

IN THE MATTER OF

ALLIED SPECIALTIES, INC., AND RALPH J. BIERY, WILLIAM G. WHITE, AND ANNE STRINGER

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

Docket 3360. Complaint, Mar. 17, 1938—Decision, May 21, 1941

Where a corporation and its president, and secretary-treasurer, who directed and controlled its policies and operations, and who had been engaged in similar practices through the instrumentality of previous corporations, since dissolved; engaged in the competitive interstate sale and distribution of nut display warmers and peanuts for use therein, under arrangements by which owners or proprietors of the business where the warmers were placed and said corporation each retained a certain proportion of the 5 cents charged per bag of nuts, and 2 cents per bag were retained by the purchaser of the warmers;

In selling their said nut display warmers, usually in lots of 25 or more, through salesmen employed by them on a commission basis whom they furnished with advertisements to be placed in the local papers in towns in which they were preparing to solicit orders containing such typical statements as "\$2,600 CASH will purchase controlling interest in business. Worth \$500 monthly to right man. * * * Unusual circumstances have made this opening available. Address Box —," and furnished with a prearranged sales talk outlining the plan of operation;

- (a) Represented that exorbitant profits would be earned from operation of such warmers, and made use of a guarantee or repurchase agreement to be attached to contract of purchase, which provided that if a cash return of 120 percent was not realized on the investment, they would repurchase the warmers at the price of the original investment less certain rental deductions, or resell the territory; facts being none of the purchasers earned \$300 to \$500 monthly or any other substantial sum, as advertised, method of vending proposed was impractical and would not induce sufficient sales to cover cost of operation of said warmers, which did not earn the average amount claimed for them, and their earning capacity was grossly exaggerated;
- (b) Represented, as aforesaid, that, upon the purchase of a designated number of said devices, they would give the purchaser exclusive territory and would place the warmers in various locations for him; facts being that, in many instances, they sold the warmers to more than one purchaser operating in territory granted as exclusive, and did not find location for operation; and
- (c) Authorized and made use of repurchase agreement above described notwithstanding the fact they did not live up to its provisions, but, on the contrary, refused to accept the return of any warmers or to resell the territory where they were located;

With effect of misleading and deceiving a substantial number of customers and prospective purchasers of said nut display warmers into the erroneous

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belief that said representations were true and, by reason thereof, into purchase of said products, with result of diverting trade unfairly from competitors who do not misrepresent their respective products or business: *Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair methods of competition.

Before *Mr. Miles J. Furnas* and *Mr. Arthur F. Thomas*, trial examiners.

Mr. John Darsey and *Mr. S. Brogdyne Tev, II*, for the Commission.
White & Jones, of Indianapolis, Ind., for respondents.

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 Allied Specialties, Inc., a corporation, Ralph J. Biery, William G. White, and Anne Stringer, individually, and as president, vice president, and secretary-treasurer, respectively, of said corporation, hereinafter designated as respondents, have been and are using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to said 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. The respondent, Allied Specialties, Inc., is a corporation organized and existing under the laws of the State of Indiana, having an office and principal place of business at 621 North Noble Street, Indianapolis, Ind. It is now, and for several years last past has been, engaged in the business of distributing and selling in commerce, as hereinafter set out, nut display warmers, under the trade name "Ko-Pak-Ta," and peanuts for use in said nut display warmers. All of the respondents named herein act together and in cooperation with each other in doing the things herein alleged.

The individual respondents, Ralph J. Biery, William G. White, and Anne Stringer, are president, vice president, and secretary-treasurer, respectively, of the respondent corporation, and are more actively in charge of said corporation and direct and control all of its policies and operations.

To a substantial extent, sales of said products are made by respondents to persons located in States other than the State of Indiana, pursuant to which sales, and as a part thereof, shipments are made by the respondents from the State of Indiana, through and into other

States of the United States, to said purchasers. Respondents maintain a course of trade in said nut display warmers and nuts sold and distributed by them in commerce between and among the various States of the United States.

There are other corporations, partnerships, firms, and individuals, engaged in the sale of similar products, or products to be used for same and similar purposes, who cause their products, when sold, to be transported from their respective places of business to purchasers thereof located in the various States of the United States other than the State from which said respective shipments originate. The respondents are, and have been at all times herein mentioned, in competition with such corporations, partnerships, firms and individuals in such commerce.

