control a mill, factory or manufacturing plant wherein said hosiery or other textile products are manufactured.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commision:

It is ordered, That the initial decision of the hearing examiner shall, on the 16th day of June 1966, become the decision of the Commission.

It is further ordered, That respondents, Midwest Hosiery Incorporated, a corporation, Sidney Leibowitz, Solomon Kopman, and Ann Gruber, individually and as officers of said corporation, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

WILMINGTON CHEMICAL CORPORATION ET AL.

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

Docket 8648. Complaint, Oct. 28, 1964—Decision, June 17, 1966

Order requiring a Chicago, Ill., manufacturer of a water repellent product, to cease misrepresenting the origin and waterproofing qualities of its product and making deceptive claims concerning testing, profitability, discounting of notes, and guarantee coverage.

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 Wilmington Chemical Corporation, a corporation, and Joseph S. Klehman, individually and as an officer of said corporation, here-

inafter 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 Wilmington Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 33 West Hubbard Street, Chicago, Illinois.

Respondent Joseph S. Klehman is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water repellent paint to dealers for resale to the public under the trade name of "X–33."

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

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 5. Respondents' method of doing business is to cause salesmen, called franchise managers, to contact prospective customers, first by telephone and then in person. The salesmen or franchise managers then negotiate with the customers, called franchise dealers, exclusive franchises to sell respondents' product within a specified territory. At the same time, and as a necessary part of the transaction, an order is obtained from the franchise dealers for a specified quantity of respondents' X–33. The merchandise is paid for either in cash or by the customers giving trade acceptances in payment thereof, which trade acceptances are immediately transferred to a finance company.

PAR. 6. In the course of such solicitations said salesmen or representatives have made many statements and representations, directly or by implication, to prospective purchasers of respondents' products and have performed many physical demonstrations.

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

1. That the corporate respondent is a subsidiary of, a division of, an exclusive licensee of, or is affiliated with, E. I. dupont de Nemours & Company, usually designated by the respondents' salesmen or representatives as "Dupont"; or that X–33, the product sold by the respondents, is manufactured, developed or tested by Dupont.

2. That X–33, the product sold by the respondents, is unconditionally guaranteed for ten years.

3. That franchise dealers will realize profits of varying amounts up to $25,000 per year from the resale of respondents' products.

4. That the franchise may be cancelled by the dealer at any time and that any unsold quantities of respondents' product will be picked up or transferred to another dealer or that a refund will be made for any of respondents' product unsold.

5. That the supply of respondents' product purchased by the dealer will be sold out before the first payment on the trade acceptances becomes due.

6. That X–33 was successfully tested by Dupont, by the corporate respondent or by an independent testing laboratory before being marketed.

7. That X–33 is a waterproof product.

8. That X–33 is suitable for use on silos and will prevent spoilage.

9. That any trade acceptances given in payment for said merchandise will be retained by the corporate respondent and not sold to, or discounted by, a third person.

10. That the corporate respondent is an old established firm with many years of experience in manufacturing paint.

PAR. 7. In truth and in fact:

1. The corporate respondent is not a subsidiary, affiliate, division, or exclusive licensee of E. I. dupont de Nemours & Company, but on the contrary, the sole connection between the corporate respondent and Dupont is that one of the ingredients of X–33 (known by the trade name of "Tyzor HS") is manufactured by Dupont and purchased from it by the corporate respondent; the

product sold by the respondents, known as X–33, is neither manufactured nor developed by E. I. dupont de Nemours & Company; nor has it been tested by that company; on the contrary, X–33 is manufactured by the corporate respondent, and contains "Tyzor HS" in combination with other ingredients not manufactured by Dupont.

2. X–33, the product manufactured and sold by respondents, is not unconditionally guaranteed for ten years or any other period of time, but on the contrary, the only guarantee issued by the respondents to consumers is to the effect that should the application leak where X–33 has been applied, the X–33 will be replaced any time within ten years, provided the X–33 was applied in accordance with the company's directions. The said guarantee specifically provides that it does not cover labor replacement costs.

3. Franchise dealers generally do not earn $25,000 a year or whatever lesser amount was represented to them at the time of the purchase and, in some cases, make no profit at all.

4. No cancellation of the contract is permitted and the respondents do not pick up any unsold quantities of X–33 or transfer them to another dealer nor do the respondents make any refund to the franchise dealers for unsold merchandise.

5. The supply of X–33 purchased by the franchise dealers is not usually sold before the trade acceptances fall due but, on the contrary, in many cases, the dealers are unable to make any substantial sales at all.

6. X–33 had never been tested by Dupont, the respondent nor any independent laboratory prior to being marketed.

7. X–33 is not a waterproof product but, on the contrary, is only a water repellent.

8. X–33 is not a sealer and does not close the pores in the material to which it is supplied. Therefore, it is not suitable for use in making silos airtight.

9. Any trade acceptances given in payment of the merchandise are immediately sold to, or discounted by, a third party who becomes a holder in due course.

10. The corporate respondent is not an old established firm and does not have many years experience in manufacturing paint. On the contrary, the corporate respondent was incorporated September 23, 1961 and started to market X–33 some time subsequent to that date.

Therefore, the representations set forth in Paragraph Six,

above, and others similar thereto, were and are false, misleading and deceptive.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy B. Pope and *Mr. Carlos P. Lamar, III,* supporting the complaint.

Mr. Herbert I. Rothbart and *Mr. Edgar A. Blumenfeld,* Chicago, Ill., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

SEPTEMBER 17, 1965

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PRELIMINARY STATEMENT

The complaint in this proceeding was issued by the Federal Trade Commission October 28, 1964, but was not served on the respondents until December 5, 1964. The complaint charges respondents with the use of false, misleading, and deceptive representations in the sale of a water repellent sold under the trade name X–33, in violation of Section 5 of the Federal Trade Commission Act.

An answer generally denying all the allegations of the complaint was filed January 5, 1965, by the respondent Klehman on behalf of the corporation and himself.

An informal prehearing conference was held January 5, 1965, followed on February 2, 1965, by a formal prehearing conference. Neither respondent was represented by counsel at the time of those conferences, the individual respondent, Joseph S. Klehman, appearing *pro se* and as president of respondent Wilmington Chemical Corporation.

Shortly before the hearings began on March 19, 1965, Edgar A. Blumenfeld, of Chicago, filed an appearance as counsel for respondents. On the first day of hearings, he was joined as counsel of

record by Herbert I. Rothbart, also of Chicago, who acted as principal defense counsel in the course of the hearings.

After Mr. Blumenfeld's retention as counsel, respondents filed motion March 12, 1965, for postponement of the hearing for 60 days, on the ground that counsel's belated entry in the case necessitated additional time for preparation of the defense. The hearing examiner denied the motion by order filed March 16, 1965, and the Commission, by order dated March 18, 1965, denied respondents' request to file an interlocutory appeal. The motion was renewed on the first day of hearings (Tr. 10) and again it was denied (Tr. 14).

Provision was made, however, for an interval between the close of the Government's case-in-chief and the commencement of defense hearings. For various reasons, that precise arrangement was not carried out, but, as a practical matter and by general agreement, there was an interruption in the hearing schedule to allow respondents additional opportunity to prepare their defense (Tr. 924–27, 1169–70).

There were 16 days of hearings, resulting in a transcript of 1,851 pages. More than 450 documents were offered in evidence, of which more than 350 were admitted.

Hearings were held in Chicago, Illinois, and Washington, D.C., as authorized by Commission order dated March 2, 1965.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed in the office of the Commission.

The parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Replies or exceptions also were filed by counsel for both parties.[1]

Proposed findings not adopted, either in the form proposed or

[1] Although each party was required, by order of the examiner, to file its exceptions not later than July 30, 1965, respondents' Exceptions were not filed until August 2, 1965. However, in view of respondents' explanation regarding a delay in their receipt of the Government's Proposed Findings and Brief, respondents' Exceptions have been received and considered by the hearing examiner.

in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions, and order filed by both parties, as well as their respective replies, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of such review and his observation of the witnesses, makes findings of fact, enters his resulting conclusions, and issues an appropriate order.

By order dated June 3, 1965, the Commission extended the time for filing of this initial decision to September 7, 1965. In essence, that action took account of an extension of time granted the parties, at respondents' request, for filing their proposed findings and related submittals. Subsequently, by order dated September 2, 1965, the Commission granted the examiner an additional 10-day extension, or until September 17, 1965.

As required by Section 3.21(b)(1) of the Commission's Rules of Practice, the Findings of fact include references to principal supporting items in the record. Such references to testimony and exhibits are thus intended to comply with that Rule and to serve as convenient guides to the principal items of evidence supporting the Findings of Fact, but those record references do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record.

References to the record are made in parentheses, and certain abbreviations are used:

Tr	Transcript[2]
Par	Paragraph
p	page
pp	pages
CX	Commission exhibits
RX	Respondents' exhibits
GPF	Government's Proposed Findings
Brief	Government's Brief
Reply	Government's Reply Brief
RPF	Respondents' Proposed Findings
Exceptions	Respondents' Exceptions

Counsel supporting the complaint are ordinarily referred to as Government counsel or the Government, and witnesses called by Government counsel may be referred to as Government witnesses.

[2] Sometimes, reference to testimony cite the name of the witness and the transcript page number without the abbreviation Tr.—for example, Klehman 32.

FINDINGS OF FACT

I. *Respondents and Their Business*

General

Respondent Wilmington Chemical Corporation (sometimes referred to as Wilmington or as Wilmington Chemical) is a corporation organized, existing, and formerly doing business under and by virtue of the laws of the State of Illinois (Tr. 769–70). It was incorporated on or about September 21, 1961 (Tr. 43–45, 980). Until October or November 1963, it maintained its principal office and place of business at 33 West Hubbard Street, Chicago, Illinois (Tr. 769–70, 1815). Since that time, the address of the corporation has been in care of its registered agent, Attorney Edgar A. Blumenfeld, 180 West Washington Street, Chicago, Illinois (Prehearing Conference Transcript, pp. 61–62).[3]

Respondent Joseph S. Klehman has been and is the sole stockholder and the president of the corporation (Tr. 32, 45–47). His business address has been the same as that of the corporation (Tr. 32, 770–71).

Before Wilmington Chemical Corporation was organized, Klehman was engaged in the offering for sale, sale, and distribution of water repellent products for other companies. He was a salesman for United Silicones during 1959 and 1960, selling a product known as Aquagard. From September 1960 to September 1961, he was sales manager for Silmica Corporation of America, which sold Sil-o-dri (Tr. 37–43, 941–48).[4]

Since the inception of Wilmington Chemical, Klehman has formulated, directed, and controlled the acts and practices of the corporation (Tr. 52–56, 95–96, 137–38, 140–46, 151, 770, 829, 980, 1258, 1599, 1737; CX 100 R-T).

Although Wilmington Chemical Corporation was organized as a corporation, the actual control of the company was entirely in Klehman's hands (Tr. 52, 980). The other corporate officers were

[3] This is the only instance where the examiner has found it necessary to rely on the transcript of the prehearing conference. Respondents, in their Exceptions (pp. 1–2), object to any reliance on that transcript. The question is essentially academic as far as the instant proceeding is concerned, but, in the opinion of the examiner, there is no valid reason why the prehearing record may not be used. Under Rule 3.8(b), the prehearing conference transcript is not a matter of *public* record in the absence of agreement by all the parties, but it is a part of the record of the proceeding and should be available to the deciding and reviewing authorities to the extent necessary (see § 1.133, General Procedures).

[4] Despite the dispute between counsel concerning the operations of other water repellent distributors with which Klehman was formerly connected, the examiner sees no necessity to make findings in that regard. Whether the operations of those other companies were similar or dissimilar to that of Wilmington Chemical Corporation is not dispositive of the issues in the instant proceeding.

employees, hired by Klehman, subject to his direction, and subject to dismissal at his will (Tr. 52). The Board of Directors had little or nothing to do with establishing or controlling the sales practices or policies of the company (Tr. 766–67).

From the latter part of 1961, or the early part of 1962, until about November 1963, the corporation and Klehman were engaged in the manufacture, offering for sale, sale, and distribution of a water repellent product to franchise dealers for resale to the public under the trade name X–33 (Tr. 48, 771–75, 981; CX 20 I-J). The first shipment of X–33 went out in April 1962 (Tr. 48).

In the course and conduct of their business, respondents caused their product, when sold, to be shipped and transported from their place of business in Chicago, Illinois, to purchasers located in various States of the United States. They maintained a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act (Tr. 776).

Sales of X–33 by respondents were substantial, gross sales amounting to approximately $1,500,000 between April 1962 and November 1963 (Tr. 50). Of that total, 90 to 95 percent were sales in interstate commerce (Tr. 50–51).

X–33 was a compound, consisting of 2 percent DuPont Tyzor HS and 98 percent solvent (Tr. 994). It was represented as suitable for use on exteriors, interiors, basements, wood, masonry, and other porous surfaces, as a means of conditioning against water penetration, dampness, freeze-thaw damage, flaking and chipping, erosion from acids or alkalies, staining, and efflorescence (CX 15).

Competition

In the conduct of their business, respondents were in substantial competition, in commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as the X–33 sold by respondents.

Klehman took the position that, because X–33 had certain unique characteristics, his product was not in competition with other water repellent products (Tr. 776–77). The record establishes that Wilmington Chemical Corporation may have been the only company selling a water repellent product formulated from DuPont Tyzor (Tr. 776), but Klehman conceded that there were hundreds of other water repellents on the market (Tr. 777).

Specifically, Klehman has described the two silicone-base water repellent products he formerly sold as "similar" in purpose or

function to X–33, and "in the same general family" (CX 100 E, Tr. 37–38, 40).

Testimony by a DuPont official also indicates that the DuPont Tyzor ingredient in X–33 did not significantly differentiate it from other water repellent compounds using silicones (Remsen 228–30).

Even if X–33 contained a unique ingredient, that would not prevent it from being included in a class of products of the same general kind and nature, and consequently in competition with such products. The argument that respondents were not in competition with others, is rejected.

(Even if the evidence respecting competition should be held insufficient to support a conclusion that respondents' practices constituted "unfair methods of competition," the fact remains that the practices constituted "unfair or deceptive acts or practices in commerce." They are, therefore, subject to Commission interdiction.)

Business Methods

Respondents' method of doing business was in substance as follows:

Respondents contracted with salesmen, designated "franchise managers," to display, demonstrate, and sell X–33. These salesmen were paid no salary, but operated solely on a commission basis. They were furnished samples of the product, sales literature, and various sales tools for demonstrations. They also were furnished contract and order forms (Tr. 805–23).

Customarily, a franchise manager (salesman) made telephone contact with a prospective franchise dealer—usually a person already engaged in some form of retail business. An appointment was made for the franchise manager to see the prospect, to explain the operation, to demonstrate the product, and to negotiate an exclusive franchise agreement to sell X–33 within a specified territory. Usually, the signing of a franchise agreement was accompanied by the execution of an order for a specified quantity of X–33 (Tr. 815). Each franchise manager was authorized to sign the agreement on behalf of Wilmington and to accept orders for X–33 (CX 100 P–Q, Tr. 109).

Sometimes, the merchandise was paid for in cash or by check, or sold on open account, but in the majority of cases, the dealers executed trade acceptances which, on approval of the franchise

agreement by the home office, were discounted to a finance or factoring company (Tr. 815–17, 887–88).

Many—perhaps most—of the salesmen had been trained by Klehman, either while he was president of Wilmington or while he was sales manager of Silmica Corporation of America (CX 100 R-T; Tr. 54–56).

Whether properly denominated "salesmen" or "independent contractors," the franchise managers were authorized representatives or agents of respondents in connection with the negotiation of dealer franchise agreements and the sale of X–33. They had authority to make representations concerning the product and related matters.

Regardless of any professed limitations on their actual authority as agents or representatives of respondents (CX 100 P-Q), they were clothed with at least apparent authority, and dealers were entitled to rely on the representations they made.

(The legal principles underlying these findings, as well as the legal consequences thereof, are set forth *infra,* pp. 905–909.)

Contract Provisions

By signing the franchise agreement (*e.g.,* CX 69), a dealer purportedly signified his understanding and agreement—

1. That the guarantee was a "ten-year material replacement guarantee" (Par. 2).

2. That Wilmington did "NOT UNDERTAKE TO SELL THE MATERIAL FOR THE DEALER, EITHER DIRECTLY OR THROUGH ITS REPRESENTATIVES"; that the dealer was "OBLIGATED TO PAY FOR THE MATERIAL WHEN PAYMENT [was] DUE WHETHER OR NOT THE MATERIAL [was] THEN SOLD"; and that Wilmington's obligations were "limited to the cooperation and facilities specifically set forth in this Franchise Agreement" (Par. 10).

3. That the dealer could make immediate payment, or that he had "the option of paying with 3 negotiable Trade Acceptances, due 30–60–90 days, which Trade Acceptances prior to maturity [were] to bear no interest and [might] be discounted by the Company" (Par. 12).

4. That the contract covered and included "THE ENTIRE AGREEMENT BETWEEN THE PARTIES"; that "no representations or promises other than those expressly contained in this agreement [had] been made to induce the signing of this contract"; and that "Any modification, variation, or enlargement of this agreement, in order to be binding upon the company, [had to] specifi-

cally appear on the face hereof and be initialed by the parties hereto" (Par. 13).

5. That the agreement was "A PURCHASE ORDER AND NOT A CONSIGNMENT"; that "all of the Trade Acceptances referred to above [would] be paid at maturity"; and that "Orders [were] not subject to cancellation" (Par. 14).

6. That the merchandise ordered became the dealer's "property . . . when receipted for by the Transportation Company" (Par. 15).

7. That the dealer had "read this Franchise-Order and . . . agreed to purchase and accept the . . . merchandise . . ." (Par. 16).

8. That if the franchise was not renewed, the dealer had "full rights to solicit and engage negotiations [*sic*] with the new dealer for the purpose of effecting the disposal of remaining merchandise, if any" (Par. 17).

Verification Procedures

Both Klehman and Donald Peterson, respondents' former sales manager, testified concerning the "verification procedures" designed to confirm the arrangements with the dealers. They said that soon after an agreement was sent in, the franchise dealer was called in order to verify all the terms on which the franchise manager had made the sale and to determine at that time whether the order was to be accepted or cancelled (CX 102–C, Tr. 962–66, 1597–1608, 1666–67, 1741–42, 1756–58, 1772–74). If there was a serious misunderstanding on the part of a dealer that couldn't be worked out, the contract was cancelled (Tr. 964–66, 1603).

That there *were* follow-up calls, with a substantial number of cancellations resulting, is established by the record. But there also is evidence indicating that, in large measure, the calls constituted window-dressing, an attempt to forestall a charge that respondents were reaping the fruits of the salesmen's misrepresentations. The verification sheets in evidence (RXs 37–57) confirm only that calls were made, not the substance of the conversations.

The testimony of the dealer-witnesses suggests that the verification call did not involve the careful, detailed interrogation and explanation indicated by the testimony of Klehman and Peterson.

Several dealers said the call amounted to little more than congratulating or thanking them as new dealers (Lovett 298–99, Skewis 352–53 [" . . . just a few words, it wasn't much"], Goldsmith 558, Mathweg 611, Schmitz 670, Juday 712, 720). Others

referred to the call as constituting a "welcome to the club" (Fitch 483–84) or to the "family" (Meier 741); see also Bass 438. Neil described the call as "Just a goodwill call . . . public relations" (Tr. 451–53). Only Kruse indicated the call was to verify the order and to check out the terms (Tr. 519). See also Frederking 544 (call specified the date of shipment and urged submittal of a list of prospects). Warnock could remember no details of the call (Tr. 641–42).

The picture that emerges hardly supports respondents' attempted justification that Wilmington "took all possible precautions . . ." (RPF, p. 5).

Discontinuance of Business

Wilmington Chemical Corporation went out of business in October or November 1963. It now has no employees and no so-called franchise managers. Although admitting that he still is president, Klehman said that the corporation otherwise has no officers and no bank account (Tr. 1815).

The corporation went out of business "because of the action of the Food and Drug Administration"—seizures, confiscations, and press releases that resulted in damaging publicity (Tr. 1816). The " . . . Food and Drug Administration was just grabbing all the merchandise all over the country and it was impossible to continue under those circumstances" (Tr. 1079).

The FDA action, under the Federal Hazardous Substances Labeling Act, was prompted by reports of deaths and injuries resulting from flash explosions of X–33. A press release of August 30, 1964 (RX 172 S–T), attributed three deaths and over 30 injuries to X–33. The same press release stated further that the Government had seized almost 500 shipments of X–33.

Dun and Bradstreet issued a "very stringent report," and the Better Business Bureau issued a report relating the actions of the Food and Drug Administration.

As a result, Wilmington lost its credit with the banks and finance companies. Its salesmen could not make sales, so they quit (Tr. 1816–17; see also Peterson 1660–62). Suppliers refused to deliver raw materials.

Wilmington's losses were severe, and its capital was destroyed. It was left with uncollectable accounts receivable. In terms of dollar volume, the loss was something like half a million dollars (Tr. 1818).

According to Klehman, there was nothing for Wilmington to do but to go out of business (Tr. 1817).

Regarding the future, Klehman testified:

> I had no intention of ever resuming at that time, have no intention at the present time of resuming it. I have no intention in the future of resuming it. The circumstances were such that it made it absolutely impossible to continue without any question whatsoever. (Tr. 1817)

Wilmington has been kept alive, according to Klehman, because some 900 dealers have joined with it as co-plaintiffs in a suit against Shell Oil Company relating to the danger of the Shell solvent that was used (Tr. 1817–18).

Color Deep Corporation

Klehman also is president of Color Deep Corporation (sometimes referred to as Color Deep), which was organized between September 1961 and November 1963 (Tr. 33, 1096–97). Color Deep manufactured and sold a product similar to X–33. The Color Deep product was a water repellent and came in various colors, as distinguished from X–33, which was a clear liquid (Tr. 34). The Color Deep product was sold in essentially the same manner as X–33 (Tr. 34–35).

Color Deep has been inactive since about May or June 1964 (Tr. 35–36, 1826–27).

Color Deep was adversely affected by the Food and Drug action against Wilmington Chemical Corporation (Tr. 1828), but it continued to make sales out of inventory subsequent to the autumn of 1963 (Tr. 1829).

Color Deep has joined with Wilmington Chemical in the suit against Shell. That is the reason, according to Klehman, why it still is in existence as a corporation (Tr. 1839–40).

At the time of trial, Klehman testified that he had no other active business connections (Tr. 35).

II. The Challenged Representations

Summary Findings

On the basis of his consideration of the testimony and other evidence, the examiner finds that by oral representations made by sales representatives, or by published advertising and promotional literature, or by both,[5] respondents represented, directly and by implication—

[5] Certain problems that arise as a result of the complaint's pleading regarding the nature of the representations made are discussed *infra*, pp. 845–846, 860–861.

1. That the corporate respondent was a subsidiary of, a division of, an exclusive licensee of, or otherwise affiliated with, E. I. duPont de Nemours & Company (sometimes abbreviated "DuPont"); or that X–33, the product sold by the respondents, was manufactured, developed, or tested by DuPont.

2. That X–33, the product sold by the respondents, was unconditionally guaranteed for ten years.

3. That franchise dealers would realize profits of varying amounts from $2,000 to $15,000 per year, or profits at the rate of $8,559 per 1,000 population of a trade area, from the resale of respondents' products.[6]

4. That the franchise might be cancelled by the dealer at any time and that any unsold quantities of respondents' product would be picked up or transferred to another dealer or that a refund would be made for any of respondents' product unsold.

5. That the supply of respondents' product purchased by the dealer would be sold out before the payments on the trade acceptances became due.[7]

6. That X–33 was successfully tested by DuPont, by the corporate respondent, or by an independent testing laboratory before being marketed.

7. That X–33 was a waterproof product or had waterproofing properties.[8]

8. That X–33 was suitable for use on silos and would prevent spoilage.

9. That any trade acceptances given in payment for X–33 would be retained by the corporate respondent and would not be sold to, or discounted by, a third person.

It is further found that there is no proof to support the charge that respondents represented "That the corporate respondent is an old established firm with many years of experience in manufacturing paint."

Regarding each of the foregoing representations, the examiner finds the facts as follows:

1. The corporate respondent is not a subsidiary, affiliate, division, or exclusive licensee of E. I. duPont de Nemours & Company. On the contrary, the sole connection between the corporate respondent and DuPont was that one of the ingredients of X–33

[6] Par. Six (3) of the complaint alleged representations of "varying amounts up to $25,000 per year."

[7] Par. Six (5) alleged that the representation related to a sell-out "before the first payment" was due.

[8] See *infra*, pp. 878–879.

(known by the trade name "Tyzor HS") was manufactured by DuPont and purchased from it by the respondents. Respondents had permission to state in their advertising and on their labels that X–33 contained Tyzor HS manufactured by DuPont.

