and said cost is more than covered and absorbed by the price obtained for the colored enlargement.

(7) Said respondents further engage in both deception and duress in order to induce the customer to sign and return the above-described postcard obligating him to purchase a tinted or colored enlargement for 75 cents, plus postal charges. In connection with the return of the signed postal card respondents represent:

Please sign and mail the enclosed card today. By it, you will let me know which frame you wish—* * * It will also give me an opportunity to recheck your address on the shipping label before mailing your plain enlargement which is being made and will be sent to you when finished. So please give us all necessary information on the enclosed card which requires no postage.

* * *

The special offer made in this offer can be made one time and to new customers only, and must be done while I have your order here. * * *

P. S. SPECIAL NOTICE.—Please be sure to return the enclosed postcard with your instructions * * * It bears your file order number which we need to locate your picture * * * *WE CANNOT LOCATE YOUR PICTURE WITHOUT IT.*

By said representations respondents lead the customer to believe that in order to locate his original order for a plain black and white enlargement and to locate the treasured or prized picture or photograph the customer had theretofore transmitted with his original 10-cent order, it will be necessary for the customer to sign and return the postcard which has his order number stamped thereon, and that unless said postcard is signed and returned the customer's treasured photograph and the black and white enlargement also are lost.

In truth and in fact the location and identification of the customer's order number and picture, including the treasured or prized photo that had been transmitted originally by the customer, are not dependent upon the customer's signing and returning the said postcard. The said order number and 8 x 10 inch picture, and the original photograph, are not lost or misplaced as the apprehensive customer is led to believe, and no signed postcard is necessary to locate them. Nevertheless, the purpose and mission of said postcard and the circular accompanying it are to force or induce the customer, under fear of losing his photograph and black and white picture, to sign an order for a 75¢ tinted or colored enlargement, and the customer's said treasured picture or photograph is withheld from him by respondents to enable them, through misrepresentation and duress, to force the customer into buying said 75 cent enlargement.

PAR. 4. The use by respondents of the aforesaid acts, practices and methods in connection with the offering for sale and sale of their said products in commerce, as aforesaid, including the failure to reveal essential and important facts in connection therewith, has had, and now has, the tendency and capacity to, and does, mislead and deceive the purchasing public concerning the actual character and purpose of the original offer respondents make, including the identity of the actual product respondents are selling and offering for sale, and concerning the quality and value of their said enlargements, and has led, and does lead, purchasers erroneously to believe that the representations and implications so made and used by respondents are true, and causes and has caused a substantial number of the purchasing public to purchase substantial qualities of said products.

The use by respondents of the aforesaid acts, practices and methods further has the tendency and capacity to do, and does unfairly divert trade to respondents from their competitors engaged in the sale of black and white and tinted or colored photographic enlargements of photographs and snapshots and of frames therefor in commerce among and between the various States of the United States and in the District of Columbia, who truthfully represent their said products. As a further consequence of the aforesaid acts and practices of the respondents the business of competitors has been injured by a loss of prestige with and the loss of the confidence of a substantial portion of the public.

PAR. 5. The aforesaid acts and practices of respondents, 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 June 16, 1944, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof charging them with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of said Act. After the filing of respondents' answer, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission 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, answer thereto, testimony and other evidence, recommended decision of the hearing examiner and exceptions thereto by counsel for respondents and counsel supporting the complaint, briefs, and oral argument of counsel; and the Commission, having duly considered the matter and having entered its order ruling on the exceptions to the recommended decision of the hearing examiner, 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. Respondents Ward S. Hill and Jessie A. Hill are individuals trading as copartners under the trade name of Geppert Studios with their office and principal place of business at 608 East Locust Street, Des Moines, Iowa.

Respondents are engaged in the photo-finishing business and in the production, sale and distribution of plain and colored photographic enlargements. Respondents conduct a mail order business in connection therewith.

PAR. 2. Respondents cause and have caused their said products, when sold, to be transported from their place of business in the State of Iowa, to purchasers thereof located in various 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 said products in commerce between and among the various States of the United States and in the District of Columbia. Respondents are now, and at all times mentioned herein have been, in substantial competition with others likewise engaged in the sale and distribution of plain and colored photographic enlargements in commerce.

PAR. 3. In the course and conduct of their aforesaid business and in promotion thereof, respondents have placed advertisements in various newspapers and periodicals throughout the United States in which advertisements they stated that for the purpose of getting acquainted with new customers they would beautifully enlarge free, one snapshot, photo or picture from a print or negative to make an 8 x 10 inch picture. Said advertisements also stated that information on hand-tinting in natural colors would be sent immediately and that the customer's picture would be returned with the free enlargement.

PAR. 4. Upon receipt of the customer's name and address along with the print or negative submitted for free enlargement, it has been the

respondents' practice to mail a follow-up letter consisting of form letter, an illustrated folder and a return postal card for ordering a hand-tinted frame enlargement of the print or negative submitted. Typical of the statements contained in respondents' form letters are the following:

Since you requested information on hand tinting, I will also make a second 8 x 10 inch enlargement from your treasured picture * * * and have our experienced skillful artist hand tint it in natural true lifelike colors, then place it in a handsome frame of your choice.

You will find enclosed "The Unfinished Work," which will tell you how much more natural and life-like hand tinting in natural oils makes any enlargement. * * *

* * *

Please sign and mail the enclosed card today. By it, you will let me know which frame you wish * * * also will give me an opportunity to recheck your address on our shipping label before mailing your plain enlargement which is being made and will be sent to you when finished. So please give us all necessary information on the enclosed card which requires no postage.

* * * So let us hear from you right away. Fill out the enclosed card and drop it in the mail today.

The special offer made in this offer can be made one time and to new customers only and must be done while I have your order here. Therefore I will wait until I hear from you.

* * * be sure to let me hear from you as we do not keep pictures after they are finished. Don't delay! Fill out the enclosed card and mail it right away—TODAY!

P. S. SPECIAL NOTICE—Please be sure to return the enclosed postcard with your instructions * * * it bears your file order number which we need to locate your picture * * * *WE CANNOT LOCATE YOUR PICTURE WITHOUT IT.*

The postal card referred to contained an order for a framed and tinted 8 x 10 inch enlargement of the picture previously submitted. The return postal card sent by respondents reads as follows:

SEND NO MONEY
BEAUTIFUL IVORY & GOLD
OR BLACK & GOLD FRAME

Your choice of either the beautiful Black and Gold frame or Ivory and Gold frame is included with your hand-colored enlargement. Both have easel back and give permanent protection from tearing as well as adding beauty that must be seen to be appreciated. Please check the frame you wish below.

MAIL THIS CARD TODAY
MR. WARD S. HILL, *President*
GEPPERT STUDIOS

Please rush my 8 x 10 enlargement and the second hand-tinted 8 x 10 enlargement on deluxe golden-toned, extra heavy paper in a beautiful frame. I am sending no money. When the two enlargements arrive (one 8 x 10 plain and one 8 x 10 colored on deluxe, golden-toned, extra heavy paper framed), I will pay

only $1.49, plus a few cents for handling and postage to my postman for the second enlargement.

Name_____ Post Office _____
Address or R. F. D_____ State _____

The third enclosure is a printed folder entitled "THE UNFINISHED WORK," on the front page of which is sketched a partly done black-and-white portrait with features and expression missing. Inside is a handsomely lithographed half-tone in colors and beside it a smaller black-and-white cut of the same subject. Typical of the statements contained in this folder are:

YOUR SNAPSHOT ENLARGEMENT BECOMES A *BEAUTIFUL* WORK OF ART WHEN HAND TINTED!

Even this beautiful illustration by expensive four-color lithography does not do full justice to the original photograph—compared with what *you* get when we hand-tint your enlargement.

* * * Any photograph you send us to have hand-tinted does become a work of art, * * *.

* * * our artists can add so much realism, naturalness and sparkle when they hand-tint your enlargement. * * * have uncanny ability to bring out exactly the right shades of color in a way to flatter any subject. * * *

Quality tinting such as you get from the Geppert Studios for the small charge we make, might cost as much as $10.00 elsewhere. But under our plan, every home can enjoy the advantages of this modern development, *color in photography*, at a cost of only a few cents. * * *

Through up-to-date methods, through careful and expert workmen, the Geppert Studios have become nationally known for pictures of exceptional quality. * * *

When we first inaugurated this service, it represented a new era in photography—it meant that another milestone in photographic history had been passed. * * * Color marks one of the biggest improvements in pictures—and color is YOURS to enjoy at trifling cost. * * *

A FEW LETTERS SENT BY THOUSANDS OF PLEASED CUSTOMERS * * *

PAID $10 FOR PICTURE NOT AS GOOD

* * * My mother-in-law paid ten dollars for this same picture enlarged by someone else and I can truthfully say it is not as nice as this one that only cost me seventy-five cents enlarged and colored by you.

* * *

BETTER THAN PICTURES AT $12 TO $14

* * * we have never seen one painted before that looks so natural. Have seen pictures that came as high as $12 and $14 and can say this one is more clear and natural looking by far.

PAR. 5. Respondents' operating schedule is such that a picture submitted in response to their offer of a free enlargement has not completed the enlargement process until at least twenty days after its

receipt by respondents. This allows ample time for the customer to send in his order for a hand-tinted enlargement. Upon receipt of the postal card ordering a hand-tinted picture, two 8 x 10 inch enlargements, are made, one is hand-tinted, and both are then sent c. o. d. to the customer together with his original picture. If no order for the hand-tinted picture is received within the twenty days, one 8 x 10 inch black-and-white enlargement is made and, together with the original picture, is sent to the customer at no cost to him.

PAR. 6. Through the use of the statements and representations above set forth respondents have implied that they will not send the free enlargement or return the original picture unless the hand-tinted enlargement is ordered. They have implied that they cannot find the original picture without the order number on the postal card order blank, that they are waiting to recheck the address, that nothing will be sent out until the customer is heard from and that pictures are not kept after they are finished and may be destroyed if the customer delays sending in the postal card order blank. The type of picture submitted for photographic enlargement is often one which is of great sentimental value to the customer. Thus respondents' representations have had the tendency and capacity to cause the customer to order a hand-tinted enlargement, which he would not otherwise have ordered, through fear of loss of his original valued picture.

PAR. 7. Through the use of the statements and representations hereinabove set forth or described and others similar thereto not specifically referred to herein, respondents also have represented (1) that their black-and-white 8 x 10 inch enlargement of any submitted picture will be beautifully done in the sense that it will be a sharp, clear picture of the subject matter originally photographed, (2) that their colored enlargements are of exceptional quality, being sharp and clear in detail, have realism, naturalness and sparkle, and are flattering to the subject, (3) that their colored enlargements are comparable to those costing from $10 to $14 elsewhere, (4) that inherent defects, such as lack of photographic detail, in their black-and-white enlargements are remedied in their colored enlargements, and (5) that their colored enlargements are superior in quality and appearance than their four-color lithographed picture in their illustrated folder.

PAR. 8. Respondents' black-and-white enlargements made from photographs submitted in response to their free offer are made without retouching, spotting or any other treatment other than enlargement by photographic process. In order for a good enlargement to be made from a photograph or negative by this method, the original must be excellent photographically. Any defects such as blemishes, bad exposure, wrong focus or surface flaws will be magnified and more appar-

ent in the enlargement than they were in the original photograph. Such photographs are not beautifully enlarged in the sense that they are sharp, clear pictures of the subject originally photographed. Many of the photographs submitted for enlargement are defective and cannot be beautifully enlarged without retouching, spotting and other treatment by skilled persons. Certain of the enlargements produced by respondents from such photographs are blurred and indistinct and are not beautifully enlarged by any standard.

Respondents' colored enlargements are not of exceptional quality. Many of them are neither clear nor sharp in detail, do not have realism, naturalness, or sparkle and are not flattering to the subject originally photographed. None of them are comparable in quality to the class of professionally made enlargements which sell for from ten to fourteen dollars. At best they are no more than average quality and typical of hand-tinted enlargements made by inexpensive quantity production methods.

In producing their colored enlargements, respondents' employees merely spot certain blemishes in the print and rub on thin transparent paint mixed with oil, all of which work is performed in a few minutes time. The great care, attention to detail and skilled artistry exercised in producing an expensive, high quality, oil-colored enlargement are not present in respondents' work. Lack of clarity and detail in their enlargements, resulting from or made more obvious by the enlargement process, is not remedied by their hand-tinting process. Said hand-tinted enlargements are inferior in quality and appearance to the four-color lithographed picture in respondents' illustrated advertising folder.

PAR. 9. The complaint further alleges that respondents' "get acquainted" offer of a "free" enlargement is false and misleading in that it falsely implies that the offer is going to be available for only a limited period of time and is free. It further alleges that, in fact, the offer is not for a limited period of time, being respondents' regular offer, and that the enlargement is not free in that a fee of ten cents, represented to be for handling and return mail but which allegedly covers a substantial part of the total cost, is required or requested.

In fact, respondents' offer, while not limited in point of time, is limited to one enlargement per customer. The record shows that when respondents receive an order which is shown on its face or is determined in some other manner to be a repeat order, the customer is required to pay a higher price established for other customers. Upon this record it cannot be found that respondents' use of the term "get acquainted" is false and misleading.

Since entering into an agreement with the Commission in 1942 to cease and desist from representing that a photographic enlargement is given free when, in fact, a consideration is required therefor, respondents have used two forms of "free" offers of photographic enlargement. One offered the enlargement "free" without qualification. The other, in addition to the free offer, stated that ten cents for handling and return mail would be appreciated. In fact, respondents furnished an enlargement without cost to all persons responding to said advertisement whether ten cents was sent or not. The record does not show that the cost of handling and return mail was less than ten cents. Upon this record it cannot be found that respondents' use of the term "free" in their offers of free enlargements has been false or deceptive since 1942.

The complaint also alleges that respondents have falsely represented that they were giving a picture frame free. The record shows that respondents discontinued the use of this representation approximately one month prior to the issuance of the complaint herein. Respondents have stated they do not intend to resume this practice. Under the circumstances the Commission is of the opinion that the public interest does not require any further corrective action as to this practice.

Other allegations of the complaint to the effect that respondents falsely represented (1) that the customer, by replying to the get acquainted advertisements, had requested information on hand-tinting, and (2) that the frame for the colored enlargement was handsome, have not been sustained by the evidence of record.

PAR. 10. The use by respondents of the false and deceptive statements and representations, referred to in Paragraphs Seven and Eight of these findings, has had the 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 into the purchase of respondents' enlargements as a result of such erroneous and mistaken belief.

The purchase of respondents' enlargements because of respondents' coercive practices as referred to in Paragraph Six of these findings or because of respondents' false and deceptive statements and representations as referred to in Paragraphs Seven and Eight of these findings has had the tendency and capacity to divert to respondents from their competitors substantial trade in commerce between and among the various States of the United States and in the District of Columbia.

The use of said coercive practices and false and deceptive representations also has had the tendency and capacity to injure the mail order

photographic enlargement industry generally through loss of confidence of a substantial portion of the public in the integrity of the members of the industry.

CONCLUSION

The acts and practices of the respondents as herein found (excluding those found in Paragraph Nine) were all to the prejudice and injury of the public and constituted 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.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, respondents' answer thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint introduced before a hearing examiner of the Commission theretofore duly designated by it, the hearing examiner's recommended decision and exceptions thereto, briefs and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondents Ward S. Hill and Jessie A. Hill individually and as co-partners trading as Geppert Studios, or trading under any other name, and their agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of photographic products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Stating or implying in any manner that a print or negative submitted for enlargement in response to an advertised offer will not be returned unless an additional purchase is made or act performed which was not required in said offer.

2. Engaging in any practice which has the effect of coercing persons to purchase merchandise they otherwise would not have purchased.

3. Representing, directly or by implication:

(a) That any print or negative submitted will be beautifully enlarged unless it is clearly stated that for such results the print or negative submitted must be photographically suitable.

(b) That their colored enlargements of all prints or negatives submitted will be sharp and clear in detail, will have realism, naturalness or sparkle or will be flattering to the subject.

(c) That their colored enlargements are of exceptional value; that they are of a value in excess of their true market value; or that they are comparable or superior in quality or appearance to any specified illustration, unless such is the fact.

(d) That any lack of photographic detail or other defects in their black-and-white enlargements are remedied in their colored enlargements unless such is the fact.

4. Publishing any testimonials which contain any of the above prohibited representations.

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.

IN THE MATTER OF

ACADEMY KNITTED FABRICS CORPORATION ET AL.

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

Docket 6028. Complaint, Aug. 11, 1952—Decision, Dec. 27, 1952

Where a corporation engaged in the manufacture and interstate sale and distribution of certain fabrics made of highly inflammable brushed rayon which resembled in texture and appearance fabrics made of wool, acetate and other fibers not readily inflammable, and were used by the purchasers for sweaters and other articles of wearing apparel for the consuming public; and its three officers—

Sold and distributed said fabrics without disclosing either on their invoices or bills to purchasers or by attached labels or tags that they were highly inflammable, and thereby impliedly warranted that they were suitable for use in the manufacture of wearing apparel and that such apparel was safe to wear, when in fact they were dangerous and unsafe for use;

With tendency and capacity to mislead a substantial number of manufacturers of wearing apparel and members of the consuming public as to the safety of the fabrics and wearing apparel made therefrom, and thereby cause them to purchase substantial quantities of such fabrics or apparel; and with effect of placing in the hands of uninformed or unscrupulous manufacturers a means and instrumentality whereby members of the purchasing public might be deceived:

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 E. Steinmetz for the Commission.
Solomon & Rosenbaum, 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 Academy Knitted Fabrics Corporation, a corporation, and Jacob M. Wallerstein, Harry Leventhal and Murray Feiner, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Academy Knitted Fabrics Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 318 West 39th Street, New York, New York. The individual respondents, Jacob M. Wallerstein, Harry Leventhal and Murray Feiner are respectively president, vice-president and secretary-treasurer of the corporate respondent and as such officers, formulate, direct and control the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter mentioned. These individual respondents have their offices at the same place as the corporate respondent.

PAR. 2. Respondent, Academy Knitted Fabrics Corporation, is now, and for several years last past has been, engaged in the monufacture, sale and distribution of fabrics composed of various fibers, including rayon. Respondents cause the fabrics made by the corporate respondent, including those composed of rayon, when sold, to be transported from the place of business of Academy Knitted Fabrics Corporation in the State of New York to purchasers thereof located in various other States of the United States. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said fabrics in commerce among and between the various States of the United States.

PAR. 3. Rayon is a chemical fiber which may be manufactured so as to simulate wool and other natural fibers in texture and appearance. Some fabrics and articles of wearing apparel manufactured from such rayon fibers have the appearance and feel of wool. Many members of the purchasing public are unable to distinguish between articles of wearing apparel manufactured from such rayon fabrics and, articles of wearing apparel manufactured from wool. Consequently, articles of wearing apparel manufactured from such rayon fabrics are readily accepted by many members of the purchasing public as wool products.

PAR. 4. Some of the rayon fabrics, manufactured, sold, and distributed by the respondents are a particular type of brushed rayon that is highly inflammable. Such fabrics simulate wool in texture and appearance and respondents do not inform the purchasers of said fabrics that said fabrics are highly flammable.

Purchasers of respondents' said fabrics make up sweaters and other articles of wearing apparel from them for sale to members of the purchasing public. Such products resemble wool products and are readily accepted by many members of the public as wool products.

PAR. 5. Garments and other products manufactured from wool have for many years held, and still hold, great public esteem and confidence because of their outstanding qualities. Wool is not readily inflam-

mable and is a desirable material for garments, including sweaters and other outer wear.

