

Syllabus

IN THE MATTER OF
PHILADELPHIA RUBBER WASTE COMPANY ET AL.

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

Docket 3010. Complaint, Dec. 5, 1936—Decision, July 26, 1939

Where a corporation had long engaged in manufacture and sale of storage batteries, dry batteries, radios, radio tubes, motor generator sets, distributors, spark-plug suppressors, intercommunicating devices, and electric clocks, for use, chiefly, in automobiles, under its registered trade name Philco, and had registered said name as trade-mark in various States and in foreign countries and spent many millions of dollars in advertising its said products under said name and mark, and said products, as thus advertised by it and by advertisements placed by its dealers, had come to be well and favorably known to purchasing public, and said name Philco was understood by many buyers as meaning that any product offered for sale thereunder for use in or on automobile was product of said corporation, and it featured colors blue and yellow in its advertising and packed and marketed its radio tubes in blue and yellow cartons, and constantly litigated to prevent use of name Philco by others; and thereafter a corporation and individual, owner of 94 percent of stock thereof prior to its dissolution, engaged in manufacture, sale and distribution of repair parts and automobile tires and tubes including tube repair kits, tire patches and reliner, patch cement and gasket cement, and three individuals, engaged as partners in sale and distribution of such products which they purchased from said corporation and, thereafter, from said individual—

Made use of such trade names as Philco Rubber Co., Philco Rubber Sales Co., Philco Auto Supply and others including term Philco and sold their said products, purchased as aforesaid from said individual, with brand or label Philco thereon and thus sold inner tubes and spark plugs also dealt in and made use of labels on tube repair kits which were yellow with printed matter on blue background, and, described as "True Blue" said kits and made use of said colors for spark plug containers, displaying, as aforesaid word Philco, and featured in their catalogues, at top and bottom of pages, in conspicuous type such slogans as "Philco Guarantees You Satisfaction," "Philco Gives You Highest Quality at Lowest Prices," "Philco Products Mean Repeat Business and Greater Profits" and others of similar tenor, and represented thereby that said various products were made by said corporation or licensees, successors, or assignees thereof,

Notwithstanding fact that said automobile tube repair kits, reliners, patches and other products thus designated, etc., were not made by said corporation first referred to or concern through which said corporation sold, under trade name Philco, its said products for resale to general public, and said individuals and partners formed no part of and had no connection with said corporation or concern, which did not manufacture, sell or distribute said repair kits, patches and other products sold and distributed by said individuals and partners;

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With effect of misleading and deceiving substantial number of members of purchasing public into erroneous and mistaken belief that such false and misleading statements and representations were true and into purchase of products of said individuals and partners because of such erroneous and mistaken belief and with result of thereby diverting trade unfairly to them from said corporation and from their other competitors who do not misrepresent the manufacturer or manufacturers of their respective products; *Held*, that such acts and practices of said individuals as above set forth were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition.

Before *Mr. John W. Addison*, trial examiner.

Mr. Joseph C. Fehr for the Commission.

Mr. Malvin H. Reinheimer, of Philadelphia, Pa., for Albert Schwartz.

COMPLAINT

Pursuant to 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," the Federal Trade Commission, having reason to believe that Philadelphia Rubber Waste Co., a corporation, and Albert Schwartz, Isadore M. Engel, and Simon Sperberg, copartners, trading as Philco Rubber Co., Philco Rubber Sales Co., Philco Auto Supply, Philco Auto & Rubber Supply, and Philco Spark Plug Co., hereinafter referred to as respondents, have been and are now using unfair methods of competition in commerce as "commerce" is defined in 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, Philadelphia Rubber Waste Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located in the city of Philadelphia, in the State of Pennsylvania. Albert Schwartz, Isadore M. Engel, and Simon Sperberg are copartners, trading under the names and styles of Philco Rubber Co., Philco Rubber Sales Co., Philco Auto Supply, Philco Auto & Rubber Supply, and Philco Spark Plug Co., with their principal place of business located in the city of Washington, in the District of Columbia. They also operate a branch office and place of business in the city of Richmond, in the State of Virginia.

