

Complaint

IN THE MATTER OF

AUTOMATIC BURNER CORPORATION AND A. B. C. OIL
BURNER SALES CORPORATION

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

Docket 1492. Complaint,¹ May 17, 1928—Decision, Sept. 10, 1928

Where a corporation engaged in the manufacture of oil burners, and in the sale thereof through its corporate selling agency, and said agency, advertised that as a result of tests made by the United States Department of Agriculture their burner had been officially proven and stated by said department to have an "over-all efficiency of over 80 per cent" and "topped all other burners", the fact being that in the tests made upon the foregoing and other burners, a large number of separate "runs", showing wide variations, were made for each burner, that due to lack of proper equipment and other matters said tests were not regarded nor promulgated by said department as conclusive, and that the most favorable "run" for the aforesaid burner was selected by said corporation; with the intent and effect of creating the false impression that there was presented a fair compilation and analysis of the complete test, duly promulgated as a Government report:

Held, That such false and misleading advertising, under the circumstances set forth, constituted unfair methods of competition.

Mr. W. T. Chantland for the Commission.

Ryan, Condon & Livingston, of Chicago, Ill., for respondents.

SYNOPSIS OF COMPLAINT

Reciting its action in the public interest, pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent Automatic Burner Corporation, engaged in the manufacture and sale of oil burners for heating homes and business establishments, and respondent A. B. C. Oil Burner Sales Corporation, its sales subsidiary, both Illinois corporations, with principal offices and places of business in Chicago, with claiming Government indorsement falsely or misleadingly and advertising falsely or misleadingly in regard thereto, in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce.

Respondents, as charged, engaged as above set forth, following

- (1) the undertaking of certain tests of various oil burners by the United States Department of Agriculture, which tests, for lack of

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proper equipment and for other reasons were not regarded by said department as conclusive, nor the results thereof compiled or promulgated as such nor given the department's sanction, and (2) the making of a report by a former employee of the department, theretofore engaged in said tests, and employed by respondents to make such report, in which report said former employee set forth only results shown by the most favorable of 51 "runs" made for respondents' burner, as for each of the others, and showing great variations for each, so that the only result of any fair value for each would be the average.

Widely circulated said report, and by reference and advertising, intentionally so referred thereto as to create the impression that it presented a fair compilation and analysis of the complete test and that, as such, it was and had been duly promulgated as a Government report, making such false and misleading statements, on the basis of said report, in their advertising in a trade paper of general circulation, to wit, "Fuel Oil", as that, as a result of the tests made, the said "ABC Burner" of respondents had been officially proven and stated by the United States Department of Agriculture to have an "over-all efficiency of over 80 per cent" and "topped all other burners,"² and, later, notwithstanding a promise to the aforesaid department, upon having their attention drawn to the false and misleading character of their advertising, resumed and knowingly and willfully continued false and misleading advertising of similar form and import.³

Said false and misleading advertising, as charged "was calculated to mislead dealers and the purchasing public, to the prejudice of competitors, dealers, purchasers, and the public, and constitutes an unfair method of competition in commerce within the intent and meaning of section 5."

² The matter referred to, specifically, was as follows:

80.7 PER CENT EFFICIENCY? ABC WINS AGAIN

The Department of Agriculture, Washington, D. C., recently completed the most comprehensive test of oil burners ever made. ABC won easily the thermal efficiency test with the high mark of 80.7 per cent, etc.

³ Some of said advertisements were as follows:

(a) "First in United States Government test."

(b) "That's why it (referring to the ABC burner) was given highest heating efficiency rating in United States Government oil-burner test. Should we send you the Government report?"

(c) "80.7 per cent efficiency 'ABC wins again.' The Department of Agriculture, Washington, D. C., recently completed the most comprehensive test of oil burners ever made. ABC won easily the thermal efficiency test with the high mark of 80.7 per cent."

(d) Another of such advertisements which then appeared, in several newspapers of wide and general circulation, of similar tenor, is described in footnote relating to said advertisement (designated as exhibit (A)), but not published. See footnote on page 214.