PAR. 6. By failing to reveal the inflammable characteristics of the said fabrics, respondents have represented and impliedly warranted that said fabrics are suitable to be manufactured into sweaters and other garments that are safe to wear. In truth and in fact, sweaters and other garments made from respondents' said fabrics are dangerous and unsafe to be worn as articles of clothing because of their inflammability.

Respondents' said practices place in the hands of retailers and others a means and instrumentality whereby members of the purchasing public may be mislead and deceived in the manner aforesaid.

PAR. 7. 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

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 December 27, 1952, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 11, 1952, 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 that Act. After respondents had filed their answer to the complaint, a hearing was held before the above-named hearing examiner at which a stipulation of facts was entered into between counsel supporting the complaint and counsel for respondents and incorporated into the record of the proceeding. The stipulation provided that, subject to the approval of the hearing examiner, the facts set forth therein might be taken as the facts in the proceeding and in lieu of evidence in support of and in opposition to the complaint, and that the hearing examiner might proceed upon such statement of facts to make his initial decision stating his findings as to the facts, including inferences which he might draw from the stipulated facts, and his conclusion

based thereon, and enter his order disposing of the proceeding without the filing of proposed findings or conclusions or the presentation of oral argument. The stipulation further provided that upon appeal to or review by the Commission the stipulation might be set aside by the Commission and the case remanded to the hearing examiner for further proceedings under the complaint. Thereafter the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, answer and stipulation, the stipulation having been approved by the hearing examiner, who, after duly considering the matter, 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 Academy Knitted Fabrics Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 318 West 39th Street, New York, New York. Respondents Jacob M. Wallerstein, Harry Leventhal and Murray Feiner are president, vice-president and secretary-treasurer, respectively, of respondent corporation and as such officers formulate, direct and control the acts, policies and practices of the corporation, including the acts and practices hereinafter set forth.

PAR. 2. The corporate respondent is now, and for several years last past has been, engaged in the manufacture, sale and distribution of fabrics composed of various fibers, including rayon. Respondents cause these fabrics, when sold, to be transported from the place of business of the corporation in the State of New York to purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in such fabrics in commerce among and between the various States of the United States.

PAR. 3. Some of the rayon fabrics manufactured and sold by respondents were made of a particular type of brushed rayon which is highly inflammable. These fabrics resembled in texture and appearance fabrics made of wool, acetate and other fibers which are not readily inflammable. Respondents failed to disclose, either on their invoices or bills to purchasers or by means of labels or tags attached to their fabrics, the fact that the fabrics were highly inflammable, although it appears that respondents did supply such information orally by telephone to at least some of their customers. The fabrics were used by the purchasers principally for making sweaters and

other articles of wearing apparel which eventually reached the consuming public.

PAR. 4. The sale and distribution by respondents of the fabrics in question without disclosure, or without adequate disclosure, of the fact that the fabrics were highly inflammable, constituted an implied warranty that they were suitable for use in the manufacture of wearing apparel, and that such apparel was safe to wear. Actually such fabrics and apparel, because of their high inflammability, were dangerous and unsafe for use.

PAR. 5. The acts and practices of respondents, as set forth above, had the tendency and capacity to mislead and deceive a substantial number of manufacturers of wearing apparel and members of the consuming public with respect to the safety of respondents' fabrics and of wearing apparel made therefrom, and the tendency and capacity to cause such manufacturers and members of the public to purchase substantial quantities of such fabrics or of wearing apparel made therefrom. Respondents' acts and practices served also to place in the hands of uninformed or unscrupulous manufacturers a means and instrumentality whereby members of the public might be misled and deceived.

PAR. 6. The acts and practices in question have already been discontinued by respondents.

CONCLUSION

The acts and practices of respondents as hereinabove set out are all to the 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 the respondents, Academy Knitted Fabrics Corporation, a corporation, and its officers, and Jacob M. Wallerstein, Harry Leventhal and Murray Feiner, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of fabrics, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Offering for sale or selling fabrics which are highly inflammable, without clearly disclosing thereon or by means of labels or tags attached thereto that such fabrics are highly inflammable.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of December 27, 1952].

Syllabus

IN THE MATTER OF

PHILIP MORRIS & COMPANY, LTD., INC.

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

Docket 4794. Complaint, Aug. 5, 1942—Decision, Dec. 29, 1952

In seeking to determine through tests and analyses involving clinical studies the relative irritating effects of smoke from diethylene glycol and glycerine-treated cigarettes, the vagaries of subjective observation and the defects inherent in objective observation are equally well known, and to apply the results of the observations reported in a number of cases which is less than trivial compared to the tremendous number of cigarette smokers in the country is wholly unwarranted.

As respects the relative irritation produced by the smoking of cigarettes which have been submitted to different treatment or which may represent the brands of different manufacturers, the throats of people vary in their susceptibility to irritation.

In appraising the validity of various tests on animals and on human beings, made in varying ways and under varying conditions by respondent and used by it as a basis for sustaining categorically its unqualified representations concerning its product to the public for many years, the Commission was of the opinion as respects the substantiality and probative value of certain other tests made in the premises that it was not held to higher standards of substantiality or probative value in dealing with such respondent than the latter had observed in dealing with the public, and that inasmuch as the respondent had invoked a certain type of test as a medium for proving the truth, the Commission might invoke such a test to prove falsity.

The smoke of all cigarettes is an irritant and the extent of such irritating effects depends upon numerous factors including the tolerance of the individual smoker, the frequency of smoking, the extent to which the smoke is inhaled, the rapidity with which the cigarette is smoked, and the length to which it is smoked.

Where one of the largest manufacturers of tobacco products in the United States, engaged in the competitive interstate sale and distribution of its Philip Morris cigarettes, in the manufacture of which, begun in 1932 or 1933, it employed as a hygroscopic agent or moistener diethylene glycol instead of glycerine, the principal hygroscopic agent used generally by cigarette manufacturers; in advertising its said products in magazines of nationwide circulation, in newspapers of interstate circulation and through radio broadcasts in nationwide hookups and otherwise—

(a) Falsely represented that its said cigarettes did not irritate the upper respiratory tract and were less irritating thereto than other brands, including the four leading competitive brands; and that the irritation produced by other cigarettes was of longer duration than that produced by its said cigarette:

(*b*) Represented that certain purported findings and conclusions by physicians based upon purported tests or experiments made by them were made and published for the sole benefit of the medical profession;

When in fact the studies and experiments referred to in its various advertisements were made at its instance as a basis for and in support of its advertising claims;

(*c*) Falsely represented that after a day of smoking its said Philip Morris cigarettes the throat and mouth of the smoker would be as fresh and comfortable and the breath as pure and sweet as in the morning before smoking; and

(*d*) Falsely represented that its cigarettes protected the smoker from "smoker's cough", effects of inhaling, and throat irritation due thereto;

With capacity and tendency to mislead members of the public into the erroneous belief that said representations were true and thereby into the purchase of substantial quantities of said product:

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.

In considering the numerous tests made at respondent's instance over a period of years, upon the results of which it rested its claims that its cigarettes, in which "only diethylene glycol" was used as the hygroscopic agent, possessed the qualities and comparative merits attributed thereto, and which involved experiments upon rabbits and other animals and also upon human beings under a variety of conditions and through the use of a variety of devices and methods:

The Commission was of the opinion and found by reason of numerous variables and inconsistencies, and particularly as illuminated by other tests and concessions, that the record failed to sustain the conclusion that the smoking of cigarettes containing diethylene glycol was less irritating to the upper respiratory tracts of humans than the smoking of cigarettes which contained glycerine and that the smoking of respondent's cigarettes was less irritating or harmful in the various respects claimed than the smoking of other brands, including the leading brands of cigarettes.

Charges of complaint which related to other matters than those above involved and which included the charges that respondent falsely represented that outstanding superiority of its "Revelation" pipe tobacco over any other pipe tobacco, with its freedom from bite and better action on the mouth and throat than that possessed by other pipe tobaccos had been scientifically established; that respondent's advertising and labeling of its "Dunhill" cigarettes had the capacity and tendency to mislead and deceive the purchasing public into the belief that they were made in England and imported into America and that they were the same cigarettes formerly sold by Alfred Dunhill, Ltd., at a higher price; and that respondent, to aid in the sale of its said cigarettes in the aforesaid general connection, represented in the advertisements that it would send upon request therefor reprints of all papers published on the influence of hygroscopic agents on irritation from cigarette smoke, when in fact it purposely failed to send to such persons any reprints which showed that the hygroscopic agent

used in the manufacture of its cigarettes was irritating, and in numerous cases failed to send any such reprints whatever, were dismissed.

Before *Mr. Charles A. Vilas*, *Mr. Andrew B. Duvall*, *Mr. J. Earl Cox*, and *Mr. Earl J. Kolb*, hearing examiners.

Mr. John R. Phillips, *Mr. George M. Martin* and *Mr. Frederick McManus* for the Commission.

Lee, Toomey & Kent, of Washington, D. C.; *Pennie, Edmonds, Morton, Barrows & Taylor* and *Conboy, Hewitt, O'Brien & Boardman*, of New York City, 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 Philip Morris & Company, Ltd., Inc., a corporation, hereinafter referred to as respondent, has 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, Philip Morris & Company, Ltd., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its executive office in New York City, New York, and with its factories in the city of Richmond, State of Virginia. It is now, and for more than two years last past has been, engaged in the manufacture of tobacco products, including cigarettes branded respectively "Philip Morris" and "Dunhill," and a pipe tobacco branded "Revelation," and in the sale and distribution thereof in commerce among and between the various States of the United States and in the District of Columbia. It now causes, and for more than two years last past has caused such tobacco products, when sold by it, to be transported from its place of business in Richmond, Virginia, to the purchasers thereof, some located in said State and others located in the other States of the United States and in the District of Columbia and there is now, and has been for more than two years last past, a constant current of trade and commerce conducted by said respondent in such tobacco products, between and among the various States of the United States and the District of Columbia. Respondent is now and for more than two years last past has been one of the largest manufacturers of tobacco products in the United States and is now, and for more than two years last past has been, in substantial competition with other corporations and with persons, firms and partnerships engaged in the sale of tobacco products

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 its business described in Paragraph One hereof and for the purpose of aiding in the sale by it of its said "Philip Morris" brand of cigarettes in the commerce aforesaid, respondent has disseminated and caused to be disseminated, and is now disseminating and causing to be disseminated, by United States mails, in magazines of nation-wide circulation, in newspapers of interstate circulation, by radio broadcasts in nation-wide hookups and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

(a) That Philip Morris cigarettes cause no throat or nose irritation; that when smokers have changed to Philip Morris cigarettes every case of irritation of the nose and throat due to smoking, has cleared completely or has definitely improved; that a smoker of Philip Morris cigarettes may rely and depend upon and be assured of freedom from irritation of the mucosa due to smoking;

(b) That Philip Morris cigarettes may be smoked as much and as often as one likes, unhampered or unmarred by throat irritation; that such cigarettes can be enjoyed to the full "without worry" and with "never a thought" of throat irritation; and that one may smoke such cigarettes "all you please" with "no thought of irritation marring your pleasure";

(c) That Philip Morris cigarettes may be consumed "without smoking penalties"; that "you pay no penalties for Philip Morris pleasures"; and that throats and mouths are as fresh and comfortable and the breath as pure and sweet after a day of smoking Philip Morris cigarettes as in the morning;

(d) That Philip Morris smokers are assured protection and "real" protection, "in unusual degree" against smoking penalties, smoker's coughs and effects of inhaling, and throat irritation; that no other cigarette provides protection like Philip Morris; that the difference between Philip Morris cigarettes and other brands of cigarettes is "vital," "more than important"; that the protection provided by the smoking of Philip Morris cigarettes against throat irritation is vital; that Philip Morris cigarettes are beneficially useful in forestalling, precluding and rendering nugatory the harmful effects of cigarette smoking;

(e) That the superiority of Philip Morris cigarettes is recognized by eminent medical authorities, has been long known to eminent members of the medical profession, has been scientifically proved and is so outstanding as to be without parallel in the history of cigarettes;

(f) That Philip Morris cigarettes protect the smoker from irritation due to inhaling; that in such respect the effect of smoking Philip Morris is "strikingly contrasted" with that of four other leading brands of cigarettes and with that of other brands; that said competing brands are three times as irritating for inhalers as are Philip Morris; that the irritation caused by them lasts five times as long as that caused by Philip Morris; that Philip Morris smokers enjoy the world's finest tobaccos; that there is "a vital difference" between the irritating tendencies of Philip Morris cigarettes and other cigarettes as they affect the throat, lungs, trachea and other parts of the body when tobacco smoke is inhaled; that by smoking Philip Morris cigarettes or by changing thereto from other cigarettes one may avoid the penalties of inhaling and "can help" his throat; that eminent doctors have found that inhaling is a condition for which Philip Morris cigarettes are beneficial and exceptional;

(g) That certain purported findings and surveys based upon purported experiments are "findings of a group of distinguished doctors for the sole benefit of their own profession," were made merely to find out if Philip Morris cigarettes "were any different," were reported not to the respondent but "for the sole benefit of the medical profession" and were published in authoritative medical journals "for their own profession rather than the general public," "for the guidance of other doctors alone" and because they "thought it important enough to inform other doctors"; that such findings and the publication thereof in medical journals constitute "unquestionable proof" of the superiority of Philip Morris cigarettes "so vital to all who smoke"; that "you *must* accept" and "*must* believe" the same "because they are the impartial findings of a group of distinguished doctors";

(h) That outstanding superiority over other pipe tobaccos, freedom from bite, and definite and measurably better action on the mouth and throat have been scientifically established and proved for "Revelation" pipe tobacco and that such superiority, freedom from bite and better action on the mouth and throat from the use of Revelation pipe tobacco have been recognized by eminent medical authorities; that the properties and qualities claimed for Philip Morris cigarettes (as set out in (a) to (g) subparagraphs hereof) are applicable to and true of Revelation tobacco; that the difference between "Revelation" tobacco and competitive pipe tobaccos is "fundamental" and otherwise radical in principle.

PAR. 3. In truth and in fact (a) Philip Morris cigarettes cause throat and nose irritation and when cigarette smokers change to Philip Morris cigarettes irritation of the nose and throat due to smoking is

not cleared or improved; (b) a smoker of Philip Morris cigarettes may nor rely and depend upon and be assured of freedom from irritation of the mucosa due to smoking; (c) the smoking of Philip Morris cigarettes will produce throat irritation and such cigarettes cannot be used without danger of throat irritation; (d) throats and mouths of smokers of Philip Morris cigarettes, after a day of smoking such cigarettes, are not as fresh and comfortable nor the breath as pure and sweet as in the morning before smoking such cigarettes; (e) Philip Morris smokers are not, by the use of such cigarettes, assured protection against smoking penalties of whatever kind and Philip Morris cigarettes are no less irritating to the throat and no less harmful than are other cigarettes; (f) the superiority of Philip Morris cigarettes is not recognized by eminent medical authority and has never been scientifically established and they have no superiority over other brands of cigarettes; (g) the effect caused by smoking Philip Morris cigarettes is the same as the effect produced by the smoking of other cigarettes; (h) Philip Morris cigarettes are as irritating as and cause as much irritation as that caused from the use of other cigarettes and there is no essential difference between the irritating tendency of Philip Morris cigarettes and the irritating tendency of other cigarettes, nor have eminent doctors nor doctors of any established reputation found that Philip Morris cigarettes are beneficial and exceptional in inhaling; (i) the purported findings and surveys set out in Subparagraph (g) of Paragraph Two hereof were not based upon accurate tests or experiments; were not authoritative or scientific or complete and are contrary to findings and surveys based upon scientific, complete and accurate and authoritative experiments; (j) such purported findings were not those of a group of distinguished doctors for the sole benefit of their own profession, nor were they made merely to find out if Philip Morris cigarettes were any different, but were made for the benefit of the respondent who paid for them. The said purported findings and surveys were reported to the respondent and were not made for the sole benefit of the medical profession; (k) they were published for the purpose of promoting the sale by the respondent of Philip Morris cigarettes and the publication of such findings in medical journals does not constitute proof of the superiority of Philip Morris cigarettes over other brands of cigarettes: (l) such findings were not impartial, but the cost of the making thereof was paid by the respondent, and participating in the experiments upon which such findings and surveys were made were persons without training and experience sufficient to make the tests accurate, complete and scientific and who with others making such tests were subsidized by the re-

spondent; (m) there is no outstanding superiority of Revelation pipe tobacco over any other pipe tobaccos nor does it have any freedom from bite or better action on the mouth and throat than that possessed by other pipe tobaccos; no superiority, freedom from bite and better action on the mouth and throat have been scientifically established for Revelation pipe tobacco nor are such purported qualities of Revelation pipe tobacco recognized by any eminent medical authority; (n) there is no essential or fundamental or radical difference between Revelation pipe tobacco and other brands of pipe tobacco.

In general, the representations made by respondent, set forth in Paragraph Two above, and the implications and intendments thereof, whether specifically controverted herein or not, are inaccurate, deceptive, false and misleading.

PAR. 4. The representations made by the respondent as set out in Paragraph Two hereof have the capacity and tendency to deceive and mislead and have misled and deceived the purchasing public into the beliefs that such representations are true and have induced and still induce the purchasing public to purchase respondent's Philip Morris cigarettes and Revelation pipe tobacco in such erroneous beliefs. Thereby substantial injury has been done by respondent to substantial competition in interstate commerce.

PAR. 5. Alfred Dunhill, Ltd., of London, England, is known in the United States as a manufacturer and distributor of pipes, tobaccos, and a high-priced "Dunhill" cigarette produced in England. Cigarettes manufactured by the aforesaid Alfred Dunhill, Ltd. prior to the manufacture of "Dunhill Cigarettes" by the respondent, sold in the United States at prices higher than many well-known brands manufactured in the United States. Since the respondent began the manufacture of "Dunhill cigarettes" in the United States and the sale of the same therein, for the purpose of aiding in the sale by it of its said Dunhill brand of cigarettes in the commerce aforesaid, it has disseminated and caused to be disseminated and still disseminates and causes to be disseminated by the United States mails and magazines of nation-wide circulation and newspapers of interstate circulation, by radio broadcasts in nation-wide hook-ups, and other means in commerce, advertisements typical of which are the following:

ORDINARY PRICE
NOW BUYS AN
EXTRAORDINARY
CIGARETTE—BY
Alfred Dunhill Ltd.
London, Eng.

This new Superior Cigarette is blended to the private formula of Alfred Dunhill, Ltd. * * * the first to be offered at popular price. It is an extraordinarily enjoyable cigarette * * * at the ordinary price of popular brands. Your dealer will gladly supply you!

POPULAR PRICE
NOW BUYS
Superior cigarettes—blended
to the private formula of
Alfred Dunhill Ltd.
London, Eng.

NOW THAT THEY COST
NO MORE * * * WHY DENY
YOURSELF DUNHILLS?

Smokers of popular-price cigarettes today can enjoy genuine Dunhill Superior Cigarettes *at no greater cost!*

Demand
Dunhill's
—they cost NO MORE!

Ordinary popular price now buys this extraordinary cigarette! Blended to the private formula of Alfred Dunhill, Ltd.

NO DIFFERENCE IN PRICE—
BUT *WHAT* A DIFFERENCE IN
QUALITY!—DUNHILL
new Superior cigarettes

Taste will tell you—this is truly a superior cigarette. *But today you pay no more for Dunhill's than for ordinary cigarettes!*

WITHOUT PAYING
A PENNY MORE—
YOU CAN NOW ENJOY
DUNHILL'S!