Said respondent corporation is now, and has been for more than 1 year last past, engaged in the manufacture of tire patches, tire liners, rubber patch cement, gasket cement, spark plugs, inner tubes, and tire repair kits, which it sells and distributes among various

states of the United States, under the trade name or designation of "Philco," upon which it uses the brand of "Philco Rubber Company, Philadelphia." Of the three copartners named, respondent Albert Schwartz has been and is now in charge of the respondent corporation's principal place of business in Philadelphia; respondent Isadore M. Engel is in charge of the said partnership's principal place of business in Washington, D. C., known as "Philco Rubber Company," which also displays upon its windows the words "Philco Rubber Sales Company, Washington"; respondent Simon Sperberg is in charge of the said partnership's branch office and place of business located in Richmond, Va. Said respondents' places of business in Washington, D. C., and Richmond, Va., do no manufacturing but sell and distribute products manufactured by respondent corporation, the said Philadelphia Rubber Waste Company, in its plant in Philadelphia, Pa., and labeled or branded with the name "Philco," as aforesaid, in commerce between and among the various States of the United States and in the District of Columbia.

In the course and conduct of their business, said respondents, Philadelphia Rubber Waste Co., a corporation, and said Albert Schwartz, Isadore M. Engel and Simon Sperberg, were at all times herein referred to in competition with other corporations, individuals, firms, and partnerships likewise engaged in the sale and distribution, of similar products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. The Philadelphia Storage Battery Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its factory and principal place of business located in the city of Philadelphia, in the State of Pennsylvania. It is now and since 1919 has been engaged in the manufacture of radio and television receiving and broadcasting equipment, condensers, transformers, power units, converters, amplifiers, radio and telephone central control equipments, public address systems, storage batteries, electrolytes, testing apparatus, lubricating oils, furniture, and of a wide variety of automotive and other mechanical apparatus. It has for several years last past also been engaged in the sale and distribution of said products, in commerce, between and among various States of the United States and in the District of Columbia, through its subsidiary, Philco Radio and Television Corporation, under the trade name and designation of "Philco," causing said products, when sold, to be shipped from its place of business in the State of Pennsylvania to purchasers thereof located in States of the United States other than the State of Pennsylvania. Said company has built up and enjoys a valuable good

will in the word "Philco" as applied to its said products, particularly batteries, radios, and the various parts used in the assembling thereof in automobiles and other devices. Purchasers and prospective purchasers of automobiles and radios and accessories thereof as well as member of the respective trades dealing therein have, through long usage and over a long period of time, identified automotive and other mechanical apparatus and accessories which bear the name "Philco" as the products of the well and favorably known Philadelphia Storage Battery Co.

PAR. 3. In the course and conduct of their business as described in paragraph 1 hereof, and for the purpose of creating a demand on the part of the purchasing public for their products, the aforesaid respondents began at a date long subsequent to the adoption and use by said Philadelphia Storage Battery Co. of the word "Philco" as a trade name or designation for its products, to use the word "Philco" as a trade name or brand, and have continued to the present time to use the same in the manufacture, sale and distribution of their own products. They have caused and now cause said products to be marked and branded with the word "Philco." In catalogs and price lists used in soliciting the sale of and selling said products among customers and prospective customers in various States they have used and featured and now use and feature the word "Philco" as their trade name and as the brand name or designation for said products.

PAR. 4. The representations made by the respondents as set forth in paragraph 3 hereof and others similar thereto, are false, misleading and deceptive in that the products of respondents as thus advertised and branded have a tendency and capacity to confuse, mislead, and deceive purchasers and prospective purchasers into the belief that the products so described and referred to were and are the products of the Philadelphia Storage Battery Co., when such was and is not the fact, to the injury of said Philadelphia Storage Battery Co. and other competitors, which said competitors have built up and have for many years enjoyed valuable good will, as aforesaid, in the manufacture, distribution and sale of their respective products among the purchasing public in various parts of the United States.

PAR. 5. There are, and have been for more than one year last past, among the competitors of respondent manufacturers and distributors likewise engaged in the business of manufacturing and selling in commerce, as herein set out, tire patches, tire liners, rubber patch cement, gasket cement, spark plugs, inner tubes, tire repair kits, and similar products for use in automobiles who do not misrepresent said products and who do not deceive and mislead purchasers or prospective

purchasers of their products by simulating or using the word "Philco" as a trade name or brand or by simulating or using the trade name or brand of any other competitor, and who truthfully represent their products under their own trade names or brands.