Although there is testimony that certain personnel of DuPont, as individuals, advised and collaborated with Klehman in the formulation of X–33 and engaged in some experimental testing, the evidence does not support a finding that X–33 was manufactured, developed, or tested by the DuPont Company.

X–33 was manufactured under the direction and control of the respondents and contained DuPont's "Tyzor HS" in combination with other ingredients not manufactured by DuPont.

2. X–33, the product manufactured and sold by respondents, was not unconditionally guaranteed for ten years or any other period of time. On the contrary, the only guarantee issued by the respondents to consumers was to the effect that should a leak appear where X–33 had been applied, the X–33 would be replaced any time within ten years, provided the X–33 was applied in accordance with the company's directions. The guarantee specifically provided that it did not cover labor replacement costs.

3. Franchise dealers generally did not earn from $2,000 to $15,000 a year, or realize profits at the rate of $8,559 per 1,000 population. In some cases, they made no profit at all.

4. Although there is evidence that a substantial number of contracts were cancelled before their formal acceptance by the respondents, no cancellation of a contract was permitted once the order was shipped. The respondents did not pick up any unsold quantities of X–33 or transfer them to another dealer, nor did they make any refund to the franchise dealers for unsold merchandise.

5. The supply of X–33 purchased by the franchise dealers was not usually sold before the trade acceptances fell due, but, on the contrary, in many cases, the dealers were unable to make any substantial sales at all.

6. Neither DuPont, nor the corporate respondent, nor any independent testing laboratory had appropriately tested the product X–33 to determine its effectiveness for its intended uses, either before the product was marketed or at any time. On the basis of the evidence presented, the finding is that X–33 was not subjected to any tests so devised or so conducted as to constitute a creditable basis for the representations made.

7. X–33 was not a waterproof product, nor did it have waterproofing properties, but was merely a water repellent.[9]

8. X–33 was not a sealer and did not close the pores in the material to which it was applied. Therefore, it was not suitable for use in making silos airtight.[10]

9. Any trade acceptances given in payment for X–33 were immediately sold to, or discounted by, a third party who became a holder in due course.

In view of the finding that there was failure of proof concerning any representation that the corporate respondent was an old established firm with many years of experience in manufacturing paint, there is no occasion for a related finding here.

The Evidence

We turn now to a consideration of the evidence that supports the Summary Findings concerning the representations alleged in Paragraph Six and challenged as false, misleading, and deceptive in Paragraph Seven of the complaint. Each subject will be considered in the sequence of the numbered sub-paragraphs of Paragraphs Six and Seven of the complaint.

Respondents indulge in an over-simplification when they contend that the case in support of the complaint is "based almost entirely upon the testimony of some 21 dealer witnesses." (RPF, p. 1) Obviously, the dealer testimony is important, but in view of the Government's documentary evidence, together with the testimony of Klehman and other evidence offered by respondents, corroborating and supplementing the dealer testimony, it is too much to say that the Government's case "must stand or fall based upon the credibility and probative value to be accorded" the testimony of the dealer-witnesses (RPF, p. 2).[11]

Before discussing the subsidiary facts leading to the ultimate facts just found, some explanation should be made regarding the use of documentary evidence to support many of those findings.

Although Paragraph Six of the complaint refers only to statements and representations made by respondents' salesmen, Government counsel, in their Proposed Findings, have relied also on

[9] See *infra*, pp. 878–879.

[10] Although this finding is made substantially in the language of the complaint (Par. Seven (8)), the conclusion of the hearing examiner is that this does not contravene the representation in the complaint (Par. Six (8)) that X–33 was suitable for use on silos and would prevent spoilage. This is more fully discussed subsequently.

[11] As a convenient reference, the Appendix contains a tabulation listing the dealer-witnesses and showing other relevant data concerning them. For comment on their credibility, etc., see *infra*, pp. 893–894.

advertising and promotional literature admittedly used by respondents, and the examiner likewise has relied on such published advertising and promotional literature.

Respondents have made no point of this technical variance, but the examiner has given it consideration. In his opinion, the technical deficiency is cured by the fact that in Paragraph Eight of the complaint, a broader reference is made to the "use by the respondents" of the allegedly false and deceptive representations.

At any rate, consideration of the published advertising is authorized by Rule 3.7 (a) (2), providing that "When issues not raised by the pleadings but reasonably within the scope of the proceeding initiated by the original complaint are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings . . . ."

In the opinion of the exaiminer, the representations made in published advertising constitute an issue "reasonably within the scope of the proceeding." The fact that the record is replete with such published material, much of it received without objection by respondents, confirms that the truth or falsity of those published representations is an issue that was "tried by express or implied consent of the parties."

Analysis Regarding Each Charge

I. Connection with DuPont

Analysis of the dealer testimony shows that there were, of course, variations in the approaches made by the salesmen. However, a number of similarities appear in the testimony of various of the dealers, so that we can classify the various types of representations made.

The representations made or impressions created by the salesmen emerge as several different themes common to two or more of the dealers. In the following analysis, each such theme is numbered with a Roman numeral and followed by a sampling of the dealer testimony; each paragraph begins with the name of the dealer and shows in parentheses the name of the salesman.

Theme I. Dealer thought he was dealing with DuPont because of the emphasis placed on DuPont by the salesman, together with the implications and innuendoes of the salesmen.

Huffstutter (Russell): ". . . conversation . . . strictly . . . around DuPont. . . . very emphatic. . . . I thought we were dealing with DuPont. The impression was that strong. . . . the main thing that he kept hammer-

ing, was DuPont." (Tr. 357–58) "DuPont was the conversation." (Tr. 366) "The word 'DuPont' was in the conversation constantly." (Tr. 378)

Neil (Edwards): Salesman "intimated" that Wilmington Chemical was a DuPont subsidiary (Tr. 449).

Fitch (Edwards): Salesman "completely tied it up as a DuPont product" (Tr. 474). I thought it was a DuPont product as a whole." (Tr. 477)

Kruse (Edwards): ". . . somehow or other DuPont had something to do with making this X–33. . . ." (Tr. 511)

Jahnke (Hoehl): Had the impression that Wilmington Chemical was a DuPont subsidiary because of "the salesman's talking about the product made by DuPont in it, and also his insinuation. . . ." (Tr. 559)

Schmitz (Hoehl): ". . . led to believe that DuPont was manufacturing it. . . ." (Tr. 665) ". . . DuPont was definitely in the conversation." (Tr. 666; see also Tr. 675)

Juday (Lightcap): ". . . . every indication that I was dealing with practically the DuPont Company." (Tr. 689; see also Tr. 715) ". . . he insinuated in every way that it was the DuPont Company." (Tr. 707)

Theme II. Dealer was led to believe that Wilmington Chemical was a subsidiary of DuPont or at least a company operating on DuPont's behalf or marketing the item for DuPont.

Huffstutter (Russell): ". . . under the impression that we were almost dealing with DuPont, but through a company that was operating for them." (Tr. 366) ". . . led to believe that Wilmington was marketing this item for DuPont." (Tr. 367; see also Tr. 375)

Bass (Edwards): ". . . was represented to me as being a subsidiary of DuPont." (Tr. 415; see also Tr. 426)

Neil (Edwards): Salesman "intimated" that Wilmington Chemical was a DuPont subsidiary (Tr. 449; see also Tr. 454). ". . . by intimation, I had the feeling that DuPont was behind it 100 percent." (Tr. 450) Salesman "made the statement that they were licensed formulators for DuPont's Tyzor. . . ." (Tr. 448; see also Tr. 452)

Forsberg (Edwards): Salesman said DuPont was "in charge of it . . . really behind the whole thing. . . ." (Tr. 465)

Fitch (Edwards): Had "impression" that "Wilmington was set up as a part of DuPont." (Tr. 484–86)

Kruse (Edwards): He was told that X–33 "was made by someone else as I recall, and I think it was DuPont. And that this company was selling it. . . . This Wilmington Chemical Company." (Tr. 512)

Frederking (Visser): Salesman told him that DuPont scientists perfected X–33, but ". . . could not manufacture it . . . ." "That is why Wilmington Chemical is taking this on." (Tr. 541)

Jahnke (Hoehl): Salesman said X–33 "was a DuPont product, and they were a subsidiary of DuPont." (Tr. 592; see also Tr. 590, 596–97)

Mathweg (Livingston): Salesman claimed that DuPont "couldn't dispose of it through their own channels so it was disposed of through their corporation, the Wilmington Corporation." (Tr. 605)[12]

[12] Despite the positiveness of this statement by Mathweg, he later made a contradictory statement that was never cleared up. That, presumably, is the reason Government counsel do

Juday (Lightcap): Salesman said, ". . . you are dealing with the DuPont Company." (Tr. 690) Wilmington was represented as "an independent company . . . wholly owned by DuPont." (Tr. 707)

Theme III. Dealer thought DuPont was a backer or underwriter of Wilmington Chemical or the product X–33.

Gellhaus (Hoehl): Salesman led him to believe that DuPont was a "backer" or "underwriter" of X–33—that "they approved of it . . . had tested it and went along with it." (Tr. 405–06)

Neil (Edwards): ". . . so, by intimation, I had the feeling that DuPont was behind it 100 percent." (Tr. 450)

Forsberg (Edwards): Salesman said DuPont was "in charge of it . . . really behind the whole thing. . . ." (Tr. 465)

Frederking (Visser): Salesman said DuPont scientists perfected X–33 but ". . . could not manufacture it. . . . That is why Wilmington Chemical is taking this on." (Tr. 541)

VandeNoord (Edwards): Salesman said that X–33 ". . . was a formula of DuPont" (Tr. 568), and had been tested by DuPont (Tr. 570).

Schmitz (Hoehl): Salesman represented that X–33 had been tested by DuPont and led Schmitz to believe "that DuPont was manufacturing it. . ." (Tr. 665).

Theme IV. Salesman said the relationship between Wilmington Chemical and DuPont could not be publicly stated because of the anti-trust laws or other Government restrictions.

Bass (Edwards): Salesman said the fact that Wilmington was a subsidiary of DuPont was ". . . not stated so in the contract because of Anti-trust laws and this sort of thing." (Tr. 415–16)

Neil (Edwards): Salesman said, "We have to be careful about those things on account of anti-trust laws and so forth. . ." (Tr. 449).

Forsberg (Edwards): Salesman said that the fact of the DuPont connection was "off the record, we can't put it in writing. . ." (Tr. 465).

Fitch (Edwards): Salesman represented that X–33 ". . . was a DuPont product but they didn't want to tell it to the public as such because of anti-trust laws and I don't know some legal rigamarole he claimed there was." (Tr. 477) Salesman explained DuPont ". . . couldn't put their name on there as such because of the anti-trust laws." (Tr. 485; see also Tr. 474)

Frederking (Visser): Salesman said DuPont couldn't manufacture X–33 because "the Government would not let them" for the same reason that General Motors couldn't "take on any more stuff." (Tr. 541)

Mathweg (Livingston): Salesman said that because ". . . DuPont was a large company, the Government had certain holds that they couldn't dispose of it [X–33] through their own channels. . . ." (Tr. 605) [13]

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not rely on his testimony in support of GPF 12. When Mathweg was asked whether the salesman stated that there was any connection between Wilmington and DuPont, he replied: "No, I don't believe he did. He just claimed that they bought the Tyzor from DuPont and, therefore, they were selling it." (Tr. 605) As a result of this contradiction, the testimony is weakened, but it still has corroborative value.

[13] See footnote, *supra*, p. 847.

Juday (Lightcap): Salesman said, "You know how the government is on DuPont for Anti-Trust violations. . . ." (Tr. 690)

Theme V. Miscellaneous representations concerning DuPont affiliation, including claim that DuPont had tested and approved X–33.

Gellhaus (Hoehl): Salesman led him to believe that DuPont had "tested" and "approved" X–33 (Tr. 406). Salesman said respondents "were licensed formulators for DuPont's Tyzor, that they were the only ones to meet [make?] it and, of course, it was an exclusive product and handled only on an exclusive franchise basis. . . ." (Tr. 448; see also Tr. 452)

VandeNoord (Edwards): Salesman said X–33 "was a formula of DuPont" (Tr. 568–69) and had been tested by DuPont (Tr. 570).

Warnock (Hoehl): Salesman said DuPont had tested X–33 (Tr. 635).

Leach (Draus): Salesman told Leach that the product was "formulated by DuPont" and referred to it as DuPont's Tyzor, not X–33 (Tr. 655).

Schmitz (Hoehl): Salesman represented that X–33 had been tested by DuPont and led him to believe that DuPont was manufacturing it (Tr. 665).

Juday (Lightcap): Wilmington Chemical represented as "a separate corporation . . . licensed by the DuPont Company." (Tr. 690–714)

Theme VI. The DuPont name on the label of the can made the representations regarding DuPont affiliation more convincing.

Bass (Edwards): DuPont name on the label of the can was "very convincing" (Tr. 416). Salesman emphasized DuPont name on the label (Tr. 449).

Forsberg (Edwards): DuPont name is ". . . what sold me on the product." (Tr. 464)

Fitch (Edwards): Label on can "is laid out so DuPont stands out like a ten dollar bill." (Tr. 486–87)

Jahnke (Hoehl): The name "DuPont upon the can" enhanced the impression that Wilmington Chemical was a DuPont subsidiary (Tr. 599).

Juday (Lightcap): ". . . every indication that I was dealing with practically the DuPont Company. . . . This was DuPont on a rather large . . . label. . . ." (Tr. 689–90)

Theme VII. The word Wilmington in the corporate name, when tied up with Wilmington, Delaware, as DuPont's headquarters, enhanced the representation of DuPont affiliation.

Bass (Edwards): Salesman said, "We have taken the name Wilmington which naturally you associate with DuPont at Wilmington, Delaware." (Tr. 416)

Neil (Edwards): Reference made to Wilmington, Delaware, as DuPont's headquarters (Tr. 449).

Fitch (Edwards): "That is where they got the name because DuPont is in Wilmington." (Tr. 484)

Juday (Lightcap): When Juday asked if the corporate name had any con-

nection with Wilmington, Illinois, salesman told him, ". . . you don't read between the lines very well. . . . What I have been trying to tell you is that you are dealing with the DuPont Company. They got the name of 'Wilmington' from Wilmington, Del[a]ware." (Tr. 690)

Three dealer-witnesses did not testify concerning representations made to them about the relationship between Wilmington Chemical and DuPont. Three others did mention the subject, but their testimony fails to support the charge.

Government counsel started to inquire of the witness Lovett on this matter (Tr. 278), but, after objection, withdrew the question (Tr. 279; see RPF, p. 7; *cf.* Reply, p. 8).

The dealer Sievert was not interrogated on this point; neither was Goldsmith.

Nothing actionable appears in the testimony of Neff (Tr. 321–22), Skewis (Tr. 344), or Meier (Tr. 374).

Although a further analysis of the dealer testimony regarding DuPont shows that a more representative sampling of salesmen's representations might have been presented, it also demonstrates a pattern that warrants this proceeding against respondents.

A review of the data presented under the theme headings, *supra*, shows that one or two salesmen were worse offenders than others, but it also clearly indicates that the representations testified to were not merely isolated derelictions on the part of a few salesmen but were part of a pattern of deception.

It will be observed that the testimony of several of the dealers appears under more than one theme heading. Occasionally, there is a measure of inconsistency in their understanding of the relationship between Wilmington Chemical and DuPont. For example, Juday testified that Wilmington was a subsidiary of DuPont, an independent company licensed by DuPont, and a company marketing X–33 for DuPont. That apparent inconsistency does not indicate that Juday was mistaken, but rather it emphasizes the skillful technique of the salesman in creating a general impression of an affiliation with DuPont without being too specific. It demonstrates also the use of innuendo and a technique of asking questions and making statements that lead the customer to draw the wrong conclusion.

In addition, this record provides a classic example of presenting the truth in a deceptive manner or using the truth to reinforce a misleading representation.

Listen, for example, to the dealer Neil:

I asked him if Wilmington Chemical was a subsidiary of DuPont or if DuPont owned it and he intimated that it was.

He said, "What do you see on the label?"
I said, "DuPont."
And he says, "Of course, you know where they are located."
I said, "Yes, Wilmington, Delaware."
And he said for—"We have to be careful about those things on account of anti-trust laws and so forth, you read a lot about that in the papers and you understand that."
And I—so, by intimation, I had the feeling that DuPont was behind it 100 percent. (Tr. 449–50)

The testimony of Forsberg also is illuminating. Here is an excerpt:

Q. Was DuPont ever mentioned in your conversation?
A. Yes, right.
Of course, the man told me, he said—now, in fact, that's what sold me on the product. He showed me the sample can he had and in big black—I don't remember whether it was black, it was black background, I believe, I believe it was white letters or the other way around, I don't remember, but, right away I says, "Is it a DuPont product?"
Well, he said, "It's—it has some stuff in it that is derived from DuPont products."

* * * * * * *

Q. Well, was anything further said about DuPont, though?
A. Well, he said it is off the record, we can't put it in writing but he says they're in charge of it.
He says they're really behind the whole thing, he says. (Tr. 464–65)

In the case of Juday, the salesman used the technique of imparting confidential information. If Juday repeated what he had been told about the DuPont affiliation, the salesman said he would deny it (Tr. 690; see also Skewis 344, and Forsberg 465).

In their cross-examination of the dealer-witnesses and in their Proposed Findings, respondents have sought to show that the salesmen simply made the truthful representation that X–33 contained DuPont Tyzor. They can point to isolated testimony that tends to support that contention. For example, the redirect examination of Huffstutter (Tr. 378), standing alone, is cited (RPF, p. 8) as showing that the representations connecting DuPont with X–33 did not "go any further than just the Tyzor component." The answer there must be assessed, however, in the context of the entire testimony, including the statement of the witness that "The word 'DuPont' was in the conversation constantly"—and not always in reference to the Tyzor ingredient (Tr. 378).

Regarding Huffstutter, respondents complain (RPF, p. 8) that his damaging testimony concerning the representations as to Du-

Pont affiliation was elicited by a leading question. The record (Tr. 357) shows not only that the question was not objectionably leading, but that respondents did not object. (For further comment regarding leading questions, see *infra*, p. 896.)

In summary, the net effect of all this testimony inevitably leads to the conclusion that the salesmen represented that there was a relationship between Wilmington Chemical and DuPont extending beyond the mere fact that X–33 contained DuPont Tyzor.

That representations had been made elsewhere concerning a connection between Wilmington Chemical and DuPont was confirmed by other witnesses.

John Madsen, vice-president of the Better Business Bureau of Metropolitan Chicago, Inc., testified that his office had received inquiries involving "allegations that representatives of Wilmington Chemical Corporation were in some way alluding to the fact that there may have been a tie-in between DuPont and Wilmington." (Tr. 1200–01) These inquiries were received from various parts of the country, including Savannah, Georgia; El Paso, Texas; Lansing, Michigan; and two cities in Illinois (Tr. 1201).

Two officials of the Chicago District Sales Office of DuPont testified that their office had received telephone inquiries from members of the public about X–33 and the relationship between Wilmington Chemical and DuPont (Shackelford 188; Remsen 208). The general nature of these inquiries was whether X–33 was a DuPont product, whether there was a connection between Wilmington Chemical and DuPont, whether DuPont stood behind the product, and whether DuPont stood behind the guarantees for the product (Remsen 209–10).

The Madsen, Shackelford, and Remsen testimony on the inquiries they received is of value primarily as corroborative of the dealer testimony, but it also tends to rebut respondents' contention that the dealer testimony was not fairly representative.

So much for the representations made by the salesmen. Now let us look at the facts regarding the relationship with DuPont.

No Affiliation with DuPont

At the outset, some insight is provided by Klehman's explanation of why he named his corporation the Wilmington Chemical Corporation. He chose that name "Because of the fact that the material which made it work came from Wilmington, Delaware, which was the Tyzor," and he wanted to identify his product and his company with DuPont (CX 102 M).

Despite Klehman's contention that there was more of a relationship between his company and DuPont than that of simply supplier and customer, there is little or no real dispute regarding the basic facts on this point.

The record establishes (1) that Wilmington Chemical is not a subsidiary, affiliate, division, or exclusive licensee of DuPont; (2) that DuPont simply manufactured one of the ingredients of X–33; and (3) that respondents were authorized by DuPont to state in their advertising and on their labels that X–33 contained Tyzor HS, manufactured by DuPont.

The only questions concerning which there is any genuine dispute relate to the role of DuPont in formulating or developing X–33 and in testing it.

Klehman conceded that Wilmington Chemical Corporation was neither a subsidiary, nor a division, nor an affiliate of DuPont (Tr. 828, 831).

The examiner rejects as tenuous the contention that Wilmington was a "licensee" of DuPont in that Wilmington was given permission to use the DuPont name in the labeling and advertising of X–33 (Tr. 832), and that it was an "exclusive" licensee because Wilmington was the only purchaser of DuPont Tyzor HS (Tr. 832–33).

There is no contention that DuPont manufactured anything but the Tyzor ingredient. Klehman conceded that X–33 was manufactured by Empire Oil and Chemical Company under a contract with respondents (Tr. 1037).

The record indicates (Tr. 170–72, 1040, 1302–12) that all salesmen were given a memorandum (CX 28) in which they were "instructed *never, never* to state that Wilmington Chemical Corporation is a subsidiary of the duPont Corporation, an affiliate or has any other relationship with E. I. duPont deNemours and Company, except as a formulator of our basic raw material which is Tyzor." They were further told "*never, never* to state that we have an exclusive license from duPont." [14]

The testimony of Klehman, together with CX 28, effectively disposes of any claim of a formal affiliation with DuPont. To round out the picture, however, brief reference is made to the testimony of Francis L. Shackelford, District Sales Manager for DuPont in Chicago, and John M. Remsen, Assistant Manager of the same office.

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[14] Compare the reference to the antitrust laws in CX 28 with the twist placed on it by the salesmen, *supra*.

Shackelford testified specifically that to the best of his knowledge, there was no relationship between the two companies "other than that of supplier and customer." (Tr. 188) DuPont simply sold to Wilmington Chemical an organic titanate called Tyzor HS (Tr. 188).

Shackelford did confirm that DuPont gave Wilmington Chemical qualified permission to show on the label of its container that X–33 contained DuPont Tyzor. With the approval of DuPont headquarters, Shackelford's assistant, Remsen, approved the label that eventually was used on the can (Tr. 204–06, 217).

The testimony of Shackelford's assistant, Remsen, confirms that Tyzor HS was not sold to anyone except Wilmington Chemical (Tr. 213). But this was only because DuPont had no other buyers, not because of any restrictive agreement (Tr. 221–22).

Although Remsen received and "casually" reviewed literature that Wilmington Chemical submitted (Tr. 217–18), neither he nor anyone else in DuPont "approved" any literature of Wilmington Chemical (Tr. 220).

Development and Testing of X–33

We are left, then, with the questions (1) whether DuPont developed or formulated X–33 and (2) whether DuPont tested X–33. Because of the inter-relation between the two questions, they will be treated together.

Under questioning as a Government witness, Klehman insisted that DuPont "formulated X–33" (Tr. 835). According to Klehman, DuPont specified "what the formulation should be in chemical terms" and indicated the "constituent parts of X–33" (Tr. 840–41). Klehman stated that DuPont specified the solvent that was to be used (Tr. 841–42). Yet, when he was asked if DuPont developed X–33, he replied that he "never said any such thing" and complained that Government counsel was "putting words in [his] mouth" (Tr. 840).

His answers on cross-examination were not altogether consistent with his earlier testimony. When he was asked who developed and formulated X–33 (Tr. 1031), he stated only that "quite a number of people" were involved, primarily from DuPont and Shell (Tr. 1031–32). Contrary to his earlier testimony (Tr. 841–42), he said DuPont personnel recommended a formulation of 2 percent Tyzor (Tr. 1032), *while Shell recommended the solvent* (Tr. 1032–35).

In deposition testimony in connection with private litigation,

Klehman had disclaimed credit for originating the X–33 formula (CX 100 F), attributing its development to "people" from DuPont and Shell (CX 100 G).[15] Specifically, he mentioned only Robert Moyer, Dr. K. C. Johnson, and William Brockett, all of DuPont (CX 100 G–H).

Klehman was then asked: "Would it have been on the recommendation and counsel of the three gentlemen that you have named that you entered into the formula of your product, X–33?" (CX 100 I)

Klehman answered: "Yes and no. Yes if the question is put in a general way and no if it's put in an extremely specific way, that's the best way I can answer it." (CX 100 I)

Again, this detracts from, if it doesn't contradict, his testimony (Tr. 835–42) that DuPont "formulated X–33."