PAR. 2. In the course and conduct of the business as hereinabove described, the nut display warmers are sold through salesmen, who are employed on a commission basis, and each purchaser is required to purchase enough of said devices to equip and operate a "chain." The nut warmers are procured by respondents at a cost of \$5.50 each, and are sold to the public in lots of twenty-five or more at a price of \$26.50 each. The salesmen are paid a commission of \$8.50 on the sale of each nut warmer, resulting in a net profit to respondents of \$11.50 for each nut warmer sold. The respondents supply 75 envelopes of nuts with each warmer, which nuts are valued at $1\frac{1}{3}$ cents per envelope, aggregating a total value of \$1 per warmer for the nuts furnished. The warmers are located by the purchasers in public places of business where members of the public may secure nuts therefrom at 5 cents per bag. The owners or proprietors of the businesses where the warmers are placed are permitted to retain $1\frac{2}{3}$ cents per bag for rental and service in connection with the sale of the nuts. One and one-third cents per bag is remitted to respondents and 2 cents per bag is retained by purchasers of the warmers.

In the course and conduct of the business as aforesaid, and for the purpose of promoting the sale of said products, the respondents have adopted, follow, and pursue a sales plan designed to mislead, deceive, and confuse customers and prospective purchasers respecting the earnings to be realized from the purchase and operation of the nut warmers offered for sale, and the guarantees made by respondents with regard to such earnings, which said sales plan may be summarized as follows:

(a) Salesmen are authorized and instructed to cause contact advertisements to be inserted in local newspapers in the territories which have been assigned to them, which advertisements grossly exaggerate the earnings to be realized from the required investments. The fol-

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lowing ads are typical of those suggested by respondents for this purpose:

\$2,600 CASH

will purchase controlling interest in business. Worth \$500 monthly to right man. Party selected must be between 25 and 55 years of age, and furnish references. Gentile. Unusual circumstances have made this opening available. Address Box # —.

WANTED—Man, 30 years of age or over to take complete charge of business in —. Man selected must have \$400 cash and dependable references. Compensation unusually good. Give phone. Box # —.

MANAGER WANTED—Gentile preferred by reliable company operating in 28 States, to handle its wholesale business in *name of city* and surrounding counties. Worth \$300 monthly to right man. Must possess \$1,250 cash. Man selected must have some business experience, excellent references, confidence in his own ability, and a strong desire to succeed. For such a man we have an excellent opportunity. Unless you meet these requirements please do not answer. Give full qualifications and phone number. Box # —.

(b) Sales talks are furnished salesmen by respondents which authorize and instruct them to represent exorbitant and impossible profits to be earned from operating the nut display warmers, and to promise prospective purchasers exclusive territories upon the purchase of a designated number thereof. The sales talks suggest many different methods of representing exaggerated earnings and the value of the exclusive territory to be assigned, such as references to ambiguous provisions of the contract of purchase and comparisons with fictitious standards.

(c) Salesmen are authorized to offer slow prospects a repurchase agreement, or insurance policy, which may be attached as a rider to the contract of purchase, which repurchase agreement or insurance policy seemingly provides that if a cash return of 120 percent is not realized on the investment made, the nut display warmers will be repurchased by the respondents at the price of the original investment, less certain minor deductions.

(d) The salesmen are instructed and authorized to make many other varied representations and suggestions in aid of the sales plan set forth in subsections (a), (b), and (c) hereof, all of which representations and suggestions are calculated and intended to create false impressions in the minds of customers and prospective purchasers respecting the earnings to be realized and the nature and effect of various provisions of the contract of purchase and the repurchase agreement executed incident thereto.

PAR. 3. The respondent, Allied Specialties, Inc., is the successor of International Merchandising Corporation of America, which was an

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Indiana corporation, and which corporation during its existence was the successor of Roy Stringer Co., Ltd., which was also an Indiana corporation. Both of the above named predecessor corporations were engaged in the sale of nut display warmers such as those being currently offered for sale and sold by the respondents, and caused their said products, when sold, to be transported from their respective places of business to purchasers thereof residing in the various other States of the United States. The respondents, William G. White and Anne Stringer, were connected with both of the said predecessor corporations in official capacities. The respondent, Ralph J. Biery, was a salesman for the Roy Stringer Co., Ltd. While so connected, as above set forth, with said predecessor corporations, the individual respondents, Biery, White, and Stringer, both in their official capacities and as individuals, actively participated in the formation and execution of a sales plan and policy for said predecessor corporations identical with and similar to, in its major respects, that which is now being used by the respondents, as set forth in paragraph 2 hereof.