PAR. 6. The use by respondents of said methods, acts and practices as above set forth, has had and now has the tendency and capacity to unfairly divert trade to respondents from their said competitors to the substantial injury of said Philadelphia Storage Battery Co. and those competitors selling the products of said Philadelphia Storage Battery Co. and other competitors, and also has the tendency and capacity to injure a substantial portion of the public by inducing purchasers and prospective purchasers to purchase their products manufactured and sold by respondents, as aforesaid, in and because of the erroneous belief that said products thus advertised under the trade name or brand "Philco" are the products of the Philadelphia Storage Battery Co., as aforesaid.

PAR. 7. The aforesaid methods, acts and practices of the respondents are all to the prejudice of the public and of the respondents' competitors as hereinabove alleged. Said methods, acts, and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 5, 1936, issued and served its complaint in this proceeding upon respondents, Philadelphia Rubber Waste Co., a corporation, and Albert Schwartz, Isadore M. Engel, and Simon Sperberg, copartners, trading as Philco Rubber Co., Philco Rubber Sales Co., Philco Auto Supply, Philco Auto & Rubber Supply, and Philco Spark Plug Co., charging them with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of answer thereto by respondent Albert Schwartz, on behalf of Philadelphia Rubber Waste Co., a corporation, and Albert Schwartz, trading as Philco Rubber Co., and Philco Rubber Sales Co., testimony and other evidence in support of the allegations of said complaint were introduced by Joseph C. Fehr, attorney for the Commission, and in opposition to the allegations of the complaint by Malvin H. Reinheimer, attorney for the respondent Albert Schwartz, trading as Philco Rubber Co., before John W. Addison, an examiner of the Commission theretofore

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duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto filed on behalf of respondent, Albert Schwartz, trading as Philco Rubber Co., testimony and other evidence, brief in support of the complaint and brief in opposition thereto filed on behalf of respondent Albert Schwartz, trading as Philco Rubber Co. (respondents Isadore M. Engel and Simon Sperberg, copartners, trading as Philco Rubber Co., Philco Rubber Sales Co., Philco Auto Supply, Philco Auto & Rubber Supply, and Philco Spark Plug Co., not having filed a brief), and the oral arguments of counsel aforesaid (oral arguments not having been requested by or on behalf of respondents Isadore M. Engel and Simon Sperberg, copartners, trading as aforesaid); and the Commission, having duly considered the matter, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Philadelphia Rubber Waste Co. was a corporation organized in August 1932, under and by virtue of the laws of the State of Delaware. Said corporation's principal place of business was located in Philadelphia, Pa. During the life of said corporation, the respondent Albert Schwartz owned 94 percent of the stock of said corporation. On December 29, 1936, which date was subsequent to the filing of the complaint herein, said corporation was dissolved. Thereafter, on January 21, 1937, the respondent Albert Schwartz registered the name Philadelphia Rubber Waste Co. under the Fictitious Names Act of the State of Pennsylvania, and as an individual has been, and is, doing business under that trade name. The business now carried on by respondent Albert Schwartz as an individual under said trade name and under the trade name Philco Rubber Co. is of the same character as that previously carried on by him through the respondent corporation, the Philadelphia Rubber Waste Co.

Respondents Albert Schwartz, Isadore M. Engel and Simon Sperberg are individuals trading as copartners under the names and styles of Philco Rubber Co., Philco Rubber Sales Co., Philco Auto Supply, and Philco Rubber & Auto Supply (misnamed Philco Auto & Rubber Supply in the complaint), with their principal place of business at 311 H Street NE., in the city of Washington, D. C. They also operate a branch office and place of business at 504 Broad Street,

Richmond, Va. They secured, in June 1934, the registration of the term "Philco" as a trade-mark for tire and tube repair kits in the name of Philco Rubber Co. Isadore M. Engel for about 3 years, beginning in September 1934, traded as Philco Spark Plug Co. at 311 H Street NE., Washington, D. C. He applied in 1935 for registration in the United States Patent Office of the term "Philco" as a trade-mark for spark plugs, but the registration was denied in April 1937, in an uncontested opposition by Philadelphia Storage Battery Co.