In view of the temperament displayed on the witness stand, Klehman's modesty concerning the credit for the formulation of X–33 is somewhat surprising.[16] Statements of this nature must be assessed, however, in light of the fact that respondents are involved in litigation, both as plaintiffs and defendents, in connection with responsibility for the formulation of X–33—a product that turned out to be extremely hazardous. The two companies at which Klehman now points the finger are among the nation's largest corporations, with correspondingly deep pockets.

On the subject of testing, Klehman testified that X–33 was tested by DuPont on several occasions (Tr. 842, 1035–36). He said such tests were run about eight months before production and sale of X–33 began and continued at "irregular intervals" after that time (Tr. 1036; see also CX 102 M). Klehman indicated that he had received laboratory reports and other correspondence from DuPont evidencing such testing (Tr. 842–43).

However, the record contains only two such reports, one produced by Government counsel, the other by respondents. Neither qualifies as proof of testing by DuPont within the meaning of the representations made.

One of the documents is CX 99 A–B. This hardly can be called a test report on X–33 within the sense of the representations we are concerned with. It deals with the submittal by DuPont of "laboratory formulas" for coloring X–33. Klehman testified that

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[15] The questioning suggests the existence of earlier testimony in which Klehman *had* claimed credit (CX 100 F), but no such statement is in this record.

[16] See RX 21 A, a letter in which Klehman referred to ". . . my plans for formulating . . . Tyzor H–S as a waterproofing material."

CX 99 A–B was not the only test report received from DuPont (Tr. 842–47, 891–94).

But the only other documents remotely resembling DuPont test reports are RX 171 A–C. These documents indicate some laboratory work by DuPont in response to questions posed by Klehman regarding Tyzor HS (RX 171 A). The report itself (RX 171 B–C) deals only with Tyzor HS. The exhibit is not a test report on X–33.

The only other documentation respecting testing that may appear to involve DuPont is a letter dated August 28, 1961, from Moyer to Klehman (RX 12 A–B). It is primarily devoted to advising Klehman how the DuPont name and trademark might be used by him in advertising and labeling. However, the letter concludes by stating that Moyer's "own work in the laboratory indicated that by hand stirring it was possible to dissolve 2% [Tyzor HS] in Stoddard Solvent." He promised to "repeat the test" when he received the sample of Shell Sol B.

Experiments involving "hand stirring" hardly qualify as tests of the effectiveness of X–33.

Incidentally, this letter (RX 12 A–B) contains a warning that "The [DuPont] trademark should not be used in a way that the DuPont Company appears to endorse your product or that the DuPont Company is responsible for the quality of your end product."

Moyer signed as Sales Supervisor of the Dyes and Chemicals Division (RX 12 A–B).

In asserting that X–33 was tested before it was placed on the market in April 1962 (Tr. 872), Klehman said Moyer was among those making such tests (Tr. 873–76, 990–94). Moyer had the title of sales supervisor (Tr. 881; RX 12 A–B). Klehman believed Moyer was a chemist (Tr. 881–82), but the record contains no proof that he was. DuPont's "office and laboratory" at Clifton, New Jersey, was identified as the locale of much of the testing (Tr. 994; CX 100 K–L).

It was Moyer who called Klehman's attention to Tyzor HS (Tr. 873). Moyer also arranged for Shell Oil Company to provide a solvent so that he " . . . could formulate what subsequently became known as X–33." (Tr. 873–74)

According to Klehman, the test run by Moyer was designed to "see how, what subsequently became known as X–33 would work on masonry and other porous surfaces." (Tr. 874) The test was designed in part to find a solvent which would dry more quickly

than the solvent that Klehman had been using, but there "were multiple purposes involved . . . ." Tests were run with different solvents (Tr. 874–75).

Klehman's testimony was to the effect that he and Moyer ran tests on Kleenex, paper towels, cement blocks, a brick wall, a cement walk, several different types of wood, including plywood, textiles, leather, asbestos shingles, and roofing material (Tr. 875). Klehman further indicated that Moyer tested the product on a basement wall (Tr. 875). He said other tests were run to determine the degree of permanency that would be afforded by the product (Tr. 876).

Moyer supposedly arranged for tests of X–33 by one or more independent laboratories for the purpose of evaluating X–33 (Tr. 882–83). But no reports of any such tests were produced, and the laboratories were not identified.

On "cross-examination" by defense counsel, Klehman further developed the extent and nature of his contacts and conferences with DuPont representatives. Besides Moyer, he mentioned Dr. K. C. Johnson, William Brockett, William White, Jack Remsen and Mr. Shackelford (Tr. 986). There were others whose names he did not remember (Tr. 987).

Recounting his initial contact with Moyer in his search for a water repellent product superior to silicones (Tr. 987–88), Klehman said that he obtained a sample of the DuPont product (presumably Tyzor HS), mixed it with a solvent and ran some tests—"beautiful, wonderful tests, much superior to the silicones" that he had been using for several years (Tr. 987–88).

Klehman testified that Dr. Johnson and Brockett ultimately recommended a weighted formulation of 2 percent Tyzor and 98 percent solvent (Tr. 994; see also Tr. 988–90).

Once the proper solvent was obtained from Shell Oil Company, tests run by Moyer and himself "were extraordinarily good," according to Klehman, and he was satisfied (Tr. 993–95).

Some supplementation of Klehman's testimony regarding early testing and development is found in his depositions taken in connection with private litigation (CXs 100–102). He was present at some of the Clifton laboratory tests, but some were carried on in his absence (CX 100 L). He described one test as involving application of X–33 to a piece of Kleenex. Placing the treated Kleenex over a glass of water, he inverted the glass, and determined whether the Kleenex held back the water (CX 100 L; cf. CX 22C).

In addition to listing the various materials on which the product was used, Klehman said it was tested both indoors and outdoors and in varying temperatures (CX 100 M).

Klehman's deposition testimony suggests that the tests to which he referred were more in the nature of sales demonstration gimmicks [17] rather than actual scientific testing (CX 102 P). The colloquy is as follows:

> Q. These Kleenex tests and brick tests and so forth that you made at Clifton, New Jersey, who conceived of that method of testing? Were those your ideas?
>
> A. Well, you must remember, I was a salesman in the field for about three years. *Now I had a list of things that we call demonstrations which is the same thing as test.* Some of them I devised; some other salesmen devised, and I learned about. (CX 102 P; emphasis added)

In support of their contention that there was no misrepresentation of respondents' relationship with DuPont, respondents cite RXs 15, 21, and 22 (RPF, pp. 15, 23).

RX 15 is simply a DuPont information bulletin relating to Tyzor HS in which the statement is made that it "can be used as a masonry water repellent and sealer when diluted and applied from a solvent."

RX 21 A–B is a copy of a letter dated April 18, 1962, from Klehman to Brockett reviewing developments and confirming Klehman's understanding regarding respondents' use of the DuPont name. This exhibit, although obviously self-serving, does tend to confirm some of Klehman's testimony. But it also suggests that Klehman was the originator of the idea of formulating Tyzor HS "as a waterproofing material." And it contradicts Klehman's present claim that DuPont specified the formula for X–33, including the solvent (Tr. 835–42).

Although the testimony of DuPont's Shackelford and Remsen was positive on the lack of more than a supplier-customer relationship between their company and Wilmington Chemical, it was more equivocal on the subject of testing. Its purport was simply that if DuPont personnel had tested X–33, they would have known about it, but they were aware of no such testing. They conceded that they might not have been advised of testing, etc., that took place before respondents began operations in Chicago. (Tr. 185–87, 193–97, 199, 203, 208)

Concerning the DuPont personnel named by Klehman, Shackelford said he knew Moyer, formerly in direct sales for DuPont in

[17] Compare CX 100 L and CX 22 C. See also CX 22 B–I.

the New York area but now stationed in the Far East (Tr. 197–98); Dr. Johnson, formerly the technical sales manager for dyes, now retired (Tr. 198); and Brockett, now connected with DuPont's export sales organization in Wilmington (Tr. 198–99). Shackelford did not know whether Moyer, Johnson, or Brockett ever conducted tests on X–33 (Tr. 199).

As for Remsen, he stated that DuPont's Chicago laboratory was asked to carry out some test work on X–33 (Tr. 211, 219). But this consisted merely of an attempt to improve the coloration of the product (Tr. 212; see RX 171 A–C).

In trying to determine, definitively, the role of DuPont, both in developing and testing X–33, the testimony of Moyer might have been illuminating. He was not produced by the Government to contradict Klehman's testimony as to the part he or his company played, nor was he produced by respondents to corroborate Klehman's self-serving testimony. Neither counsel has made any comment on this point, but the record indicates that Moyer is now in the Far East (Tr. 197–98).

Under these circumstances, it would be bootless to undertake to draw an adverse inference from the failure to produce Moyer.

Conclusionary Finding

On consideration of all this evidence, the examiner concludes that it warrants a finding that the only relationship between DuPont and respondents was that supplier and customer. All the DuPont contacts that Klehman testified to add up, at best, to little more than the cooperation of sales and technical personnel with a customer or potential customer. It was not established that any of the personnel were qualified for the developmental and testing work concerning which Klehman so effusively testified. Neither is it clear that the activities of these persons may be properly imputed to DuPont.

For all this record shows, Moyer, the key man in the activities described by Klehman, was a "sales supervisor," not a qualified chemist or technician. There is evidence that what Klehman refers to as "tests" were little more than sales demonstration gimmicks.[18]

The examiner attaches particular significance to the failure of respondents to produce any real documentation to corroborate Klehman's self-serving and free-wheeling testimony.[19] It is note-

[18] See further comment under "Testing of Product," *infra*.

[19] For a discussion of the principles applicable to respondents' burden of going forward with the evidence on this point, see *infra*, pp. 875–878.

worthy also that the officials of the DuPont branch office servicing respondents' account had no knowledge of all the testing that DuPont supposedly was doing, particularly the testing that Klehman said went on after respondents began operations in Chicago.

The interest of Klehman in establishing the DuPont connection as a fact in relation both to this litigation and to other litigation, pending or anticipated, is such as to require that his testimony be heavily discounted.

Respondents have made out only a colorable case on the DuPont relationship. On balance, the evidence supports the finding that all the claims of DuPont affiliation, other than that of supplier and customer, were false, misleading, and deceptive.

The principle that it is unfair to pass off a product as the product of a better-known manufacturer is too well established to require any elaborate citation of authority. The decisions of the Commission abound with instances where such practices uniformly have been held unfair. (See, generally, Par. 7785, CCH Trade Regulation Reporter.)

Caveat

A *caveat* is in order at this point regarding the findings that the misrepresentation of DuPont affiliation was enhanced by the DuPont name on the X–33 label and in advertising material, and also by the word "Wilmington" in respondents' corporate name. Since the record contains evidence to that effect, and since it is relevant to the charge, the examiner considers it appropriate to make findings accordingly.

That is not to say, however, that this proceeding properly involves the question whether the corporate name and the use of the DuPont name, separately or in combination, constituted a passing off of X–33 as a DuPont product.

That *caveat* is prompted not only by the findings referred to, but also by the fact that in GPF 12 (p. 6), Government counsel seek a finding that the representations concerning respondents' connection with DuPont were accomplished not only by means of salesmen, but also by means of "literature, advertising, and otherwise." And regarding the word "Wilmington," Government counsel make specific reference (GPF, p. 8), to evidence of confusion engendered by the fact that Wilmington is the headquarters of DuPont (Tr. 206).

Record references cited to support GPF 12 include the advertising and promotional material in evidence as CXs 13 A, 14 B, 23 C,

and 92 B. In those exhibits are numerous references to the fact that X–33 was "formulated from DuPont Tyzor." Some contain pictures of the can, demonstrating that such a legend was prominently displayed on the label. And both labeling and advertising, of course, feature the name Wilmington Chemical Corporation as well.

Government counsel also make reference to the testimony, on cross-examination, of the dealer Fitch concerning the impact of the DuPont name on the label (Tr. 486–87; CX 73).

However, the record shows and the Government concedes (GPF 22, p. 16) that "respondents had permission to state in their literature that Tyzor HS, manufactured by DuPont, was used in the manufacture of X–33. . . ."

Although the examiner has interpreted the complaint to embrace published representations as well as oral representations made by salesmen (*supra,* pp. 845–846), that does not mean that the words "DuPont" and "Wilmington" on labels and in publications have been found deceptive independently of their association with salesmen's representations. In the examiner's opinion, the complaint does not fairly put in issue the narrow question whether the use in labeling and advertising of the words "DuPont," or "Wilmington," or both, is itself actionably deceptive.

Therefore, aside from finding that those terms, when used in conjunction with oral representations, had the capacity to mislead and deceive, the examiner explicitly disclaims any ruling, affirmative or negative, concerning the impression created *solely* by the use of those terms on labels and in advertising.

For that reason, the order does not contain any specific injunction regarding the continued use of those terms.

2. *Guarantee*

Seven dealers testified concerning guarantee representations. Five were told that X–33 was "fully" or "unconditionally" guaranteed for ten years (Neff 322; Goldsmith [20] 557; Mathweg 607; Schmitz 666; Meier 736).

The testimony of Schmitz and Meier indicates the deception inherent in the unqualified term "guaranteed." Schmitz said he "was led to believe" that if he put X–33 on his basement wall, "it would be good for ten years" (Tr. 666). But when he read the contract and other material, he "found out then it was just a ma-

[20] The fact that Goldsmith later cancelled his order does not require us to disregard his testimony (*cf.* RPF, p. 16).

terial replacement guarantee" (Tr. 666). Meier's testimony (Tr. 736) was similar.

Of the other two witnesses queried regarding the guarantee, Bass apparently understood that it was only a material replacement guarantee (Tr. 425), while Lovett's testimony on cross-examination (Tr. 306) sheds no light on the issue.

Neff, Mathweg, Schmitz, Meier, and Bass all testified specifically that they had no occasion to test the guarantee.

The exhibits in the record show that claims to the effect that X–33 was "unconditionally guaranteed for at least ten years" (CX 44 B) were extensively used in advertising and promotional material, including letters sent to dealers (for examples, see CXs 3 A, 42, 43, 51, 62 B, 65, 92 A, and 95 A).

The term "unconditionally guaranteed" was not always used, but the various exhibits contain language indicating that the product was unqualifiedly or absolutely guaranteed for ten years.

In view of the representations concerning the guarantee contained in respondents' advertising and promotional literature, there is no basis for doubting that respondents salesman made similar oral representations to prospective dealers.

Klehman acknowledged that the advertising for X–33 used the words "unconditionally guaranteed" (Tr. 788). The intent, according to Klehman, was to couple that representation with a disclosure that the guarantee was a material replacement guarantee. But he could not say that this intent was carried out (Tr. 788–89), and the record shows that it was not.

The guarantee card (CS 17) reads in part as follows:

10-YEAR MATERIAL REPLACEMENT GUARANTEE

We hereby guarantee that should the application, described on guarantee card registered with the company, leak where X–33 has been applied, we will replace free of charge, the X–33 necessary, so that you will have no further outlay for material for a period of ten years from date of registration. X–33, however, is to be applied in accordance with the company's direction. This guarantee does not cover labor replacement costs.

WILMINGTON Chemical Corporation
33 West Hubbard Street Chicago 10, Illinois

IMPORTANT: This guarantee is effective only after job is registered. Detach and mail registration card immediately after job is completed.

Klehman confirmed that CS 17 contained the terms of the guarantee (Tr. 143).

Klehman testified, without contradiction, that there were only about a dozen claims under the guarantee, and all of them were honored (Tr. 1824). In each instance, new material was shipped

to the claimants, either in the amounts requested or in slightly higher amounts (Tr. 1841). The fulfillment of the guarantee was simply the replacement of the product (Tr. 1842). Klehman did not recall any requests for a money refund (Tr. 1842).

The finding is that X–33 was not unconditionally guaranteed for ten years or for any other period of time. On the contrary, the only guarantee issued by the respondents to consumers was to the effect that should a leak develop where X–33 had been applied, the product would be replaced at any time within ten years, provided it had been applied in accordance with directions. The guarantee specified that it did not cover labor costs.

The guarantee form itself (CX 17) sets forth clearly and conspicuously the nature and extent of the guarantee, the manner in which the guarantor will perform, and the identity of the guarantor.

The fact that a copy of the guarantee, revealing its limitations, was ultimately furnished both the dealer and the consumer does not provide a defense to the charges in the complaint that the published and oral advertising of the guarantee has been false, misleading, and deceptive.

The vice in the representations that X–33 was guaranteed was the failure to state adequately, if at all, what the guarantee was and to disclose its limitations. *Parker Pen Co.* v. *Federal Trade Commission,* 159 F. 2d 509 (7th Cir. 1946); Guides Against Deceptive Advertising of Guarantees. (For comment regarding the effect of the Guides in adjudicative proceedings, see *infra,* pp. 886–887.)

The representation of the guarantee as unconditional, and the use of the unqualified terms "guaranteed" or "guaranteed for ten years," or any similar representation, unaccompanied by a conspicuous and adequate disclosure of the nature and limitations of the guarantee in close conjunction therewith, constituted an unfair and deceptive practice.

3. *Dealer Profits*

Concerning the profits to be made from selling X–33, the salesmen represented annual figures ranging from $2,000 to $15,000. In summary, the seven dealers testifying positively on the subject told of these earnings claims:

"easily" $2,000 (Schmitz 666–67);
at "least" $2,500; "from there on up" (Warnock 636);
$2,500 (Jahnke 592);

$5,000 or $6,000; reduced to $3,000 by verification call (VandeNoord 567, 585);
$5,000 (Lovett 244–45);
"minimum" of $5,000; "no limits" (Fitch 475); and
". . . all the way from 10 to 15 thousand dollars" (Kruse 513).

Neff (Tr. 323) and Skewis (Tr. 345) told of non-specific rosy predictions, but their testimony has been given no weight in the consideration of this allegation.

In the "Merchandising Manual for Dealers" (CX 20 G), the dealer was given a formula by which to figure out his annual gross profit on a "very conservative" basis. In a town of one thousand population, the dealer was told, he should sell, on a "rock-bottom basis," 2,853 gallons of X–33, and with a $3 markup, his annual gross profit should be $8,559.

Although this estimate was shown for dealers located in a town of only 1,000 population, the inference was left that in town with larger populations, proportionately higher gross profits should be expected.

Only about a third of the dealers who testified gave any detailed information concerning the extent of their sales and profits, but there is little doubt that sales were negligible and profits minimal or non-existent. (See Lovett 312; Huffstutter 375; Bass 417; Fitch 475; Kruse 522, but cf. 515, 518–21; Frederking 548; Goldsmith 556–57; VandeNoord 569, 580, 584–85; Jahnke 593–94; Warnock 636; Schmitz 667, 669; and Meier 740.)

In connection with respondents' motion to dismiss at the close of the Government's case, the examiner reserved his ruling respecting Paragraph Six (3) and Paragraph Seven (3). In so doing, he indicated a preliminary determination that there might have been failure of proof of those allegations (Tr. 1524).

As indicated by that action, there are problems on the basis of this record respecting the charge that earnings were misrepresented. But after careful review of the record and the applicable law, the examiner has reversed his tentative, initial determination. The motion to dismiss this charge is now denied.

Despite the skepticism of respondents' counsel as to what the various salesmen told the dealers, it is established by the evidence that representations were made that dealers would realize profits in amounts ranging from $2,000 to $15,000 a year. And the formula in CX 20 G may be readily converted to a representation of $25,000 profits or more in towns of 3,000 population or over.

On the other hand, there is no testimony, expert or otherwise,

that under normal circumstances, dealers could not make that amount of profit, or perhaps more. The testimony is simply that no dealer who testified even approached the lowest figure referred to. Most dealers sold little or none and realized no profits.

But in fairness, those facts must be assessed in the light of developments that precluded continued sale of the product. Either on a voluntary basis or on the advice or order of Government representatives, most dealers discontinued the sale of the product; thus, there was no real test of the profitability of the product. Nevertheless, as shown *infra,* there is a solid basis for finding the representations deceptive.

Actually, the complaint does not allege the impossibility or improbability of the earnings represented. Paragraph Seven (3) simply charged that franchise dealers generally did not earn $25,000 a year, or such lesser amount as might have been represented to them, and that in some cases they made no profit. A finding can be—and is—made substantially in the language of that allegation.

In that connection, it will be noted that none of the dealer testimony is to the effect that salesmen represented that other dealers were actually making any particular profit. In other words, they apparently did not state as a fact that such profits were being made. In general, the dealer testimony was that the salesman predicted specified profits for the particular dealer he was talking to.

It is a fairly close question whether representations of the kind involved here are factual representations or are more in the nature of permissible puffing.

The term "puffing" refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess, *Gulf Oil Corporation* v. *F.T.C.,* 150 F. 2d 106 (5th Cir. 1945). Statements made for the purpose of deceiving prospective purchasers cannot properly be characterized as mere puffing, *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission,* 187 F. 2d 693 (7th Cir. 1951).

In *De Forest's Training, Inc.* v. *Federal Trade Commission,* 134 F. 2d 819, 821 (7th Cir. 1943), it was held that representations regarding the growth of an industry and the employment opportunities in it were statements of fact rather than of opinion. Respondents had challenged the Commission's order "on the grounds that it seeks to prevent petitioner from making predictions and expressing opinions as to future events. . . ."

The argument was made "that the representations were matters of opinion, not intended as statements of existing facts, but as a prophecy of things to come" and that even if subsequent developments "had not justified the predictions made. . ., that fact should not condemn statements made in good faith." But, said the Court:

> It is elementary that it was petitioner's duty to deal fairly with the public and not to make false, deceptive, or misleading statements. So, too, it is clear that whatever statements are made, must be taken with and accepted in their ordinary sense.
>
> With these principles in mind, we think the question here involved was one of fact, as distinguished from mere opinion . . . .

(See also Par. 7533.35–.379, CCH Trade Regulation Reporter.)

In the instant case, the representations as to earnings, although involving some expression of opinion, perhaps, were in the nature of factual representations which cannot be dismissed as mere puffing. There is a valid distinction to be drawn between the representations here made as to prospective sales and profits and such representations as those describing a product as "perfect," "easy," "amazing," "wonderful," or "excellent." Even such terms as those have been held to be actionably deceptive.

The cases in which exaggerated earnings representations have been banned by the Commission are too numerous to be ignored. (See cases collected at Par. 7591, CCH Trade Regulation Reporter.)

In determining whether the earnings claims were deceptive, the examiner notes the failure of respondents to present any evidence concerning the profitability of X–33 (see *infra*, pp. 875–876). In addition, interestingly enough, respondents' counsel, in cross-examining the dealer-witnesses, and in Respondents' Proposed Findings (pp. 18–20), provide a basis for a finding that the earnings representations made by the salesmen were wholly unrealistic, were without any foundation in fact, and were made with actionably reckless disregard of the truth.

For example, respondents' counsel, referring to eight of the dealer-witnesses who testified regarding profits, state (RPF, p. 18):

> As a matter of fact, a thorough evaluation of the method and manner of the business operations for these 8 dealers literally reveals that based on their operation it would have been highly difficult, if not impossible, to *obtain profits up to $25,000.00 per year.* (Emphasis in original.)

Specifically, respondents find incredible the earnings the sales-

men represented for Kruse (RPF, pp. 18–19; see Tr. 513, 515–18); Schmitz (RPF, p. 20; see Tr. 666–67); Lovett (RPF, p. 18); and VandeNoord (RPF, p. 19).

Respondents rely, moreover, on Schmitz's testimony (Tr. 680) to the effect that he realized that such figures were speculative and that salesmen tend to inflate the figures concerning anticipated earnings.

However, respondents inflate this single statement into a broad generalization that dealers " . . . testified that they knew full well that a representation of this type . . . was certainly to be considered as 'puffing' or salesmanship." (RPF, p. 18).

That contention is rejected. The evidence in this record is that the dealers did take the representation as to profits in their literal sense. To require truthful representations on such subjects is not to apply uncritically push to an absurd extreme the principle that the Commission has responsibility to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable. (See *Kirchner, trading as Universe Company,* Docket 8538 (Final Order, Nov. 7, 1963, *aff'd, Kirchner* v. *Federal Trade Commission,* 337 F. 2d 751 (9th Cir. 1964) [63 F.T.C. 1282]).)

On this record it cannot be said that the reprentations of the salesmen regarding profits were "unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons" to whom the representations were addressed.

If the respondents should re-enter the water repellent business, or any other business in which the rate of sales or profits should be material, they cannot be prejudiced by an order that says no more than that their representations concerning those matters must have a basis in fact, *Tractor Training Service* v. *Federal Trade Commission,* 227 F. 2d 420 (9th Cir. 1955), *cert. denied,* 350 U.S. 1005 (1956).

4. *Cancellation of Contract, Etc.*

We come now to the charge that respondents' salesmen misrepresented that franchise agreements were readily cancellable; that unsold stock would be picked up by respondents or transferred to another dealer; or that a refund would be made for it.