PAR. 4. The use by respondents of the sales plan set forth in paragraph 2 hereof and of the representations and statements made directly by respondents and by agents of the respondents, has the tendency and capacity to confuse, mislead, and deceive purchasers and prospective purchasers respecting the real or usual profits to be derived from the operation of respondents' nut display warmers; also to confuse, mislead, and deceive customers and prospective purchasers into the erroneous and mistaken belief that their investment guarantees them a return of 120 percent and that the failure to earn such a percentage will entitle them to a refund of their money, less certain minor deductions; also to confuse, mislead, and deceive customers and prospective purchasers into the belief that they are obtaining an exclusive territory for the operation of said nut display warmers. In truth and in fact, the respondents' nut display warmers will not earn or average the amounts claimed for them and their usual earning capacity is grossly exaggerated. The repurchase agreement or insurance policy attached as a rider to the contract of purchase is not a guarantee in the true sense of the term, for it contains so many vague and veiled conditions precedent to be complied with by the purchaser as to make it impossible of fulfillment. The 120 percent profit guarantee contained therein is, by virtue of the hidden conditions, rendered a mere subterfuge. The respondents do not intend that the "exclusive territory" provision of the purchase contract or that the 120 percent earning guarantee in the repurchase agreement shall ever become effective or operative.

PAR. 5. The use of the sales plan hereinabove set forth, and the false and misleading representations made in pursuance thereof, have the tendency and capacity to, and do, mislead and deceive a substantial number of customers and prospective purchasers of nut display warmers into the erroneous belief that said representations are true, and cause a substantial number of said purchasers, because of such erroneous belief, to purchase the nut display warmers of the respondents. The aforesaid acts, practices and misrepresentations have the capacity and tendency to, and have, diverted trade unfairly to respondent Allied Specialties, Inc., from competitors who do not misrepresent their products or their respective businesses and to disrupt, demoralize, and otherwise injure the entire trade in nut display warmers. As a result thereof, substantial injury has been, and is now being, done by respondents to substantial competition in commerce among and between the various States of the United States.

PAR. 6. The aforementioned methods, acts, and practices of respondent are all to the prejudice of the public and 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 the Federal Trade Commission, on March 17, 1938, issued and subsequent 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 March 17, 1938, issued and subsequently served its complaint in this proceeding upon the respondents, Allied Specialties, Inc., a corporation, and Ralph J. Biery, William G. White, and Anne Stringer, individually and as president, vice president, and secretary-treasurer, respectively, of said corporation, 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 the answers of the respondents thereto, testimony and other evidence in support of the allegations of said complaint were introduced by S. Brogdyne Teu, II, attorney for the Commission, before trial examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. The respondents appeared by Attorney William G. White but did not introduce evidence in opposition to the complaint. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint, answer thereto, testimony,

and other evidence, report of the trial examiners upon the evidence, brief in support of the complaint (no brief having been filed by the respondents or oral argument requested), and the Commission having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent Allied Specialties, Inc., is a corporation organized and existing under the laws of the State of Indiana, having its office and principal place of business at 621 Noble Street, Indianapolis, Ind. It is now, and for several years last past has been, engaged in the sale and distribution of nut display warmers under the trade name "Ko-Pak-Ta" and peanuts for use in said nut display warmers.

The respondents Ralph J. Biery and Anne Stringer are individuals and are, respectively, president and secretary-treasurer of respondent corporation Allied Specialties, Inc.

Respondent William G. White is an individual and until his resignation in May 1938 was vice president of respondent corporation. His activities, however, were limited to those of attorney, and said respondent did not participate in the acts and practices hereinafter described.

Respondents Ralph H. Biery and Anne Stringer are actively in charge of said corporate respondent and direct and control all of its policies and operations.