Respondent Philadelphia Rubber Waste Co., a corporation was, and respondent Albert Schwartz, trading as Philco Rubber Co., has been, and is now, engaged in the business of manufacturing, selling and distributing in commerce among and between various States of the United States and in the District of Columbia repair parts for automobile tires and tubes, including tube repair kits, tire patches and reliners, patch cement and gasket cement, all of which are branded or labeled with the designation "Philco." Said corporate respondent and respondent Albert Schwartz caused and respondent Schwartz now causes said products, when sold by them, to be transported from their place of business in Philadelphia, Pennsylvania, to the purchasers thereof at their respective points of location in various States of the United States and in the District of Columbia. Respondents Albert Schwartz, Isadore M. Engel, and Simon Sperberg, copartners trading under the aforesaid trade names, purchase and have purchased said products branded or labelled with the designation "Philco" from respondent Albert Schwartz, (said respondents formerly purchasing said products from respondent Philadelphia Rubber Waste Co., a corporation) and cause and have caused said products, when resold by them, to be transported from their place of business in the District of Columbia to the purchasers thereof at their respective points of location in the States of Maryland, South and North Carolina, Florida, and in the District of Columbia. The said respondents trading as copartners also sell and distribute to the purchasers, situated as aforesaid, automobile inner tubes and spark plugs branded or labelled with the designation "Philco." In their catalog, in conspicuous type, at the top and bottom of pages, they display these slogans: "Philco Guarantees You Satisfaction"; "Philco Gives You Highest Quality at Lowest Prices"; "Philco Products Mean Repeat Business and Greater Profits"; "Let Philco Help You Meet Competition" and "Increase Your Profits With Philco Products." The labels used by respondents on said tube repair kits are yellow, with the printed matter appearing on a blue background, and

the kits are described as "True Blue." The containers for said spark plugs are also blue and yellow and carry a cross in yellow, on one part of which appears the word "Philco," and on the other the words "Spark Plugs," both printed in blue.

PAR. 2. In the course and conduct of their business, said Philadelphia Rubber Waste Co. was, and said individual respondents Albert Schwartz, Isadore M. Engel, and Simon Sperberg were at all times herein referred to, and still are, in competition with other corporations firms, partnerships, and individuals likewise engaged in the sale and distribution of like and similar products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. The Philadelphia Storage Battery Co. is a corporation organized, existing, and doing business since 1906 under and by virtue of the laws of the State of Pennsylvania. It has a factory and principal place of business located at Ontario and C Streets in the city of Philadelphia, Pa. It makes or has made storage batteries, dry batteries, socket powers, radios, radio tubes, motor generator sets, vibrators, distributors, spark plug suppressors, intercommunicating devices, and electric clocks. Its radio receiving sets are for use some in homes and others in automobiles. Most of its other items are for use on automobiles only. It began making radio tubes and automobile radios in 1929 or 1930. Since 1919, it has, directly or indirectly, sold its products throughout the United States under the trade name "Philco," which it registered in the United States Patent Office as a trademark in 1920, for batteries, battery plates and battery plate separators; in 1923, for batteries and battery parts and supplies; in 1924, for electrolytes; in 1929, for radio receiving sets and radio speakers; and in 1930 for a long list of batteries and battery parts and supplies. It has also registered the name as a trademark in various States of the United States and in foreign countries. Its products have been handled in stores in every State of the Union since 1919, and have also been sold in foreign countries. Among the stores offering its products for sale at retail are: Radio stores, automobile accessories stores, department stores, tire stores, garages, jewelry stores, furniture stores, and hardware stores. Since 1918, it has spent more than 25 million dollars, advertising "Philco" products, and for the three years ending with 1937, spent over 3 million dollars a year in advertising them in full-page advertisements in The Saturday Evening Post, newspaper advertisements, billboard advertising and outdoor signs, window displays, store displays, and advertising direct by mail. Its own advertising is supplemented by advertisements placed by its

dealers. Its annual sales have risen from about 3.4 million dollars in 1919 to over 48 million dollars in 1937. The products are well and favorably known to the purchasing public and there are many buyers who understand that any product offered for sale under the name "Philco" for use in or on an automobile is the product of Philadelphia Storage Battery Co. Its radio tubes are packed and marketed in blue and yellow cartons, and it features these colors and a cross or grid in its advertising matter. It is constantly engaged in litigation to prevent use of the name "Philco" by other companies and has been successful in preventing its use in connection with the sale of razors and oil burners.

PAR. 4. The Philco Radio and Television Corporation is a Delaware corporation having its principal place of business at Tioga and C Streets, Philadelphia, Pa., and is engaged in selling and distributing in commerce, among and between the various States of the United States and in the District of Columbia, the products of the Philadelphia Storage Battery Co., under the trade name Philco, to individuals, and to business concerns, who in turn sell the same to the general public.