That allegation finds support in the testimony of six dealers: Neff 323–24 (confusing in part, but purport is clear); Bass 423–24; Neil 449; Sievert 530 (no refund from Wilmington promised, but it would transfer stock to another dealer, who would make "refund"); Frederking 542–43; and Mathweg 604–05, 620

(Wilmington would "pick up the products unsold and refund our money").[21]

Mathweg pointed out that " . . . they didn't specify in this contract that they would redeem the products that we could not sell, which he [the salesman] did in word tell us. So after you go over and read their fine print, you don't find it." (Tr. 620).

Respondents rely on this testimony as demonstrating that dealers were "able to ascertain from the franchise agreement exactly what the nature of the company's obligations were [*sic*] upon cancellation" (RPF, p. 22). The fact, however, that a careful reading of the contract might contradict a salesman's representations does not excuse the misrepresentation charged. (See *infra*, pp. 909–910.)

One of the key exhibits relied upon by the Government to support the allegation of Paragraph Seven (4) is a letter from Wilmington Chemical Corporation, dated March 16, 1963, addressed to the dealer Skewis (CX 61). The letter, on the letterhead of the respondent corporation and signed by J. A. Forester, vice-president, reads as follows:

> This is to advise we have refused the shipment of X-33 you returned, as being and "unauthorized return". Under the provisions of paragraphs 14 and 15 of the Exclusive Franchise Dealership, the merchandise became your property when receipted for by the transportation company; the goods are not shipped on consignment; and the order is non-cancellable.
>
> Further, paragraphs 10 and 12 specifically outline your financial obligation. The trade acceptances executed for the purchase have been assigned to a third party, the finance company, who is a holder in due course under the Negotiable Instruments Act, and as such is entitled to payment and will collect all monies due, accordingly.
>
> We urge you to reconsider your position in this matter, recall the shipment and avoid the storage charges which are accumulating and for which you are liable. We fail to understand your reasons for the unauthorized return,***.

It is not without significance that CX 61 appears to be a printed form letter.

A similar policy is evidenced by a letter dated September 19, 1962, addressed to the dealer Sievert (CX 78).[22] This letter, signed by Peterson as national sales manager, again sets forth the policy as follows:

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[21] Respondents erroneously say (RPF, p. 21) that only five dealers gave testimony regarding cancellation; they discuss the testimony of only four, and they ignore the testimony of Neil and Frederking. Unaccountably, respondents also find some of the representations testified to as "in complete harmony with the franchise agreements" and contradictory of the complaint's allegations (see RPF, pp. 21, 22).

[22] Although CX 78 appears to be a photocopy of a carbon copy, Sievert testified that he received the original (Tr. 531).

Under the terms of your exclusive franchise dealership, specifically Paragraph 14, we are unable to cancel your franchise agreement, or accept return of the merchandise.

* * * * * * *

Financially, we are not involved, and your forthcoming trade acceptances are a matter between you and the finance company.

The record indicates that Skewis signed a dealership contract on February 6, 1963 (CX 60). About a week later he attempted to return the merchandise (Tr. 346). CX 61 is the company's response to this attempt. The shipment was returned to him about February 21 (Tr. 346).

Skewis paid for the merchandise with a check for $1,053.03, then stopped payment on it. Later he settled with the Chestnut Finance Company for $400 (Tr. 349–50).

In the case of the dealer Sievert, he called Wilmington Chemical and asked if he could return the merchandise, "or if they could get somebody to take my material off my hands, and they didn't do it, they didn't want to." They never did accept return of the product (Tr. 530).

Warnock at first refused to accept delivery of the X–33 shipped to him but did eventually take it at the insistence of the finance company (Tr. 636–37).

The dealer Schmitz attempted to return the X–33 and to obtain a refund, but ultimately, the finance company collected his last payments (Tr. 673–74).

The testimony of the respondent Klehman (Tr. 847–50, 965–66) tends to confirm rather than contradict the allegation that no cancellation of the contract was permitted once the order was shipped. In the course of describing the so-called verification procedure, Klehman explained that if misunderstandings were discovered in the course of the verification call, the contract could be cancelled, "but once it goes out in the truck it's too late. Then it's outside of our control" (Tr. 965–66).

Earlier, he had been asked:

If a franchise dealer requested to be relieved of his contract and either sent back unsold merchandise or transfer it to some other dealer, did Wilmington Chemical Company ever honor that request? (Tr. 847)

Klehman referred, among other things, to Paragraph 10 of the dealership agreement (CX 84 A), providing that the company did not undertake to sell the material for the dealer, either directly or through its representatives, and that the dealer was obligated to pay for the material when payment was due whether or not the material was then sold.

His reliance on this part of the contract (Tr 850) tends to confirm that the policy of the company was contrary to the representations made by some of the salesmen.

Although Klehman said that the company did accept returned merchandise "in certain cases" (Tr. 851), the only specific instance that he gave involved the dealer Juday (see *infra*).

The testimony of the respondents' former sales manager, Peterson, indicates that it was unusual for the company to permit cancellation once the dealership contract had been accepted by the company. Peterson could recall only "one or two instances" where this was done (Tr. 1764–65), and he acknowledged that these were exceptional cases (Tr. 1765).

Although it appears that the dealers Fitch, Goldsmith, and Juday cancelled their contracts and did not pay for the X–33 they ordered (Tr. 495, 557–58, 725–26), these instances can hardly be cited as examples of voluntary cancellation on the part of respondents. Both Fitch and Goldsmith found it necessary to retain counsel in order to terminate their dealership arrangements (Tr. 494–95, 556–58). Juday stopped payment on the trade acceptances, and ultimately shipped the X–33 back to the company (Tr. 695–98, 725–26).

There seems to be little doubt that respondents did cancel contracts rather readily in instances where the X–33 had not actually been shipped (Tr. 1600–03; see also CX 102 C).

Approximately 600 franchise argreements were cancelled between April 1962 and November 1963. These agreements represented business amounting to about a half million dollars. Of the 600 dealer cancellations, approximately 500 were at the request of the dealer (Peterson 1645–47).

There was extensive testimony by Klehman (Tr. 1375–1480, 1484–90) and by respondents' former sales manager Peterson (Tr. 1597–1692, 1702–85) concerning cancellations. As indicated by Government counsel (Brief, p. 17), some of this testimony leaves much to be desired, but respondents did establish that cancellation was permitted before formal acceptance of the contract by respondents had resulted in shipment of the product.

A number of the cancellations shown by the record involved the 11 franchise managers who had negotiated the contracts with the 21 dealers who testified on behalf of the Government.

The obvious reason why cancellation was resisted after shipment of the product, involved the practice of respondents in discounting to a third party (a finance company or factoring corporation) the trade acceptance given in payment.

Of course, respondents had a right to rely on the contract terms, and this proceeding does not involve any action to prevent enforcement of a valid contract. The vice against which the complaint is directed is the misrepresentation of respondents' policies and practices in derogation of the contract provisions.

Thus, it is found that respondents, through their salesmen, made the representations alleged.

It is further found that respondents did allow cancellation of dealer contracts before shipment of X–33, but that their policy and practice did not permit cancellation once shipment had been made. The record also supports the further finding that respondents did not pick up any unsold quantities of X–33, transfer them to another dealer, or make any refund for unsold merchandise.

5. *Turnover of Product*

Only three witnesses testified concerning representations respecting the demand there would be for X–33:

The salesman told Lovett "that the initial shipment should be turned over within three months" (Tr. 245–46), which was when the last of the three trade acceptances was due (Tr. 288; CXs 38–40). The salesman led Lovett to believe that the product would turn over so fast that he could get his money from selling the merchandise and pay for it before the 90-day period was up (Tr. 289).

Lovett conceded, on cross-examination, that he "would have to have seen it to believe it" (Tr. 293–94). He was not, however, "skeptical" of the representation; it was a new product, and he had never seen anything like it before. He didn't "know whether it would sell or wouldn't sell," but he did know "There is a great need for that type of product." (Tr. 294) So, based on his feeling that there was a good potential market, he accepted the salesman's representation that the product would turn over in three months.

The witness Sievert testified that the salesman told him X–33 would be a fast selling article; that Sievert would sell his shipment before he had to pay for it (Tr. 528).[23]

According to the witness Schmitz, he was to make three monthly payments for his initial shipment, and he was told that he "should definitely have that all sold and be reordering by the time [he] made that first payment" (Tr. 667–68).

[23] Although Sievert testified he paid by check (Tr. 528), CX 78 indicates he signed trade acceptances.

The evidentiary support for the allegation found in Paragraph Six (5) of the complaint, relating to the rapidity with which X–33 might be sold, is obviously not extensive. But the limited amount of testimony on this point supports the finding that such a representation was made.

As in the case of representations regarding profits, the question arises whether such a representation constituted a representation of fact or whether, because of the speculative nature of such a prediction, it fell within the realm of permissible puffing. For the reasons previously stated, the examiner holds that the representation is not excused as puffing.

There is no doubt, on this record, that dealers generally did not sell out their supply of X–33 before either the first or last payment became due. Again we are confronted, as we were regarding the earnings claim, with the question whether it is fair to make a finding of falsity of the turnover representation in view of subsequent events that were not anticipated by any of the parties at the time of sale.

The question is not without difficulty, but on the basis of the rationale set forth *supra* (pp. 865–867) it is held that the representation was actionably deceptive.

6. *Testing of Product*

Regarding testing of the product, VandeNoord said the salesman told him X–33 "had been thoroughly tested" by Dupont (Tr. 570); Warnock was likewise told that Dupont had tested the product (Tr. 635); and Schmitz testified to a representation that "It was tested, supposed to have been tested by Dupont . . . It was highly tested and recommended . . . " (Tr. 665).

Among the published representations concerning testing were these:

> Careful laboratory tests have shown that after fifteen freeze-thaw (−30 to 120 degrees Fahrenheit) cycles, X–33 was about twice as effective as the closest competitive product. (CX20 H)[24]
>
> * * * * * * *
>
> . . . the backing of the tests and reputation of Wilmington Chemical Corporation and DuPont (CX 20 I).
>
> Tested by a leading independent testing laboratory (CX 24 G).

The findings previously made concerning representations as to testing by Dupont (*supra*, pp. 855–860) resolves many of the questions presented here relating to the validity of test claims.

Aside from the documents purportedly reflecting testing by Du-

[24] There was no evidence regarding any such testing as described here.

pont (CX 99 A, B; RX 171 A–C; see *supra*, pp. 855–856) the record contains only four written reports respecting testing—three produced by respondents and one by the Government. They are as follows:

(1) CX 104 B–C—A report dated March 29, 1963, by M.B. Christian Laboratories, Inc., Tallulah, Louisiana, relating to a test of the effectiveness of X–33 on termites. Klehman first said he was not sure whether that was the only test performed by Christian Laboratories (Tr. 861–62). Later, he said that the Christian Laboratories ran several tests (Tr. 894–95, 1039). CX 101 H (a deposition excerpt) contains a fragmentary reference to tests by the Christian Laboratories, and Klehman there indicated he had that report in his records. But no documentation was offered by respondents.

(2) RX 25 A–B—This report, dated April 10, 1963, reported on water repellent tests with X–33 by the Insecticide Testing Laboratory of the Wisconsin Alumni Research Foundation, Madison, Wisconsin. In essence, the report was to the effect that blotting paper and Kleenex tissue treated with X–33 were water repellent compared to untreated controls. According to RX 25 B, the purpose of the test was "To evaluate the water retaining capacity of papers treated with formulation X–33."

(3, 4) RXs 250 and 251–RX 250 is a letter dated April 2, 1963, from the Pesticide Department of the Wisconsin Alumni Research Foundation, Madison, Wisconsin, addressed to Klehman and purporting to transmit "two reports covering the cockroach repellent and water repellent test" of X–33. The letter states:

> Formulation X–33 failed to show any repellency against the German cockroach. Also Whatman's No. 1 filter paper and Kraft 50 lb. brown paper saturated with formulation X–33 failed to show any difference in water retaining capacity when compared to the untreated controls.

The letter adds that a sample of X–33 "in a sealed transparent container showed no evidence of precipitation after six weeks of storage." The only report actually offered was that involving the precipitation-storage test (RX 251).

Also in the record is a letter dated April 11, 1963, addressed to Klehman, from the Pesticide Department of the Wisconsin Alumni Research Foundation (RX 24), thanking Klehman for his letter of April 8, 1963, and acknowledging receipt of a sample of X–33, together with refractory blocks and blotting paper, and noting that "testing has been scheduled." We are left to speculate on the results.

A letter dated June 15, 1962, from the Special Products Sales Division of Shell Oil Company to Klehman indicates that some testing was done by that company. The letter (RX 22) reads in part as follows:

> We received the pail of Tyzor HS and have some work underway on solubility in Shell Sol B-8 and Shell Sol B. Some of the tests will be run at low temperatures.

But once again, there is no corollary proof; and a solubility test for Tyzor HS has little significance to the issue posed here.

CX 101 C refers to tests of a compound consisting of 2 percent Tyzor and 98 percent Shell solvent for "efficaciousness as a water repell[e]nt on building materials," but the deposition excerpt does not identify the tester, and the record is otherwise silent.

In addition to testing by the companies or laboratories mentioned, tests were conducted, according to Klehman, by National Can Company, American Can Company, and Empire Oil and Chemical Company (Tr. 1036–39). (Empire manufactured the product for respondents.)

Klehman referred to an unidentified laboratory in Lubbock, Texas, and to tests by Underwriters Laboratories (Tr. 1039), but was vague about the nature of those tests and had no written reports concerning them (Tr. 1118).

Klehman stated, without explanation, that he had not produced at the hearing all of the written reports of tests that were made (Tr. 1108; see also Tr. 843). He did not believe that either National Can Company or American Can Company gave him written reports. He said the National Can test was about March 1962, while that conducted by American Can was in the spring or summer of 1964. Klehman did not know exactly what either company tested X–33 for (Tr. 1109).

Quality control tests performed by Empire Oil and Chemical Company were simply for the purpose of determining whether X–33, as manufactured, corresponded to the formula (Tr. 1110).

Klehman testified generally that tests were run on X–33 to indicate the probable length of time it would remain an efficient water repellent (Tr. 1118–22), but the record is silent as to both methodology and results. (See also Tr. 877–78.)

Respondents' representations are challenged by Paragraph Seven (6) of the complaint on the ground that "X–33 had never been tested by Dupont, the respondent nor any independent laboratory prior to being marketed." But GPF 27 (pp. 21–24) is as follows:

Prior to being marketed, X–33 has never been tested by DuPont, the corporate respondent, or by an independent laboratory for its effectiveness for the uses for which it is intended.

It will be observed that in that Proposed Finding, Government counsel have injected an element not specifically present in Paragraph Seven (6) of the complaint. The complaint makes the broad allegation that X–33 had "never been tested," and does not explicitly qualify the allegation by reference to the nature or purposes of the testing. In Paragraph Six (6), however, the complaint deals with a representation that the product had been "successfully tested."

That language may be interpreted as implying that the tests demonstrated the effectiveness of X–33 for its intended uses, and Paragraph Seven (6) of the complaint also may be interpreted as embodying such a qualification.

So the issue is as stated by the Government, instead of the simple question whether there had been *any* testing, no matter how superficial.

Even as so interpreted, the issue still poses problems. The complaint's pleading of a negative averment (that the product had "never been tested") raises some nice questions involving the distinction between the burden of proof and the burden of producing evidence, sometimes known as the burden of going forward with the evidence. Also involved are certain presumptions or inferences to be drawn from the failure of a party to produce evidence.

The burden of proof, of course, remains on Government counsel. But once they established *prima facie,* as they did, the absence of qualified testing, the burden of going forward with the evidence was shifted to respondents.

"Slight evidence may be sufficient to shift the burden of proof of a fact from the plaintiff to the defendant, where such fact is peculiarly within the knowledge of the defendant and would ordinarily be difficult for the plaintiff to prove." (20 Am. Jur., Evidence, §132).

The rule applicable to the circumstances of this case was well stated in *United States* v. *Denver and Rio Grande Railroad Company,* 191 U.S. 84, 91–92 (1903):

. . . where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.

The court explained:

When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.

The Court referred to the "practical injustice" of a rule different from that being applied here. It said that a different rule "would require the plaintiff not only to establish a negative, . . . but to establish it by testimony peculiarly within the knowledge of the defendant." The Court took note of the "difficult . . . if not . . . impossible task" that would be imposed on the plaintiff.

By way of illustration, the Court referred to cases where persons are prosecuted for doing business without a license.

"It might be extremely difficult," said the Court, "for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slighest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of."

That illustration constitutes a persuasive factor for the application of the rule here.

The rule laid by the Supreme Court in the *Denver* case is essentially a specialized application of the broad rule that the omission by a party to produce important evidence to a fact of which he has knowledge, and which is peculiarly within his own control, raises the presumption that the evidence, if produced, would be unfavorable to his cause, 20 Am. Jur., Evidence, § 138, 140, 184; see also 2 Wigmore on Evidence (3d ed. 1940), § 285–91.

Although the case for the application of that rule here would be stronger if Government counsel had required respondents, by subpoena duces tecum, to produce all documentary evidence in their possession relating to testing, there is no doubt that respondents were on notice that the issue of testing made production of such documents material.

The fact that the principles just stated are applicable even in criminal proceedings (20 Am. Jur., Evidence, § 150) demonstrates that it is not unfair to apply them here.

In the course of the Government's case-in-chief, it was estab-

lished, from the testimony of respondent Klehman, supplemented by that of two Dupont officials, that no qualified testing of X–33 had been conducted. The burden of producing contrary evidence then shifted to the respondents. That burden they failed to carry.

In their discussion of this issue (GPF 27, pp. 21–24), Government counsel may appear to seek to shift the burden of proof to respondents. Government counsel complain that although Klehman testified concerning tests, "in only a few instances did he produce written proof of the nature and results of the tests." They tax respondents for "[t]his failure of corroboration," but necessarily admit that the record does contain documentary evidence indicating that some tests had been conducted.

In this state of the record, careful analysis of the representations and of the evidence is required.

The representation that X–33 had been tested, either by respondents, by Dupont, or by independent laboratories must itself be tested by determining whether the so-called tests reflected by this record constituted a reasonable and truthful basis for the broad representations made.

The representation that X–33 had been successfully tested carried with it an implication that the testing had been conducted by wholly independent, disinterested, non-commercial testing agencies, involving practical tests made under controlled conditions. It is fair to say that the tests testified to by respondent Klehman as having been made by him and Moyer, jointly or separately, were, at best, no more than laboratory experiments. And, as indicated in the discussion of Dupont testing (*supra*, p. 858), the indications are that they were little more than sales demonstration gimmicks.

On the basis of the evidence in this record, the ruling must be that the information in the possession of the respondents regarding testing was insufficient to support the representations made by salesmen and in published advertising and promotional literature. See *Bristol-Myers Company* v. *Federal Trade Commission*, 185 F. 2d 58, 60–61 (4th Cir. 1950).

It cannot be found that here, the tests were so devised or conducted as to constitute a creditable basis for such representations.

Prior proceedings of the Commission provide firm support for the principle here applied.

In *Hearst Magazines, Inc.*, Docket 3872, 32 F.T.C. 1440, 1462 (1941), the order prohibited representations that products had been tested "unless and until the product concerning which such

representation is made has, in fact, been adequately and thoroughly tested in such a manner as to assure, at the time such product is sold to the consuming public, the quality, nature, and properties of such product in relation to the intended usage thereof and the fulfillment of the claims made therefor. . . ."

Likewise, in a consent proceeding involving *General Motors Corporation,* Docket No. C–795 (Decision and Order, July 27, 1964) [66 F.T.C. 267, 272], the respondent was ordered to stop.

> Representing, directly or by implication, that any product has been tested, either alone or in comparison with other products, and that such test proves or supports a claim as to the performance of such product, unless such representations clearly and accurately reflect the test results and unless the tests themselves are so devised and conducted as to constitute a creditable basis for any such representation. (See, generally, Par. 7865, CCH Trade Regulation Reporter.)

Accordingly, the representations of respondents concerning tests and testing were not warranted on the basis of the actual facts in possession of respondents. It is not shifting the burden of proof to respondents to hold that their failure to produce satisfactory evidence of qualified testing justifies the finding and order here made.

The circumstances may not be altogether analogous, but it is not inappropriate here to apply the principle laid down in *Charles of the Ritz Distributing Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 679 (2d Cir. 1944), that a respondent's "failure to introduce evidence thus within its immediate knowledge and control, if existing anywhere, . . . is strong confirmation of the Commission's charges."

In the *Ritz* case, the evidence that that respondent failed to present was alleged to be a trade secret, but the explanation did not deter the Court from drawing an inference adverse to respondent.

Thus, in the instant case, respondents' representations regarding testing, like the claims respecting the Dupont connection, have a colorable basis in the evidence, but the coloration fades when exposed to the light of analysis.

7. *Waterproofing Qualities*

In considering the "waterproof" representation, we are met at the threshold with a semantic difficulty. This results from the language of the complaint in alleging (Paragraphs Six (7) and

Seven (7)) that X–33 was represented as "a waterproof product," but that X–33 was "not a waterproof product."

The issue is not whether X–33, a non-aqueous solution containing an organic titanate, was *itself* waterproof, but whether its application to other materials would make *them* waterproof. In other words, we are concerned here with the question whether X–33 was a *waterproofing* product.

The examiner does not mean to suggest that there was any real confusion among the parties or the witnesses as a result of the terminology used in the complaint. All concerned recognized that the issue was as stated above.

In view of the admission of the respondent Klehman (Tr. 823–26, 1057) that both he and his employees used the term "waterproof" to describe X–33 and its qualities, and in view of the published advertising containing such terms (CXs 13 A, 14 B, 19 K, 22 E, G, 23 D, 24 E–F, 42, 43, 51, 65, 67, 74, 77), there is no necessity to detail the testimony of dealers concerning "waterproof" representations made to them by respondents' salesmen.

For completeness of the record, however, the transcript references are as follows:

Lovett 241, 244, 306, 313; Skewis 345; Huffstutter 358; Gellhaus 385–87, 392–93, 406; Neil 450; Frederking 542; Goldsmith 556; Jahnke 590; Mathweg 603, 609–10; Warnock 633–34; Leach 655; Schmitz 664, 666; Juday 686; see also Forsberg 464.

Among and typical of the representations regarding waterproofing in published advertising and promotional material are these statements:

Floors and walls in cellars can be made completely bone dry and waterproof by applying X–33 . . . .

Below grade seepage can now be avoided. Reasonable hydro-static heads can be controlled. Dampness, mildew and condensation can be eliminated.

* * * * * * *

. . . preserve it and waterproof it for at least ten years. (CX 13 A, 14 B, 19 K, 24 E, 24 F)

Porous material and masonry is water proof as soon as the solvent evaporates. (CX 23 D)

. . . the waterproofing quality of X–33! (CX 22 E, G)

(See, in addition, CXs 42, 43, 51, 65, 67, 74, 77.)

The term "water repellent" also was used, but frequently in conjunction with the term "waterproof" (see, for example, CX 52 E).

Regarding the terms "waterproofing" and "water repellent,"

Klehman said there had always been "a lot of confusion" in his mind "as to exactly what those terms mean as opposed to each other." Although he tried to use the words "water repellent," he said he found it difficult to use that term because "waterproofing" is "more commonly used" (Tr. 823).

Klehman conceded that he and his employees did use the word "waterproof" instead of "water repellent" (Tr. 825; see also Peterson 1765; *cf.* 1626, 1629, 1636, 1638, 1643, 1645).

Despite his own derelictions (Tr. 823–25, 1057), Klehman said he tried his best to get the franchise managers to use the term "water repellent" (Tr. 1057).

He testified that he saw "extremely little" difference between the two terms; that "X–33 made porous materials impermeable to the passage of water"; that as far as he was concerned, such material was then "either waterproof or water repellent"; and that to draw any further distinction was "splitting hairs" or "nit picking" (Tr. 1057). He said he had "never seen" the Trade Practice Rules for the Masonry Waterproofing Industry (Tr. 796). But neither he nor Peterson ever explained why they had tried to substitute the term "water repellent" for "waterproof."

Klehman recognized "certain limitations" in the application of X–33. Rendering of a product impervious to the passage of water applied only to porous products, he said, and only "under certain conditions" (Tr. 1057–58). In the presence of hydrostatic pressure in basements below grade, there was no assurance concerning the effectiveness of X–33 in rendering the wall impermeable to the passage of water. In "those cases it might not be effective." (Tr. 1058)

In response to an earlier question whether X–33 was effective under hydrostatic pressure, Klehman said the answer was "Yes and no," depending on the variables involved. He conceded that there are certain cases where hydrostatic pressure would force water through a cellar wall (Tr. 867–68).

We have, then, the admitted and demonstrated use of the challenged terminology, together with Klehman's concessions concerning the limitations of X–33. There remains the question whether the "waterproof" representations were incompatible with the admitted limitations of X–33.