YOUR TASTE WILL KNOW
THE DIFFERENCE—BUT
YOUR PURSE WON'T!
DUNHILL'S
Now at Popular Price

The package carrying said Dunhill Cigarettes from the respondent to the trade and the purchasing public bears on the front and back thereof the name "DUNHILL Cigarette Majors" and the words "Tradition, Dependability, Superior," and on one side, over the facsimile signature of "Alfred Dunhill" the statement, "The method employed in the blending of DUNHILL CIGARETTES ensures the complete enjoyment of their ripe Turkish and domestic tobaccos." The only indication of domestic origin is on the reverse side and consists of the required factory notice with the legend "Made in U. S. A." in small type.

There is a preference on the part of a portion of the purchasing public for cigarettes manufactured in foreign countries and imported into the United States of America and such cigarettes so manufactured and imported bring from that portion of the purchasing public a nigher price than do American cigarettes. The aforesaid advertising and labeling of its Dunhill Cigarettes by the respondent in the manner and form hereinafter set out have the capacity and tendency to mislead and deceive the purchasing public into the belief that such Dunhill Cigarettes manufactured and sold by the respondent in the commerce aforesaid are manufactured in England and imported into America and that the aforesaid Dunhill Cigarettes made by the respondent are the same cigarettes formerly sold by Alfred Dunhill, Ltd. at a higher price than that at which the respondent offers its said Dunhill Cigarettes in the commerce aforesaid. Such labeling and advertising have the capacity and tendency to mislead the purchasing public into purchasing respondent's Dunhill Cigarettes in the aforesaid erroneous beliefs. Thereby, substantial injury has been done and is being done by respondent to substantial competition in interstate commerce.

PAR. 6. The aforesaid acts and practices of respondent as hereinabove alleged are all to the prejudice of the public and respondent's competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondent, in the course and conduct of its business described in Paragraph One hereof, and for the purpose of aiding in the sale by it of its said "Philip Morris" brand of cigarettes in the commerce aforesaid, has represented directly and by implication through advertisements disseminated by United States mails and in magazines of nation-wide circulation that it will send, upon request, to persons making such requests, reprints of all papers published on the influence of hygroscopic agents on irritation from cigarette smoke, but respondent has purposely failed to send to such persons any reprints of papers published on the influence of hygroscopic agents on irritation from cigarette smoke which show that the hygroscopic agent used in the manufacture of Philip Morris cigarettes are irritating to the throat, of which there are many; and in numerous cases the respondent has refused and neglected to send to persons requesting them, any reprints of papers published on the influence of hygroscopic agents on irritation from cigarette smoke.

The aforesaid acts and practices of respondent as alleged in Paragraph Seven hereof 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 August 5, 1942, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it 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 respondent's 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 hearing examiners 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 the hearing examiner last appointed on the complaint, the answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, and said hearing examiner, on January 23, 1952, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, counsel for respondent 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. The respondent, Philip Morris & Company, Ltd., Inc., is a Virginia corporation with its executive offices in New York City, New York, and its factories at Richmond, Virginia.

PAR. 2. For more than two years prior to the issuance of the complaint, the respondent has been, and now is, engaged in the manufacture of tobacco products including cigarettes under the brand name "Philip Morris." Philip Morris cigarettes have been, and now are, sold and transported in commerce between the various States of the

United States and in the District of Columbia. The respondent is now, and for more than two years prior to the issuance of the complaint has been, one of the largest manufacturers of tobacco products in the United States and is now, and has been, in substantial competition with other corporations, persons, firms and partnerships engaged in the sale of tobacco products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business and particularly for the purpose of aiding in the sale of its "Philip Morris" brand of cigarettes in interstate commerce, the respondent disseminated and caused the dissemination of advertisements and advertising material concerning said cigarettes by the United States mails, in magazines of nation-wide circulation, in newspapers of interstate circulation, by radio broadcasts in nation-wide hookups and by other means in commerce. Among and typical of the statements contained in the said advertisements were the following:

You'll like Philip Morris. Full enjoyment of the world's finest tobaccos—unmarred by throat irritation.

No worry about throat irritation even when you inhale!

No other cigarette can give this proof. No worry about throat irritation even when you inhale!

Recognized laboratory tests have conclusively proven the advantage of Philip Morris over other cigarettes, i. e.:

The irritant quality of the smoke of four other leading brands averaged more than three times that of the strikingly contrasted Philip Morris.

Further—the irritant effect of such cigarettes was observed to last more than five times as long.

On comparing—the irritant quality in the smoke of the four other leading brands was found to average more than three times that of the strikingly contrasted Philip Morris—and that the irritation lasts more than five times as long!

Many smokers don't even know it—but *all* smokers inhale some of the time. That's why you need Philip Morris' superiority for the nose and throat—recognized by medical authorities!

With Philip Morris—you have no opinion—no facts from any private research of our own. Instead we simply call your attention to the findings of an independent group of doctors. You can draw your own conclusions. For the sole benefit of their own profession these doctors report in authoritative medical journals * * *.

Their findings—written only for other doctors to use—were reported in authoritative medical journals.

Especially if you inhale, remember—Philip Morris provides such complete enjoyment—plus real protection * * * pleasure without penalties!

* * * enjoying the last cigarette of the day as much as the first—their throats as comfortable—their breath as pure and sweet as in the morning.

Smoking's more fun when you're not worried by throat irritation or "smoker's cough."

PAR. 4. Through the use of these statements and others not specifically set forth herein, disseminated as aforesaid, respondent has represented directly or by implication:

(1) That Philip Morris cigarettes do not cause irritation of the upper respiratory tract.

(2) That Philip Morris cigarettes are less irritating to the upper respiratory tract than other brands of cigarettes.

(3) That Philip Morris cigarettes are less irritating to the upper respiratory tract than the four leading brands which compete with Philip Morris.

(4) That the irritation produced by other cigarettes is of longer duration than that produced by Philip Morris.

(5) That certain purported findings and conclusions of physicians based upon purported tests or experiments made by them were made and published for the sole benefit of the medical profession.

(6) That after a day of smoking Philip Morris cigarettes the throat and mouth of the smoker will be as fresh and comfortable and the breath as pure and sweet as in the morning before smoking.

(7) That Philip Morris cigarettes protect the smoker from "smoker's coughs," effects of inhaling and throat irritation due to inhaling.

PAR. 5. In the manufacture of cigarettes it is the practice to add a hygroscopic agent or moistener to the tobacco for the purpose of keeping the cigarettes soft, pliable, and in good smoking condition when they reach the ultimate consumer. Historically, glycerine has always been the principal hygroscopic agent used by cigarette manufacturers.

PAR. 6. During the year 1932, the respondent formulated a blend of tobacco for a new cigarette to be known as "Philip Morris" which was placed on the market on January 23, 1933. The blend of tobacco at the present time used in the Philip Morris cigarette is substantially the same as that adopted in 1933. The constancy of the blend is as carefully controlled as possible, despite yearly variations in the sources, quality and mildness of the tobacco used. In the new Philip Morris cigarette as introduced on the market, respondent used 2.74 percent of diethylene glycol as the hygroscopic or moistening agent. This agent has been continuously and exclusively used by the respondent in Philip Morris cigarettes from 1933 to date. The base or average percentage of diethylene glycol used in Philip Morris cigarettes to date with adjustments for seasonal changes has remained at 2.74 percent. This amount gives a hygroscopic effect of 3.65 percent glycerine, the amount previously used by respondent.

PAR. 7. From statements in respondent's advertising with reference to its "exclusive method of manufacture," "vital difference in manufacture," "new method of manufacture," "In Philip Morris Cigarettes

only diethylene glycol is used as the hygroscopic agent," the nature of respondent's tests and respondent's answer it is apparent that the various claims which it has made concerning the amount of irritation consequent upon the use of Philip Morris cigarettes are based solely upon its use of diethylene glycol instead of glycerine as a humectant. The case was tried entirely upon the issues of whether (1) the use of diethylene glycol in a cigarette results in a smoke which is non-irritant to the nose and throat and (2) such smoke is less irritant than that of cigarettes in which glycerine is used.

It is upon various tests and observations which the respondent relied as furnishing affirmative proof of the truth of its representations, not only for the purposes of this proceeding but for advertising purposes prior thereto.

PAR. 8. Respondent's first comparative test was made early in 1934 by Dr. M. J. Mulinos and a medical student named Osborne. A blend of tobacco, identical with the regular blend of the Philip Morris cigarette sold to the public, was divided into three parts or batches. To one part was added 2.74 percent diethylene glycol as a hygroscopic agent. In the second, 3.65 percent glycerine was used, while no hygroscopic agent was added to the third part. Each batch of tobacco was then subjected to the other regular processes of manufacture used with the Philip Morris cigarette.

Solutions were made of the smoke of the three different types of cigarettes by bubbling the smoke, produced by a mechanically operated smoking machine, through 3 cc. of either water, saline solution or Ringer's solution. The smoke solutions were then instilled into the conjunctival sacs of rabbits, and the edemas resulting from the different solutions graded, by visual observation, in accordance with a scale which Mulinos had used in previous rabbit-eye experiments. Under this scale edemas were given nine classifications for severity ranging from 0 to 4 plus.

The investigators reported as their conclusion that the cigarettes which had been made with diethylene glycol as the hygroscopic agent were less irritating than those with no hygroscopic agent, and much less irritating than those made with glycerine.

PAR. 9. Mulinos used the salt solution or Ringer's solution because the questions had come up as to "whether water was the same solvent as was found in the eye or elsewhere in the body." Moisture of the membranes of the throat is due to a water solution of salts very much like Ringer's or saline solutions. It appears that any of the cigarettes may have been used in connection with any of the liquids. No attempt was made to differentiate between the results when the different liquids were used but "most or all the results were pooled." Mulinos was not

able to tell whether the results depended upon the solution used, hence, the pooling of the results.

Ringer's solution and saline solution are isotonic, that is, they approximate the salt content of the blood and the body fluids; plain water is not isotonic. In view of the difference in the liquids used, the significance of which was apparently recognized by Dr. Mulinos, his failure to differentiate as between the liquids used is inexplicable. Distilled water is an irritant. If, in fact, Ringer's or saline solutions are less irritant to the conjunctival sac than plain water, it is apparent that the results would be loaded against the cigarette whose smoke was put into solution in water as against a cigarette whose smoke was put into solution in saline or Ringer's fluid. The failure to use identical fluids in the preparation of all solutions casts grave doubt upon the results claimed.

It is further to be noted that Mulinos "had to obtain" a solution sufficiently concentrated "to elicit edema in the rabbits' eyes" and his solutions were so strong that he would not put them in the human mouth because of their large nicotine content. If the solutions contained such a concentration of nicotine, it is fair to assume that there was a correspondingly high concentration of irritants.

Assuming, but not admitting, that a strong solution of smoke from cigarettes containing diethylene glycol was shown by Mulinos' test to be measurably and significantly less irritant to rabbits' eyes than a strong solution of smoke from cigarettes containing glycerine, it by no means follows that a measurable and significant difference would be manifest if weak solutions were used; the work of Dr. Haag, which is in evidence, and the testimony of Mulinos support this conclusion. Neither does it follow that the same readable and significant differences would be manifested in the human nose and throat as a consequence of actually smoking the two types of cigarettes.

The Commission is of the opinion, and finds, that the conclusion that the smoking of cigarettes containing diethylene glycol is less irritating to the upper respiratory tract of humans than the smoking of cigarettes containing glycerine cannot be drawn from this experiment. In this opinion, it is supported, were support necessary, by the statement of respondent's witness, Dr. Samuel J. Kopetzky, who after referring to this test, and others, stated:

> Without discussing in detail those papers, it is very evident that the results these authors present leaves the question open, because the results are controversial.

PAR. 10. About July 20, 1934, the respondent made arrangements with Dr. Mulinos to carry his experimental work further by testing, with his rabbit-eye technique, the irritating properties of the smoke

of the five leading brands of cigarettes—Philip Morris, Chesterfield, Old Gold, Lucky Strike and Camel, purchased by him on the open market. In a published report the authors compared the average edema resulting from the four different brand cigarettes tested with the results obtained in their first experiment where the cigarettes were supplied by the respondent. The authors concluded that with the glycerine treated cigarettes, regardless of the blend of tobacco, the flavoring material, or method of manufacture, the irritation is substantially the same—and greater than that caused by diethylene glycol treated cigarettes.

PAR. 11. This second experiment also involved the use of the strong smoke solutions referred to above and the use of various solvents for the smoke. Therefore, the finding set out in Paragraph Nine (supra) is also applicable to this experiment.

PAR. 12. Dr. Mulinos also conducted other rabbit-eye experiments in the same manner, using solutions of the fumes of vaporized glycerine and diethylene glycol, and also the fumes of the same products when incorporated in cigarettes made of ground asbestos.

Again the technique involved the use of solutions of such concentration as to elicit edema.

The finding set out in Paragraph Nine (supra) is applicable to these experiments.

PAR. 13. Early in 1935 the respondent retained Dr. George B. Wallace, Professor of Pharmacology in the New York University Medical School, to undertake the work of repeating the Mulinos experiment. Raymond L. Osborne participated as a co-worker in this experimental work. Dr. Wallace and his co-workers followed the technique of Dr. Mulinas as closely as possible using test cigarettes identical with those supplied to Dr. Mulinos.

Dr. Wallace and his co-workers concluded that the solutions from the diethylene glycol treated cigarettes were less irritating than those from cigarettes with no hygroscopic agents, and much less irritating than those with glycerine.

PAR. 14. The test conducted by Dr. Wallace and Osborne is subject to the same objections as those made by Dr. Mulinos, except that in this test all solutions were made in saline solutions. It does not represent a conclusion reached by an independent source since Osborne participated in both series of tests.

In fact, Osborne and one Reinhart, who was a worker around Dr. Wallace's laboratory, made the visual appraisals of edema, which were the basis for the claimed results. Reinhart had been instructed by Osborne in making these readings.

The finding set forth in Paragraph Nine is applicable to this test.

PAR. 15. In July 1934, arrangements were completed for the handling of the clinical phase of respondent's program for evaluating the irritant properties of cigarette smoke. Dr. Wendell Phillips arranged for the services of ten doctors who performed the actual clinical work during the summer and early fall of 1934. Each of the participating doctors selected his own subjects and, within the general plan of the experiment as outlined by Dr. Phillips conducted the clinical work as he saw best.

The cigarettes used were supplied by the respondent and were of two types. The first type was the regular Philip Morris cigarette containing 2.74 percent diethylene glycol as the hygroscopic agent. The second type was the same identical cigarette with the exception that 3.65 percent glycerine was used as the moistening agent instead of diethylene glycol.

Reports of the experiment were submitted to Dr. Frederick B. Flinn of Columbia University for analysis.

PAR. 16. Dr. Flinn made an analysis of the data submitted to him by the doctors selected by Dr. Wendell Phillips. He published this in the form of an article in the February 1935 issue of the "Laryngoscope."

Dr. Flinn later published in the "Laryngoscope" of January 1937 an article entitled "Further Clinical Observations on the Influence of Hygroscopic Agents in Cigarettes." This article was based upon the "clinical work" of two ear, nose and throat specialists. Both of the Flinn reports were favorable to Philip Morris.

PAR. 17. In June of 1942 the respondent, through the cooperation of Dr. William Wherry, then Secretary of the American Academy of Opthalmology and Otolaryngology, arranged for a clinical study of the relative irritating effects of the smoke from diethylene glycol and glycerine treated cigarettes. A group of nose and throat specialists from various parts of the United States agreed to participate in the experiment. Test cigarettes supplied by the respondent were of two types—one containing 2.74 percent diethylene glycol as the hygroscopic agent, and the other 3.65 percent glycerine. The cigarettes were in all respects the regular, commercial Philip Morris cigarettes so far as the blend of tobacco, flavoring, paper and methods of manufacture were concerned.

PAR. 18. The vagaries of subjective observations are well known as are the difficulties inherent in objective observations of the character involved in this procedure, which were conceded by respondent's witness Flinn. It is impossible to tell whether a particular throat condition is due to smoking. The testimony of several of the participating doctors that their conclusions, concerning the relatively less irritating

nature of cigarettes treated with diethylene glycol, were not necessarily applicable to all people under all conditions is of great significance in view of the flat and unqualified representations made by respondent. It is, in the opinion of the Commission, an eminently sensible position, and that to apply the results of the observations as reported in a number of cases which is less than trivial compared to the tremendous number of cigarette smokers in this country would be wholly unwarranted. The throats of people vary in their susceptibility to irritation; in some people cigarettes do not produce irritation; others have throats which are easily irritated by any cigarette; the same cigarette will give different responses in different people; some people develop tolerances for cigarette smoke; the amount of irritation is to an extent influenced by the length of the butt which is not smoked and the rapidity with which the cigarette is smoked; environment, occupation, season of the year, present and previous infections are factors and obviously variable.

The Commission is of the opinion, and finds, that the conclusion that the smoking of cigarettes containing diethylene glycol is less irritating to the upper respiratory tract cannot be drawn from this series of "clinical" observations.

The Commission, for the same reasons, is disregarding other like observations which indicated that there was no significant difference in the irritation produced by these types of cigarettes.

PAR. 19. In January of 1944, Dr. Melvin C. Myerson, a physician specializing in diseases of the ear, nose and throat, was retained by the respondent to study the relative irritating effects of smoke from diethylene glycol and glycerine treated cigarettes. Dr. Myerson in this study used Philip Morris, Old Gold, Chesterfield, Camel and Lucky Strike cigarettes, all of which he procured on the open market. The technique and procedure adopted by Dr. Myerson was to examine a subject's uvula before smoking and to pick out a single blood vessel in a definite location. After smoking the condition of the same blood vessel was observed. Relative increase in the size of this blood vessel after smoking was taken as showing the relative irritation produced by the different cigarettes.

Dr. Myerson concluded from this experiment that Philip Morris cigarettes produced a much lesser intensity of irritation than that produced by the other cigarettes tested.

PAR. 20. Subsequent to September 1944, a study was conducted by Dr. C. William Lenth and others of the effects of smoking on the blood vessels of the uvula. The results of this study are more fully considered later herein. In brief it involved the photographing of the subject's uvula before and after smoking and the measuring of

all the measurable blood vessels before and after. The Myerson study was made only on a single blood vessel.

The Lenth experiment demonstrated the variation in the response of different blood vessels in the same uvula to cigarettes containing the same humectant, and is conclusive against the drawing of any valid conclusions from observations made on a single blood vessel.

The Commission is of the opinion, and finds, that the conclusion that Philip Morris cigarettes are less irritating than the other cigarettes tested by Myerson cannot be made from his study.

PAR. 21. Dr. John M. Lore was employed by respondent to make a study of the relative irritating effects of cigarettes containing glycerine and diethylene glycol as humectants. His study was made of the underside of the tongue and the floor of the mouth; why this area was selected does not appear.

Respondent in its brief disavows this study as being any more than some confirmation of the results noted by other experimenters in animals. Accordingly, it is found that this study does not demonstrate that cigarettes treated with diethylene glycol are less irritating than those treated with glycerine.

PAR. 22. Further experimental work dealing with the relative irritating effects of the smoke of cigarettes containing glycerine and diethylene glycol was done, at the instance of the respondent, by Dr. Samuel J. Kopetzky, and at the instance of glycerine producers, by Dr. Axel M. Hjort.