PAR. 2. The individual respondents Ralph J. Biery and Anne Stringer have previously been engaged in acts and practices similar to those hereinafter described, as officers, directors, and salesmen of various corporations owned and controlled by them. In 1931 Roy Stringer, Ltd., a corporation, was organized, having its principal place of business at 968 Fort Wayne Avenue. The individual respondent Anne Stringer was secretary and treasurer of said corporation, and the respondent Ralph J. Biery acted as salesman for said corporation. In April 1935, the International Merchandising Corporation of America was organized. The respondent Anne Stringer was secretary and treasurer of said corporation and respondent Ralph J. Biery acted as salesman. Both the Roy Stringer, Ltd., and the International Merchandising Corporation of America, a corporation, were discontinued prior to the organization of the respondent cor-

poration, Allied Specialties, Inc., and were engaged in acts and practices similar to, and identical with, the acts and practices hereinafter described.

PAR. 3. In the course and conduct of their business the said respondents Allied Specialties Inc., Ralph J. Biery, and Anne Stringer, hereinafter referred to as respondents, cause said nut display warmers and nuts for use therein to be shipped from their place of business in the State of Indiana to purchasers thereof located in various other States of the United States. Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States.

PAR. 4. Respondents are engaged in substantial competition in commerce among and between the various States of the United States and in the District of Columbia with other corporations and with partnerships, firms, and individuals engaged in the sale and distribution of similar products in commerce among and between the various States of the United States.

PAR. 5. In the course and conduct of their business, respondents sell said nut display warmers, usually in lots of 25 or more, through salesmen who are employed on a commission basis. These nut display warmers are purchased by respondents at a cost of \$5.50 each and are sold to the public in lots of 25 or more at a price of \$26.50. The salesmen are paid a commission of \$8.50 on the sale of each nut warmer. The respondents supply 75 envelopes of nuts with each warmer. The purchasers of such warmers place them in public places of business where members of the public may secure nuts therefrom at 5 cents per bag. The owners or proprietors of business where the warmers are placed are permitted to retain $1\frac{2}{3}$ cents per bag for rental and service in connection with sale of the nuts, $11\frac{1}{3}$ cents per bag is remitted to the respondents, and 2 cents per bag is retained by purchaser of the warmers.

PAR. 6. For the purpose of promoting the sale of said nut display warmers, the respondents follow and pursue a sales plan designed to mislead, deceive, and confuse customers and prospective purchasers respecting the earning to be realized from the purchase and operation of the nut warmers offered for sale.

The respondents employ a number of sales representatives who travel through the various States of the United States, calling upon prospective purchasers and soliciting orders for respondents' nut display warmers. Such salesmen, when preparing to operate in a particular town or locality, place an advertisement in the local news-

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paper, which advertisement is furnished by the respondents for use of said salesmen and of which the following are typical examples:

\$2,600 CASH

will purchase controlling interest in business. Worth \$500 monthly to right man. Party selected must be between 25 and 55 years of age, and furnish references. Gentile. Unusual circumstances have made this opening available. Address Box # —.

WANTED—Man, 30 years of age or over to take complete charge of business in ———. Man selected must have \$400 cash and dependable references. Compensation unusually good. Give phone. Box # —.

MANAGER WANTED—Gentile preferred by reliable company operating in 28 States, to handle its wholesale business in (*name of city*) and surrounding counties. Worth \$300 monthly to right man. Must possess \$1,250 cash. Man selected must have some business experience, excellent references, confidence in his own ability, and a strong desire to succeed. For such a man we have an excellent opportunity. Unless you meet these requirements please do not answer. Give full qualifications and phone number. Box # —.

When said representative of respondent receives a reply to such advertisement, an appointment is arranged with the prospective purchaser, and said representative outlines the plan of operation, usually following a prearranged sales talk furnished by the respondents, and represents that exorbitant profits will be earned from operating the nut display warmers and promises such prospective purchasers exclusive territory upon the purchase of a designated number of such devices and further represents that the respondents will place such devices in various locations for the prospective purchaser.

Salesmen are authorized to offer prospects a repurchase agreement, which may be attached as a rider to the contract of purchase, which provides that if a cash return of 120 percent is not realized on the investment made, the nut display warmers will be repurchased by the respondents at the price of the original investment less certain rental deductions, or the territory resold by the respondents.