The primary standard for testing the claim (and the only standard relied on by the Government) is that established by the Commission for use of "waterproof" terminology in the Trade Practice Rules for the Masonry Waterproofing Industry (August 31, 1946). Rule 2 reads as follows:

(I) In the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word "waterproof," "waterproofing," or any other word or representation of similar import, as descriptive of any industry product unless, when properly integrated with or applied to masonry units or masonry structures, the product will render such units and structures impermeable to, or proof against the passage of, water and moisture throughout the life of such units or structures and under all conditions of water or moisture contact or exposure . . . .[25]

By Klehman's own testimony (Tr. 867–69, 1057–58), X–33 would not render masonry units or masonry structures "impermeable to, or proof against the passage of, water and moisture throughout the life of such units or structures and under all conditions of water or moisture contact or exposure. . . ."

The evidence does not stop there, however. Klehman's admissions were supplemented by the testimony of an industry expert called by the Government—Francis Scofield, technical director of the National Paint, Varnish and Lacquer Association, a trade association of paint manufacturers, with headquarters in Washington (Tr. 1125).

It is difficult to understand respondents' attack on Scofield (RPF, pp. 25–26) in view of the nature of his testimony. In essence, Scofield testified that a product consisting of Tyzor HS in an appropriate solvent would be effective as a water repellent (Tr. 1144, 1155–56, 1164), but that it would not qualify as a waterproofing compound within the definition (Rule 2) in the Commission's Trade Practice Rules for the Masonry Waterproofing Industry (Tr. 1145–46, 1148). He volunteered the statement, however, that, in his opinion, the definition was unrealistic and that a product such as X–33 might properly be described as a waterproofing compound (Tr. 1129, 1163–64).

Despite the circumstances surrounding the admission in evidence of CX 105 (RPF, p. 25), the examiner sees no basis why Scofield's testimony, either relating to that exhibit or generally, should be disregarded or denied any weight, as urged by respondents.[26]

Although respondents raised some question concerning Scofields's qualification to testify specifically on the properties and

[25] The rule is subject to various qualifications which, despite the contentions of respondents (RPF, pp. 26–27), are not really involved in this case. The record fails to support respondents' argument that "the explanations and other conditions set forth in the instruction manual and related brochures" of Wilmington Chemical Corporation justify the use of the word "waterproofing" as provided in Rule 2. Both in published material and in oral representations, the term was used without any qualification.

[26] Respondents contend (RPF, p. 26) that there was "substantial contradiction" in Scofield's testimony. They give no record citations, but a review of the record demonstrates that respondents' paraphrase of the testimony is erroneous (see Tr. 1145–46, 1156–57, 1161–65).

performance of X–33, there is no well-founded doubt about his expertise in the field. The fact that he had not personnally tested either X–33 or the ingredient Tyzor HS (Tr. 1154–55) does not discredit his expert opinion based on his education, general knowledge, and practical experience with water repellent products, *Concrete Materials Corp.* v. *Federal Trade Commission,* 189 F. 2d 359, 361 (7th Cir. 1951).

Scofield graduated from Lehigh University in 1931 with a B.S. in chemistry (Tr. 1125–26). He worked five years for the National Bureau of Standards, primarily in its paint laboratory. He went to work for the Scientific Section of the Association in 1936 and has been associated with it ever since. He has been technical director three and one-half years. He has dealt largely with paints, water repellents, and things of that nature during the time that he has been associated with the Association (Tr. 1126). He testified to an impressive list of scientific or technical associations in which he is active (Tr. 1126–27).

The National Paint, Varnish and Lacquer Association is a trade association made up of manufacturers of paints and related products, including varnishes, lacquers, putty, roof coatings, and water repellents, and also of the suppliers of raw materials to that industry (Tr. 1128–29).

Scofield has had experience with water repellents in general and has dealt with them (Tr. 1128). He has written numerous pamphlets and technical articles (Tr. 1129). (See also Tr. 1165–66.)

It was established that Scofield was generally familiar with the properties of organic titanates (Tr. 1140), with a "substantial amount of background information" from reading material in technical journals and trade advertisements and from talking to people in the field (Tr. 1140–41). He had read a Dupont brochure entitled "DuPont 'Tyzor' Organic Titanates" (CX 105; see Tr. 1130).

Scofield testified that a compound composed of 2 percent Tyzor and 98 percent solvent (the formula for X–33), applied to the inside of a cellar wall, part of which was above the surface and part of which was below the surface, would not produce a "waterproofing condition" within the definition of "waterproof" in the TPC Rules (Tr. 1148).

It has been Scofield's experience, "through many years and much experience, that it is almost impossible to waterproof a wall from what we refer to colloquial[ly] as the downstream side. . . ."

By that he meant that the application of a coating on the inside of the wall would not prevent water from coming through (Tr. 1149–50).

Scofield said he used the term "water repellency" [27] to mean resistance to "the tendency of water to spread and be taken up" by capillary attraction "acting as a wick." As an illustration, he noted that a waxed surface, for example, does not wet; the water gathers in globules (Tr. 1145).

"Waterproofness" he described as "a positive resistance to the penetration of water under any circumstances. It is essentially a different mechanism. It requires an imperviousness. . . ." (Tr. 1145) He further defined waterproofness as "an absolute barrier —typically metal foil or something of that sort," whereby neither liquid, nor vapor, nor anything goes through it (Tr. 1146).[28]

Cross-examination served to confirm and strengthen his earlier testimony that application of a product such as X–33 to a basement would not preclude liquid under "sufficient pressure" from passing through (Tr. 1156). Listing the factors that need to be taken into account, he said his "expectation" would be that in "a well constructed basement with no more water pressure outside than sand or loose dirt . . . probably a good coating of this sort would keep 98 percent of the water from coming through—it goes downhill from that" (Tr. 1156–57).

Scofield gave a guarded, qualified opinion regarding the longevity of a film applied to a surface by using a compound consisting of 2 percent Tyzor and 98 percent solvent (Tr. 1150). Subject to certain variables, and recognizing that any answer involves a "subjective" element, he stated that "Extremely thin films of this sort . . . have inherently a relatively short life expectation. . . ." (Tr. 1151–52)

Respondents take comfort, of course (RPF, p. 26), in Scofield's personal opinion that the Commission's definition, to the effect "that a waterproof material is a material that will prevent the penetration of water under any conditions . . . is a little broad" (Tr. 1129). The respondents ignore his further statement that he had been "overruled by a number of courts," so that he withdrew his position (but see *infra*).

[27] Throughout the record of Scofield's testimony (and elsewhere in the transcript), the words "repellent" and "repellency" are misspelled "repellant" and "repellancy." Here and elsewhere, the examiner has simply used the correct spelling without bracketing the "e" or otherwise specifically flagging the fact (except by means of this footnote) that an obvious error has been corrected in quoted matter. To perpetuate the error by repeating it and adding the customary "*sic*" would serve no useful purpose.

[28] These definitions presumably embrace Scofield's interpretation of Rule 2 (see Tr. 1161–62; *cf.* Tr. 1129, 1163–64).

Amplifying his position, Scofield explained:

> . . . I did not feel at the time that the Federal Trade Commission drew up that definition, and I do not feel to this day, that it is a fair one. I think that it is too restrictive. But it is not my job, thank God, to run the Federal Trade Commission. So if they want to play it that way, we play it that way.
>
> * * * * * * *
>
> I believe that a material which will, under the conditions of use, retard the passage of a large majority of water, and reduce the water problem, might fairly be described as waterproof. The powers that be have decided—this is a semantic matter. (Tr. 1163–64).

Although not directly so stated, Scofield's feeling that the Commission's definition is overly strict may have been predicated on the fact that apparently, "no known substance will make solid masonry or anything else absolutely impermeable to or proof against the passage of water or moisture" (*Prima Products, Inc.* v. *Federal Trade Commission*, 209 F. 2d 405, 407 (2d Cir. 1954).) (See also the Commission's finding in *The Lumino Company, Inc.*, Docket 3222, 27 F.T.C. 354, 361 (1938) that analyses by the United States Bureau of Standards had failed to disclose any "material or compound which is a positive, absolute waterproofing or moisture proofing or dampness preventing material or compound. . . .")

Note, in *Prima Products* (*supra*, at p. 408) Judge Medina's expressed doubt that "persons of average intelligence" would expect "waterproofed" masonry structures to remain "absolutely dry" under all conditions. But he held that since "these Rules are applicable alike to all members of the industry, petitioner must comply with them." [29]

The testimony of the Government's own expert witness calling into question the validity or fairness of the Commission's interpretation of "waterproof" terminology in its TPC Rules* requires a careful examination of the weight to be accorded such Rules.

Regarding the effect that properly may be accorded the Commission's Trade Practice Rules in an adjudicative proceeding, there appears to be some conflict of authority. And, anomalous though it may be, the courts seem to have given the Rules greater weight than the Commission itself.

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[29] Only two of the dealer-witnesses were interrogated concerning their understanding of the terms "waterproof" and "water repellent" (Lovett 306, 313, and Mathweg 609–10). This testimony is not too illuminating, except that it shows an understanding on their part that a waterproofing product would bring about a more long-lasting result than a water repellent.

*As here, Trade Practice Rules are sometimes referred to as "TPC Rules" (Trade Practice Conference Rules).

From the examiner's review of the authorities this synthesis emerges:

An examiner may take account of Trade Practice Rules, *not* as "legal commands" [*Northern Feather Works, Inc.* v. *Federal Trade Commission*, 234 F. 2d 335, 338 (3d Cir. 1956)[30]]; *not* as "substantive rules of law" or "factual conclusions . . . as a substitute for evidence" [*Lifetime Cutlery Corp.*, Docket 7292, 56 F.T.C. 1648, 1649 (1959)[31]]; and *not* as rules having "the force and effect of law" [*Amasia Importing Corp., Docket* 4459, 48 F.T.C. 37, 50 (1951)].

Instead, TPC Rules may be viewed as evidence of industry standards [*Fresh Grown Preserve Corp.*, 37 F.T.C. 824, 827-28; 139 F. 2d 200 (2d Cir. 1943)] or as evidence of industry customs, including the meaning of particular terminology [*Detra Watch Case Corp.*, Docket 8597 (September 24, 1964) [66 F.T.C. 848][32]]; or as "guides" which "express the judgment and experience of the Commission" [33] concerning applicable "legal requirements" — "the substantive requirements of the statutes which the Commission administers" [*Detra, Amasia, supra*]; or as "advisory opinions for the guidance of businessmen acting on a voluntary basis" [*Gojer, Inc.*, Docket 7851, 58 F.T.C. 1164 (1961)].

Such Rules are "within the competence" of the Commission to promulgate

[30] In *Northern Feather*, a case involving misbranding of pillows, a question arose as to the proper testing of down content, and the provisions of the Commission's Trade Practice Rules were held to provide a proper standard.

The tolerance provisions of the Trade Practice Rules for the Feather and Down Products Industry were upheld in a related case, *Buchwalter* v. *Federal Trade Commission*, 235 F. 2d 344, 346 (2d Cir. 1956); see also *Burton-Dixie Corporation* v. *Federal Trade Commission*, 240 F. 2d 166 (7th Cir. 1957), and *Lazar* v. *Federal Trade Commission*, 240 F. 2d 176 (7th Cir. 1957).

Reference also may be made to a line of cases in which Trade Practice Rules prescribed a "water resistance" test for watches represented as "water resistant"—for example, *Delaware Watch Co., Inc.*, Docket 8411 (June 19, 1963), 332 F. 2d 745 (2d Cir. 1964) [63 F.T.C. 491].

[31] In *Lifetime Cutlery*, Trade Practice Rules were denied probative weight. Government counsel had sought a finding that respondents' use of the term "gold-plated" was deceptive simply on the basis of Trade Practice Rules. The Commission upheld the hearing examiner in refusing to so rule and remanded the case for further evidence.

[32] In *Detra*, the Commission pointed out that the Rules there involved were predicated upon definitions and customs already existing in the industry, and held that the representations in question had the capacity and tendency to deceive those who relied both upon the industry custom and the Rules.

Since the Masonry Waterproofing Rules have been in effect since 1946, the principle set forth in *Detra* provides a predicate for a finding here that violation of a Trade Practice Rule of nearly 20 years' standing would have a similar capacity and tendency to deceive those relying on the Rule as reflecting proper industry practices relating to the use of "waterproofing" terminology.

See, generally, 62 Yale L.J. 912, 935, 941–43 (1953), suggesting the use of Trade Practice Rules as evidence of prevailing industry custom and usage and as an indication of the meaning of descriptive terminology used in specific industries. See also Kittelle and Mostow, "Review of the Trade Practice Conferences of the Federal Trade Commission," 8 Geo. Wash. L. Rev. 427, 449 (1940).

[33] In *Concrete Materials Corp.* v. *Federal Trade Commission*, 189 F. 2d 359, 361–62 (7th Cir. 1951), the court commented that "the Commission itself has had wide experience in the masonry waterproofing industry." It referred to the Commission's promulgation of the Trade Practice Rules for the Masonry Waterproofing Industry after "many conferences and months of investigation." (The record in the *Concrete Materials* case included evidence of testing by the Bureau of Standards, as well as expert opinion testimony based upon tests of similar products.)

in the public interest [*Prima Products, Inc.* v. *Federal Trade Commission*, 209 F. 2d 405, 408 (2d Cir. 1954)[34]], if "they are reasonable and fair" [*Northern Feather, supra*] — and industry members "must comply with them" [*Prima Products, supra*[35]], even though the rules do not impose any "legal injunction" [*Gojer, supra*].

Although Trade Practice Rules are directed against "trade practices which are violative of laws administered by the Commission" [§1.62, F.T.C. General Procedures], "the proceeding is not based on transgression of the Trade Practice Rules" [*Amasia, supra*]. Violations may result in "corrective action," not under the Rules as such, but "under applicable statutory provisions" for "failure to comply with such rules" [*Detra, supra*].

Although it may be possible to distinguish and harmonize those various holdings, the "silken thread" to lead us through the labrynth is found, happily, in current precedents relating to the Commission's Guides.

The Commission distinguishes between Trade Practice Rules and Guides (compare § 1.55 with § 1.62, F.T.C. General Procedures), but the relationship is such[36] that it is not inappropriate to give to Trade Practice Rules the same effect that the Commission has said should be accorded to Guides provisions in adjudicative proceedings.

In *Gimbel Bros., Inc.*, Docket 7834, 61 F.T.C. 1051, 1072–73 (1962), the Commission specifically addressed itself to "the proper status of the *'Guides'* with respect to a Commission proceeding." And all that it said there appears properly applicable to TPC Rules.

The *Gimbel* opinion, by Commissioner MacIntyre, characterizes the Guides "as a compilation and summary of the expertise acquired by the Commission from having repeatedly decided cases dealing with identical false claims. . . ."

Although "they are not substantive law in and of themselves,"[37] they constitute "a codification of the interpreta-

[34] The *Prima Products* case involved a product advertised as a "waterproofing" agent, and thus dealt specifically with the Masonry Waterproofing Rules in issue here. As a case squarely in point, *Prima Products* would be controlling were it not for the doubts engendered by the Commission's own reservations concerning the effect of the Rules in adjudicative proceedings, as shown above (*passim*).

[35] In rejecting the contention that respondent should be permitted to continue to circulate certain advertising materials because the Rules had not been adopted at the time of publication, the Court said that "If the expressions there used are now open to objection . . . further distribution thereof must be stopped." (*Prima Products*, 209 F. 2d at 409)

[36] Both Guides and Rules are described as designed to provide guidance regarding the "legal requirements" applicable to particular practices. (Compare § 1.55–1.56 and § 1.62.)

[37] In *Clinton Watch Company*, Docket No. 7434, Order on Petition to Reopen Proceeding (February 17, 1964), [64 F.T.C. 1443], the Commission noted that all businessmen, "though not under formal order, are equally bound by the substantive requirements of the Federal Trade Commission Act, as defined and particularized" by the Guides Against Deceptive Pricing. See also *Majestic Electric Supply Company, Inc.*, Docket No. 8449 (February 28, 1964) [64 F.T.C. 1166].

tive rules which the Commission and the courts have applied. . . ." They are "promulgated after lengthy and detailed study of all pertinent decided cases and are the end product of continuous official observation of advertising practices and consumer reaction from the founding of the Commission to the date of publication."

"They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out."

The Guides "list many of the common terms used by advertisers" and "point out the meaning these terms convey to the public as determined in past proceedings." They may not be "ignored" or "rejected" by businessmen.

By applying those principles to the instant proceeding we can achieve, in the words of the *Gimbel* opinion itself, "consistent interpretation" and bring "order . . . to the semantic jungle. . . ."

Thus, the examiner is bound to view Rule 2 of the Masonry Waterproofing Rules as containing the interpretation which the Commission, "unaided by further consumer testimony or other evidence" (*Gimbel, supra*), will place upon the use of the terms "waterproof" and "waterproofing."

If there should be any lingering doubts regarding the propriety of the meaning ascribed to "waterproof" by the Commission, or of the resulting findings here, reference may be made to the dictionary definitions [38] of the relevant terms:

> *Waterproof*—impervious to water: as a: covered or treated with a material (as a solution of rubber) to prevent permeation by water b: relating to or characterizing a machine or structure so constructed that a stream of water may be directed on it under specified conditions without the water entering.
>
> *Impervious*—1a: not allowing entrance or passage through: impenetrable (waterproofed so that the coat was impervious to rain)
>
> —Webster's Third New International Dictionary (1961)

Thus, the finding that X–33 was not a product that would "waterproof" surfaces to which it was applied, may be based primarily on the applicable Trade Practice Rules. In the opinion of the

[38] For discussion of words and their meaning, as well as the role of the dictionary, see *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362, 363 (D.C. Cir. 1952); *International Parts Corporation* v. *Federal Trade Commission*, 133 F. 2d 883, 886 (7th Cir. 1943); *Benton Announcements, Inc.* v. *Federal Trade Commission*, 130 F. 2d 254, 255 (2d Cir. 1942); *James S. Kirk & Co.* v. *Federal Trade Commission*, 59 F. 2d 179, 181 (7th Cir. 1932) *cert. denied* 287 U.S. 663.

examiner, it is appropriate to accept those Rules as indicating the expert judgment of the Commission concerning the proper use of the questioned terms—a judgment supported by dictionary definitions and recognized in Court proceedings.

In addition, there is expert testimony to the effect that a product formulated as was X–33 would not make surfaces impermeable to water under all conditions—that is, would not "waterproof" them. And that expert testimony is buttressed by the admissions of the respondent Klehman.

Moreover, as evidence that "waterproof" terminology is being used in the industry in accordance with the Commission's definition, it is worth noting that the Commission closed several proceedings involving alleged misrepresentation of so-called "waterproofing" compounds on the basis that respondents were complying with the Rules: *Euclid Chemical Co.,* Docket 5538, 45 F.T.C. 812 (1949); *The Truscon Laboratories, Inc.,* Docket 5290, 45 F.T.C. 819 (1949), and *Anti-Hydro Waterproofing Co.,* Docket 4975, 45 F.T.C. 834 (1949). And Scofield's testimony that "if they [the F.T.C.] want to play it that way, we play it that way" (Tr. 1163) and that "the rule having been adopted . . . you have to live with it" (Tr. 1164) may be taken as a reflection of industry acceptance, however, grudging it may be.

The finding must be—and is—that respondents' unqualified use of "waterproofing" representations was false, misleading, and deceptive.

8. *Suitability for Silos*

Representations by salesmen concerning the use of X–33 on silos are covered in the following summary:

X–33 "would seal the moisture content, . . . that whatever was in the silos, it would be sealed" (Neff 323); effective on silos (Gellhaus 386–87); "could be used" for treating silos (Frederking 542, VandeNoord 569, Warnock 634); useful for silos "so it [the ensilage?] wouldn't stick to the silos and freeze . . ." (Neil 450); "good . . . on the inside of silos to keep your silage from spoiling" (Kruse 512–13); silos treated with X–33 "would never seep moisture for ten years" (Mathweg 609–10).

Typical of the representations made in respondents' advertising and promotional literature are the following:

Silos, Grain Elevators: X–33 protects and preserves wood and masonry outside—snug-dry conditions inside. Furthermore, X–33's non-toxic barrier guards against excessive fermentation and rotting—resists the formation of

acids, alkalis, rust, algae and mold—helps grain and ensilage retain highest nutrition without deterioration. Avoid pit puddles and tunnel damp, condensation and sweating walls with X–33's dependable efficiency.

REMEMBER—Tyzor is a treatment, not a coating. (CX 15 C)

ACID RESISTANT—X–33 when applied to masonry or other porous building materials will resist damage caused by acid. This is especially important on the farm where acid contained in ensilage will enter into the cement staves causing serious damage not only to the Silo;—but allowing air holes to occur causing rotting, spoiling and excessive fermentation in the ensilage. (CX 23 D)

See also CXs 13 B, 14 A, 18 A, 19 B and 24 E.

The difficulty with the charge relating to the suitability of X–33 for use in treating silos, lies both in the pleadings and in the evidence.

The representation charged in the complaint (Paragraph Six (8)) is "that X–33 is suitable for use on silos and will prevent spoilage."

The traverse of that representation, as set forth in Paragraph Seven (8), is as follows:

> X–33 is not a sealer and does not close the pores in the material to which it is [applied]. Therefore, it is not suitable for use in making silos airtight.

It will be observed that the representation set forth in Paragraph Six (8) contains nothing regarding the sealing of silos or making them airtight.

That X–33 is not a sealer and does not close the pores and therefore is not suitable for use in making silos airtight, although a perfectly logical statement, does not disprove the representation that X–33 is suitable for use on silos and will prevent spoilage.

Aside from the admission of the respondent Klehman that X–33 does not seal the pores (Tr. 866–68; see also CX 3 A–B)[39] there is simply no proof regarding the allegation. The record references just cited are the only pertinent citations advanced by Government counsel to support their contentions (GPF 29, p. 25).

There is no evidence that X–33 is not "suitable for use on silos" or that it will not "prevent spoilage."

Likewise, there is no evidence to support the complaint's charge that in order to be "'suitable for use on silos" and to "prevent spoilage," a product such as X–33 must be "suitable for use in making silos airtight."

[39] Klehman testified that X–33 "does not seal the pores or close the pores"; air can get through those pores even with X–33 applied (Tr. 866). Klehman explained further that after a porous material had been treated with X–33, water could get out, "but only in the form of a vapor, only through normal evaporation" (Tr. 866–67). Sales literature also emphasizes this point.

The record shows that only Neff (Tr. 323) reported a representation regarding sealing of silos, although Mathweg said he was told that silos treated with X–33 wouldn't "seep moisture" (Tr. 609–10). Of all the advertising material, CX 18 A appears to be the only exhibit containing such a term ("seals the silo tightly against the deteriorating effects of time and nature").

In the opinion of the examiner, it is not sufficient to point to the inconsistency between the general representation that X–33 is not a sealer and does not seal the pores of the material to which it is applied, and the specific representation that it seals the moisture content of silos.

The record simply does not contain sufficient evidence to permit an informed determination concerning the effectiveness of X–33 when applied to silos.

There may be misrepresentations contained in the published advertising and promotional literature of the respondents, and there may have been misrepresentations made by respondents' salesmen, but whatever they may be, they have not been properly put in issue in this proceeding.

On the basis of the pleadings, and in the light of the evidence of record, the charge of misrepresentation relating to the suitability of X–33 for use on silos and in preventing spoilage of ensilage must be dismissed as not proved.

9. *Financing*

Various arrangements were made by the franchise dealers to pay for the X–33 they ordered (Klehman 815–16; see pp. 839–840, *supra*). Many of the dealers signed trade acceptances. (A trade acceptance is a draft or bill of exchange drawn by the seller (in this case, Wilmington), on the purchaser of goods sold (the dealer), and accepted by such purchaser (the dealer); see, for example, CXs 38 A—40 B.)

Klehman conceded that Wilmington generally transferred the trade acceptances to Eaton Factors Company, Inc., or to Chestnut Finance Company (Tr. 887–88; see also Tr. 817, 1043). Wilmington had a contract with each of those companies, providing in substance that Wilmington was to receive approximately 75 percent of the face amount of the trade acceptances at the time they were negotiated (Tr. 888).

Thus, the issue presented by the complaint is whether salesmen misrepresented the financing arrangement by leading the dealer to believe that payment would be made simply to Wilmington

rather than to a third party. This was important from a commercial or legal standpoint because (without getting into the intricacies of the laws governing negotiable instruments), if the transferee (that is, the finance company) was a "holder in due course" of the drafts, it was entitled to payment regardless of any defense the dealer might have against collection by Wilmington itself (see CXs 61, 78).