Dr. Kopetzky's experiment involved, in brief, the cutting open of a rabbit's trachea, the insertion of a small metal tube, or cannula, therein, closing the wound, and connecting the cannula to a small reservoir of smoke which the rabbit breathed through the cannula.

From this experiment Dr. Kopetzky concluded that smoke from cigarettes containing diethylene glycol is much less irritating than the smoke from otherwise identical cigarettes containing glycerine.

Dr. Hjort's experiment also involved the insertion of a cannula in the animal's trachea and the breathing of smoke through it.

The Commission is of the opinion that both of these experiments involved the creating of conditions so far removed from those under which cigarettes are smoked by humans that observations made thereunder are of no assistance in determining the issues in this proceeding. They are therefore disregarded.

The same is true of an experiment with dogs conducted by Mrs. Dorothy M. Gullicksen.

PAR. 23. Dr. Samuel J. Kopetzky who performed the tracheotomy experiments hereinbefore described also conducted experiments in which he used a pharyngeal colorimeter. Colorimeters for evaluating

color are used in various fields and Dr. Kopetzky merely adopted a well-known principle for evaluating the color of the membranes of the throat. The principle further involved is that irritation causes a reddening of tissue and, therefore, the intensity of color would be susceptible to evaluation by a colorimeter. Visual examination of color is dependent upon an observer's reaction, whereas the colorimeter actually registers color intensity.

PAR. 24. The device was submitted to Electrical Testing Laboratories, Inc., for a determination of its response to a series of color chips, and as "equipment designed by the client for the measurement of changes in the pharyngeal wall of the throat."

In making this test of the device:

> Red and white paints with low specular reflection characteristics were secured. Various shades of the red were prepared by mixing the two in different proportions. The mixtures were applied to five wooden blocks, care being taken to assure a uniform surface. [Underlining supplied.]

The readings which were taken indicated "that the instrument is sensitive to changes in red as shown on these blocks."

The apparatus was found to show a decreasing reading with increase of saturation—that is the darker the color the lower the reading.

PAR. 25. Dr. Hans Hirschfield, a specialist in ear, nose and throat diseases, an assistant of Dr. Kopetzky, carried out the routine experimental work involving the use of the Kopetzky pharyngeal colorimeter for measuring the irritant effects of smoking. The procedure was basically the measurement of the redness of the subject's throat before and after smoking by the use of this device.

Subsequently, Dr. Kopetzky performed additional experiments using essentially the same procedure.

As a result of this new work, instead of a trend as shown in his previous colorimetric experiment, Dr. Kopetzky concluded that cigarettes moistened with glycerine are more irritating than cigarettes moistened with diethylene glycol and that the difference in reaction can be picked up by the colorimeter.

In a later test conducted by Drs. Lenth and Andrews also using a colorimeter and human subjects two series of readings were made on the throat of each subject before any smoking was done. The two series were made 15 minutes apart, and each consisted of four readings made at 10-second intervals. These readings showed different degrees of redness within a 30-second period and also different degrees of redness in the two periods in the same individual.

Those observations as well as Dr. Kopetzky's clearly demonstrated that the color of the individual throat is far from static even without exposure to an irritant; they also demonstrate the unsoundness of

relying upon single observations before and after smoking, as Kopetzky did in both of his tests.

In the Lenth experiment a series of four readings at 10-second intervals were made on each subject after smoking. These readings also showed different degrees of redness within a 30-second period.

When it is considered that a difference of a very few points in the readings on the scale upon which they were made would change the entire picture, the demonstrated capacity of the throat to change color almost from moment to moment must be a vital consideration. Conclusions based on single readings before and after smoking cannot be regarded as valid.

The Commission is of the opinion, and finds, that no conclusions can be drawn from the two Kopetzky colorimeter tests and they are disregarded.

PAR. 26. The foregoing is predicated upon the assumed accuracy of Dr. Kopetzky's colorimeter as a measuring device.

In testing the colorimeter used by Dr. Lenth which duplicated as nearly as possible Dr. Kopetzky's device it developed that its registration of color on wet surfaces was quite erratic. Dr. Lenth rectified this by the use of polaroid filters. The Kopetzky machine was tested on surfaces of low specular reflection. However accurate it may have been under those circumstances, it does not follow that it would be accurate on wet surfaces, such as the human throat, where specular reflection is present to a considerable degree. Furthermore, the polarizing filters which were found to be essential to consistent readings of redness were not used.

PAR. 27. Subsequent to July 8, 1950, some new experimental work dealing with the irritative qualities of cigarette smoke was done by Dr. Kurt Lange, an Assistant Professor of Clinical Medicine at the New York Medical College, who was employed by the respondent for this purpose.

The method used by Dr. Lange was to apply either whole smoke or smoke solutions to the eyes of rabbits and objectively to measure the resulting irritation by the fluorescein-dermofluorometer technique. The experiment was based upon the theory that the greater the irritation, the greater the permeability of the mucous membrane and consequently the greater the concentration of the fluorescein.

Fluorescein is a dye which when irradiated by a long wave ultraviolet light emits a yellowish-green fluorescence of high intensity. This occurs even when the dye is present in very low concentrations. The dye is nontoxic and when injected intravenously it diffuses readily into interstitial tissue space where its intensity can be detected by visual observation or by objective measurement with a dermofluor-

ometer. The dermofluorometer consists of a long wave ultraviolet light source and is rigidly aligned at a definite distance from the area under investigation. The search unit of this instrument consists of a phototube (attached to the light source), the sensitivity of which is limited to the reflected light rays emitted by fluorescein. The degree of deflection of the microammeter is directly proportional to the concentration of fluorescein.

PAR. 28. In making this experiment three main comparisons were made by Dr. Lange:

(a) Two lots of cigarettes containing tobacco of uniform composition were made. One lot contained as the hygroscopic agent 2.74 percent diethylene glycol; the other lot contained 3.65 percent glycerine. The smoke from these two types of cigarettes was tested and compared on twenty animals, and the results were tabulated.

(b) Solutions produced from the same cigarettes above were tested and compared on seven animals and the results were tabulated.

(c) Philip Morris, Old Gold, Chesterfield, Camel and Lucky Strike cigarettes were purchased in the open market. In a series of tests the smoke, sometimes from the commercial Philip Morris cigarettes and sometimes from specially made Philip Morris, was compared with the smoke from each of the four other brands.

At the conclusion of these experiments Dr. Lange prepared certain tabulations showing the results of his experiments which were ultimately delivered to Dr. Herbert Arkin for statistical analysis.

In evaluating Dr. Lange's data Dr. Arkin stated in his report that the nictitating membrane, which is the so-called third eyelid of the rabbit, was much more responsive to smoke irritation and, therefore, a better index of the differences between cigarettes and based his analyses on the nictitating membrane data. His report was favorable to Philip Morris as less irritating to the nictitating membrane.

PAR. 29. In 41 rabbits which were used only once in the comparison tests the highest readings were found in the conjunctiva in 36 instances and in the nictitating membrane in 46 instances. (There were two readings in each eye, one for the conjunctiva and one for the membrane, and thus two high readings for each rabbit.)

In the 19 other rabbits so used more than once the highest readings were found in the conjunctiva in 33 instances and in the nictitating membrane in 64 instances out of 97 readings.

The Commission sees no reason for discarding the readings on the conjuctiva which constitute one-half of the observations made because in someone's opinion the nictitating membrane is more responsive to smoke irritation when in 38 percent of the observations the conjunctiva appeared to be the more sensitive.

"In order to show that with identical irritation of both eyes closely parallel results are obtained, 6 rabbits were subjected to smoke according to Method A from cigarettes of the same brand (Table 4). No evidence of any significant difference resulted. * * *" (Dr. Lange's report, Resp. Ex. 93.)

This table shows a variation in readings between the right and left conjunctiva of the same rabbit, so subjected to the same smoke, of 16 percent, a variation which Dr. Lange stated to be insignificant. It follows, therefore, that in comparing conjunctiva readings in the right and left eyes, of the same animal, which have been exposed to different smokes, any variation of 16 percent or less may be attributed to the rabbit and not to the smoke.

In only 6 instances did the comparison of the glycerine-treated cigarettes and those treated with diethylene glycol show a percentage difference of over 16 percent. Of these six, two favored the cigarettes treated with glycerine and four favored the other.

When one eye was exposed to smoke supposedly from a Philip Morris brand cigarette and the other to smoke from an Old Gold cigarette, only nine out of twenty comparisons on the conjunctiva showed a percentage difference in excess of 16 percent. Of the nine, three favored Old Gold and six favored Philip Morris.

In a like test where Chesterfield cigarettes were used instead of Old Gold, only three out of ten comparisons on the conjunctiva showed a percentage difference in excess of 16 percent Of these, two favored Philip Morris and one favored Chesterfield.

In a like comparison of Philip Morris brand cigarettes with Camel cigarettes, only five out of ten comparisons on the conjunctiva showed a percentage difference in excess of 16 percent; of these, four favored Philip Morris and one favored Camel.

In a like comparison of Philip Morris cigarettes (four "brand" and six "special") with Lucky Strike cigarettes, only two out of the ten comparisons showed a percentage difference in excess of 16 percent; of these, one favored Camel and one Philip Morris brand.

The Commission is of the opinion, and finds, that the results of this test upon the conjunctiva of rabbits form no basis for a conclusion that cigarettes treated with diethylene glycol are less irritating to the human respiratory tract than cigarettes treated with glycerine, or that Philip Morris cigarettes are less irritating to the human respiratory tract than Old Gold, Chesterfield, Camel or Lucky Strike cigarettes.

PAR. 30. The readings on the nictitating membrane, which is found only in animals, were used by respondent because it was more responsive to smoke irritation, and respondent, by submitting this test as evidence of the truth of its representations, in effect, asks that its

claimed results be regarded as applicable to the human upper respiratory tract.

The question before the Commission is a practical one: "Are Philip Morris cigarettes less irritating to the human upper respiratory tract than others?" It is not an abstract scientific problem. As a matter of pure science, the question of the relative irritancy of the products of combustion of glycerine and diethylene glycol might, perhaps, be determined by minuscule differences in the response of the rabbits' nictitating membranes thereto. Not so here. Apparently this membrane is, or at least was regarded by respondent's witnesses as being, more sensitive to smoke than the conjunctiva of the rabbit. It seems fair to assume that it is also more sensitive to such irritation than the human upper respiratory tract. In order for the Commission to apply the claimed results of this test to the question before it, it would have to find (1) that the response of the human upper respiratory tract to the various smokes was in some fashion proportional to the response of the rabbit's nictitating membrane, and (2) that the difference in this proportionate response is significant. The Commission does not so find.

The Commission is of the opinion, and finds, that the results of this test upon the nictitating membranes of rabbits form no basis for a conclusion that cigarettes treated with diethylene glycol are less irritating to the human respiratory tract than cigarettes treated with glycerine or that Philip Morris cigarettes are less irritating to the human respiratory tract than Old Gold, Chesterfield, Camel or Lucky Strike cigarettes.

PAR. 31. In September of 1944, the Glycerine Producers retained C. William Lenth, a consulting chemist of Wilmette, Illinois, to supervise some experimental work concerning the relative irritating properties of cigarette smoke. Dr. Lenth was instructed to repeat the experiments offered by the respondent and to make such improvements in methods and techniques as were possible in order to obtain completely objective information.

PAR. 32. The Glycerine Producers made arrangements with the R. J. Reynolds Tobacco Company, manufacturers of Camel cigarettes, to prepare special experimental cigarettes. These cigarettes were of three types as follows: one lot contained 3.65 percent glycerine as the hygroscopic agent, one lot contained 2.74 percent diethylene glycol as the hygroscopic agent, and the third lot contained no hygroscopic agent. These cigarettes were shipped in November of 1944 to Dr. Lenth in Chicago, who distributed them for use in the experimental work.

PAR. 33. A colorimeter experiment was conducted by Dr. Albert H. Andrews of Chicago, Illinois, a specialist in broncho-esophagology and laryngological surgery, in which Dr. Lenth actively participated. The colorimeter used in these experiments was constructed by John Staunton, a research physicist and development engineer, and duplicated as near as possible the machine used by Dr. Kopetzky and Dr. Hirschfield in the experiments above described. Mr. Staunton has had wide experience in the development of instruments, involving the use of electrical and optical science, for making measurements, many of which related to color measurements.

PAR. 34. In preliminary tests Dr. Lenth found that there was a great deal of variability obtained on any one subject in a matter of minutes. It was determined that this was due to the moisture on the subject's throat causing a specular or reflected glare when the colorimeter was used.

There is an increase in the salivary flow induced by cigarette smoking which in turn increases the moisture present on the pharyngeal wall.

PAR. 35. Due to the moisture present in the pharyngeal wall there is considerable percentage of specularly reflected light collected by the phototube of the colorimeter. Such light being reflected without penetration from the surface of the pharyngeal wall will not show the hue of the material underlying this surface, but will be of the same hue as the illumination. Consequently, while it will be affected by the condition of the surface, it will not serve to give a measurement of the hue or saturation of the underlying material.

As the purpose for which the colorimeter was intended was to ascertain the redness of the tissues in the throat, a purpose requiring the measurement of color saturation of the tissues underlying the pharyngeal surface, a measurement which includes a considerable proportion of specular reflection would be only of doubtful value as it would be affected by factors which bear no relation to either saturation or hue of the underlying tissues. Such factors would include wetness of the surface, roughness of the surface, and reflectivity of the surface. The relative influences of these factors may be very great compared to that of red saturation because the light reflected without color discrimination from the surface contains wave lengths which may affect the blue sensitive phototube used in this apparatus far more strongly than the red-colored light which it is proposed to measure.

PAR. 36. Mr. Staunton determined the difficulties of specular reflection could be overcome by the use of polarizing filters located in the beam and so oriented as to stop the specularly reflected light.

The colorimeter was tested with these filters and they were found to be effective; without them the device was unreliable.

PAR. 37. The significant difference between this test and those of Dr. Kopetzky is that in this case Lenth and Andrews made two series of readings before smoking and one series after, as described in Paragraph Twenty-five.

PAR. 38. In this test thirty-three subjects were used of whom thirty-one smoked both cigarettes treated with glycerine and with diethylene glycol.

Respondent's witness Dr. Kopetzky has supplied one method for interpreting the data acquired from these colorimeter readings. This he did by dividing the post-smoke reading for each individual by the ante-smoke reading, for each cigarette tested. The cigarette whose readings produced the larger quotient was classified by him as causing the lesser "redness" and consequently the lesser irritation.

It has been demonstrated that the color of the individual throat is far from static, even without exposure to an irritant. Thus in interpreting the Lenth data the lowest ante-smoke reading (highest redness) may be taken as showing the maximum of redness which that individual's throat will manifest spontaneously at that time. Similarly in the post-smoke readings the lowest reading indicates the maximum redness induced by the cigarette.

Using these lowest readings and the method of calculation employed by Dr. Kopetzky, it appears that in thirty-one subjects, one was equally affected by both cigarettes, the throats of twelve became "redder" after the cigarettes treated with diethylene gylcol, and those of the remaining eighteen "redder" after the cigarettes treated with glycerine.

Calculations made by Dr. Lenth on the basis, which Kopetzky used, of single readings, ante-smoke and post-smoke, showed that in seventeen instances throats were "redder" after the diethylene glycol treated cigarettes and in fourteen redder" after the glycerine treated.

Other calculations made by Dr. Lenth, using averages of all the readings, showed nineteen favorable to the glycerine treated cigarettes and twelve to those treated with diethylene glycol.

A further calculation based on the averages of the highest and lowest ante-smoke and post-smoke readings showed seventeen favorable to the glycerine treated cigarettes and fourteen favorable to those treated with diethylene glycol.

PAR. 39. Early in 1935 the American Tobacco Company retained Dr. Harvey B. Haag, head of the Department of Pharmacology at the Medical College of Virginia, as a consultant with a view to studying the differences in irritation from smoke solutions prepared from di-

ethylene glycol treated cigarettes and glycerine treated cigarettes. Dr. Haag set out to duplicate as far as possible the prior technique of Mulinos and Osborne though he introduced several variations. He used test cigarettes furnished by the American Tobacco Company which contained 2.74 percent diethylene glycol and 3 percent glycerine. He did not use cigarettes to which no hygroscopic agents had been added. Dr. Haag obtained only 32 puffs from each cigarette which was smoked for 5/6 of its length; while Mulinos and Osborne obtained 60 puffs from each cigarette which was smoked to the greatest extent possible. His smoke solutions were all made in physiological salt solutions.

PAR. 40. Dr. Haag, upon instillation of his smoke solutions into the rabbits' eyes, was unable to obtain edema of the area except in a few instances—and consequently adopted hypermia or redness as his criterion of irritation. In all, 50 separate tests were made, equally divided between the two types of cigarettes used, which formed the basis for Dr. Haag's reported conclusion that there was no significant difference either as to the intensity or duration in the irritation produced by the instillation into the rabbit's eye of the two types of smoke solutions employed.

PAR. 41. The solutions used by Dr. Haag were weaker than those used by Mulinos; they were strong enough, however, to produce edema, in some instances, and redness. They would certainly more closely approximate the irritation to the human throat caused by smoking than would Mulinos', which he would not have put in the human mouth.

PAR. 42. In December of 1935, Dr. Carl Miner of the Miner Laboratories, on behalf of the Glycerine Producers, made arrangements with Dr. Anton J. Carlson, Professor of Physiology at the University of Chicago, to make an investigation of the physiological effects of diethylene glycol, especially under conditions resulting from its use as a hygroscopic agent in cigarettes.

Dr. Carlson was assisted by one of his pupils, Harold G. O. Holck. Dr. Carlson studied the salivary responses of 28 subjects to the puffing of air, lighted cigarettes without hygroscopic agent, lighted glycerine treated cigarettes and lighted diethylene glycol treated cigarettes. Each subject was tested three times on each cigarette.

PAR. 43. Carlson's report shows that in the twenty-eight individuals observed the increase in saliva flow during the smoking periods was greater when the glycerine treated cigarettes were used in thirteen subjects than when the cigarettes treated with diethylene glycol were used, and less in fifteen subjects.

A comparison between the pre-smoke and post-smoke flow is particularly interesting. In the post-smoke flow it is apparent that the non-irritant factors in the smoke which affect the flow are no longer present and that any increase over the pre-smoke flow may be attributed to the continued irritation. In twenty of the subjects, increases of 20 percent or more were observed in the post-smoke period. In twelve individuals the percentage of increase of flow during the post-smoke period, over the ante-smoke flow, was greater when glycerine-treated cigarettes had been used than when those treated with diethylene glycol had been used, and less in thirteen individuals.

Dr. Carlson concluded from this work that there was essentially no difference in the irritation from the smoke of the three types of cigarettes as measured by the secretion of saliva.

That this measuring of flow of saliva is a valid means of appraising irritation is questioned by respondent. However, respondent introduced evidence concerning a test conducted by its witness Dr. Kopetzky which involved the insertion of tubes in rabbits' tracheae, passing smoke through them and evaluating the irritation. In evaluating the results, Dr. Kopetzky considered "salivary secretions in the mouth" as one of "the factors governing irritation during smoking sessions." In view of this it does not lie in the mouth of respondent to raise this question.

PAR. 44. For the purpose of duplicating and extending the experimental work of Dr. Myerson, relating to the blood vessels of the uvula, Dr. Lenth, a consulting chemist employed by the Glycerine Producers, decided to employ photographic methods.

The general method was to take a photograph, using Kodachrome film, of the uvula and soft palate of a human subject both before and after smoking in such a manner that images of the blood vessels in that area could be measured from the photograph.