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, the Federal Trade Commission issued and served its amended complaint upon the respondents, Automatic Burner Corporation and ABC Oil Burner Sales Corporation, charging them with unfair methods of competition in commerce in violation of the provisions of said act. Respondents having entered their appearance and having now tendered their motion and substituted answer, waiving hearing and consenting to order to cease and desist, in accordance with Rule III (a) of the Rules of the Commission, in words and form as follows:

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the matter of Automatic Burner Corporation et al. (Docket No. 1492)

MOTION AND SUBSTITUTED ANSWER OF RESPONDENTS, WAIVING HEARING AND
CONSENTING TO ORDER TO CEASE AND DESIST

Automatic Burner Corporation and ABC Oil Burner Sales Corporation, the above named respondents, move that they be given leave to substitute this as their answer to the amended complaint in the above matter, and answering say that they have long since ceased the publication of advertisements of the character complained of, and they have no intention to resume the publication thereof, and desiring to waive hearing on the charges set forth in said amended complaint and not to further contest the proceedings, these respondents now state that they refrain from contesting the said proceedings and they consent that an order to cease and desist be entered herein in accordance with Rule III (2) of the Federal Trade Commission.

AUTOMATIC BURNER CORPORATION,
ABC OIL BURNER SALES CORPORATION,
Respondents.

By _____
Their Attorneys.

RYAN, CONGDON & LIVINGSTON, *Attorneys,*
231 South LaSalle Street, Chicago, Illinois.

The said motion and answer is hereby received and directed to be filed, and the motion of the counsel for Commission to proceed to make findings and order, on the pleadings in accordance with said rule, is hereby granted, and the Commission being fully advised in the premises makes this its findings as to the facts and its conclusions drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Automatic Burner Corporation is a corporation organized in 1921 under the laws of the State of Illinois,

having its principal office and place of business in the city of Chicago in said State and for a number of years last past has been and now is engaged in the manufacture of oil burners designed for use in heating homes and business establishments, and in the sale of said oil burners through its selling agency, ABC Burner Sales Corporation, in and among the several States of the United States. Respondent Automatic Burner Corporation through its said selling agency causes said oil burners when sold to be transported from its said place of business in the State of Illinois into and through other States of the United States, to the purchasers thereof.

PAR. 2. Respondent ABC Burner Sales Corporation is a corporation organized under the laws of the State of Illinois, having its principal office and place of business in the city of Chicago in said State, and since prior to 1925 has been and now is the selling agency of respondent Automatic Burner Corporation, and as such is engaged in the sale of said Automatic Burner Corporation's oil burners in and among the several States of the United States and causes said oil burners when sold to be transported from the said State of Illinois into and through other States of the United States, to the purchasers thereof.

PAR. 3. Since prior to 1925, there have been, and now are, numerous other persons, concerns, and corporations engaged in the manufacture and sale in commerce of oil burners in competition with each other and with these respondents.

PAR. 4. In 1925 the United States Department of Agriculture undertook to make certain tests of various oil burners including those made and sold by the persons described in paragraphs 1 and 2 hereof. Due to the lack of proper equipment and other matters, said tests were not regarded by the Department of Agriculture as conclusive, and the results thereof were not compiled nor promulgated as final and conclusive, nor given the sanction of the Department of Agriculture as such. In the making of such tests for each of the various burners, 51 separate "runs" were made, which "runs" as to each burner showed great variations, so that the only result that could be regarded as of any fair value would be the average of the 51 "runs" made as to each burner.

PAR. 5. Among the burners so tested in 51 "runs" was the burner made and sold by respondents, to wit, the ABC burner. Respondents employed a person formerly with the Department of Agriculture, who had been engaged in the making of said tests, to prepare a report for them. In said report was fully tabulated the result only of one "run," which is therein called "test B" which was "run" No. 396, and the run which showed the highest degree of efficiency

of any of the "runs" as to respondent's burner. Said report has been widely circulated by respondents, and by reference and advertising so referred to, with the intent, purpose and effect of creating the impression that it presented a fair compilation and analysis of the complete test, and that, as such, it was, and had been duly promulgated as, a Government report.

PAR. 6. Respondents, using said reports so made as a basis, in December, 1925, advertised in a trade paper of general circulation, to wit: "Fuel Oil" that as a result of the tests made the said "ABC burner" of respondents had been officially proven and stated by the United States Department of Agriculture to have an "over-all efficiency of over 80 per cent" and "topped all other burners," whereas in truth and in fact no such proof, comparison, finding, or statement was made by said Department of Agriculture, and the matter so used in advertisements was false and misleading. Specifically the false and misleading matter in the advertisement above referred to was as follows:

80.7 PER CENT EFFICIENCY. ABC WINS AGAIN

The Department of Agriculture, Washington, D. C., recently completed the most comprehensive test of oil burners ever made. ABC won easily the thermal efficiency test with the high mark of 80.7 per cent, etc.

PAR. 7. That in 1925, after the appearance of said advertisement, the attention of respondents was called to the false and misleading character thereof by the Department of Agriculture, and respondents, in December, 1925, promised to desist from its use. Notwithstanding said promise, respondents thereafter, in 1926 resumed and knowingly and willfully continued their said false and misleading advertisements, of similar form and import. Some of such subsequent advertisements contained, among other things, the following:

(a) First in United States Government test.