The evidentiary support for the charge that financing arrangements were misrepresented is minimal but adequate. Of the 21 dealers who testified, the Government cites only two (Lovett and Schmitz) as supporting the allegation (GPF 20, p. 15). The testimony of a third dealer (Jahnke) also tends to substantiate the allegation, although some confusion is shown on the part of the witness—confusion that reflects the misrepresentation alleged.[40]

Four other dealers testified on this subject (Bass 442–43, VandeNoord 569, Mathweg 604, and Leach 655–56), but their testimony does not directly support the charge, although some of it suggests that there may have been misrepresentation regarding financing. One dealer understood that the purchase was not to be financed by respondents (Mathweg 604).

The other 14 were not interrogated on the subject.

Regarding the trade acceptances he signed (CXs 38 A—40 B), Lovett said that "they were turned into the bank, but the original agreement with Mr. Jansen [respondents' salesman] was—or the way that he led me to believe—was that Wilmington was going to finance this transaction" (Tr. 246–47, 251–54). Lovett didn't know the legal term for the papers he signed; it was ". . . a note of some type . . ." (Tr. 246).

The dealer Schmitz understood that he was to make three monthly payments of approximately $135. On the basis of what the salesman told him, he understood "that Wilmington Chemical Company, like all other places of business I do business with, would just carry an open account or contract. But it turned out, it was sold to Chestnut Finance. I found that out later by mail. . . ." (Tr. 667–68)

On cross-examination, Schmitz said:

> I was led to believe that I was just dealing with Wilmington Chemical Company, and that is who I was going to deal with and not a third party. (Tr. 673)

Although the Schmitz testimony is not as clear and specific as

[40] See also Tr. 528, showing that Sievert thought he had simply given a "check" in payment, whereas CX 78 indicates he had signed trade acceptances.

it might be, it is not so obscure as respondents contend (RPF, p. 30). Its meaning is clear enough in relation to the charge.

The witness Jahnke was asked what the arrangements were for paying for the X–33 (Tr. 592). He replied:

> I though I was to be paying it to Wilmington Chemical Corporation through personal checks when I was billed, but I found out that they had sold the notes to the First National Bank, and I had sent the first check to the Wilmington Chemical Corporation and also the bank. The bank had sent a check in.
>
> Of course, they—the next two checks were given to the First National Bank at Denison, while the first check was sent directly to the Wilmington Chemical Corporation. (Tr. 593)

Thus, all three witnesses demonstrated some lack of knowledge of the niceties of such financial transactions, but they all agreed they were led to believe that their obligations to pay ran simply to Wilmington.

Aside from scoffing generally at the quantity and quality of the dealer testimony, respondents advance as their principal ground of defense that all the dealers who executed trade acceptances also signed an authorization form that put them on notice regarding the nature of the transaction. RX 23 is illustrative of the form. Addressed to Chestnut Finance Corporation,[41] and designed to be signed by the dealer, it states that:

> We hereby certify that said acceptances are valid [*sic*], that you are a holder in due course thereof, and that there are no defenses or offsets of any kind whatsoever to any of said acceptances.
>
> We hereby authorize and direct the [*name of dealer's bank*] to honor and pay forthwith the above described Trade Acceptances upon presentment and further waive any necessity of notification to us prior to such payment.

The preamble is to the effect that the document was being signed "To induce you [the finance company] to purchase from WILMINGTON CHEMICAL CORPORATION, or to induce you to make advances of monies to WILMINGTON CHEMICAL CORPORATION against the collateral of . . . trade acceptances . . . ." There followed a listing of the trade acceptances, their date, the installment amounts, and the due dates.

Klehman testified that all dealers who executed trade acceptances, including most of the dealers who were called as Government witnesses, signed an authorization form similiar to RX 23 (Tr. 1322–60).

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[41] But see Tr. 1322–23, indicating that one such authorization was addressed "To Whom It May Concern."

There are evidentiary problems respecting this testimony of Klehman. This defense was advanced after all the dealer witnesses had testified, and Government counsel was thus precluded from inquiring about the circumstances of the purported signing.

It is significant also that respondents thought so little of the matter that defense counsel did not inquire of a single dealer witness regarding such forms.[42] This, too, precluded a Government follow-up.

Moreover, although respondents' counsel stated that a witness would be called from the finance company to authenticate the forms (Tr. 1344), that was never done. As a matter of fact, Klehman indicated that he had been unable to locate such forms with respect to most of the dealers in question (Tr. 1344–45; *cf.* 1321–29).

Even accepting Klehman's testimony at full face value, however, it does not warrant the proposed conclusion of respondents (RPF, p. 29) that "there was no deception on the part of Wilmington Chemical Corporation. . . ."

At least a partial answer may be found in the testimony of the dealer Leach. He said he "found out later" that the trade acceptances were "bank drafts." Making no claim of misrepresentation, he simply said he "figured the paper work was fairly well routine" (Tr. 655–56).

Moreover, assuming that Lovett, Schmitz, and Jahnke[43] did sign such authorizations, it is clear that the document did not alert them to its contradiction of the salesman's representation.

The legal principles underlying the findings here made are set forth *infra*, pp. 909–910.

10. *Status of Corporate Respondent*

In support of the complaint's allegation (Par. Six (10)) that respondents represented that Wilmington Chemical was "an old established firm with many years of experience in manufacturing paint," Government counsel have cited only one exhibit—CX 20 I ("Merchandising Manual for Dealers"). The only relevant language it contains refers to "the backing of the tests and reputation of Wilmington Chemical Corporation and DuPont."

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[42] But see Tr. 1326–27, to the effect that the authorizations were not available to counsel when the dealers testified. That might excuse the failure to show the documents to the witnesses, but it does not satisfactorily explain the failure to question them on the subject.

[43] Although RX 23 purports to have been signed by Jahnke, note that it was not received as authenticated evidence that the witness Jahnke actually signed it, but simply to illustrate the nature of the form that respondent Klehman said was used in connection with the trade acceptances (Tr. 1044–46; *cf.* RPF 29–30).

Proposed findings of Government counsel do not claim any other record support for the allegation in question, and the examiner is aware of none. None of the dealer-witnesses testified as to any such representation.

Only one witness was questioned along that line, and he failed to recall any such representations. He didn't remember that anything was said about the size or origin of the Wilmington Chemical Company (Skewis 345).

In this state of the record, Paragraph Six (10) of the complaint must be dismissed for failure of proof. The motion to dismiss that charge, on which the examiner reserved decision in mid-trial (Tr. 1524–25), is now granted.

Evaluation of Testimony

Respondents' generalized attack on the evidentiary support for the charges of the complaint requires some discussion supplemental to that set forth *supra* relating to each separate charge. This evaluation will consider (1) the *quantum* of the dealer testimony; (2) the hearsay objection; (3) the alleged use of leading questions; and (4) the alleged unreliability of the dealer testimony, together with (5) a conclusionary finding on the subject.[44]

1. *Quantum*

The examiner is not impressed by the statistical argument made by respondents—that is, the contention (RPF, pp. 2, 4) that the case must fall because 21 dealers alleging misrepresentation constituted less than 1 percent of the 3,000 dealers who "consummated" franchise agreements to sell X–33. Aside from the uncorroborated, self-serving statement of the respondent Klehman that the dealers called as witnesses were not representative (Tr. 1063), there is no evidence to support the argument that the testimony of those 21 dealers shows "a highly distorted picture concerning the operations" of the respondents (RPF, p. 4). Moreover, it is well established that when proof is offered of misrepresentations made in connection with some transactions, it is no defense to show that there were numerous other transactions in which there was no misrepresentation, *Basic Books, Inc.* v. *Federal Trade Commission*, 276 F. 2d 718, 721 (7th Cir. 1960).

If, as found by the examiner, the testimony of those 21 dealers

[44] Concerning the testimony offered by respondents, the examiner believes its evaluation is sufficiently covered in the foregoing text and in certain comments, *infra*, relating to the defense of discontinuance.

essentially supports the allegations of misrepresentation, Government counsel would have been properly subject to censure for unduly proliferating the evidence and extending the proceeding had they called additional witnesses. [See *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, (1953).]

2. *The Hearsay Objection*

In their attack on the reliability of the dealer testimony, respondents advance a remarkably novel doctrine in contending that such testimony concerning salesmen's representations constituted hearsay. This position was rather consistently taken by respondents' counsel at the trial, and it is renewed in Respondents' Proposed Findings (pp. 4–5). Respondents complain that the dealer testimony "uniformly embraced hearsay declarations involving the independent contractor [that is, respondents' salesman] and the dealer witness" (RPF, p. 4). As a result, respondents say, "There was no burden upon Respondents to disprove this testimony, simply because it had never been established as a matter of probative evidence." (RPF, p. 5)

Although superifically, the testimony of the dealers concerning statements made to them by respondents' salesmen is, in a loose sense, hearsay, it is well established that the general rule against the receipt of hearsay evidence does not apply in the circumstances of this case. This is because the statements made by the salesmen constitute the very matter in issue in this proceeding. We are concerned, first, with the question whether the statements were made, before we reach the question of their truth or falsity. The dealer testimony concerning the representations was designed to establish only the former. Obviously, instead of seeking to prove the truth of the so-called hearsay statement, the Government was contending the contrary.

Thus, in receiving testimony concerning the statements made, the hearsay rule did not apply because the statements were not offered testimonially—that is, they were not offered as evidence of the truth of the facts contained therein. (See 6 Wigmore on Evidence, § 1770; *National Labor Relations Board* v. *G. W. Thomas Drayage & Rigging Co., Inc.,* 206 F. 2d 857, 860 (9th Cir. 1953) and *Ward* v. *United States,* 296 F. 2d 898, 903 (5th Cir. 1961).)

A familiar analogous illustration is a slander case, where the initial issue is whether or not the allegedly defamatory words were spoken by the defendant. There, as here, testimony as to the

utterance obviously is not for the purpose of proving the truth of the statement.

As a corollary to their contention that the dealer testimony was never established as a matter of probative evidence, respondents urge that "there was an affirmative burden upon counsel supporting the Complaint to substantiate this testimony," but they "never called even one independent contractor [salesman] to give testimony regarding any one of these hearsay statements made by the dealer witnesses" (RPF, p. 5).

Actually, in view of the defense offered by respondents, it was incumbent upon them to offer testimony that the representations were not made by the salesmen. Any adverse inference to be drawn concerning the failure to call any of the salesmen is to the detriment of the defense case, rather than of the case in support of the complaint.

3. *Leading Questions*

Brief mention should be made of respondents' contention that the probative value of the dealer testimony "is highly suspect" because their answers on crucial matters "were given in response to leading questions" (RPF, p. 5). This argument is made in general terms and cites only two transcript pages (Tr. 385–86) in support.

In spite of the absence, generally, of specific record citations, the examiner has considered this point in his evaluation of the testimony of the dealer-witnesses.

Review of the record shows that there were objections, frequently sustained, to leading questions by Government counsel, and that there were admonitions by the examiner that leading questions should be avoided to the fullest extent practicable.

Some of the questions put by Government counsel were in the nature of leading questions, but most of the so-called "leading questions" merely directed the witness's attention to a particular subject, and he was then asked if the salesman had mentioned it.[45] True enough, such a question could be answered yes or no, but the fact remains that in general, if the answer was affirmative, the witness then told in his own words what the salesman said.

As far as the crucial issues in this case are concerned, the so-

[45] In discussing "Count III" (RPF, pp. 17–20), respondents complain that the testimony regarding representations as to profits was elicited by leading questions. The fact is that each witness was simply asked what representations were made on that subject, and no amount was suggested in the questions put.

called leading questions did not instruct the witness how to answer or put into his mouth words to be echoed back. Upon the record as a whole, the examiner is satisfied that respondents have not been prejudiced by the use of leading questions. Actually, Government counsel were held to a higher standard than is required by the strict letter of the rules of evidence respecting leading questions. The lone transcript reference relied on by respondents (Tr. 385–86) tends to negate the point contended for.

There is no basis for a conclusion that the impact of the dealer testimony is vitiated because it was elicited by leading questions.

4. *Alleged Unreliability of Dealer Testimony*

Respondents make the further argument that the testimony of the 21 dealers must be disregarded because of "overzealous and unfair" investigational activities by the Commission attorney who investigated this case (RPF, p. 2). Respondents allege that the pre-complaint investigational procedure "had the obvious effect of establishing a relationship of mutual interest and concern between the witnesses and the Commission, which tainted all of their testimony and jeopardized a fair trial. . ." (RPF 2).

The principal basis for these sweeping charges is the testimony of the respondent Klehman that the Commission's attorney-investigator, Edward Statton, coerced and intimidated the dealers into testifying in support of the charges of the complaint by threatening to join each dealer as a respondent in the proceeding (RPF, p. 2; Tr. 1067, 1825).

Additionally, respondents assert that "Statton further informed these dealers that the product X–33 'was no good', 'should not be sold', 'was extremely flammable', 'the dealers should not sell it or they would be liable for it', 'it had not been properly tested', and that Respondents 'were running a racket'." (RPF, p. 2)

Before discussing the legal significance of those allegations, it is necessary to set the record straight concerning some of the "facts" relied on by respondents.

First, the record does *not* show, as respondents say (RPF, p. 2), that *all* of the dealer-witnesses "were personally contacted" by Statton. With respect to 9 of the 21 dealer-witnesses, there is absolutely no record basis for respondents' statement. There is nothing to indicate any prior contact by Statton in the cases of Lovett, Neff, Huffstutter, Gellhaus, Kruse, Frederking, Goldsmith,

or Leach; and Juday specifically testified that he had had no contact with Statton before the day he testified (Tr. 706).

Second, the recklessness of respondents' allegations concerning Statton is further demonstrated by the fact that three of the four record citations on this subject (RPF, Par. 4, p. 2) not only fail to support their contentions but actually show the contrary:

(1) Respondents' allegation (RPF, p. 2) that Statton "informed these dealers" that respondents were "running a crooked racket" [46] is not supported by the record (see Tr. 1837–38). Klehman's testimony at the cited pages is simply to the effect that Statton told *him* that, not that such a statement was made to the dealers.

(2) In support, presumably, of the charge that Statton told dealers that X–33 "was no good," reference is made to Tr. 594. The record at that point shows only that Jahnke testified that Statton told him "that it was being investigated" by the Commission. (The words "no good" were defense counsel's, not the witness's.)

(3) The testimony of Warnock likewise fails to support respondents' position except in part. According to this testimony, Statton did not tell Warnock not to sell the product, nor did he advise him not to pay for it, but he did say "it hadn't been thoroughly tested yet" (Tr. 640–41).

The record does confirm that one dealer (VandeNoord) testified that Statton told him X–33 was "extremely flammable" and advised him not to continue selling the material lest he be held "liable" (Tr. 580, 584–86).

The statements attributed to Statton by Warnock and VandeNoord are hardly exceptionable in any sense. They certainly show no attempt to influence the testimony of those dealers.

Now let us consider the principal accusation—that Statton admitted threatening to make the dealers respondents if they didn't testify for the Government.

Respondents emphasize (RPF, p. 2) that Klehman's testimony is uncontradicted. But the examiner must recognize that the testimony is an uncorroborated, self-serving statement by a party respondent.

Despite the seriousness of the charge, it is noteworthy that respondents apparently thought so little of the matter that defense counsel failed to inquire of a single dealer-witness concerning the

[46] The word "crooked" was included in the transcript but was omitted from respondents' quotation (RPF, p. 2).

alleged threats.[47] With Klehman's testimony obviously subject to discount because of its self-serving nature, it is significant that no effort was made to corroborate the charge by inquiring of any of the so-called subjects of the threat.

With this opportunity ignored, the inference must be drawn that corroboration was not sought because it would not have been forthcoming.[48]

Furthermore, the failure by respondents to inquire of the dealer-witnesses on this point, coupled with the fact that the accusation was made by Klehman after all the dealer-witnesses had been excused, precluded Government counsel from questioning the dealers on the subject.

Respondents seek to augment the impact of Klehman's testimony by invoking the proposition that the Government's failure to call Statton as a witness warrants an inference that his testimony "would have been in opposition to and contrary with the charges in this Complaint" (RPF, p. 3).

After the defense rested its case, Government counsel said that there would be no rebuttal (Tr. 1847); that Klehman's testimony regarding the Statton statement was not "important enough for rebuttal"; and that, in any event, Statton couldn't be called before adjournment of the hearing because he was on military duty (Tr. 1848; see also Reply Brief, p. 4).[49]

The examiner recognizes that he is authorized to draw an adverse inference from the fact that Statton never was called as a witness to rebut or explain the statements attributed to him by

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[47] As we have seen, defense counsel did ask a few of the dealer-witnesses questions about their interviews by Statton, but such questions did not touch on any threats supposedly made by Statton or even suggest such a thing.

[48] Klehman testified (Tr. 1839) that Mr. Rothbart, respondents' principal trial counsel, was present and could "verify" the conversation in question. In view of the strong policy (see Canon 19, Canons of Professional Ethics, American Bar Association) discouraging a lawyer from testifying in a matter in which he also is counsel (except for real necessity), the examiner draws no inference adverse to respondents from the fact that Mr. Rothbart did not take the stand to corroborate Klehman's testimony. (To keep the record straight, Mr. Rothbart was not respondents' counsel at the time Statton allegedly made the statement in issue.)

[49] Regardless of the legal effect that may be attached to the matter, it is unfortunate that such a cloud was left hovering in this record without explanation by Statton. Contrary to the position of Government counsel (Reply Brief, p. 4), it *is* a matter of "importance" that we assure not only fairness itself, but also the appearance of fairness.

The record shows that before Government counsel rested their case-in-chief, they were on notice concerning Klehman's charge against Statton (Tr. 1067; see also Prehearing Conference Transcript, pp. 21–25), and that Statton was then available as a witness. As a matter of fact, it was on the morning of the day that Klehman first voiced the accusation that Government counsel withdrew the name of Statton as a Government witness to be called during the case-in-chief, and requested that the rule of sequestration be lifted so that Statton might be permitted to assist Government counsel at the hearing. The door was left open for possible calling of Statton as a rebuttal witness. (Tr. 935–36)

Klehman. However, under all the circumstances shown by the record, the examiner declines to draw the inference that Statton would have admitted making the statement as a statement of fact if he had been called. As a corollary, of course, there remains no basis, except Klehman's unsupported testimony, for any inference that Statton actually engaged in the conduct charged.

Even if we were to give full credence to Klehman's testimony that Statton made the quoted statement, and even if we were to hold that, as a vicarious admission of the Government,[50] it may be taken as proof of the truth of the matters therein asserted, there still would be problems in giving the statement the effect contended for by respondents.

Assuming that Statton did make the quoted statement and assuming that it may be given some evidentiary value as far as its substantive content is concerned, it still suffers from various infirmities as proof that Statton did coerce and intimidate the dealers.

Under all the circumstances reflected by this record (see Tr. 853–60, 1058–68, 1824–25, 1833–39, 1843–44), including the animosity that Klehman said had developed between him and Statton (Tr. 860, 1059–67, 1833–39), there is real doubt that the statement, if made, was intended as a statement of fact. The circumstances suggest that the statement, if made, may have been an ill-advised jest or, more likely, heavy-handed sarcasm. The examiner finds it incredible that any investigator, Government or otherwise, would seriously make such a statement, in the presence of at least one witness (footnote 48, *supra,* p. 899), to the party under investigation, even if—or particularly if—it were true.

Upon the record as a whole, the examiner is unimpressed by Klehman's testimony concerning the conduct of Statton. The testimony stands uncontradicted, but it must be critically viewed as a self-serving statement by a party respondent, with strong motivation to discredit the Government's case—a statement, moreover, that is otherwise uncorroborated, even though there was opportunity for corroboration. And, as noted, it strains credulity to view the so-called admission as a statement of fact.

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[50] In view of the position ultimately taken by the examiner, there is no necessity to delve into the complexities of the question whether Statton, as an agent of the Government, was authorized to make such a statement (truthful or otherwise) on behalf of the Government. The examiner doubts that it would be appropriate to so hold, but for present purposes, it may be assumed (without deciding) that the statement properly may be viewed as a vicarious admission attributable to the Government. Otherwise, the statement would have to be considered as a hearsay statement which, although perhaps properly admissible, may not be accepted as proof of the truth of the matter asserted therein.

Thus, the record is barren of any substantial probative basis for a finding that Statton did in fact coerce and intimidate the dealers by threatening to make them respondents if they did not appear as Government witnesses.

Although the examiner has accorded little or no weight to Klehman's testimony regarding Statton, let us consider, *arguendo*, the results that respondents profess to see flowing from the conduct charged:

> The statements made and conduct followed by Mr. Statton can be equated literally with instructions that were so strong and precise that they must have pre-conditioned the witnesses. This was confirmed by the conduct and, in many instances, the obvious hostility on the part of the dealer witnesses at the time they testified. (RPF, p. 3)

Not only are those contentions unsupported by any record references, but they are belied both by the conduct and by the testimony of the witnesses in question. The demeanor of the dealer-witnesses did not indicate coercion or intimidation or any "pre-conditioning." It is significant also that, with an exception treated *infra*, no other proof was developed by respondents that remotely calls into question the veracity of any of the dealer-witnesses.

There is no basis whatever for the defense argument that all the dealer testimony "must be totally disregarded" (RPF, p. 3).

One other observation may be made on this point. If, in fact, the witnesses had been "pre-conditioned," as urged by respondents, it might be expected that each of them would have gone down the line in support of every allegation of the complaint concerning the representations made to dealers by respondents' salesmen. Yet, respondents, painting with the same broad brush, are able to contend that the dealer testimony fails to support any of the charges (see, for example, RPF, pp. 4, 7, 12, 15).

Respondents can't have it both ways.

Another aspect of respondents' attempt to discredit the dealer testimony [51] is grounded in the fact that four of the dealers—Bass, Forsberg, Fitch, and Neil—had retained counsel, who advised Wilmington Chemical Corporation that each repudiated his franchise agreement because the product was "unsatisfactory" and did not perform as represented (RXs 1—3 B).

Review of the record on this subject shows not only that many of respondents' allegations are factually unfounded, but also that

[51] Note also the sinister "prejudice" respondents find lurking in the use by one witness (Kruse) of the word "they" (RPF, p. 18; see Tr. 513).

there is otherwise no basis for rejecting or downgrading the testimony of the four dealers cited.

For example, the record does not establish, as contended by respondents (RPF, p. 8), that these dealers "all had hired counsel to sue Wilmington Chemical Corporation. . . ." Neither is there warrant in the record for respondents' statement (RPF, p. 9) that "they all agreed their position was represented by the letter written by their counsel" (RX 3). (See Bass 441, Neil 456–57, Fitch 496, 498–99.) In any event, the letter (RX 3) is not inconsistent with the testimony.

Comparison of respondents' comments regarding Fitch (RPF, p. 10) with the facts of record demonstrates the inaccuracies and inconsistencies underlying respondents' efforts to discredit the dealer-witnesses. It is true that Fitch acknowledged he was "mad" at Wilmington (Tr. 494), but his frank answer on this point is a factor to be taken into account in assessing the credibility of his entire testimony.

As far as the witness Neil is concerned, neither his testimony nor his conduct justifies the contention of respondents that he was "anxious to testify against Respondents" or that he was making an "effort to attack the Respondents" (RPF, p. 9).

Similarly, the examiner finds no discrediting bias or prejudice on the part of Bass or Forsberg.

In the case of the dealer Juday, respondents completely distort the record in their statement (RPF, p. 13) regarding his use of notes while testifying. The record shows that respondents' objections to the use of the notes was sustained (Tr. 687–88), except that when the witness could not remember a specific figure, he was allowed to use the notes to refresh his recollection in that regard (Tr. 691–93).

Even if it were true, as argued by respondents (RPF, p. 13), that Juday technically was not a customer because, after his suspicions were aroused, he stopped payment on the trade acceptances, that fact would not require that his testimony be disregarded or discounted. Moreover, it cannot be said that he was not initially deceived, even though his subsequent independent inquiries confirmed his suspicions. Beyond that, the law is well settled that there is no necessity for proof of actual deception; the test is whether the challenged representations have the capacity and tendency to deceive.

Much of the dealer testimony does suffer from a common deficiency arising from the well-known frailty of human memory.

Understandably, after the lapse of two or three years and under the nervous strain of testifying under oath in a formal legal proceeding for the first time, few of the dealers could remember with certainty exactly what was stated to them.

Unable to remember all the details of their conversations with respondents' salesmen, some dealers frequently stated their "impression" or "theory," or used such terms as "I was led to believe. . ." or "The salesman led me to believe. . . ."

Such testimony is acceptable; it does not have to be disregarded or discounted. The examiner is able, from this testimony, to determine what is, after all, the crux of the case—what impression was created in the dealers' minds by the sales talk and what the dealers were "led to believe" by the salesmen.

Thus, in a case involving false advertising, the Court held admissible the testimony of lay witnesses concerning the meaning conveyed to them by advertising, stating: "The issue was the impression made or likely to be made upon the reading public by the . . . representations . . ." *Gulf Oil Corporation* v. *Federal Trade Commission,* 150 F. 2d 106, 108 (5th Cir. 1945).