The cigarettes used in this experiment were special test cigarettes, one lot containing 3.65 percent glycerine, one lot containing 2.74 percent diethylene glycol, and the third lot containing no hygroscopic agent. Brand cigarettes purchased on the open market were also used.

PAR. 45. Dr. L. H. James, a bacteriologist, developed a method, at Dr. Lenth's suggestion, for the measurement of the blood vessel images of the uvula and soft palate as they appeared upon projection of the films. The technique employed was to use a projector to enlarge to 20 times actual size the blood vessels shown on the film upon a ruled chart hung upon a wall. Measurements of the blood vessels were then made.

PAR. 46. As in the Myerson test, enlargement of the blood vessels was taken as a criterion of irritation. The records of this test show that the percentage of enlarged blood vessels was not significantly different after the smoking of special test cigarettes, Philip Morris, Old Gold, Chesterfield, Camel or Lucky Strike cigarettes.

PAR. 47. For several years the respondent made to the public the representations to which this proceeding relates based substantially, if not fundamentally, upon experiments in which smoke solutions were instilled into rabbits' eyes as proof that Philip Morris cigarettes were less irritating than other cigarettes.

Certainly such conduct constitutes, not merely a concession, but an affirmative representation that such tests constitute a valid method for the determination of the relative irritancy of different cigarettes.

In presenting its defense respondent introduced other tests as evidence of the truth of its claims. By so doing it has *a fortiori* represented to the Commission that the reaction of the blood vessels of the uvula and colorimeter readings of the throat constitute methods by which the relative irritancy of cigarettes can be validly determined. The introduction by respondent of the Kopetzky test in which increased salivary flow was used as an index of relative irritation establishes this as one of the methods of appraisal sanctioned by respondent. Not only has respondent approved these methods, but affirmatively urges the results of those tests as substantial evidence.

Whatever opinion may be held as to the substantiality and probative value of the Carlson saliva test, the Haag smoke solution test, and the Lenth uvula and colorimeter tests in the abstract, they are nevertheless the same sort of evidence which was regarded by respondent as of sufficient substance and probative value to warrant the making of categorical and unqualified representations based thereon concerning its cigarettes to the public for many years and to warrant the Commission in making findings favorable to respondent. The Commission is of the opinion that under such circumstances it is not held to higher standards of substantiality or probative value in dealing with respondent than respondent has observed in dealing with the public. Respondent has invoked the test as a medium of proving truth; the Commission may invoke the test to prove falsity.

Upon this basis the Commission is of the opinion that the record as a whole and the results of the Haag rabbits-eye test, the Lange observations on the conjunctiva, the Carlson saliva experiment and the Lenth uvula and colorimeter experiments in particular, warrant the following findings, which are made, i. e.:

(a) The smoke of all cigarettes, including Philip Morris cigarettes, is an irritant, and the extent of such irritating effect depends upon numerous factors, including the tolerance of the individual smoker, the frequency of smoking, the extent to which the smoke is inhaled, the rapidity with which the cigarette is smoked, and the length to which it is smoked.

(b) Philip Morris cigarettes are irritating to the human upper respiratory tract.

(c) There is no significant difference in the irritation of the human upper respiratory tract produced by Philip Morris cigarettes and Old Gold, Camel, Lucky Strike, or Chesterfield cigarettes.

(d) The use of diethylene glycol instead of glycerine as a humectant in cigarettes has no significant effect upon the irritancy of the cigarettes.

(e) The studies and experiments referred to by respondent in its various advertisements were not made for the benefit of the medical profession but were, in fact, made at the instance of respondent as a basis for, and in support of, its advertising claims.

(f) Philip Morris cigarettes will not protect the smoker from "smoker's coughs," the effects of inhaling or from throat irritation due to inhaling.

PAR. 48. Respondent's claim that the irritation produced by cigarettes treated with diethylene glycol was of shorter duration than that produced by those treated with glycerine was essentially based on the work of Mulinos and Wallace referred to above.

The Commission is of the opinion that the record does not support respondent's claim. In view of the Commission's finding (c) (supra), the Commission, as a corollary, finds that there is no significant difference in the duration of the irritation attributable to the humectant.

PAR. 49. Respondent in its answer admits that "throats and mouths of smokers of Philip Morris cigarettes, after a day of smoking cigarettes, are not as fresh and comfortable nor the breath as pure and sweet as in the morning before smoking such cigarettes."

It is, therefore, found that Philip Morris cigarettes do affect the breath and leave an aftertaste.

PAR. 50. The foregoing statements and representations used by respondent in connection with the offering for sale, sale and distribution in commerce of its Philip Morris cigarettes had the capacity and tendency to mislead and deceive members of the public into the erroneous and mistaken belief that the said statements and representations were true and into the purchase of substantial quantities of said cigarettes by reason of said 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 and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The Commission has considered the record in connection with the other issues presented by the pleadings and has concluded that the allegations of the complaint with respect thereto have not been proved.

ORDER

It is ordered, That the respondent, Philip Morris & Company, Ltd., a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of its "Philip Morris" brand of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

(1) That Philip Morris cigarettes, or the smoke therefrom, will not irritate the upper respiratory tract.

(2) That Philip Morris cigarettes, or the smoke therefrom, are less irritating to the upper respiratory tract than cigarettes, or the smoke therefrom, of any of the other leading brands of cigarettes.

(3) That the irritation caused by smoking other leading brands of cigarettes is of longer duration than that caused by smoking Philip Morris cigarettes.

(4) That the use of diethylene glycol as a humectant in cigarettes renders, or significantly contributes to rendering, the smoke therefrom less irritating to the upper respiratory tract than the smoke from cigarettes in which glycerine is used as a humectant.

(5) That Philip Morris cigarettes, or the smoke therefrom, will not affect the breath or leave an aftertaste.

(6) That the use of Philip Morris cigarettes protects the smoker against smoker's coughs, the effects of inhaling or throat irritation due to inhaling.

and from:

(7) Misrepresenting the reasons for which any study, survey, experiment, test or the like was made.

It is further ordered, That the charges of the complaint, other than those to which this order relates, be, and the same hereby are, dismissed.

It is further ordered, That the respondent shall, within (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 this order.

Commissioner Carretta not participating for the reason that oral argument in this proceeding was heard prior to his becoming a member of the Commission.

IN THE MATTER OF

UNITED STATES PENCIL COMPANY, INC. ET AL.

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

Docket 5929. Complaint, Oct. 9, 1951—Decision, Jan. 3, 1953

As respects lead strength in pencils, this may vary as much as 10 or 15 percent in different sections of the same pencil, and there is a like variation between pencils of the same grade or hardness produced by different manufacturers.

Where a corporation and its two officers, engaged in the interstate sale and distribution of lead pencils and, in connection therewith, in the distribution of premiums or "free" goods; through circulars mailed to individuals and firms whose names and addresses were procured primarily from telephone and other directories—

(*a*) Represented that they offered ball point pens, memo pads, pencils sharpeners, and other articles free; the facts being that in order to get any article of "free" merchandise, it was necessary that the customer purchase one gross or more of pencils from them;

(*b*) Represented that their pencils were superior to all other leading brands, that the lead therein was more than twice as strong as that in ordinary pencils, and that such strength had been shown by tests made on a United States Bureau of Standards machine;

The facts being that their pencils had never been tested on a Bureau of Standards testing machine; while they had had some private tests made, conclusions reached were not supported by reliably accurate data, so that the report of the concern showing that their pencils ranked first among the five groups tested could not be accepted as supporting their claim, especially that their pencils "rate 1st among a test of all leading brands"; and while a cursory test was made in their place of business by a representative of a company from which they purchased, on a machine similar to that described in a governmental bulletin and such as were constructed and used by various pencil companies, the evidence would not support a finding that leads in their pencils were significantly stronger than those in ordinary pencils;

With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true and with effect of thereby inducing its purchase of substantial quantities of their merchandise; and

(*c*) Directly and indirectly represented "National Credit Service Company" to be a bona fide collection agency in no way connected with themselves, and through use of said trade name employed various methods of intimidation and harassment to induce consignees of their merchandise, including both authorized and unauthorized shipments, to make payments allegedly due them;

The facts being that the National Credit Service Company was merely a trade name which said officers had adopted and registered as such in the New York County Clerk's office, and which they made use of only in connection with unpaid accounts due to the corporation or to other companies owned or controlled by said individuals;

With tendency and capacity to mislead and deceive persons to whom they had consigned merchandise as to the nature of the National Credit Service Company and its relation to them and of thereby causing such persons to pay to them sums of money which they were not obligated to pay:

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.

As respects the charge in the complaint that respondents had shipped merchandise to consignees without having received bona fide order therefor and in other cases had shipped larger quantities than had been ordered: it appeared, under all the circumstances, that such shipments were the result of honest mistakes or due to the affixing to orders of nonauthentic signatures by pranksters.

In said general connection, it further appeared that while respondents in their efforts to collect offered a discount upon pencils claimed by the recipient to have been missent, asked for the return thereof at their expense, and used the National Credit Service Company as a collection agency, in no case was suit ever filed; and that after exhausting such remedies the account was closed out and the loss accepted as an incident of the business.

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

Mr. Jesse D. Kash and *Mr. L. J. Farnsworth* for the Commission.

Ruth Gottdiener, 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 United States Pencil Co., Inc., a corporation, David Teitelbaum and Samuel Fingerhut, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, United States Pencil Co., Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 100 Fifth Avenue, New York, New York.

Respondents David Teitelbaum and Samuel Fingerhut are President and Secretary-Treasurer, respectively, of the corporate respondent and in such capacity they formulate and execute its policies and practices. Their business address is the same as that of corporate respondent.

PAR. 2. Respondents have for several years last past been engaged in the sale and distribution of lead pencils, pencil sharpeners, ball point pens, fountain pens, desk pads, cutlery, and other merchandise. Respondents cause and have caused their said products, when sold, to be transported from their aforesaid place of business in the State of New York to purchasers thereof located in the 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 said products in commerce among and between various States of the United States and in the District of Columbia. Their volume of trade in said commerce has been and is substantial.

PAR. 3. Respondents, in the course and conduct of their said business and for the purpose of inducing the sale of their said merchandise, have made many statements and representations with regard to the quality and price thereof. The statements and representations so made by respondents have appeared in advertisements, circulars, and other advertising media of general circulation in various States of the United States. Typical of said representations of respondents, but not all inclusive, are the following:

FREE
with each and every gross of pencils
Jumbo Ballpoint pen memo pad. * * *

FREE
with each and every gross of pencils
this orbic ballpoint pen * * *
Free gift included for quick action
Postage free order blank.
A great many thousands have sold for
$10.00 each * * *

Nationally advertised sharpener $3.00
FREE with an order of one gross or more. * * *

FREE with any order of one gross or more
FAMOUS "EVER-SHARP" Ball Pen
* * *

Best
by Test
N. Y. Testing Laboratory
has shown that "USCO" bonded pencils
rate 1st among a test of all
leading brands. * * *

New . . . Electro Bonded 100 percent Stronger Leads.
New USCO Electro Bonded Pencils tested on
a United States Bureau of Standards
Testing Machine shows that these leads
are definitely more than twice as strong
as ordinary pencils.

PAR. 4. Through the use of aforesaid statements and others of the same import, but not specifically set out herein, respondents have represented that they offer ball point pen and memo pad sets, ball point pens, pencil sharpeners, and other merchandise free; that respondents' pencils are superior to those of all other leading manufacturers and that the same is proven by a test made by the New York Testing Laboratory; that the lead in corporate respondent's pencils is more than twice as strong as that in ordinary pencils and that their pencils are not ordinary pencils, but are superior to ordinary pencils.

PAR. 5. In truth and in fact, respondents do not give ball point pen and memo sets, ball point pens, pencil sharpeners, and other articles "free." In order to obtain said merchandise, it is necessary to purchase other merchandise and the price of the so-called free merchandise is included in the price of the merchandise purchased. The tests performed by the New York Testing Laboratories did not show corporate respondent's pencils to be superior to the brands tested and characterized by respondents as leading brands and said pencils are not in fact superior to those tested. The lead in said pencils is not significantly stronger than that in pencils which are generally considered to be ordinary. By all accepted standards respondents' pencils are ordinary, not extraordinary or superior.

PAR. 6. The use by respondents of the foregoing false, misleading and deceptive statements and representations had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' merchandise.

PAR. 7. Further, in the course and conduct of their said business respondents make and have made a practice of shipping merchandise to consignees thereof without having received orders therefrom for said merchandise and attempting to collect the price thereof. Respondents have also engaged in the practice of shipping to customers larger amounts of merchandise than had been ordered and attempting to collect the price thereof.

PAR. 8. In the course and conduct of their business and for the purpose of enforcing payments allegedly due them for shipments, both authorized and unauthorized, of their goods, respondents have adopted

and used the name "National Credit Service Company," and by the use of such name, and by letter, and fictitious addresses and notices, have represented it to be a bona fide collection agency in no way connected with respondents. Under this guise respondents employ various methods of intimidation and harassment to induce consignees of respondents' merchandise to make payment therefor, whether said consignees had ordered the merchandise or not.

PAR. 9. The said representations were false. In truth or in fact, "National Credit Service Company" was not a bona fide collection agency nor was it independent of and distinct from respondents; it was a trade name used by respondents as a front for making and enforcing collections as herein set forth.

PAR. 10. The use of the name "National Credit Service Company" and the practices aforesaid, by respondents, had the tendency and capacity to mislead and deceive persons to whom respondents' merchandise has been consigned, with respect to the nature of "National Credit Service Company" and its relation to respondents, and by reason thereof to pay to respondents sums of money which they were not obligated to pay because of the unauthorized shipment of merchandise and because merchandise was purchased as the result of respondents' deceptive practices as herein alleged.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair acts and deceptive practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rules XXII and XXIII 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 January 3, 1953, 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, "Commissioner Mason and Commissioner Carretta not concurring in those portions of the findings as to the facts, conclusion and order to cease and desist which relate to the use of the word 'free' ".[1]

[1] Said "Decision," etc. dated January 22, 1953, reads as follows, omitting the formal Order of Compliance, set forth infra at page 744, and the nonconcurrence of Commissioners Mason and Carretta as to the use of the word "free", as above set out:

The initial decision of the hearing examiner having been filed in this proceeding on November 21, 1952, and counsel for respondents having seasonably filed a notice of respondents' intention to appeal therefrom; and

No appeal brief having been filed within the time provided by the Commission's Rules

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 9, 1951, issued and subsequently served its complaint in this proceeding upon the respondents United States Pencil Co., Inc., a corporation, and David Teitelbaum and Samuel Fingerhut, 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, answer thereto, testimony and other evidence, and 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:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, United States Pencil Co., Inc., is a corporation, organized in 1918, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 100 Fifth Avenue, New York, New York, in a building at the corner of Fifth Avenue and 15th Street with entrances also at 1–3 West 15th Street.

Respondents David Teitelbaum and Samuel Fingerhut are president and secretary-treasurer, respectively, of the corporate respondent and in such capacity, they formulate and execute its policies and practices. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents have for several years last past been engaged in the business of selling and distributing lead pencils and in connection therewith have distributed as premiums or "free" goods pencil sharpeners, ball point pens, desk pads and other merchandise. In connection with their aforesaid business, respondents cause and have

of Practice and, therefore, no matter having been presented for determination by the Commission on appeal:

Therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the initial decision of the hearing examiner, a copy of which is hereto attached, did on January 3, 1953, become the decision of the Commission.

caused their said products to be transported from their aforesaid place of business in the State of New York to customers and purchasers thereof located in the 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 said products in commerce among and between various States of the United States and in the District of Columbia.

The respondents contact prospective customers through the use of advertising circulars mailed directly to individuals and firms whose names and addresses are procured primarily from telephone and other directories. Annually they send out approximately 60 million circulars at a mailing cost of over $500,000.00, receive some 600,000 orders and do more than $1,000,000.00 business, mostly in small orders of from 1 to 10 gross of pencils. They have about 150 employees. Their volume of trade in commerce has been and is substantial.

PAR. 3. Respondents, in the course and conduct of their said business and for the purpose of inducing the sale of their pencils, have, in the aforementioned circulars, made representations with regard to the quality and price of their pencils and with respect to the "free" merchandise offered to customers. Typical of said representations, but not all inclusive, are the following.

FREE with each and every gross of pencils
JUMBO BALLPOINT PEN MEMO PAD * * *

Nationally Advertised
SHARPENER . . . FREE
With an order of one gross or more.

FREE! With Any Order of
One Gross or More
Famous
"EVER-SHARP"
Ball Pen

BEST BY TEST
N. Y. Testing Laboratory has
shown that "USCO" bonded
pencils rate 1st among a
test of all leading brands.
* * *

NEW . . . ELECTRO BONDED 100% STRONGER LEADS.
New USCO ELECTRO BONDED PENCILS, tested on a U. S. Bureau of Standards Testing Machine, shows that these leads are definitely more than twice as strong as ordinary pencils.

PAR. 4. Through the use of the aforesaid statements and others of the same or similar import but not specifically set out herein, respondents have represented that they offer ball point pens, memo pads, pencil sharpeners and other merchandise free; that respondents' pencils are superior to all other leading brands; that the lead in

respondents' pencil is more than twice as strong as that in ordinary pencils; and that such strength is shown by tests made on a United States Bureau of Standards testing machine.

PAR. 5. In truth and in fact respondents do not give ball point pens, memo pads, pencil sharpeners or other articles of merchandise free. These mentioned articles and other merchandise are offered to respondents' customers only in connection with the sale of pencils, and in order to get any article of "free" merchandise, it is necessary that the individual customer purchase one gross, or more, of pencils from the respondents.

Respondents' pencils are not superior to all other leading brands and the lead in respondents' pencil is not twice as strong nor significantly stronger than the lead in other pencils, whether of leading or ordinary brands. The respondents' pencils have not been and are not now tested on a United States Bureau of Standards testing machine.

In 1948 respondents had some tests made by the New York Testing Laboratories, Inc. but the indicia of a careful, scientifically valid experiment were not evident either in the objective selection of pencils to be tested or in the manner in which the tests were carried out, nor were the conclusions reached adequately supported by reliably accurate data. Hence, the report of the New York Testing Laboratories, Inc., showing that respondents' pencils ranked first among the five groups of pencils tested, cannot be accepted as supporting the claim made in respondents' advertising, especially that their pencils "rate 1st among a test of all leading brands."

The record does not show that a test of comparative strength of the leads of respondents' and other brands of lead pencils was ever made on a U. S. Bureau of Standards Testing Machine or that there is such a testing machine. The record does show that a cursory test was made in respondents' place of business by the representative of a company from which respondents were purchasing pencils on a machine similar to one described in a governmental bulletin, SS–P–201, and that similar machines are constructed and used by various pencil companies. The reliable, probative and substantial evidence does not support a finding that leads in respondents' pencils "are definitely more than twice as strong as ordinary pencils" or that they are significantly stronger. The record shows that lead strength may vary as much as 10 percent or 15 percent in different sections of the same pencil and that between pencils of the same grade of hardness produced by different manufacturers there will be a like variation in lead strength.

PAR. 6. The use by respondents of the foregoing statements and representations herein found to be false, misleading and deceptive had and has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations are true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' merchandise.

PAR. 7. In the course and conduct of their said business respondents have shipped merchandise to consignees thereof without having received bona fide orders therefor and, in other cases, larger quantities of merchandise than have intentionally or actually been ordered, and have collected or attempted to collect the price thereof. However, the record does not show that such shipments have been wilfully or intentionally made by respondents. On the contrary, the record seems clearly to establish that such shipments were made only as the result of mistakes or because of the mischievous pranks of practical jokers.