(b) That's why it (referring to the ABC burner) was given highest heating efficiency rating in United States Government oil-burner test. Should we send you the Government report.

(c) 80.7 per cent efficiency: "ABC wins again." The Department of Agriculture, Washington, D. C., recently completed the most comprehensive test of oil burners ever made. ABC won easily the thermal efficiency test with the high mark of 80.7 per cent.

(d) Another of such advertisements which then appeared, in several newspapers of wide and general circulation was as set out in Exhibit A, attached hereto and made a part hereof.⁴

⁴ Not published, said exhibit (A), being a reproduction of an advertisement used by respondents, captioned "Proof from U. S. Government ABC oil burner saves you money," and featuring the alleged indorsement, "unbiased authoritative", by the United States Government, of respondents' said burner, with its highest rating, along with further matter setting forth the advantages or alleged advantages of said burner.

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CONCLUSION

That said false and misleading advertising was calculated to mislead dealers and the purchasing public, to the prejudice of competitors, dealers, purchasers, and the public, and constitutes an unfair method of competition in commerce within the intent and meaning of section 5 of an "Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission and the motion and substituted answer of respondents, and the Commission having made its findings as to the facts and its conclusion thereon, in accordance with Rule III (2) of its Rules of Procedure, that the respondents have violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes",

Now, therefore, it is ordered, That the respondents, Automatic Burner Corporation and ABC Oil Burner Sales Corporation, their officers, directors, agents, employees, and successors do cease and desist—

From in any manner directly or indirectly representing or advertising that its ABC burner has, by tests made by the United States Department of Agriculture, been given a rating of an "overall efficiency of over 80 per cent," or "topped all other burners," or that as the result of any such tests made said burner was "first in United States Government tests," and from in any manner advertising or representing that the United States Department of Agriculture has promulgated the results of any tests concerning the oil burners of said respondents, or of comparative tests between their said oil burner and the oil burners of others.

It is further ordered, That the respondents, Automatic Burner Corporation and ABC Oil Burner Sales Corporation, shall, within 60 days after the service upon them of copies of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Syllabus

IN THE MATTER OF
SAMUEL BREAKSTONE

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

Docket 1457. Complaint, Apr. 20, 1927—Decision, Sept. 14, 1928

Where spark plugs conspicuously bearing the capital letters "AC" on the exposed part of the porcelain cores thereof, sold in individual cartons and containers bearing said letters or symbol, and nationally advertised thereunder, and made under patented processes, had long been manufactured and come to be well and favorably known to the trade and consuming public by such brand, and as the product of the particular manufacturer, which had long made the same, and to constitute nearly half of all spark plugs made and sold in the United States, to be in great demand among the trade and consuming public, and to be standard equipment for a large number of automobiles of various makes; and thereafter an individual, engaged in the sale in various States of automobile parts, supplies, and accessories, who had purchased several hundred thousand cores made by such manufacturer (who made cores for its own plugs only and did not market the same separately in the case of its one-piece plugs), for airplane motors, bearing its trade-mark "AC", and sold by the Government after the war,

- (a) Sold said cores so branded, in spark plugs not made by said manufacturer, for use in automobile motors, in competition with it and its dealers, and with manufacturers of and dealers in other plugs, and through numerous wholesale and retail dealers, who marketed the same in competition with dealers handling not only the genuine AC plugs, but those of others also without removing or attempting to remove the aforesaid symbol or trade-mark, or disclosing directly or indirectly that such plugs were not the product of said manufacturer, and that the cores were not adapted or intended for use in automobiles; with the capacity and tendency to mislead and deceive a large and substantial part of the trade and consuming public into buying and selling said inferior and poorly functioning plugs as and for genuine AC plugs made by the aforesaid manufacturer (from which they were indistinguishable by the purchasing public in the ordinary course of trade), for use in automobile motors, and with the effect of so doing; and
- (b) Sold cartons and containers bearing conspicuously thereon the brand "AC Spark Plug", originally the property of and intended by the aforesaid manufacturer for use in the sale of its own product (and of the type familiar to the trade and consuming public in such connection), but discarded and sold by it for junk and eventually purchased by him, to spark plug dealers, and supplied the same to dealer-purchasers of his spurious AC plugs for their use in packing and marketing said plugs; with the intent and effect of furthering his false and misleading practices in the sale of said plugs, through being packed and marketed therein, and with the capacity and tendency thereby to mislead and deceive a large and substantial number of dealers into buying and selling, and consumers into