As was stated in *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, 167 (7th Cir. 1942), "The ultimate impression upon the mind . . . arises from the sum total of not only what is said but also of all that is reasonably implied."

The *Aronberg* case also stands for the proposition that representations "must be considered in their entirety," and as they would be understood "by those to whom they appeal," taking into account that representations "are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers."

In *Aronberg,* the Court was dealing with published advertising, but the principles there expounded are even more applicable to oral representations of salesmen.

To the same effect, see *Charles of the Ritz Distributing Corporation* v. *Federal Trade Commission,* 143 F. 2d 676, 679 (2d Cir. 1944): "The important criterion is the net impression which the advertisement is likely to make upon the general populace."

Defense counsel was allowed considerable latitude in cross-examining the dealer-witnesses to test their memory and veracity and to show bias and prejudice, if any. The answers were frequently illuminating (see, for example, Lovett 284–85) and sup-

plied no real ammunition for the shot-gun attack characterizing respondents' efforts to discredit the dealers.

5. *Conclusionary Finding*

On the basis of his observation of the witnesses and his careful review of the testimony in the record, the examiner holds that there is no basis for respondents' charge that they were intimidated or coerced, or that they showed such hostility, bias, or prejudice as to warrant either disregarding their testimony or discounting it. Although some of the witnesses were understandably indignant about their business dealings with respondents, there is no basis for holding that their credibility was thereby impaired.

Each of the 21 dealer-witnesses testified to one or more of the charges. Despite sweeping statements by respondents' counsel in their submittals, the testimony of the dealers stands essentially uncontradicted. Their credibility has not been impeached. They all impressed the hearing examiner as substantial businessmen who told a straightforward story of the representations made to them which induced them to enter into a franchise contract and purchase substantial quantities of X–33. (The fact that only a few of these witnesses stated explicitly that the representations induced them to sign the contract and order the product is not important. This is an inference that validly may be drawn by the deciding authority.)

There was nothing intrinsically incredible in their testimony, and, except as may be otherwise noted, it has been accorded great weight by the examiner.

III. *Respondents' Defenses*

Introduction

In addition to denying that the challenged representations were made as charged or, in the alternative, defending them as true, respondents advance numerous other defenses or grounds for dismissal. Aside from some grounds already disposed of,[52] they contend:

[52] The examiner has rejected the defense that through the so-called verification procedure, respondents "took all possible precautions consistent with recognized and established business practices . . ." (RPF, pp. 5–6; see pp. 840–841, *supra*). Similarly, it has been held that the evidence of cancellation of a substantial number of contracts at dealer request (RPF, p. 6) did not rebut the charge of misrepresentation concerning contract cancellation and related matters.

Also considered and rejected was the argument that the 21 dealers who testified constituted what respondents call "a few isolated instances where misunderstandings with customers occurred that may have been at variance with company policy" (RPF, p. 6).

(1) That all of the individuals that the dealer-witnesses characterized as representatives of the company were, in factual and legal actuality, independent contractors in the performance of their sales activities (RPF, pp. 5, 31).

(2) That dealers could not have been misled if they had read the contract and related materials rather than relying on the representations of the salesmen—in other words, that the rule of *caveat emptor* applies.

(3) That there is no basis for naming the respondent Klehman in the order individually (RPF, p. 32).

(4) That Wilmington Chemical Corporation was permanently out of business, with no likelihood of resumption, at least 13 months before issuance of this complaint (RPF, pp. 6, 32).

Each of these contentions will be considered in turn.

Liability of Respondents for Acts of Salesmen

As previously noted, one of respondents' principal defenses is that the salesmen who made the misrepresentations charged were not employees of the respondents but were "independent contractors" (RPF, pp. 5, 31).

Interestingly enough, in the same section in which respondents emphasize the independence of the salesmen, the argument is also made that they had agreed not to undertake any of the representations challenged by the complaint.

But it is not necessary to rely on that inconsistency. Nor is it necessary to explore any nice legal distinctions between agents and independent contractors.

Government counsel have briefed the law applicable to arrangements such as that involved here, and the authorities cited are persuasive on the point that respondents cannot escape responsibility for the representations made in their behalf by salesmen, whether or not those salesmen may be considered "independent contractors" for other purposes. It is significant that respondents' submittals cite no case law or other authority on this subject, relying simply on the *ipse dixit* of their counsel.

Even if it were to be found, as contended by respondents, that the contractual arrangement between Wilmington Chemical Corporation and its salesmen "was not a mere paper arrangement . . . but conformed factually and legally to the separateness . . . attributed to it" (RPF, p. 31), that would not be dispositive of the issue.

Although Klehman generally was careful to deny that he "em-

ployed" salesmen (Tr. 805–06), the record shows that under examination by his own counsel, he was asked this question:

> Now, these independent contractors, before you would authorize them to represent you, did you have them enter into an employment agreement with you? (Tr. 968)

Klehman answered: "Yes, sir" (Tr. 968).

There is no dispute that in their transactions with prospective dealers, the salesmen or so-called independent contractors were represented as "franchise managers." They were so designated on the printed contracts furnished them by the respondents (CX 79, Tr. 809) and in letters to dealers and others (CXs 59, 65, RX 2).

It is not necessary to determine whether the salesmen were clothed with actual authority to make the representations involved in this proceeding;[53] it is clear that they were clothed with apparent authority and that respondents enjoyed the fruits of the activities engaged in by the franchise managers (CX 100 P–Q).

Whatever the legal relationship between respondents and the "franchise managers" may be in the law of contracts or agency, it is well established in trade practice law that respondents are responsible under the Federal Trade Commission Act for the representations of their representatives. *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584 (9th Cir. 1957); *Standard Distributors, Inc.* v. *Federal Trade Commission,* 211 F. 2d 7 (2d Cir. 1954); *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission,* 187 F. 2d 693 (7th Cir. 1951); *International Art Co.* v. *Federal Trade Commission,* 109 F. 2d 393 (5th Cir. 1940).

In the *Goodman* case, as here, the contention was made that the salesmen who sold a correspondence course were independent contractors for whose actions the respondent was not responsible. Because respondent carried the salesmen on his books as independent contractors, his agreements with them so stated, and he had no control over their work or the manner of performing it, the argument was made that the connection between respondent and his salesmen conformed to the classical characteristics which courts have attached to that relationship. But, said the Court:

> The criteria of direction and control, which govern in determining whether or not such relationship exists, are well recognized in law. However, even the

[53] See Klehman's deposition testimony (CX 100 P–Q), where he took the position that respondents' franchise managers "had no authority to do anything except make sales"; that they "didn't have any authority to represent the company or commit the company in any other fashion . . . than to grant the dealer the terms that were in the contract."

general criteria are not applied with rigid consistency. And in the authorities there are references to cases in which salesmen have been held to be agents of the principal notwithstanding assertions of a different relationship. However, when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity or the enforcement of standards it has established. (244 F. 2d 584, at 590; footnote omitted)

In *Goodman,* a weaver's course was sold by salesmen who were supplied with sales kits, trained to sell the course, and furnished with credentials showing them to be representatives of the respondent. The contract of purchase was made for the respondent by the salesman, and the course was prepared and mailed by the respondent.

Thus, it can be seen that the facts in that case are essentially parallel to those in the instant case. After further discussion of those facts, as well as the applicable precedents, the Court concluded:

So, regardless of the manner in which these salespersons may have been designated in contracts between them and the petitioner or were carried on his books, so far as the public was concerned, they were his authorized agents and acted not only within the apparent but also within the actual scope of their authority. (244 F. 2d 584, at 593)

The *Steelco* case also is in point here. There, franchises had been given to salesmen who were referred to as dealers. Noting that the salesmen did not purchase respondents' products for resale to the consumer but sold them on behalf of respondents, the Court ruled:

Such salesmen are agents or employees of respondents and are not independent contractors or independent dealers. Respondents are fully responsible for such salesmen's acts and statements made in connection with the sale or offering for sale of their products and germane thereto. (187 F. 2d 693, at 697)

The *Standard Distributors* case is even stronger authority for the proposition contended for because there, it was found that the representations challenged were made in violation of direct instructions of the respondent. The Court stated:

They were nevertheless the authorized agents of the corporate petitioner . . . to sell the books. The misrepresentations they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate peti-

tioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act. (211 F. 2d 7, at 13)

In *Standard Distributors,* the Court expressed its belief that the efforts to prevent misrepresentations were both "earnest and honest," but that fact did not relieve the respondents of responsibility.

Similarly, in *International Art Company* v. *Federal Trade Commission,* 109 F. 2d 393, 396 (7th Cir. 1940), the respondent company could not avoid responsibility for misrepresentations of its salesmen on the ground that they were independent contractors rather than agents, since it furnished salesmen with certificates designating them as representatives of the company, contracts, and order blanks bearing the company name, thus giving customers the right to believe that the salemen were its agents.

Again, in *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission,* 142 F. 2d 437, 440 (2d Cir. 1944),[54] it was held that however unauthorized the offending conduct of the salesmen may have been and however condemned and discouraged by their superiors, it still was conduct which subjected the employers to the jurisdiction of the Federal Trade Commission and to its cease and desist order.

Likewise, a company was held responsible for unauthorized misrepresentations of its agents in *Perma-Maid Company, Inc.* v. *Federal Trade Commission,* 121 F. 2d 282 (6th Cir. 1941).

The fact that the law of agency, in looking at both actual authority and apparent authority, reflects the realities of business dealings is demonstrated by the testimony of several of the dealers (Gellhaus 381, Forsberg 461, Sievert 525, Jahnke 589, Mathweg 621, Schmitz 662).

Thus, it becomes clear that merely because the salesmen were required to sign contracts (CX 29) designating each of them as an "independent agent" and as a "free agent" is not controlling for purposes of this proceeding. Neither is another statement (CX 27) in which each salesman acknowledged that his relationship with Wilmington Chemical Corporation was "that of an independent dealer agent," and that he was not "subject to the will or control" of the company "as to how orders will be obtained," and that he was "a free agent."

Despite this aura of an independent contractor relationship, it

[54] *Cert. denied,* 323 U.S. 753.

will be noted that related documents refer to the so-called independent contractors as "salesmen" (CX 26, 28).

Moreover, we find these independent agents agreeing "to comply with company policy and procedure at all times" and promising not to employ unethical methods or use misrepresentation in securing business (CX 29; see also RX 29 A–B). In another document (CX 28), these independent contractors are given express instructions regarding representations as to the relationship between Wilmington Chemical Corporation and DuPont.

Not only were the salesmen furnished with company contract order forms providing for their signature in conjunction with that of the dealer, but they also were furnished a sales kit containing advertising literature, samples of X–33, and various demonstration materials.

The fact that the actual franchise contract was subject to final acceptance by the company does not change the basic picture.

None of the so-called independent contractors kept a stock of X–33 on hand (Tr. 1104). They neither purchased it nor paid for it (Tr. 1101–02). The merchandise was shipped direct to the dealer (Tr. 1100). At that time, title to the merchandise was vested in Wilmington Chemical Corporation (Tr. 1100), and title passed to the dealer when it was delivered to the carrier, pursuant to the terms of the contract (*e.g.*, CX 55, par. 15). The dealer was billed by Wilmington (Tr. 1102).

Some, if not all, of the salesmen were trained by Klehman (CX 100 R–T; CX 102 E; *cf.* Tr. 54–55). Although respondents emphasize (RPF, p. 31) that the salesmen were on a commission basis rather than on a salary basis, at least some of them received a weekly check of $200 or more as "an advance on commissions" (RX 30–A).

Looking at those factors in the light of the authorities cited, the conclusion must be that whether or not they were independent contractors for certain purposes, they were duly authorized representatives of respondents for whose representations respondents are properly held liable.

Caveat Emptor

Much of the defense in this matter was devoted to efforts to show that the dealers could not and would not have been misled if they had read the contract and related materials rather than relying on the representations of the salesmen. This position is re-

flected in the examination of many of the dealer-witnesses, as well as in the briefs filed on behalf of respondents.

The contentions of respondents in that regard overlook the fact that this is not a proceeding involving strict principles of contract law. Such contentions also overlook the fact that despite the existence of certain legal principles governing the construction of written contracts, the daily conduct of business is on a more practical and realistic basis and depends on faith, trust, and confidence on the part of businessmen, as well as the consuming public.

The atmosphere in which transactions of the kind involved in this proceeding are frequently carried on is vividly demonstrated by the testimony of several of the dealer-witnesses.

For example, Huffstutter said he read the franchise agreement "inasmuch as you read any agreement of that type," but he was "used to dealing with companies where you don't have to read an agreement too much of that type" (Tr. 367–68).

Similarly, Fitch indicated that neither he nor his customers carefully read contracts that they signed (Tr. 487–88). He explained:

> If you go down to Monkey Ward's and charge a ten dollar coat, do you read out the full thing? You sign for it and go.

That is the way he does it—"With the reputable dealers you betcha" (Tr. 488).

Buying supplies from local dealers, he said, "I don't have to read the fine print" (Tr. 488). He added that "we don't need lawyers. We trust each other . . ." (Tr.489).

At another point, he said when he "was doing business with a reliable company in [his] own home town," he didn't "have to read all this fine print" (Tr. 490; see also Tr. 491–92).

In the course of cross-examining the dealer Gellhaus, defense counsel referred to the representations made immediately prior to the time that Gellhaus entered into the agreement. Defense counsel sought "to show that he did not enter into the agreement before he read it, and that upon reading the agreement as an experienced businessman, he should have understood those representations by the salesman. This was the full scope of the obligation between himself and Wilmington Chemical" (Tr. 397). Then counsel put this proposition to the witness:

> I want to be certain that you clearly understood before you signed the agreement that the obligations on the part of Wilmington Chemical Company

including any representations are all contained in that document, isn't that correct? (Tr. 398)

Gellhaus said he didn't think so and explained: "I think the salesman representing the company, what he says here is more or less a representation of the company" (Tr. 398).

We also find Bass testifying that he read the contract, but "not entirely," because "The demonstrations were so convincing and the man was the type fellow that you more or less trusted." (Tr. 439)

Similarly, Fitch didn't read the contract "word for word," but "glanced at it more or less." He didn't believe that he understood it, but he did believe that when "you are doing business with somebody like DuPont, you don't have to be careful. They are a very good company" (Tr. 484–85).

It must have been with knowledge of such business realities as those that the Supreme Court said:

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception. *FTC* v. *Standard Education Society,* 302 U.S. 112 (1937).

Nearly 30 years later, it still bears repeating.

So it is that "one dealing with another in business [has] the right to rely upon representations of facts as the truth." *Goodman* v. *F.T.C.,* 244 F. 2d 584 (9th Cir. 1957).

Thus, the fact that by reading the contract carefully or by perusing all the advertising and promotional literature, dealers might have learned the true facts is no defense to misrepresentations made by salesmen, *Exposition Press, Inc.* v. *Federal Trade Commission,* 295 F. 2d 869 (2d Cir. 1961); *Carter Products, Inc.* v. *Federal Trade Commission,* 186 F. 2d 821 (7th Cir. 1951); *Progress Tailoring Company* v. *Federal Trade Commission,* 153 F. 2d 103 (7th Cir. 1946).

Whatever may be the law respecting the rights and obligations of the dealer in any litigation with respondents, considering the plain language of the contracts, the fact remains that even "the careless businessman" is entitled to protection from deception, *Independent Directory Corp.* v. *Federal Trade Commission,* 188 F.

2d 468, 470 (2nd Cir. 1951). (For an interesting exposition of the law and philosophy regarding such matters, see the *Independent Directory* case before the Commission, 47 F.T.C. 13 (1950).)

The defense of *caveat emptor* is rejected.

Liability of Individual Respondent

Respondents urge that there is no necessity for an order against the respondent Klehman (RPF, p. 32; Exceptions, p. 10). They rely, among other precedents, on the recent case of *Lovable Company,* Docket 8620 (June 29, 1965) [67 F.T.C. 1326], where the order against the officers of the corporation was limited to them as officers and was not directed against them in their individual capacities.

But *Lovable* is distinguishable from the instant case. There, the only evidence concerning the individual respondents was an admission that they formulated, directed, and controlled the policies, acts, and practices of the respondent corporation. There was no evidence that they did any of these things except in their capacities as officers. The Commission ruled (Opinion, p. 1336) that "To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future *as an individual.*"

In the instant case, however, Klehman is not only an officer of the corporation, but he also is the sole stockholder. To all intents and purposes, he is and has been the corporation. He also is president of another corporation (Color Deep Corporation) which was, for a time, engaged in substantially the same business as the respondent corporation.

With Wilmington Chemical Corporation inactive in circumstances where its business reputation has been tarnished as a result of the Food and Drug Administration action against it, there is basis for believing that there is a reasonable possibility that Klehman may engage in the challenged practices in a capacity other than as an officer of Wilmington Chemical Corporation. It may well be that it would be "a futile gesture to issue an order directed to the lifeless entity" of Wilmington Chemical Corporation "while exempting from its operation" the individual responsible for the illegal practices, *Pati-Port, Inc.* v. *Federal Trade Commission,* 313 F. 2d 103, 105 (4th Cir., 1963).

In the opinion of the examiner, it is necessary that the order be directed against Klehman as well as the corporation in order to effectuate the prohibition against any resumption of the unfair

trade practices found. In the circumstances reflected by this record, Klehman should not escape liability on the "flimsy pretext" that he was acting on behalf of the corporation and not as an individual, *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 407–408 (2nd Cir., 1952), *cert. denied* 344 U.S. 912 (1953).

Wilmington Chemical Corporation is merely "the *alter ego*" of Klehman, and the corporation exists at his sufferance. In such a setting, the order should run against him personally, *Flotill Products Inc.*, Docket 7226 (June 26, 1964 [65 F.T.C. 1099]; reconsideration denied, September 3, 1964 [66 F.T.C. 1541]); *Pacific Molasses Co.*, Docket 7462 (May 21, 1964; reopening denied, July 20, 1964) [65 F.T.C. 675]; *Fred Meyer, Inc.*, Docket 7492 (July 9, 1963) [63 F.T.C. 1].

The case of *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149 (1st Cir., 1964), *cert. denied*, 380 U.S. 954 (1965), is inapplicable because of factual distinctions. In the *Coro* case, the Court set aside the Commission's finding holding personally liable an individual who was the corporation's largest stockholder, its president, and the chairman of its Board of Directors. Even though he had "overall corporate responsibility," including "responsibility for the acts and practices of the corporation," the Court held that there was no showing of his "personal participation," so that there was no sufficient reason for holding him individually responsible.

Here, Klehman not only is president of Wilmington Chemical Corporation, but also owns 100% of the stock (Tr. 47). He characterized it as "my company" and referred to himself as "the boss," who gave the orders (Tr. 980). The actual control of the company was entirely in his hands (Tr. 52). The other officers of the company were simply employees subject to Klehman's direction and he could dismiss them at any time (Tr. 51–52). The Board of Directors met infrequently, and then only for routine purposes (Tr. 52, 766–67).

Klehman supervised and approved the advertising and promotional literature (Tr. 95–96, 137–38, 140–46, 151–52, CX 100–0) and trained the salesmen (CXs 100 R–T, 102 E; cf. Tr. 54–60). Peterson, the National Sales Manager, worked under Klehman's direction, and Klehman issued orders as to what he should do (Tr. 1737).

Klehman is not absolved of responsibility for the acts of the corporate respondent by virtue of the fact that he did not contact

any of the dealers and may not have specifically directed any of the salesmen to make any of the representations charged. As noted elsewhere, the verification procedure utilized by Wilmington Chemical does not negate the charges in the complaint, either as to the company or as to Klehman.

Even in the case of professional managers owning little or no stock in their corporations, so that they are generally unlikely or unable to evade an order by dissolving the corporation and using its assets to create another, the Commission has recognized that they not infrequently resign from their posts to take comparable positions in other companies in the same industry, and sometimes resign to start new companies of their own in that industry. Accordingly, the Commission held it was proper to name corporate officers individually as well as in their official capacities, *Pacific Molasses Company,* Docket 7462 (Final Order, May 21, 1964; Order Denying Request for Reopening, July 20, 1964) [65 F.T.C. 675].

Where the evidence made it clear that an individual was the dominant influence in the corporation and controlled its policies and sales activities, the order ran against him both individually and as an officer of the corporation, *Morse Sales, Inc.,* Docket 6613, 54 F.T.C. 193, 198 (1957).

In *Rayex Corporation* v. *Federal Trade Commission,* 317 F. 2d 290, 295 (2nd Cir. 1963), the Court upheld the inclusion in the order of an individual corporate officer, both as such officer and individually, on the ground, that he was a substantial stockholder and that, as vice-president, he was required, in the absence of the president, to exercise the powers of the president. Even though the Court commented that as a matter of practice, he did not have "much voice" in sales and advertising practices, nevertheless his inclusion was necessary if the order was to be fully effective.

Finally, inclusion of Klehman in the order, both as a corporate officer and as an individual, is warranted by *Revco D.S., Inc.,* Docket 8576 (June 28, 1965) [67 F.T.C. 1158, 1257], where the Commission said:

> It has been the Commission's consistent view that such orders need not and ordinarily should not be limited to the officer's or employee's activities on behalf of the particular corporation with which he was associated at the time of violation, but should extend as well to future activities on behalf of any other business entity.

Discontinuance of Business:

In addition to seeking dismissal on the merits, respondents argue that the complaint should be dismissed because neither the corporation nor Klehman is now in the business of manufacturing or selling X–33 or any other product. They contend further that the respondents cannot resume business because DuPont no longer manufactures and sells Tyzor, one of the ingredients of X–33, and because X–33, in effect, has been banned by the Food and Drug Administration.

Superficially, the plea is persuasive. But it must be weighed against the settled doctrine that abandonment of unlawful practices does not render the case moot, negate the presence of public interest, or oust the Commission of jurisdiction. *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U.S. 257 (1938); *Arkansas Wholesale Grocers Association* v. *Federal Trade Commission,* 18 F. 2d 866, 871 (8th Cir. 1927), *cert. denied* 275 U.S. 533.

Thus, respondents have no right to dismissal. There is no question as to the authority of the Commission to issue an order to cease and desist even after discontinuance of challenged practices particularly when, as here, such discontinuance came only after respondents had notice that a Commission inquiry had been instituted. *Perma-Maid Co., Inc.* v. *Federal Trade Commission,* 121 F. 2d 282, 284 (6th Cir. 1941). The statutory command, as reinforced by the overwhelming weight of Commission and court precedents, demonstrates that there is no requirement that the practices proceeded against be currently in use either at the time of complaint or at the time of order. *Florida Citrus Mutual,* Docket 6074, 50 F.T.C. 959, 963 (1954).

There have been cases in which the Commission, in its sound discretion, has concluded that no order to cease and desist was necessary against practices that had been fully and voluntarily abandoned, with no likelihood of resumption. This is not such a case.

There are several fallacies in respondents' demand for dismissal.

As respondents view the matter (Exceptions, p. 5), this proceeding deals only with the product X–33, and since it is unlikely that X–33, as previously formulated, will again be placed on the market, there is no occasion for a cease and desist order.

It is true that the complaint speaks in terms of respondents' practices in connection with the sale and distribution of X–33.

But respondents overlook the fact that the complaint is concerned with their *acts and practices* in the sale of that product, and any corrective action must deal *in futuro* with such acts and practices, whether related to X–33 or some other product.

In the absence of an effective order, there would be nothing to prevent either the corporation or Klehman from resuming the same acts and practices in connection with the sale of a different product—either a water repellent product or something else. Although both Wilmington Chemical Corporation and Color Deep Corporation may now be inactive, both might be reactivated and resume business. And Klehman, as an individual or otherwise, likewise would be free to return to the water repellent industry or to engage in other business.[55]

The circumstances and timing of the discontinuance are relevant in assessing respondents' plea; although respondents knew in March 1963 that their business operations were being investigated as of questionable legality (Tr. 853), they continued to manufacture and sell X–33 until November 1963 (Tr. 1660), without any effort, apparently, to correct or discontinue the challenged practices. It was not until the Food and Drug Administration (FDA), in effect, placed an embargo on X–33 that the company ceased operations (Tr. 1816).

This, then is not a case of *voluntary* discontinuance of challenged practices, or even voluntary discontinuance of business. According to respondents' own evidence, they were forced out of business by the legal actions of the FDA and by the accompanying publicity identifying the hazards involved in using the product. If it had not been for the FDA action, respondents might well be engaged in business today and continuing the use of the practices challenged by the complaint.

Consideration must be given to both the background and the present status of the respondent Klehman. He has been engaged in the business of selling water repellent products since 1959 (Tr. 941). At the time of hearing, he was unemployed with no fixed address other than that of his attorney (Tr. 32, 35). Concerning his intentions for the future, he did testify that he has no intention of resuming the business in which he formerly was engaged (Tr. 1817).