The order blank which constitutes a part of the circular which respondents customarily use carries, in columnar style, the words: 10 gross, 5 gross, 3 gross, 2 gross, 1 gross, and before each is a box in which the purchaser is to place an "X" or checkmark designating the quantity of pencils desired, and at the bottom there is a place for signature and address. Upon receipt of an order blank bearing a name and address, respondents ship the quantity of pencils indicated thereon and the consignee is requested to remit by return mail.

The customer has no duplicate of his order, nor is the original filed by respondents who retain for their records only one copy of the invoice which is enclosed with the shipment. Thus there is no way, once an order is sent out, to verify either the quantity ordered or the signature. For a short period after the issuance of the complaint in this proceeding, respondents did retain for reference and checking a quantity of original orders selected not at random but because a careful examination gave indication that there might be some question with respect thereto. It was found that in some cases the signatures were not authentic, presumably having been placed on the orders by pranksters, in other cases the "X" or checkmark was placed in such a manner as not clearly to indicate the quantity of pencils desired, in other cases it was found that the customer did not intend to order the quantity of pencils clearly indicated on the order. Such factors coupled with careless but honest mistakes that can be attributed to respondents' own employees would account for mis-shipments and over shipments much in excess of those, than can, from the evidence in this proceeding, be found to have been made by the respondents.

In their efforts at collection, respondents have offered a discount of 10 percent upon the pencils claimed by the recipient to have been mis-sent, have asked for return of the pencils at respondents' expense, and have used National Credit Service Company as a collection agency, but in no case has suit ever been filed. After exhausting these remedies the account has been closed out and the loss accepted as an incident of the business.

PAR. 8. In the course and conduct of their business and for the purpose of enforcing payments allegedly due them for shipments, both authorized and unauthorized, respondents have adopted and used the above-mentioned National Credit Service Company, 1–3 West 15th Street, New York 11, New York, and through the use of such name and address, and in correspondence have directly and indirectly represented it to be a bona fide collection agency in no way connected with respondents and through its use have employed various methods of intimidation and harassment to induce consignees of respondents' merchandise to make payment therefor.

PAR. 9. The said representations were and are false and misleading. The National Credit Service Company is a trade name registered in the New York County Clerk's Office, adopted by the individual respondents, David Teitelbaum and Samuel Fingerhut, as partners, and used by them only in connection with unpaid accounts due the corporate respondent or other companies owned and controlled by the two partners. It is not independent of and distinct from respondents and is not a bona fide collection agency.

PAR. 10. The use by respondents of the name "National Credit Service Company" together with the practices aforesaid, had and has the tendency and capacity to mislead and deceive persons to whom respondents' merchandise has been consigned as to the nature of "National Credit Service Company" and its relation to respondents, and by reason thereof has caused and causes them to pay to respondents sums of money which they were not obligated to pay.

CONCLUSION

The aforesaid acts and practices of respondents found herein to be false and misleading 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 respondents, United States Pencil Co., Inc., a corporation, and its officers, and David Teitelbaum and Samuel Fin-

gerhut, individually and as officers of United States Pencil Co., Inc., their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale, offering for sale or distribution of pencils or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "free", or any other word or words of similar import or meaning, to designate, describe or refer to articles of merchandise which are not in truth and in fact a gift or gratuity or are not given to the recipient thereof without requiring the purchase of other merchandise, or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondents;

2. Representing directly or by implication that respondents' pencils are superior to all other leading brands of lead pencils;

3. Representing directly or by implication that the leads in respondents' pencils are twice as strong or significantly stronger than the lead in ordinary or leading brands of pencils;

4. Representing directly or by implication that tests have been made of the strength of leads in respondents or other pencils by the use of a United States Bureau of Standards testing machine;

5. Representing directly or by implication that "National Credit Service Company," or any other trade or fictitious name under which business is done by respondents, is a bona fide collection agency not connected with respondents.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent, United States Pencil Co., Inc., a corporation, and the respondents, David Teitelbaum and Samuel Fingerhut, 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 contained in said decision [as required by said decision and order of January 3, 1953].

Syllabus

IN THE MATTER OF

DAVID TEITELBAUM ET AL. DOING BUSINESS AS UNITED STATES STATIONERY COMPANY

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

Docket 5930. Complaint, Oct. 11, 1951—Decision, Jan. 3, 1953

Where four partners engaged in the interstate sale and distribution of storage and filing cabinets and other merchandise—

(a) Represented in advertising circulars of interstate circulation that steel storage cabinets depicted were regularly sold by them for $69 and that the price had been reduced to $29.95;

Notwithstanding the fact that the cabinets were regularly sold for $29.95; while they did at one time sell a different size "all-steel" cabinet for $69, there was no showing that said price was ever applicable to the smaller cabinet advertised;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that said representations were true, and with effect of causing it to purchase substantial quantities of such merchandise; and

(b) Adopted and used the name "National Credit Service Company, 1-3 West 15th Street, New York 11, New York" for the purpose of enforcing payments allegedly due them for shipments of goods, both authorized and unauthorized, and through the use of such name and address, and by correspondence, directly and indirectly represented it to be a bona fide collection agency in no way connected with them, and through use thereof employed various methods of intimidation and harassment to induce consignees of their merchandise to make payment therefor;

The facts being that the "National Credit Service Company" was merely a trade-name registered in the New York County Clerk's office and adopted and used by two of said partners only in connection with unpaid accounts due to said United States Stationery Company and to other companies in which they were interested;

With tendency and capacity to mislead and deceive persons to whom respondents' merchandise had been consigned, and with effect of causing such persons to pay respondents sums of money which they were not obligated to pay:

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.

Respondents' representation that "complete steel filing system" cabinets were sold by them for $39.95 as a regular item and that the $33.95 price constituted a reduction or a special offer, was borne out by reliable, probative and substantial evidence, and was therefore accepted as true.

Where respondents shipped merchandise to consignees without having received bona fide orders therefor, and collected the price thereof: it appeared that no shipment was made unless they had in their possession an order card bearing a name and address, that such names were sometimes affixed without authorization by persons other than those whose names were on the cards so that the orders were not bona fide, that in such cases until complaint was made, the consignor was not able to anticipate such an occurrence, and that such shipments did not appear to be greater than would normally be expected in the direct-by-mail type of operation conducted by them, and that reliable, probative and substantial evidence in the record did not show that they made a practice of shipping merchandise without having received an order.

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

Mr. Jesse D. Kash and *Mr. L. J. Farnsworth* for the Commission.

Ruth Gottdiener, 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 David Teitelbaum, William Teitelbaum, Carl Teitelbaum, Samuel Fingerhut, and Arthur Fingerhut, copartners doing business as United States Stationery 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 respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents David Teitelbaum, William Teitelbaum, Carl Teitelbaum, Samuel Fingerhut, and Arthur Fingerhut are copartners doing business under the name and style of the United States Stationery Company with their principal office and place of business at 100 Fifth Avenue, New York, New York.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the sale and distribution of filing cabinets, office desks, luggage, office equipment and other merchandise. The respondents cause and have caused their said merchandise when sold, to be transported from their aforesaid place of business in the State of New York to purchasers thereof, located in various States of the United States and in the District of Columbia.

PAR. 3. Respondents maintain and at all times mentioned herein have maintained a course of trade in said merchandise in commerce between and among the various States of the United States and in the District of Columbia. The volume of their business in said commerce has been and is substantial.

PAR. 4. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said merchandise, respondents have printed and circulated throughout the several States to prospective customers, many advertising circulars containing among other things the following statements:

Drastic reduction
Heavy gage steel extra large
"Safe Type" storage cabinet
* * *
$69.00
Only $29.95

Complete Steel Filing System
Letter and legal size
* * *
$39.95
Sensational value
$33.95 F. O. B. N. Y.

The said advertising circulars carry a pictorial representation of the merchandise offered for sale, and the bottom portion of the circular is an order blank to be detached and filled in as desired by the purchaser.

PAR. 5. Through the use of aforesaid statements and others of the same import but not specifically set out herein, respondents represent that the depicted steel storage cabinets and steel filing cabinets are regularly sold by them for $69.00 and $39.95, respectively, and that the price has been reduced to $29.95 and $33.95, respectively.

PAR. 6. The foregoing representations are false, misleading, and deceptive. In truth and in fact, respondents do not sell and have not sold said steel storage cabinets and steel filing cabinets for $69.00 and $39.95, respectively. Respondents' usual and regular price for said products was and is $29.95 and $33.95, respectively.

PAR. 7. The use by respondents of the foregoing false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were and are true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken beliefs, to purchase substantial quantities of respondents' merchandise.

PAR. 8. In the course and conduct of their business as aforesaid, respondents have made a practice of shipping merchandise to individuals, partnerships, and corporations without having received an order therefor, and then seeking to exact payment for said unordered mer-

chandise through repeated "demand letters" and by threatening legal action to collect for said merchandise.

PAR. 9. In the course and conduct of their business and for the purpose of enforcing payments allegedly due them for shipments of their goods both authorized and unauthorized, respondents have adopted and used the name "National Credit Service Company," and by the use of such name, and by letter, and fictitious addresses and notices, have represented it to be a bona fide collection agency in no way connected with respondents. Under this guise respondents employ various methods of intimidation and harassment to induce consignees of respondents' merchandise to make payment therefor, whether said consignees had ordered the merchandise or not.

PAR. 10. The said representations were false. In truth or in fact, "National Credit Service Company" was not a bona fide collection agency nor was it independent of and distinct from respondents but was a trade name used by respondents as a front for making and enforcing collections as herein set forth.

PAR. 11. The use of the name "National Credit Service Company" and the practices aforesaid, by respondents, has had the tendency and capacity to mislead and deceive persons to whom respondents' merchandise has been consigned, with respect to the nature of "National Credit Service Company" and its relation to respondents, and by reason thereof to pay to respondents sums of money which they were not obligated to pay because of the unauthorized shipment of merchandise and because merchandise was purchased as the result of respondents' deceptive practices, as herein alleged.

PAR. 12. 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

Pursuant to Rules XXII and XXIII 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 January 3, 1953, 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.[1]

[1] Said "Decision", etc., dated January 22, 1953, reads as follows, omitting the formal Order of Compliance, set forth infra at page 753:

The initial decision of the hearing examiner having been filed in this proceeding on November 21, 1952, and counsel for respondents having seasonably filed a notice of respondents' intention to appeal therefrom; and

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 11, 1951, issued and subsequently served its complaint in this proceeding upon the respondents David Teitelbaum, William Teitelbaum, Carl Teitelbaum, Samuel Fingerhut and Arthur Fingerhut, copartners doing business as United States Stationery Company, 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, answer thereto, testimony and other evidence, and 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:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents David Teitelbaum, William Teitelbaum, Carl Teitelbaum, Samuel Fingerhut, and Arthur Fingerhut are copartners doing business under the name and style of the United States Stationery Company with their principal office and place of business at 100 Fifth Avenue, New York, New York, in a building at the corner of Fifth Avenue and 15th Street with entrances also at 1–3 West 15th Street.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the sale and distribution of storage and filing cabinets and other merchandise. The respondents cause and have caused their said merchandise when sold, to be transported from their aforesaid place of business in the State of New York to purchasers thereof, located in various States of the United States and in the District of Columbia.

No appeal brief having been filed within the time provided by the Commission's Rules of Practice and, therefore, no matters having been presented for determination by the Commission on appeal:

Therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the initial decision of the hearing examiner, a copy of which is hereto attached, did on January 3, 1953, become the decision of the Commission.

PAR. 3. Respondents maintain and at all times mentioned herein have maintained a course of trade in said merchandise in commerce between and among the various States of the United States and in the District of Columbia. The volume of their business in said commerce has been and is substantial; more than 125,000 customers are served annually.

PAR. 4. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said merchandise, respondents have printed and circulated throughout the several states to prospective customers, many advertising circulars containing, among other things, the following statements:

Drastic Reduction
Heavy Gauge Steel—Extra Large
"SAFE TYPE" STORAGE CABINET
* * *
$69.00 only $29.95

In conjunction with the above quoted language, there is a pictorial representation of a 2 door, 4-shelf cabinet, described as having the following dimensions: Width 36″, Height 72″, Depth 18″, and Weight 145 pounds.

Complete Steel Filing System
Letter and Legal Size
* * *
SENSATIONAL VALUE
$39.95 $33.95

In conjunction with the above quoted language there is a pictorial representation of a cabinet containing two letter size filing drawers, two card filing drawers, and a 2-shelf storage compartment.

PAR. 5. Through the use of aforesaid statements and others of the same import but not specifically set out herein, respondents represent that the depicted steel storage cabinets and steel filing cabinets are regularly sold by them for $69.00 and $39.95, respectively, and that the price has been reduced to $29.95 and $33.95, respectively.

PAR. 6. The foregoing representations that steel storage cabinets as depicted and described above, each being 36″ by 72″ by 18″ and weighing 145 pounds, were regularly sold on the market or by respondents for $69.00 and that the price had been reduced to $29.95, are false, misleading and deceptive. From 1949 up to the date of the hearing respondents, in the regular course and conduct of their business, offered for sale through their circulars and sold the cabinets described above for $29.95. The reliable, probative and substantial evidence in the record establishes the fact that the usual and customary price for these cabinets was and is $29.95.

The record does support a finding that the respondents did at some time sell an "all steel" storage cabinet, 36" wide, 18½" deep, 76" high, weighing 200 pounds, for $69.00 but there is no showing that this price was ever applicable to the 72", 145-pound cabinet described above nor that the price of the 200-pound cabinet was ever reduced to $29.95.

The representations that "complete steel filing system" cabinets, each containing two letter size filing drawers, two card filing drawers, and a 2-shelf storage compartment, were sold by the respondents for $39.95 as a regular item and that the $33.95 price constituted a reduction or special offer are borne out by reliable, probative and substantial evidence in the record, and must be accepted as true.

PAR. 7. The use by the respondents of the statements and representations hereinabove found to be false, misleading and deceptive had and has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were and are true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' merchandise.

PAR. 8. In the course and conduct of their said business, respondents have shipped merchandise to consignees thereof without having received bona fide orders therefor, and have collected or attempted to collect the price thereof. However, the record shows that no shipment of merchandise was made by respondents unless they had in their possession an order card bearing a name and address. Such names had sometimes been affixed without authorization by persons other than those whose names were on the cards and the orders were therefore not bona fide. In such instances, the consignee was not able to anticipate receipt of any merchandise from the respondents who would know of such mis-shipment only when complaint was made.

The occurrence of mis-shipments does not appear to be greater than would normally be expected in the direct-by-mail type of operation conducted by respondents and the reliable, probative and substantial evidence in the record does not show that the respondents have made a practice of shipping merchandise to individuals or firms without having received an order.

PAR. 9. In the course and conduct of their business and for the purpose of enforcing payments allegedly due them for shipments of their goods, both authorized and unauthorized, respondents have adopted and used the name National Credit Service Company, 1–3 West 15th Street, New York 11, New York, and, through the use of such name and address, and by correspondence, have directly and in-

directly represented it to be a bona fide collection agency in no way connected with respondents and through its use have employed various methods of intimidation and harassment to induce consignees of respondents' merchandise to make payment therefor.

PAR. 10. The said representations were and are false and misleading. The National Credit Service Company is a trade name registered in the New York County Clerk's Office, adopted by the respondents David Teitelbaum and Samuel Fingerhut, as partners, and used by them only in connection with unpaid accounts due the United States Stationery Company and other companies in which the said David Teitelbaum and Samuel Fingerhut are interested. It is not independent of and distinct from respondents and is not a bona fide collection agency.

PAR. 11. The use by respondents of the name National Credit Service Company together with the practices aforesaid, had and has the tendency and capacity to mislead and deceive persons to whom respondents' merchandise has been consigned as to the nature of National Credit Service Company and its relation to respondents, and by reason thereof, to pay to respondents sums of money which they were not obligated to pay.

CONCLUSION

The aforesaid acts and practices of respondents found herein to be false and misleading 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 respondents David Teitelbaum, William Teitelbaum, Carl Teitelbaum, Samuel Fingerhut, and Arthur Fingerhut, individually and as copartners doing business as United States Stationery Company, or under any other name, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale, offering for sale, or the distribution of steel filing cabinets, steel storage cabinets or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing as the customary or usual price or value of said merchandise any price or value which is in excess of the price at which said merchandise is customarily offered for sale and sold in the usual course of business.

2. Representing, directly or by implication, that National Credit Service Company, or any other trade or fictitious name under which a

similar business is done by respondents, is a bona fide collection agency not connected with respondents.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents, David Teitelbaum, William Teitelbaum, Carl Teitelbaum, Samuel Fingerhut, and Arthur Fingerhut, 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 contained in said decision [as required by said decision and order of January 3, 1953].

IN THE MATTER OF

LOMA DRESS CORPORATION

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

Docket 5980. Complaint, Apr. 25, 1952—Decision, Jan. 3, 1953

Products manufactured from silk, the product of the cocoon of the silkworm, have for many years been held, and are still held, in great public esteem because of their outstanding qualities, and there has been for many years, and still is, a public demand for such products.

Garments manufactured from fabrics composed of rayon, and of rayon and other fibers, may have the appearance and feel of silk, and many members of the purchasing public are unable to distinguish between such garments and garments manufactured from silk. Consequently, such garments are accepted by many members of the purchasing public as silk products.

Where a corporation engaged in the manufacture and interstate sale and distribution to retailers of garments made from rayon fabrics—

Misleadingly offered and sold garments which were composed wholly or in part of rayon and simulated in texture and appearance those composed wholly or in part of silk without informing the purchasing public that such garments were rayon and not silk;

With the result that members of the purchasing public might have been led to believe that said garments were composed wholly or in part of silk, and with capacity and tendency to mislead them as to fiber content:

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. James A. Purcell*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Phillips, Nizer, Benjamin & Krim, of New York City, 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 Loma Dress Corporation, 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 will be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Loma Dress Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 501 Seventh Avenue, New York, New York.

PAR. 2. The respondent is now, and for several years last past has been, engaged in manufacturing garments from fabrics composed of rayon and also from fabrics composed of rayon and other fibers and in selling said garments to retailers who in turn sell to the purchasing public.

Respondent causes its said garments, when sold, to be transported from its said place of business in the State of New York to purchasers thereof located in the various States of the United States and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States and the District of Columbia. Its volume of trade in said commerce has been and is substantial.

PAR. 3. Rayon is a chemically manufactured fiber which may be manufactured so as to simulate silk fibers in texture and appearance, and fabrics manufactured from such rayon fibers simulate silk fabrics in texture and appearance. Garments manufactured from fabrics composed of rayon and of rayon and other fibers have the appearance and feel of silk and many members of the purchasing public are unable to distinguish between such garments and garments manufactured from silk, the product of the cocoon of the silkworm. Consequently, such garments are accepted by many members of the purchasing public as silk products.

PAR. 4. Products manufactured from silk, the product of the cocoon of the silkworm, have for many years been held, and are still held, in great public esteem because of their outstanding qualities, and there has been for many years, and still is, a public demand for such products.

PAR. 5. The garments manufactured and sold in commerce by respondent, as aforesaid, composed wholly or in part of rayon, simulate, in texture and appearance, garments composed wholly or in part of silk, the product of the cocoon of the silkworm. Respondent does not inform the purchasing public of the fact that the garments, which resemble silk in texture and appearance, are made wholly or in part of rayon and not of silk.