PAR. 5. The use by the respondents of the term "Philco" in their aforesaid trade names and the branding or labelling by respondents of their said automobile tube repair kits, reliners, patches, patch cement, gasket cement, inner tubes and spark plugs with the term "Philco" is a representation by respondents to the purchasing public that said products have been manufactured by the Philadelphia Storage Battery Co. and causes members of the purchasing public to have the erroneous and mistaken belief that said products have been manufactured by the Philadelphia Storage Battery Co.

PAR. 6. In truth and in fact, respondents do not form a part of or have any connection with the Philadelphia Storage Battery Co. or the Philco Radio & Television Corporation, which said corporations do not manufacture, sell, or distribute the said repair kits, patches, reliners, patch cement, gasket cement, inner tubes, or spark plugs which are sold and distributed by respondents.

PAR. 7. The use by the respondents of the aforesaid false and misleading statements and representations has the capacity and tendency to, and does, and did, mislead and deceive a substantial number of members of the purchasing public into the erroneous and mistaken belief that the aforesaid false and misleading statements and representations are true and into the purchase of respondents' said products because of said erroneous and mistaken belief. As a direct result thereof, trade in commerce among and between the

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various States of the United States and in the District of Columbia has been diverted unfairly to the respondents from the Philadelphia Storage Battery Co. and from their other competitors who do not misrepresent the manufacturer or manufacturers of their respective products.

CONCLUSION

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

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent Albert Schwartz, on behalf of himself and respondent Philadelphia Rubber Waste Co., testimony and other evidence taken before John W. Addison, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint, and in opposition thereto, briefs filed herein, and oral arguments by Joseph C. Fehr, counsel for the Commission, and by Malvin H. Reinheimer, counsel for respondent, Albert Schwartz, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent Philadelphia Rubber Waste Co., a corporation, its officers, representatives, agents, and employees, and respondents Albert Schwartz, Isadore M. Engel, and Simon Sperberg, individually and as copartners, trading as Philco Rubber Company, Philco Rubber Sales Co., Philco Auto Supply, Philco Rubber & Auto Supply, and Philco Spark Plug Co., or under any other name or names, their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their various items of merchandise, in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by inference, through the use of the trade name "Philco" or any colorable simulation thereof, or in any other manner, that tire patches, tire reliners, tire and tube repair kits, repair patch cement, gasket cement, spark plugs, inner tubes, or any other merchandise manufactured by manufacturers other than the Philadelphia Storage Battery Co. or its licensees, successors or

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assignees, are "Philco" products or are made by or under license from the Philadelphia Storage Battery Co.;

2. Using the term "Philco" or any other brand, corporate or trade name designed to have, or having, a tendency or capacity to deceive the purchasing public as to the identity of the manufacturer of the products sold by respondents.

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

IN THE MATTER OF
WACO DRUG COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 3468. Complaint, June 28, 1938.—Decision, Aug. 1, 1939

Where a corporation engaged in sale and distribution of "Omodyne" medicinal preparation; in advertising the same in newspapers, circulars and other periodicals distributed among the various States and through radio continuity broadcast from stations of extrastate audience—

- (a) Represented that said preparation was a competent and effective cure or remedy for, and had substantial therapeutic value in treatment of, arthritis, neuritis, lumbago, sciatica, gout, neuralgia, and rheumatism, and that use thereof quickly relieved aches and pains caused by or associated with such ailments and conditions; and
- (b) Represented that use thereof eliminated poisons from the system, and that such preparation was prepared and compounded according to a scientific method and formula;

Facts being it was not a remedy or cure for said various ailments, would not relieve poisons as above set forth, nor aches and pains caused by or associated with rheumatic conditions, it was not compounded or prepared in accordance with any scientific method or formula. but contained various drugs which were incompatible with others included therein, and such incompatible drugs thus included dissipated any therapeutic value which might otherwise be possessed by said drugs when used separately, each of which might cause toxic symptoms in users thereof, and it was not a competent or effective treatment for aforesaid ailments, and would not relieve user thereof of pains or aches caused by or associated with any of such conditions;

With effect of misleading and deceiving substantial number of members of purchasing public into erroneous and mistaken belief that such false and misleading statements and representations were true, and into purchase of its said product, and with result that trade in commerce was diverted unfairly to it from its competitors who truthfully represent the therapeutic value and effectiveness of their respective preparations:

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

Before *Mr. Henry M. White*, trial examiner.

Mr. Reuben J. Martin, *Mr. Alden S. Bradley* and *Mr. M. C. Pearce* for the Commission.

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 Waco Drug Co.,