But in view of the fact that the underlying reason for the discon-

[55] Klehman testified that the capital of the corporate respondent had been destroyed (Tr. 1818). But respondents are suing Shell Oil Company for damages relating to "the extreme danger of the solvent that was used" (Tr. 1817–18). Should that suit be successful, Wilmington might well be able to resume business.

tinuance of business was the flammability of the solvent used in X–33, and in view of the fact that water repellents are and can be formulated in solvents not involving such a hazard, there is basis for believing that Klehman might re-enter that business, either through one of the corporations he controls or through some other business entity.

It simply cannot be found, as contended by respondents (Exceptions, p. 9) that the FDA action "legally, commercially and economically precluded" respondents from ever again returning to the acts and practices challenged by the complaint.

In assessing respondents' plea for dismissal, it also is in order to consider their attitude and actions in the face of the discovery that the product was dangerously flammable. Respondents' own exhibits (RX 172 A–T) are illuminating in that regard. See, for example, RX 172 J, showing that despite FDA notice that X–33 constituted "a demonstrated health hazard requiring the removal of such stocks from the market," respondents "declined to work with [FDA] in bringing this about."

This was at a time when there had been reported one death and several injuries as a result of the use of X–33 (RX 172 J).

See also RX 172 S, a later FDA press release, in which it was reported that by that time, the product had caused 3 deaths and over 30 injuries through flash explosions. That press release contains the statement that "The Wilmington Chemical Corporation has notified FDA that it is financially unable to recall the shipments of 'X–33' still on the market."

The examiner has, moreover, taken into account the actions and the attitude of the respondent Klehman as a witness on the stand. Suffice it to say that his general demeanor and his attitude toward the Commission's investigating attorney and its trial counsel, as well as his evasions, convenient memory, and inconsistencies, impel the conclusion that both respondents should be subjected to an injunctive order.

Another circumstance to be considered is the fact that respondents have refused to concede the illegality of their practices but, on the contrary, have defended them as lawful. It is a circumstance suggesting that without corrective action there is at least a reasonable probability that the practices may be resumed, *Sears Roebuck & Co.* v. *Federal Trade Commission,* 258 F. 307, 310 (1919).

The question of dismissing a proceeding on the ground of discontinuance is one that has been considered both by the Commis-

sion and by the courts in numerous cases, and the examiner has consulted those precedents. However, it is sufficient to refer only to a recent decision of the Commission summarizing the applicable principle as follows:

> * * * In weighing pleas of abandonment or discontinuance, the Commission considers a wealth of factors, but in the final analysis the decision must be based upon a conviction that the practice has been surely stopped and will not be resumed in the future, *Chesebrough-Ponds, Inc.*, Docket 8491 (Final Order, July 27, 1964) [66 F.T.C. 252, 263].

As indicated, the examiner *has* considered a wealth of factors, but in the final analysis, he finds himself lacking a conviction that the practices have been surely stopped and will not be resumed in the future.

There exists some cognizable danger of recurrent violation. The public interest requires an order to cease and desist.

IV. *Changes Made in Proposed Order*

With respect to the matters concerning which the hearing examiner has found a violation, the order contained in the initial decision is substantially that appended to the complaint as the form of order which the Commission had reason to believe should issue if the facts were to be found as alleged in the complaint. However, the examiner has made some additions and deletions [56] as follows:

The examiner has stricken Paragraph 10 of the Proposed Order as not warranted by the evidence. In addition, he has stricken Paragraph 8 in part as not responsive to the charges or appropriate under the evidence adduced. The latter part of Paragraph 8 of the Proposed Order, generally prohibiting misrepresentation of the uses or efficacy of any of respondents' products, has been retained as an addition to Paragraph 7 of the Proposed Order.

In Paragraph 5, the examiner has stricken the reference to trade acceptances so that the order, as revised, prohibits representations that any product will be sold by the customer before payment becomes due. To limit the order to payment by trade acceptances seems unduly narrow.

In Paragraph 6, the examiner has deleted the phrase "before being placed on the market." Again, the proposed order seemed unduly restrictive in prohibiting only misrepresentations that a

[56] In addition, a few minor editorial and punctuation changes have been made, some of them contained in the Proposed Order of Government counsel.

product had been tested "before being placed on the market." As revised, the order runs against any misrepresentation of testing.

Paragraph 8 has been broadened by inserting language that will cover any form of commercial paper or other obligation, instead of limiting the prohibition to trade acceptances.

The examiner also has added a prohibition against furnishing to others the means or instrumentalities by which the public may be misled. Although such a prohibition was not contained in the tentative order attached to the complaint or in the Proposed Order of Government counsel, it is the opinion of the examiner that such a provision is necessary to assure full compliance.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The representations set forth in subparagraphs 1 through 7 and in subparagraph 9 at page 843 of this Initial Decision were false, misleading, and deceptive.

4. The use by the respondents of such false, misleading, and deceptive statements, representations, and practices has had and may have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and into the purchase of substantial quantities of respondents' products by reason of that erroneous and mistaken belief.

5. By their acts and practices, respondents placed in the hands of others, including salesmen, retailers, and dealers, the means and instrumentalities by and through which they might deceive or mislead the purchasing public.

6. The acts and practices of the respondents, as found herein, were all to the prejudice and injury of the public and of respondents' competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

7. The evidence does not support the charge in Paragraphs Six (10) and Seven (10) of the complaint regarding representations as to the status of the corporate respondent; nor does it support the charge that representations concerning the suitability of the

product X–33 for use on silos were false, misleading, or deceptive, as pleaded in Paragraphs Six (8) and Seven (8).

ORDER

It is ordered, That the respondent, Wilmington Chemical Corporation, a corporation, and its officers, and respondent Joseph S. Klehman, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of water repellent coatings, paints, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. Respondents are a subsidiary, exclusive licensee, or division of, or affiliated in any manner with, E. I. du-Pont de Nemours & Company, Incorporated, either by that name or the abbreviated name of DuPont; or in any other manner suggesting a relationship with the DuPont company other than that of seller and purchaser; or that the respondents are affiliated with any company or organization with which, in fact, they are not so affiliated; or that X–33 or any other product sold by respondent was manufactured, developed, or tested by E. I. du-Pont de Nemours & Company, Incorporated, either by that name or the abbreviated name of DuPont; or that such products were developed or manufactured by any company or organization which, in fact, has not developed or manufactured such products.

2. Respondents' products are guaranteed, unless the nature, conditions, and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

3. Franchise dealers will earn, or are likely to earn, any specific amount in dollars, or will earn any amount in excess of that usually earned by respondents' dealers in the normal course of business in a similar trade area.

4. The contract or franchise may be cancelled by the franchise dealer at any time; or that respondents will pick up any unsold quantities of respondents' products, transfer them to another dealer, or make refund to the

dealers for unsold merchandise, or that the contract is other than an outright sale of respondents' product to the dealer.

5. Respondents' product will be sold by the customer before payment therefor becomes due.

6. Respondents' products were tested by E. I. duPont de Nemours & Company, Incorporated, either by that name or the abbreviated name of DuPont, by the corporate respondent, or by an independent laboratory.

7. Respondents' products are waterproof or will cause any surface to which they are applied to become waterproof, or in any other way misrepresenting the uses or efficacy of any of their products.

8. Any trade acceptances or any other form of commercial paper or obligation given in payment for merchandise will be retained by the corporate respondent and not sold to, or discounted by, a third party.

B. Furnishing to, or otherwise placing in the hands of, others, including salesmen, retailers, or dealers, the means or instrumentalities by or through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

It is further ordered, That the charges contained in Paragraphs Six (8) and (10) and Seven (8) and (10) of the complaint be, and they hereby are, dismissed.

APPENDIX

Government Witnesses

The Government called 21 franchise dealers to testify concerning the representations made to them by respondents' sales representatives. The following tabulation shows the name and locality of each dealer, the nature of his business, the salesman who contacted him, and the transcript page where his testimony begins:

Dealer	Business	Town	Salesman	Transcript Page
Robert Lovett	Hardware dealer	Allegan, Mich.	Jansen	231
Dick Neff	Florist	Bellefontaine, Ohio	Van Jorn [1]	316
Mason Robert Skewis	Chicken hatchery	Sheldon, Iowa	Hoehl	338

[1] Neff could not remember the salesman's name, and the signature on the contract (CX 55) is illegible (Tr. 319). But a letter to Neff from Wilmington (CX 59) identifies the salesman as Van Jorn.

Dealer	Business	Town	Sales-man	Trans-script Page
Harold Huffstutter	Druggist	South Milwaukee, Wis.	Russell	354
Verlin Gellhaus	Repair shop	Sutherland, Iowa	Hoehl	379
Duane Bass[2]	Dairy equip-ment business	Des Moines, Iowa	Edwards	410
Robert Neil	Dairy equip-ment dealer	Knoxville, Iowa	Edwards	443
C. H. Forsberg	Aluminum window & door dealer	Ankeny, Iowa	Edwards	459
Harold M. Fitch[3]	Masonry contractor	Des Moines, Iowa	Edwards	470
William Kruse	Plumbing & heating contractor	Lisbon, Iowa	Edwards	506
William T. Sievert	General contractor	Grundy Center, Iowa	Edwards	523
Arthur Frederking	Electrical & plumbing contractor	Melvin, Iowa	Visser	535
Lyle Goldsmith	Grocer	Long Lake, Minn.	Burkenlow	549
John VandeNoord	Carpenter	Pella, Iowa	Edwards	563
William Jahnke	International Harvester dealer (also mayor of Denison)	Denison, Iowa	Hoehl	586
Roy Mathweg	Gamble Store operator	Randolph, Wisconsin	Livingston	599
Donald Warnock	Automobile body shop	Merrill, Iowa	Hoehl	627
David L. Leach	Retail lum-ber dealer	Joliet, Ill.	Draus	650
Leo J. Schmitz	International Harvester dealer	Arcadia, Iowa	Hoehl	660
Joseph Juday	Lumber and builders supply dealer	Middletown, Indiana	Lightcap	681
Arthur Meier	Water soft-ener & fuel oil dealer (also pres., C. of C.)	Janesville, Wisc.	Leahy	729

[2] First name mispelled as Dwayne in transcript; see CX 69.
[3] Erroneously identified in the transcript as Fish; see CX 72.

OPINION AND ORDER OF THE COMMISSION

This matter is before the Commission on the appeals of respondents, Wilmington Chemical Corporation and its sole stockholder and president, Joseph S. Klehman, from the initial decision of the hearing examiner finding that respondents made false, misleading and deceptive statements in connection with the sale of the product X–33, in violation of Section 5 of the Federal Trade Commission Act. In summary, the complaint charged, and the examiner found, that respondents had made the following misrepresentations:

(1) That Wilmington Chemical Corporation was a subsidiary of, a division of, an exclusive licensee of, or otherwise affiliated with, E. I. duPont de Nemours & Co., or that X–33 was manufactured, developed or tested by DuPont.

In fact, the sole connection between Wilmington and DuPont was that one of the ingredients of X–33 was manufactured by DuPont and purchased from it by respondents.

(2) That X–33 was unconditionally guaranteed for ten years.

In fact, the only guarantee issued by respondents provided that if a leak should occur where X–33 had been applied, the product would be replaced; labor replacement costs were not covered.

(3) That so-called franchise dealers would earn profits through the sale of X–33 in varying amounts from $2,000 to $15,000 per year.*

In fact, dealers did not achieve earnings in these amounts and, in many cases, they earned nothing at all.

(4) That the dealer might cancel the franchise at any time and that unsold quantities of X–33 would be picked up or transferred to another dealer by Wilmington or that a refund would be granted for any X–33 unsold.

In fact, no cancellation of a contract was permitted once an order was shipped, and respondents did not make any refunds for unsold merchandise.

(5) That the dealer would sell his entire first order of X–33 before payments on the trade acceptances became due.

In fact, in most cases the supply of X–33 purchased by the dealer was not sold before the trade acceptances fell due, and in many cases, dealers were unable to make any substantial sales of the product at all.

*The complaint charged varying amounts up to $25,000 per year.

(6) That X–33 had been successfully tested either by DuPont, Wilmington Chemical or an independent testing laboratory.

In fact, X–33 was never subjected to any creditable testing designed to determine its effectiveness for its intended uses.

(7) That X–33 had waterproofing qualities or was a "waterproof product."

In fact, X–33 was merely a water repellent and was not capable of waterproofing.

(8) That trade acceptances given in payment for X–33 would be retained by Wilmington and would not be sold to or discounted by a third party.

In fact, all trade acceptances given in payment for X–33 were immediately sold to or discounted by a third party who then became a holder in due course.

The complaint contained two other charges: that respondents represented that X–33 was suitable for use on silos and would prevent spoilage and that the corporate respondent is an old established firm with many years of experience in manufacturing paint. The hearing examiner held that neither of these allegations was supported by the evidence, and both charges were dismissed for insufficiency of proof. Complaint counsel does not appeal from these findings.

Respondents contend that Commission Exhibits 100, 101, and 102, consisting of copies of excerpts of depositions given by respondent Klehman in connection with personal injury suits involving X–33, should not have been admitted in evidence and ask that the exhibits therefore be "rejected." Respondents argue that these depositions are "directed to facts that are not in issue here and about which the record is silent" (Respondents' Brief, p. 6), and that "Commission counsel never really indicated how they were material, relevant, or had any probative value in the matter." (*Ibid.*) Respondents also maintain that the documents should be rejected because they were not contained in the list of exhibits to be offered by complaint counsel. While we do not agree with respondents' contention that the exhibits were improperly admitted, the Commission finds that the other evidence of record referred to in the initial decision amply supports the conclusions and order of the hearing examiner, and we exclude from our present decision any reliance upon the challenged evidence.

Respondents also argue that because the complaint relates only to "statements and representations" made to prospective purchasers of X–33, none of the documentary evidence is relevant to

the charges of the complaint. First, the complaint's reference to "statements and representations" made by respondent Wilmington's salesmen is not by its terms confined to oral representations. In fact, the issue was first raised by the hearing examiner in his initial decision. (I.D., p. 846.) Respondents entered no objection to the documentary evidence at the time of its introduction, and it is well settled that if an objection to evidence is not made at that time, it will not be heard for the first time on appeal. *E.g., United States* v. *Lutz,* 142 F. 2d 985, 989 (3d Cir. 1944); 1 Wigmore, *Evidence* § 18 (3d ed. 1940). Moreover, respondents introduced documentary evidence in their defense and, having done so, further indicated their understanding that the charges in the complaint were not confined to oral representations.

Respondents argue that the testimony of the 21 dealer witnesses called by complaint counsel should be disregarded on the ground that these witnesses were "coerced and intimidated" by a Commission investigator into testifying in support of the charges in the complaint. There is no evidence whatsoever in the record to support respondents' charges. Their lack of substance is reflected by the fact that no effort was made by respondents' counsel to inquire of a single dealer witness concerning the alleged threats (see I.D., pp. 898–899).

Respondents argue at length, with respect to each of the eight misrepresentations found by the examiner, that the testimony of the dealer witnesses does not support the charges. We have carefully examined respondents' arguments, the very thorough initial decision, and the record. We hold that the allegations of the complaint (except those numbered 8 and 10) were proved by relevant, material, and reliable evidence. The evidence elicited in support of these charges is carefully set forth in the initial decision, and it would serve no purpose to repeat it here.

Respondents, claiming that their sales representatives were "independent contractors," have attempted throughout these proceedings to refer to them as "franchise managers," the designation applied to them in contracts they entered into with the corporate respondent. The record is clear, however, that whatever label is attached, respondents' representatives were carrying out their activities under the control and direction of respondents. Each representative was furnished a sales kit, prepared by respondents, containing advertising literature, samples, and other sales aids. Accordingly, respondents are responsible for the representations made by the salesmen under their direction and con-

trol. See, *e.g.*, *Goodman* v. *F.T.C.*, 244 F. 2d 584 (9th Cir. 1957); *Standard Distributors, Inc.* v. *F.T.C.*, 211 F. 2d 7 (2d Cir. 1954); *Steelco Stainless Steel, Inc.*, v. *F.T.C.*, 187 F. 2d 693 (7th Cir. 1951).

Respondents have objected throughout the hearings, and contend in their brief, that the testimony of dealer witnesses was elicited through the use of leading questions and that the testimony frequently contained hearsay declarations. Both of these contentions misconceive the rules of evidence relating to leading questions and hearsay. We find on examination of the record that the questions asked by complaint counsel were not so phrased as to suggest the desired answer; the questions complained of, therefore, were not objectionable. The testimony claimed by respondents to have been hearsay was given by former dealers or prospective dealers relating statements made to them by respondents' representatives. These statements were not offered to establish the truth of the matters asserted therein, but merely as evidence in support of the allegations that the statements had been made. Accordingly, the testimony was not hearsay (see 6 Wigmore, *Evidence* § 1770 (3d ed. 1940)); but even if it were, its exclusion was not required.

Respondents claim that, as a result of action by the Food and Drug Administration, Wilmington Chemical Corporation and Joseph S. Klehman have terminated all activities that relate to the practices challenged in this complaint and that, therefore, there is no necessity for an order. However, it appears that the FDA action pertains specifically to X–33 and there is nothing to prevent either the corporate respondent or Klehman from resuming the same practices in connection with the sale of a different product. The public interest thus requires that an order to cease and desist be issued.

The evidence reveals that Joseph S. Klehman, the sole shareholder in respondent, was the moving spirit of this enterprise and that Wilmington Chemical Corporation was a creature of his will. In light of these facts, an order against Klehman as well as against the corporate respondent is necessary to prohibit effectively the violations of law found here.

Finally, respondents have suggested that the order is too broad and contains matters of which respondents did not have notice. The order deals specifically with the practices described in the complaint, and is entirely appropriate and necessary.

Accordingly, the Commission having determined that the find-

ings of fact and conclusions of law set forth in the initial decision are fully warranted by the evidence in the record,

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That the findings of fact, conclusions of law, and order contained in the initial decision at pages 836–845, 919, and 920–921, respectively, be, and they hereby are, adopted as the findings of fact, conclusions of law, and order of the Commission.

It is further ordered, That respondents Wilmington Chemical Corporation, a corporation, and Joseph S. Klehman, individually and as an officer of said corporation, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by each respondent named in this order, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

LONE STAR CEMENT CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C–1075. Complaint, June 17, 1966—Decision, June 17, 1966

Consent order forbidding a major portland cement manufacturing company with headquarters in New York City, to renew its 4-year lease by which it acquired nine ready-mixed concrete sites, plants, and related equipment in the Dallas-Fort Worth area and to cease using the acquired company's trade name in its operations.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§18, 45, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

(a) "Portland Cement" includes Types I through V of portland cement as designated by the American Society for Testing Materials. Neither masonry nor white cement is included.

(b) "Ready-Mixed Concrete" includes all portland cement concrete manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

(c) "The Dallas-Fort Worth Area" includes the Counties of Denton, Collin, Dallas, Tarrant, Ellis and Johnson in the State of Texas.

II. LONE STAR CEMENT CORPORATION

2. Respondent Lone Star Cement Corporation, hereinafter referred to as "Lone Star," is a corporation organized and existing under the laws of the State of Maine, with its principal office located at 100 Park Avenue, New York, New York.

3. Lone Star, the largest or second largest portland cement manufacturing company in the United States, operates fifteen portland cement manufacturing plants and thirteen distribution terminals located in thirteen different States. Through acquired subsidiaries, Lone Star is also engaged in the production and sale of ready-mixed concrete, concrete products and mineral aggregates. In 1964, Lone Star had sales of approximately $155 million, assets of about $217 million and net income of about $14 million.

4. In the State of Texas, Lone Star operates cement manufacturing plants at Dallas, Houston and Maryneal, and distribution terminals at Amarillo, Corpus Christi and Orange. Portland cement manufactured by these plants, which have an annual capacity to manufacture about 10 million barrels of portland cement, is marketed principally in the State of Texas. The Dallas-Fort Worth area is an important metropolitan market for the output of these plants.

5. Lone Star is and for many years has been engaged in the shipment of portland cement across State lines. Lone Star is engaged in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act.

III. WESCO MATERIALS CORPORATION AND WAMIX, INC.

6. Wesco Materials Corporation, hereinafter referred to as "Wesco," is a corporation organized and existing under the laws of the State of Texas, with its principal office and place of business at 1201 Main Street, Dallas, Texas. At the time of the acquisition, Wesco was engaged in the production and sale of mineral aggregates in North Central Texas.

7. Wamix, Inc., hereinafter referred to as "Wamix" is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business at 1201 Main Street, Dallas, Texas. Wamix was, at the time of the acquisition, a wholly-owned subsidiary of Wesco.

8. At the time of the acquisition Wamix was principally engaged in the production and sale of ready-mixed concrete in the Dallas-Fort Worth Area. In 1964, the ready-mixed concrete properties acquired by Lone Star from Wamix sold 495,000 cubic yards of ready-mixed concrete and consumed 607,000 barrels of portland cement.

9. Wesco and Wamix were, prior to the acquisitions, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

IV. THE ACQUISITIONS

10. On or about January 4, 1965, Lone Star acquired from Wesco its aggregate production facilities in North Central Texas as well as its interests in certain other aggregate production facilities and property in the same area. For these production facilities and property interests Lone Star paid in excess of $3.5 million.

11. On or about January 4, 1965, Lone Star acquired from Wamix, by lease for a period of four years, nine ready-mixed concrete plants in the Dallas-Fort Worth Area. The total consideration for this lease amounts to $1.4 million.

12. The Wesco and Wamix acquisitions by Lone Star were acts or practices in commerce within the meaning of the Federal Trade Commission Act.

V. THE NATURE OF TRADE AND COMMERCE

13. Portland cement is a material which in the presence of water, binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the production of

ready-mixed concrete. There is no practical substitute for portland cement in the production of concrete.

14. The portland cement industry in the United States is substantial. In 1964, there were approximately 52 cement companies in the United States operating approximately 181 plants. Total shipments of portland cement in that year amounted to approximately 365 million barrels, valued at about $1.1 billion.

15. Cement manufacturers sell their portland cement to consumers such as ready-mixed concrete companies, concrete products companies, and to contractors and building materials dealers. However, on a national basis, approximately 57% of all portland cement is shipped to firms engaged in the production and sale of ready-mixed concrete.

16. In recent years, there has been a significant trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies. Since 1959, there have been at least 35 such acquisitions.

17. In the Dallas-Fort Worth Area the trend toward vertical integration is well advanced. Additional vertical acquisitions have been made and a large ready-mixed concrete company is integrating backward by constructing its own cement plant. More than 40% of the market for portland cement in the Dallas-Fort Worth Area has been potentially foreclosed to competing cement manufacturers as the result of vertical integration.

18. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses competing cement manufacturers from a segment of the market otherwise open to them and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their markets. Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions—contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

VI. VIOLATIONS CHARGED

19. The effect of the acquisitions of Wesco and Wamix by Lone Star, as hereinbefore described, both in themselves and by aggravating the trend toward vertical integration between suppliers and consumers of portland cement, may be substantially to lessen competition or to tend to create a monopoly in the production and sale of portland cement and ready-mixed concrete in the United

States as a whole and various parts thereof, including the State of Texas and the Dallas-Fort Worth Area, in the following ways, among others:

a. Lone Star's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lone Star's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

Now therefore, the acquisitions of Wesco and Wamix by Lone Star are in violation of Section 7 of the Clayton Act, as amended, and constitute unfair acts or practicies in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Lone Star Cement Corporation is a corporation organized, existing and doing business under the laws of the State

of Maine, with its office and principal place of business located at 100 Park Avenue, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent, Lone Star Cement Corporation (hereafter "Lone Star"), refrain from renewing any and all leases by which Lone Star acquired, on or about January 4, 1965 from Wamix, Inc., nine ready-mixed concrete sites, plants and related equipment, including ready-mixed concrete mixer trucks, in the Dallas-Ft. Worth Area, said sites, plants and related equipment described generally as follows:

Wamix No. 1	2221 Irving Boulevard, Dallas, Texas.
Wamix No. 2	On Worcola Street in North Central Dallas.
Wamix No. 3	On Floyd Road in North Dallas.
Wamix No. 6	In Carrollton, Dallas County, Texas.
Wamix No. 8	On Banning Street in Oak Cliff.
Wamix No. 9	On Parkdale Street in Southeast Dallas.
Wamix No. 21	On West Freeway in Fort Worth.
Wamix No. 22	Near Euless, Tarrant County, Texas.
Wamix No. 23	In 5200 Block of Hemphill Street in Fort Worth.

It is further ordered, That on or before the expiration of such leases on January 4, 1969, Lone Star cease operation of said assets and cease using the name or word "Wamix" in any of its operations.

II

It is further ordered, That, within sixty (60) days after it has fully complied with the provisions of this Order, Lone Star submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it has complied with this Order.