PAR. 6. The practice of the respondent in offering for sale and selling its said garments, in commerce, as aforesaid, without disclosing in words familiar to the purchasing public the fact that said gar-

ments are composed wholly or in part of rayon, is misleading and deceptive and many members of the purchasing public are thereby led to believe that the said rayon garments are composed wholly or in part of silk, the product of the cocoon of the silkworm.

PAR. 7. The failure of respondent to disclose that its said garments are made wholly or in part of rayon has the capacity and tendency to mislead and deceive members of the purchasing public as to the fiber content thereof. As a result, substantial quantities of respondent's products are purchased in the belief that they are composed wholly or in part of silk, the product of the cocoon of the silkworm.

PAR. 8. The aforesaid acts and practices of the 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 January 3, 1953, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 25, 1952, issued and subsequently served its complaint in this proceeding upon respondent, Loma Dress Corporation, charging it 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 respondent's answer thereto, a hearing was held on October 20, 1952, at which testimony and other evidence in support of 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.

Subsequent to said hearing the attorney in support of the complaint and the attorney for the respondent submitted a Stipulation as to the Facts, dated October 27, 1952, which stipulation is filed in the formal proceedings herein and forms the basis for the hereinafter contained Findings as to the Facts and Conclusions to the exclusion of consideration of the respondent's answer and of the aforesaid evi-

dence. Such stipulation provides that the facts recited may be taken as the facts in this proceeding and in lieu of evidence in support of the charges contained in the complaint, or in opposition thereto; that the Hearing Examiner may proceed upon said statement of facts to make his Initial Decision, including inferences which he may draw from the facts, conclusions based thereon and enter his order disposing of these proceedings, the filing of Proposed Findings and Conclusions and presentation of oral arguments thereon being expressly waived.

The 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, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Loma Dress Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 501 Seventh Avenue, New York, New York.

PAR. 2. The respondent is now, and for several years last past has been, engaged in manufacturing garments from fabrics composed of rayon and also from fabrics composed of rayon and other fibers and in selling said garments to retailers who in turn sell to the purchasing public.

Respondent causes its said garments, when sold, to be transported from its said place of business in the State of New York to purchasers thereof located in the various States of the United States and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States and the District of Columbia. Its volume of trade in said commerce has been and is substantial.

PAR. 3. Rayon is a chemically manufactured fiber which may be manufactured so as to simulate silk fibers in texture and appearance, and fabrics manufactured from such rayon fibers simulate silk fabrics in texture and appearance. Garments manufactured from fabrics composed of rayon and of rayon and other fibers may have the appearance and feel of silk and many members of the purchasing public are unable to distinguish between such garments and garments manufactured from silk, the product of the cocoon of the silkworm. Consequently, such garments are accepted by many members of the purchasing public as silk products.

PAR. 4. Products manufactured from silk, the product of the cocoon of the silkworm, have for many years been held, and are still held, in great public esteem because of their outstanding qualities, and there has been for many years, and still is, a public demand for such products.

PAR. 5. Some of the garments manufactured and sold in commerce by respondent were composed wholly or in part of rayon and simulated in texture and appearance garments composed wholly or in part of silk, the product of the cocoon of the silkworm. Respondent did not inform the purchasing public of the fact that the garments which resembled silk in texture and appearance were made wholly or in part of rayon and not of silk.

PAR. 6. The practice of respondent in having offered for sale and selling its said garments, in commerce, as aforesaid, without disclosing in words familiar to the purchasing public the fact that said garments were composed wholly or in part of rayon, was misleading within the meaning of the Federal Trade Commission Act, and members of the purchasing public may have been led to believe that the said rayon garments were composed wholly or in part of silk, the product of the cocoon of the silkworm.

PAR. 7. The failure of respondent to disclose that its said garments were made wholly or in part of rayon had the capacity and tendency to mislead and deceive members of the purchasing public as to the fiber content thereof.

CONCLUSION

The aforesaid acts and practices of the respondent 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

It is ordered, That the respondent, Loma Dress Corporation, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of articles of wearing apparel or other products composed in whole or in part of rayon, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from offering for sale or selling said products without affirmatively and clearly disclosing thereon such rayon content.

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 January 3, 1953].

IN THE MATTER OF

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

COMPLAINT, MODIFIED DECISION, 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, Jan. 6, 1953

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 circumstance set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

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

president 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 abridgments 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 abridgments 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 abridgments 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.

MODIFIED 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 fully advised in the premises, found that this proceeding was in the interest of the public and on September 19, 1952, made 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.

Thereafter on November 21, 1952, respondents filed with the Commission a motion to modify its decision of September 19, 1952, with respect to the provisions of the order to cease and desist included therein, and the Commission, having duly considered the matter and entered its order granting the said motion in part and denying it in all other respects, makes this its findings as to the facts and its conclusion drawn therefrom and order, the same to be in lieu of its decision herein issued on September 19, 1952.[1]

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 nonfiction. The books of fiction and nonfiction are designated by respondent as "Signet" and "Mentor," respectively. Respondents obtain from the original publisher the right to reissue the

[1] See ante, p. 220.

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 abridgments were approximately 10, 22 and 27 percent, respectively. The extent of the abridgment has varied from "5.5 percent or less" to 66⅔ percent. Out of forty-eight abridgments published by respondents in the years 1947–50 (both inclusive), thirty-four were abridged from 20 to 66⅔ percent.

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 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.

PAR. 7. In offering for sale and selling books which are in fact abridgments and books which have been previously published under different titles, respondents have in numerous instances failed to disclose adequately the facts of abridgment 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 the 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 abridgment 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 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," "abridgment," "condensed" or "condensation," or any other word or phrase stating with equal clarity that said book is abridged, 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

NASH & KINSELLA LABORATORIES, 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 6034. Complaint, Aug. 26, 1952—Decision, Jan. 6, 1953

Where a corporation and its three officers, engaged in the competitive interstate sale and distribution of an insecticide designated "2-Way Roach and Insect Spray"; in advertising in circulars sent to dealers for distribution to the purchasing public, directly or by implication—

(*a*) Falsely represented that said product, when used as directed, would kill or control insects that normally infest food or feeds, including moths, mites, flour beetles and cadelles, without rendering such food or feeds unfit for consumption, and would control lice or mites on poultry, and could be wiped on the hair of dogs, cats or other animals in a sufficient amount to kill or repel lice or fleas without being injurious to such animals;

(*b*) Falsely represented that fleas were flying insects and could be killed by their said product sprayed into the air;

(*c*) Falsely represented that their said product, when used as directed and sprayed on doorways, screen doors, light bulbs or other surfaces, would kill or repel insects that gather outside such doorways and screen doors at night under light, and would kill all insects that walk on such sprayed surfaces;

(*d*) Represented that, used as a spray, said product would kill termites, either inside or outside of buildings, and was of practical value in control thereof; the facts being that while it would kill termites in the flying stage, it would be of no practical value in the control of termites within such structures, and it could not be expected to kill any significant number of them outside a structure when used as a spray;

(*e*) Falsely represented that it was absolutely harmless and nonpoisonous, and that children suffered no harm from it;

(*f*) Represented that it was "28 times more potent" against all insects than 25 percent D.D.T.; the facts being that its comparative effectiveness depended upon the type of insect and that as to certain insects, D.D.T. was more effective;

(*g*) Represented that the active ingredients in aerosol bombs were ordinarily 3 percent active and that a quart container of its spray contained 66 times more insecticide than a 1-pound bomb; the facts being that such ingredients constituted not 3 percent but 15 percent of the volume in such a bomb, and while a quart container of their product contained more insecticide than the average bomb, it did not contain 66 times more; and

(*h*) Represented falsely that said spray was effective in killing flies or insects within a 25,000 cu. ft. area when the amount expelled from the container by a few strokes of the hydraulic sprayer was sprayed into an electric fan;

With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true and to induce thereby its purchase of their said product; whereby substantial trade in commerce was diverted to them from their competitors, to the injury of competition, and there was placed in the hands of dealers and others a means and instrumentality for misleading and deceiving the purchasing public:

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

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

Mr. Edward F. Downs for the Commission.

Mr. John D. Conner, 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 Nash & Kinsella Laboratories, Inc., a corporation, and Wesley K. Nash, Charles W. Taylor and Maxine B. Nash, individually and as officers of said corporation, 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, Nash & Kinsella Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its main office located at 1218 Olive Street, St. Louis, Missouri.

Respondents Wesley K. Nash, Charles W. Taylor and Maxine B. Nash are officers of said corporate respondent and as such formulate, direct and control the policies and practices of said corporation. Said individual respondents have their offices at the same place as the corporate respondent.

PAR. 2. The respondents are now and for more than one year last past have been engaged in the sale and distribution of an insecticide designated by them as "2-Way Roach and Insect Spray," containing ingredients consisting of Petroleum Distillate, Technical Piperonyl Butoxide*, Pyrethrins. *Consists of (Butyl Carbityl) (6-Propyl Piperonyl) Ether and related Compounds. The directions for use are as follows:

2-Way Roach & Insect Spray is formulated to kill Roaches, Water-Bugs, Silverfish, Bedbugs, Ants, Fleas, Ticks, Flies, Mosquitoes, Clothes Moths and certain other insects.

1. To control Roaches, Silverfish and Water Bugs, 2-WAY should be sprayed into cracks and crevices of sinks, cabinets, pantries, shelving, etc. Spray generously along baseboards of kitchen and sink, and in basement, including ceiling.

2. Spray once a week until complete control of Roaches, Silverfish and Water-bugs is obtained. Then spray twice each month to keep out new infestations. 2-WAY deposits a residue that kills German Roaches and early stages of American and Oriental Roaches, Water-Bugs and Silverfish for two weeks and longer.

3. To kill Flies and Mosquitoes, hit them directly with spray while still or on the wing or fog the room with spray, keeping it closed for ten minutes.

4. To kill Bed-Bugs, spray mattresses, beds, springs, floors, walls and all cracks and crevices in room. Repeat once per week until complete control is obtained.

5. To kill Ants, spray runways and nests, hitting as many insects as possible. Repeat weekly until no more ants are seen.

6. To kill Fleas and Ticks, cracks and crevices in infested walls, floors and ceilings and bedding should be thoroughly sprayed once per week until control is obtained.

7. To kill Clothes Moths spray stored articles thoroughly with special attention to seams and folds. Storage containers and closets should also be sprayed. Applications should be repeated every two weeks except where treated articles are stored in a moth-tight container.

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

Respondents are now, and at all times hereinafter mentioned have been, in substantial competition with other corporations and with individuals, partnerships and firms engaged in the sale in commerce of insecticides.

PAR. 3. In the course and conduct of their said business and for the purpose of inducing the purchase of their said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents, in circulars sent by them to dealers for distribution to the purchasing public, have made certain claims with respect to their

said product. Among and typical, but not all inclusive, of such claims are the following:

The report states that the 2-WAY formula does control the insects normally found around food, feeds, processing plant and household. This means . . . moths, mites, flour beetles, cadelles . . .

2-Way controls poultry lice, mites. A few drops of 2-Way wiped on the hair of dogs or cats or other animals kills and repels lice, fleas, gnats and biting flies.

You can spray into the air and kill . . . fleas and other fliers.

You can spray doorways, light bulbs and door screen to kill and repel insects that gather outside at night under the light.

You can spray surfaces and kill insects that walk on them.

You can kill . . . termites inside or outside.

Children and food are safe with 2-Way.

Non-poisonous.

2-Way is as safe to humans and animals as the odorless, stainless oil base in which it is mixed.

288 Deaths from just one type of insecticide—be safe . . .

28 times more potent than 25 percent D. D. T. . . .

Contains 66 times more insecticide than a 1 lb. bomb (3% active) . . .

You can get a quart container full of miracle 2-Way Roach and Insect Spray—66 times more active insecticide than comes in a 1 lb. aerosol bomb with 3 percent active ingredients.

2-Way is so powerful a few strokes of the hydraulic sprayer into an electric fan in a home or a commercial establishment kills flies and other insects within a 25,000 cu. ft. area where the air currents are circulating.

PAR. 4. Through the use of the statements and representations herein above set forth, and others similar thereto not specifically set out herein, respondents have represented, directly or by implication, as follows:

(*a*) That 2-Way Roach and Insect Spray, when used as directed, will kill or control insects that are normally found around food or feeds, including moths, mites, flour beetles and cadelles, without rendering such food or feeds unfit for consumption.

(*b*) That 2-Way Roach and Insect Spray will control lice, or mites, on poultry, and that it can be wiped on the hair of dogs, cats or other animals in a sufficient amount to kill or repel lice, fleas, gnats or biting flies without being injurious to such animals.

(*c*) That fleas are flying insects and can be killed by spraying 2-Way Roach and Insect Spray into the air.

(*d*) That 2-Way Roach and Insect Spray, when used as directed and sprayed on doorways, screen doors, light bulbs, and other surfaces, will kill or repel insects that gather outside such doorways and screen doors at night under the light, or that walk on such sprayed surfaces.

(*e*) That used as a spray 2-Way Roach and Insect Spray will kill termites either inside or outside of buildings and is of practical value in the control of termites.

(*f*) That 2-Way Roach and Insect Spray is absolutely harmless and non-poisonous, that it can be used to kill insects around or infesting food without rendering such food unfit for consumption and that children suffer no harm from it.

(*g*) That 2-Way Roach and Insect Spray is 28 times more effective against all insects than 25 percent D. D. T.

(*h*) That the active ingredients in aerosol bombs is ordinarily 3 percent active, and that a quart container of 2-Way Roach and Insect Spray contains 66 times more insecticide than such aerosol bomb.

(*i*) That 2-Way Roach and Insect Spray is effective in killing flies or insects within a 25,000 cu. ft. area when the amount expelled from the container by a few strokes of the hydraulic sprayer is sprayed into an electric fan.

PAR. 5. The aforesaid statements and representations used and disseminated by respondents are false, misleading and deceptive. In truth and in fact:

(*a*) Respondents' product will not, when used as directed, kill or control insects that are normally found around food, or feeds, including moths, mites, flour beetles and cadelles, without rendering such food or feeds unfit for consumption.

(*b*) Respondents' product will not control lice or mites on poultry, and it cannot be wiped on the hair of dogs, cats or other animals in a sufficient amount to kill or repel lice, fleas, gnats or biting flies without being injurious to such animals.

(*c*) Fleas are not flying insects and they cannot be killed by spraying respondents' product into the air.

(*d*) Respondents' product will not, when used as directed and sprayed on doorways, screen doors, light bulbs or other surfaces, kill or repel insects that gather outside such doorways and screen doors at night under the light, or that walk on such sprayed surfaces.

(*e*) While respondents' product will kill termites in the flying stage when found inside a structure, such use will be of no practical value in the control of termites in such structures. It could not be expected to kill any significant number of these insects outside a structure when used as a spray.

(*f*) Respondent's product is not absolutely harmless and non-poisonous and it cannot be used to kill insects around or infesting food without, in some instances, rendering such food unfit for consumption, nor is it so safe that children can suffer no harm from it.

(*g*) The effectiveness of respondents' product as compared to D. D. T. depends upon the type of insect. D. D. T. is more effective than respondents' product as to certain insects.

(*h*) The active ingredients in ordinary aerosol bombs is not 3 percent but 15 percent of the volume. A quart container of respondents' product contains more insecticide than the average aerosol bomb, but not 66 times more.

(*i*) Respondents' product will not be of any practical effect in the killing of flies and other insects when sprayed into an electric fan.

PAR. 6. The use by respondents of the foregoing false, misleading and deceptive statements and representations, and others similar thereto, has the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase respondents' said product. As a direct result of the practices of respondents, as aforesaid, substantial trade in commerce is and has been diverted to respondents from their said competitors and injury has been and is done to competition in commerce between and among the various States of the United States.

PAR. 7. Respondents' said acts and practices also place in the hands of dealers and others a means and instrumentality for misleading and deceiving the purchasing public as aforesaid.

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

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 26, 1952, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair methods of competition and 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, and any review thereof, and the enforcement of the order consented

[1] The 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 January 6, 1953, 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.

to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of the answer to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, is to be withdrawn from the record, 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, 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 and 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 respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Nash & Kinsella Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its main office located at 1218 Olive Street, St. Louis, Missouri.

Respondents Wesley K. Nash, Charles W. Taylor and Maxine B. Nash are officers of said corporate respondent and as such formulate, direct and control the policies and practices of said corporation. Said individual respondents have their offices at the same place as the corporate respondent.

PAR. 2. The respondents are now and for more than one year last past have been engaged in the sale and distribution of an insecticide designated by them as "2-Way Roach and Insect Spray," containing ingredients consisting of Petroleum Distillate, Technical Piperonyl Butoxide *, Pyrethrins. * Consists of (Butyl Carbityl) (6-Propyl Piperonyl) Ether and related Compounds. The directions for use are as follows:

2-Way Roach & Insect Spray is formulated to kill Roaches, Water-Bugs, Silverfish, Bedbugs, Ants, Fleas, Ticks, Flies, Mosquitoes, Clothes Moths and certain other insects.

1. To control Roaches, Silverfish and Water Bugs, 2-Way should be sprayed into cracks and crevices of sinks, cabinets, pantries, shelving, etc. Spray generously along baseboards of kitchen and sink, and in basement, including ceiling.

2. Spray once a week until complete control of Roaches, Silverfish and Water-Bugs is obtained. Then spray twice each month to keep out new infestations. 2-Way deposits a residue that kills German Roaches and early stages of American and Oriental Roaches, Water-Bugs and Silverfish for two weeks and longer.

3. To kill Flies and Mosquitoes, hit them directly with spray while still or on the wing or fog the room with spray, keeping it closed for ten minutes.

4. To kill Bed-Bugs, spray mattresses, beds, springs, floors, walls and all cracks and crevices in room. Repeat once per week until complete control is obtained.

5. To kill Ants, spray runways and nests, hitting as many insects as possible. Repeat weekly until no more ants are seen.

6. To kill Fleas and Ticks, cracks and crevices in infested walls, floors and ceilings and bedding should be thoroughly sprayed once per week until control is obtained.

7. To kill Clothes Moths spray stored articles thoroughly with special attention to seams and folds. Storage containers and closets should also be sprayed. Applications should be repeated every two weeks except where treated articles are stored in a mothtight container.

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

Respondents are now, and at all times hereinafter mentioned have been, in substantial competition with other corporations and with individuals, partnerships and firms engaged in the sale in commerce of insecticides.

PAR. 3. In the course and conduct of their said business and for the purpose of inducing the purchase of their said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents, in circulars sent by them to dealers for distribution to the purchasing public, have made certain claims with respect to their said product. Among and typical, but not all inclusive, of such claims are the following:

The report states that the 2-Way formula does control the insects normally found around food, feeds, processing plant and household. This means . . . moths, mites, flour beetles, cadelles . . .

2-Way controls poultry lice, mites. A few drops of 2-Way wiped on the hair of dogs or cats or other animals kills and repels lice, fleas, gnats and biting flies.

You can spray into the air and kill . . . fleas and other fliers.

You can spray doorways, light bulbs and door screen to kill and repel insects that gather outside at night under the light.

You can spray surfaces and kill insects that walk on them.

You can kill . . . termites inside or outside.

Children and food are safe with 2-Way.

Non-poisonous.

2-Way is as safe to humans and animals as the ordorless, stainless oil base in which it is mixed.

288 Deaths from just one type of insecticide—be safe . . .

28 times more potent than 25 percent D. D. T. . . .

Contains 66 times more insecticide than a 1 lb. bomb (3 percent active) . . .

You can get a quart container full of miracle 2-Way Roach and Insect Spray—66 times more active insecticide than comes in a 1 lb. aerosol bomb with 3 percent active ingredients.

2-Way is so powerful a few strokes of the hydraulic sprayer into an electric fan in a home or a commercial establishment kills flies and other insects within a 25,000 cu. ft. area where the air currents are circulating.

PAR. 4. Through the use of the statements and representations hereinabove set forth, and others similar thereto not specifically set out herein, respondents have represented, directly or by implication, as follows:

(*a*) That 2-Way Roach and Insect Spray, when used as directed, will kill or control insects that normally infest food or feeds, including moths, mites, flour beetles and cadelles, without rendering such food or feeds unfit for consumption.

(*b*) That 2-Way Roach and Insect Spray will control lice, or mites, on poultry, and that it can be wiped on the hair of dogs, cats or other animals in a sufficient amount to kill or repel lice, or fleas, without being injurious to such animals.

(*c*) That fleas are flying insects and can be killed by spraying 2-Way Roach and Insect Spray into the air.

(*d*) That 2-Way Roach and Insect Spray, when used as directed and sprayed on doorways, screen doors, light bulbs, and other surfaces, will repel insects that gather outside such doorways and screen doors at night under the light, and kill all insects that walk on such sprayed surfaces.

(*e*) That used as a spray 2-Way Roach and Insect Spray will kill termites either inside or outside of buildings and is of practical value in the control of termites.

(*f*) That 2-Way Roach and Insect Spray is absolutely harmless and nonpoisonous, and that children suffer no harm from it.

(*g*) That 2-Way Roach and Insect Spray is 28 times more effective against all insects than 25 percent D.D.T.

(*h*) That the active ingredients in aerosol bombs is ordinarily 3 percent active, and that a quart container of 2-Way Roach and Insect Spray contains 66 times more insecticide than such aerosol bomb.

(*i*) That 2-Way Roach and Insect Spray is effective in killing flies or insects within a 25,000 cu. ft. areas when the amount expelled from the container by a few strokes of the hydraulic sprayer is sprayed into an electric fan.

PAR. 5. The aforesaid statements and representations used and disseminated by respondents are false, misleading and deceptive. In truth and in fact:

(*a*) Respondents' product will not, when used as directed, kill or control insects that normally infest food, or feeds, including moths, mites, flour beetles and cadelles, without rendering such food or feeds unfit for consumption.

(*b*) Respondents' product will not control lice or mites on poultry, and it cannot be wiped on the hair of dogs, cats or other animals in a sufficient amount to kill or repel lice or fleas without being injurious to such animals.

(*c*) Fleas are not flying insects and they cannot be killed by spraying respondents' product into the air.

(*d*) Respondents' product will not, when used as directed and sprayed on doorways, screen doors, light bulbs or other surfaces, kill or repel insects that gather outside such doorways and screen doors at night under the light, and it will not kill all insects that walk on such sprayed surfaces.

(*e*) While respondents' product will kill termites in the flying stage when found inside a structure, such use will be of no practical value in the control of termites in such structures. It could not be expected to kill any significant number of these insects outside a structure when used as a spray.

(*f*) Respondents' product is not absolutely harmless and nonpoisonous, nor is it so safe that children can suffer no harm from it.

(*g*) The effectiveness of respondents' product as compared to DDT depends upon the type of insect. DDT is more effective than respondents' product as to certain insects.

(*h*) The active ingredients in ordinary aerosol bombs is not 3 percent but 15 percent of the volume. A quart container of respondents' product contains more insecticide than the average aerosol bomb, but not 66 times more.

(*i*) Respondents' product will not be of any practical effect in the killing of flies and other insects when sprayed into an electric fan by means of a hydraulic sprayer.

PAR. 6. The use by respondents of the foregoing false, misleading and deceptive statements and representations, and others similar thereto, has the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase respondents' said product. As a direct result of the practices of respondents, as aforesaid, substantial trade in commerce is and has been diverted to respondents from their said competitors and injury has been and is being done to competition in commerce between and among the various States of the United States.

PAR. 7. Respondents' said acts and practices also place in the hands of dealers and others a means and instrumentality for misleading and deceiving the purchasing public as aforesaid.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and of the competitors of respondents and constitute unfair methods of competition and 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 Nash & Kinsella Laboratories, Inc., a corporation, and its officers and Wesley K. Nash, Charles W. Taylor, and Maxine B. Nash, individually and as officers of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the insecticide preparation designated "2-Way Roach and Insect Spray" or any other insecticide of substantially similar composition or possessing substantially similar properties whether sold under the same name or under any other name or names, do forthwith cease and desist from representing directly or by implication:

(1) That said preparation will kill or control insects that normally infest food or feeds, including moths, mites, flour beetles and cadelles, without rendering such food or feeds unfit for consumption.

(2) That said preparation will control lice or mites on poultry or that it can be wiped on the hair of dogs, cats or other animals in a sufficient amount to kill or repel lice or fleas without being injurious to said animals.

(3) That fleas are flying insects and can be killed by spraying said preparation into the air.

(4) That said preparation will, when used as directed and sprayed on doorways, screen doors, light bulbs and other surfaces repel insects that gather outside such doorways and screen doors at night under the light or kill all insects that walk on such sprayed surfaces.

(5) That said preparation can be used to kill all termites either inside, other than flying termites, or outside of buildings, or that it has any practical value in the control of termites.

(6) That said preparation is absolutely harmless or non-poisonous or that children can suffer no harm from it.

(7) That said preparation is more effective against all insects than D. D. T.

(8) That aerosol bombs ordinarily contain a smaller percentage of active ingredients than they actually do contain, or that a quart container of said preparation contains more insecticide in comparison with an aerosol bomb than it actually does.

(9) That said preparation will be of practical effect in the killing of flies and insects when sprayed into an electric fan by means of a hydraulic sprayer.

It is further ordered, That respondents shall, within 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.

NASH & KINSELLA LABORATORIES, INC.
By [S] Wesley K. Nash, *President*
WESLEY K. NASH
By [S] Wesley K. Nash
WESLEY K. NASH
By [S] Charles W. Taylor
CHARLES W. TAYLOR
By [S] Maxine B. Nash
MAXINE B. NASH

DATE: Nov. 20 '52

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 6th day of January, 1953.

Syllabus

IN THE MATTER OF

JEWEL RADIO AND TELEVISION CORP. OF AMERICA 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 5683. Complaint, July 20, 1949—Decision, Jan. 9, 1953

Where two corporations and an individual who was in practical effect their owner, engaged in the interstate sale and distribution of cameras, radios, fountain pens, radio clocks, and other articles of merchandise—

Distributed to operators and to members of the public push cards, order blanks, and illustrated circulars which described their merchandise and their plan for distributing the same through allotting it as premiums or prizes to the operators of their push cards and to members of the public under schemes which involved the operation of a game of chance, gift enterprise, or lottery scheme, pursuant to which the purchasers who made the correct prearranged selections received certain articles for the varying and chance-determined amounts theretofore paid by them; others receiving nothing, and thereby supplied to and placed in the hands of such operators the means of conducting games of chance, contrary to an established public policy of the United States Government:

With the result that many persons attracted by said sales plans and the element of chance involved therein were thereby induced to buy and sell their merchandise:

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

In said proceeding in which it appeared that more than a year after the issuance of the complaint steps were taken looking to the dissolution of both corporations and that said corporations were thereafter dissolved, but that during the period involved, orders were filled in the name of one of said corporations under the general supervision of the individual above referred to by persons originally employed by the other corporation: the Commission was of the opinion that the cease and desist order should not be directed to such corporations but be deemed dismissed as to them, and that it should also be dismissed as to certain other individuals who were joined but who, as it appeared, exercised no control or direction over the policies and practices above involved.

Before *Mr. Webster Ballinger*, hearing examiner.

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

Nash & Donnelly, of Washington, D. C., and *Mr. Arthur Block*, 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 Jewel Radio and Television Corp. of America, and Don F. Ferraro, Albert R. Ferraro, Arthur Block and Sam Specter, individuals and officers of said Jewel Radio and Television Corp. of America, and Crosby-Paige Industries, Inc., a corporation and A. Robert Lieberman and Arthur Block, individuals and officers of said corporation and 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 thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jewel Radio and Television Corp. of America is a corporation organized and doing business under and by virtue of the laws of the State of New York with its designated principal place of business located at 583 Avenue of Americas in the city of New York, New York. This respondent corporation is also registered to do business under the corporate laws of the State of Illinois at 333 West Lake Street in the city of Chicago, Illinois. The name and address of the registered agent is John A. Graf, Room 1440, 120 South LaSalle Street, Chicago, Illinois. Respondents Don F. Ferraro whose address is 875 Eighth Avenue, Jersey City, New Jersey, Albert R. Ferraro whose address is 281 Eighth Avenue, Jersey City, New Jersey, Respondent Arthur Block whose address is 30 Broad Street, New York City, and Respondent Sam Specter whose address is 33 West Lake Street, Chicago, Illinois, are individuals and officers of respondent corporation, Jewel Radio and Television Corp. of America.

Respondent Crosby-Paige Industries, 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 318 West Randolph Street in the city of Chicago, Illinois. The registered agent of said corporate respondent is Harry H. Kahn, and their registered address is Room 1440, 120 South LaSalle Street, Chicago, Illinois. Respondent A. Robert Lieberman is an individual and president of corporate respondent Crosby-Paige Industries, Inc., and his address is 602 Avenue T, Brooklyn, New York, and Arthur Block is an individual and assistant secretary of respondent corporation Crosby-Paige Industries, Inc., and his address is 30 Broad Street, New York, New York.

Both Corporate respondents and the individual respondents named herein have cooperated and acted together in doing and performing

the acts and practices hereinafter alleged, and the individual respondents named have directed and controlled the practices and policies of the corporate respondents.

Respondents are now and for more than three years last past have been engaged in the sale and distribution of cameras, radios, fountain pens, electric clocks, and other articles of merchandise and have caused said merchandise when sold to be transported from their places of business in the city of Chicago, Illinois, to purchasers thereof at their respective points of location in the various States of the United States other than Illinois and in the District of Columbia. There is now and there has been for more than one year last past a course of trade in such merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act 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 hereof respondents in soliciting the sale of and in selling and distributing their merchandise furnish and have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. One method or sales plan adopted and used by respondents is substantially as follows:

Respondents distribute and have distributed to operators and to members of the public certain literature and instructions including among other things push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise and a circular explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards and to members of the purchasing and consuming public. One of the respondents' said push cards bears 80 feminine names with ruled columns on the back of said card for writing in the name selected. Said push card has 80 partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is a number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the feminine name corresponding to the one under the master seal receives a camera. The push card bears the following legend or instruction:

LUCKY NAME UNDER SEAL
RECEIVES A
TRAV-LER 3-WAY PORTABLE AC-DC AND BATTERY RADIO

The Trav-ler is the perfect portable for everywhere! Exceptionally lightweight; brilliant radio tone; beautiful simulated gray snakeskin cabinet in dark blue trim.

No. 1 pays 1¢ No. 2 pays 2¢
No. 9 pays 9¢ No. 19 pays 19¢
All others pay 39¢
NONE HIGHER

(SEAL)

No. 9 and 19 ( )
each receive a handsome PUSH OUT
BALL-POINT PEN WITH PENCIL

WRITE YOUR NAME ON REVERSE SIDE OPPOSITE NAME YOU SELECT

Sales of respondents' merchandise by means of said push cards are made in accordance with the above described legend or instructions and said prizes or premiums are allotted to the customer or purchaser from said card in accordance with the above 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 said merchandise are thus determined wholly by lot or chance.

Respondents furnish and have furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of a game of chance, gift enterprise or lottery scheme. The sales plans or methods 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 respondents furnish and have furnished said push cards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods 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 are attached by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondents as herein 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 July 20, 1949, issued and subsequently served its complaint 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. Thereafter, upon consideration of a motion filed by respondent Arthur Block to strike his name from the complaint and good cause being shown for the relief requested, such motion was duly granted by the Commission. After the filing of answers by all other respondents, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were 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. On September 18, 1951, the hearing examiner filed his initial decision.

Thereafter this matter came on to be heard by the Commission upon the appeal from said initial decision filed by counsel for respondents, briefs in support of and in opposition to said appeal and oral arguments of counsel; and the Commission, having duly considered and ruled upon said appeal and having considered the record herein, and being now fully advised in the premises, 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, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PAR. 1. Respondent Jewel Radio and Television Corp. of America, until its dissolution subsequent to the institution of this proceeding,

was a corporation organized and doing business under and by virtue of the laws of the State of New York with its designated principal place of business located at 583 Avenue of Americas in the city of New York, New York. This respondent corporation also was registered to do business under the corporate laws of the State of Illinois and had a place of business at 333 West Lake Street, in the city of Chicago, Illinois. The name and address of the registered agent was John A. Graf, Room 1440, 120 South LaSalle Street, Chicago, Illinois. Respondent Don J. Ferraro, erroneously named in the complaint as Don F. Ferraro, was president of said respondent corporation and his present business address is 10–40 45th Street, Long Island City 1, New York. Respondent Crosby-Paige Industries, Inc., until its dissolution subsequent to the institution of this proceeding, was 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 318 West Randolph Street in the city of Chicago, Illinois. The registered agent of said corporate respondent was Harry H. Kahn, Room 1440, 120 South LaSalle Street, Chicago, Illinois.

PAR. 2. Respondent Don J. Ferraro organized in the spring of 1948 the Jewel Radio and Television Corp. of America as a distributing agent for products manufactured by another corporation in which he had a financial interest and which engaged in business in New York City. In the summer or fall of 1948, he organized Crosby-Paige Industries, Inc., a wholly owned subsidiary of Jewel Radio and Television Corp. of America, as a sales agency for products distributed by Jewel Radio and Television Corp. of America, as well as other products. All stock of Crosby-Paige Industries, Inc., has been held by Jewel Radio and Television Corp. of America, and respondent Don J. Ferraro, during all the times mentioned herein, has been the principal stockholder of the latter and, in practical effect, the owner of both corporations, and has directed and controlled the practices and policies of the corporate respondents.

PAR. 3. Respondent Jewel Radio and Television Corp. of America, respondent Crosby-Paige Industries, Inc., and respondent Don J. Ferraro, prior and subsequent to the institution of this proceeding, have engaged in the sale and distribution of cameras, radios, fountain pens, radio clocks, and other articles of merchandise and have caused said merchandise, when sold, to be transported from their places of business in the city of Chicago, Illinois, to purchasers thereof at their respective points of location in the various States of the United States other than Illinois. In the conduct thereof, there has been a course of trade in such merchandise in commerce, as "commerce" is defined

in the Federal Trade Commission Act, between and among the various States of the United States.

PAR. 4. In the course and conduct of their said business, respondents, in soliciting the sale of and in selling and distributing their merchandise, have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. One method or sales plan adopted and used by respondents has been substantially as follows:

Respondents have distributed to operators and to members of the public certain literature and instructions, including, among other things, push cards, order blanks and circulars, containing illustrations and descriptions of said merchandise and explaining respondents' plan for the distribution of their merchandise by allotting it as premiums or prizes to the operators of said push cards and to members of the purchasing and consuming public. One of the respondents' said push cards had imprinted on it 80 feminine names with ruled columns on the back of said card for writing in the name selected. Said push card had 80 partially perforated discs. Each of said discs contained one of the feminine names corresponding to those on the list. Concealed within each disc was a number which was disclosed only when the customer elected to push or separate a disc from the card. The push card also had a larger master seal and concealed within the master seal was one of the feminine names appearing on the disc. Under this particular plan, the person selecting the feminine name corresponding to the one under the master seal would receive a radio. The push card bore the following legend or instruction:

LUCKY NAME UNDER SEAL
RECEIVES A
TRAV-LER 3-WAY PORTABLE AC-DC AND BATTERY
RADIO

The Trav-ler is the perfect portable for everywhere! Exceptionally lightweight; brilliant radio tone; beautiful simulated gray snakeskin cabinet in dark blue trim.

No. 1 pays 1¢ No. 2 pays 2¢
No. 9 pays 9¢ No. 19 pays 19¢
All others pay 39¢
NONE HIGHER

(SEAL)

No. 9 and 19
each receive a handsome
BALL-POINT PEN

PUSH OUT
WITH PENCIL

WRITE YOUR NAME ON REVERSE SIDE OPPOSITE NAME YOU SELECT

Sales of respondents' merchandise by means of said push cards have been made in accordance with the above-described legend or instruc-

tions and said prizes or premiums have been allotted to the customer or purchaser from said card in accordance with the above legend or instructions. Whether a purchaser has received an article of merchandise or received nothing for the amount paid or to be paid for the merchandise or the chance to receive said merchandise has thus been determined wholly by lot or chance.

PAR. 5. Respondents have furnished various other push cards accompanied by order blanks, instructions and other printed matter for use in the sale and distribution of their merchandise by means of a game of chance, gift enterprise or lottery scheme. The sales plans or methods involved in the sale of all of said merchandise by means of said other push cards have been substantially the same as that hereinabove described, varying only in detail.

PAR. 6. The persons to whom respondents have furnished said push cards have used the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus have supplied to and placed in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove described.

PAR. 7. The use by respondents of sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 8. The sale and distribution of respondents' merchandise to the purchasing public in the manner herein found 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 have been attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby have been induced to buy and sell respondents' merchandise.

CONCLUSION

The aforesaid acts and practices of respondents have been 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.

More than a year after the complaint issued, steps were taken by respondents looking to dissolution of both respondent corporations. On March 26, 1951, final articles of dissolution were filed by respondent Crosby-Paige Industries, Inc., with the Secretary of the State of

Illinois. Certificate of dissolution was issued by the Secretary of State, State of New York, on January 3, 1951, as to Jewel Radio and Television Corp. of America, and the Secretary of State, State of Illinois, issued a certificate of withdrawal under date of June 8, 1951.

During all of the foregoing period, orders for merchandise continued to be filled in the name of respondent Crosby-Paige Industries, Inc., under the general supervision of respondent Don J. Ferraro, by persons originally employed by respondent Jewel Radio and Television Corp. of America but no evidence was adduced indicating that mailings of respondents' promotional literature and push cards continued after January 1951. Solely in view of the dissolutions of respondents Jewel Radio and Television Corp. of America and Crosby-Paige Industries, Inc., which have occurred since this proceeding was instituted, the Commission is of the opinion that the proscriptions of the order to cease and desist should not be directed to such corporate respondents and the complaint accordingly shall be deemed as dismissed with respect to the aforesaid respondent corporations.

Also named in the complaint as parties respondent were Albert R. Ferraro and Sam Specter, individually and as officers of respondent Jewel Radio and Television Corp. of America, and A. Robert Lieberman, individually and as an officer of Crosby-Paige Industries, Inc. It appearing from the testimony that said respondents have not exercised any control or direction over the policies and practices heretofore found to have been adopted and engaged in by the aforesaid respondent corporations, the Commission is of the view that the allegations of the complaint should be dismissed with respect to them.

ORDER

It is ordered, That respondent Don J. Ferraro and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cameras, radios, fountain pens, radio clocks and other articles 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, 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. Shipping, mailing or transporting to agents or distributors or to members of the purchasing public push cards or other devices which 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 by means of a game of chance, gift enterprise or lottery scheme.

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

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Albert R. Ferraro, Sam Specter and A. Robert Lieberman.

It is further ordered, That respondent Don J. Ferraro 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 the order to cease and desist.

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.