PAR. 7. All the representations made by the respondents as part of such sales plan and scheme are grossly exaggerated, misleading, and untrue. None of the purchasers of respondents' nut warmers earn \$300 to \$500 monthly or any other substantial sum, but, instead, it has been the experience of some of such purchasers that the method of vending proposed by the respondents through such device is impractical and will not induce a sufficient amount of sales to cover the cost of operating such nut display warmers. The nut display warmers do not earn the average amounts claimed for them and their earning capacity is grossly exaggerated. The respondents do not in all in-

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stances place said nut warmers in locations for operation, as represented by their salesmen. The respondents do not permit a return of the nut display warmers by a purchaser or live up to the agreements contained in the so-called repurchase agreement executed, but, instead, refuse to accept return of any such devices or to resell the territory where such devices are located. Respondents do not in all cases give exclusive territory to the purchaser but, in many instances, have sold such nut display warmers to more than one purchaser operating in the same territory, granted as exclusive. The representations contained in respondents' repurchase agreement that the nut warmers will be repurchased from the purchaser or the territory resold, if a cash return on investment of 120 percent is not received, has a tendency and capacity to cause purchasers to believe that respondents guarantee a net return of 120 percent on investment when in fact no such guarantee is given.

PAR. 8. The use of the sales plan hereinabove set forth and the false and misleading representations made in connection therewith have the tendency and capacity to, and do, mislead and deceive a substantial number of customers and prospective purchasers of nut display warmers into the erroneous belief that such representations are true and cause a substantial number of said purchasers, because of such erroneous belief, to purchase respondents' nut display warmers. The aforesaid acts and practices have the capacity and tendency to and have diverted trade unfairly to the respondents from competitors engaged in the sale and distribution of similar products in commerce among and between the various States of the United States who do not misrepresent their products or their respective businesses.

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, answers of the respondents, testimony, and other evidence taken before trial examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, the report of the

trial examiners upon the evidence, and brief filed in support of the complaint; 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 Allied Specialties, Inc., a corporation, its officers, directors, agents, representatives, and employees and the respondents Ralph J. Biery, an individual, and Annie Stringer, an individual, and their respective representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of nut display warmers and nuts for use therein and other similar products in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing any specified sum of money as possible earning or profits of operators or purchasers of respondents' nut display warmers which is not a true representation of the average net earnings or profits consistently made by operators of such nut display warmers in the ordinary course of business and under normal conditions and circumstances.

2. Representing, directly or by inference, that the respondents assign exclusive territorial rights within any certain trade area to any purchaser or prospective purchaser of said nut display warmers when such exclusive territory is not, in fact, allotted and maintained by the respondent.

3. Representing, directly or by inference, that respondents obtain locations for said nut display warmers when locations for all nut warmers sold by the respondents are not, in fact, obtained by the respondents.

4. Representing, directly or by inference, that the respondents resell or permit the return of said display nut warmers for refund of investment in case the purchaser thereof is dissatisfied, unless and until such devices are so disposed of and the investment, in fact, returned to dissatisfied customers.

5. Representing, directly or by inference, that respondents guarantee any specified amount as earnings or profits to purchasers or operators of respondents' nut display warmers.

It is further ordered, That the 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.

It is further ordered, That the complaint be dismissed as to the respondent William G. White.

Syllabus

IN THE MATTER OF

WITOL, INC., WITOL BEAUTY LABORATORIES, INC.,
AND WILLIAM WITOL, ANN FELIX AND HATTIE
BLANKFELDCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3934. Complaint, Oct. 24, 1939—Decision, May 23, 1941*

Where two corporations, business operations of one of which were subsequently discontinued, together with the individual, who was president, treasurer, and principal stockholder of both and formulated and controlled their practices and policies, engaged respectively in interstate sale and distribution of cosmetic preparation known as "Witol's New Liquid Skin Peel" and "Take-Off," as treatments for pimples, blackheads, and other skin blemishes; by means of advertisements disseminated through the mails, newspapers and periodicals, and circulars and other printed or written matter—

- (a) Represented, directly and indirectly, that their aforesaid preparations were effective in removing the outer layer of skin and giving user a new, fresh surface skin, and in treatment and removal of pimples, blackheads, whiteheads, freckles, and superficial skin blemishes, and would cause large pores and fine lines to diminish; facts being said preparations would not do any of such things; and
- (b) Represented that they were making a special offer of \$10.85 worth of merchandise for the price of 98 cents, and that such offer was limited, through such typical statements as "This *Special Introductory Offer* made to you * * * is for a limited time only," and "Notice—There is only a limited number of these *Special Introductory Offer* sets—no more can be promised—Don't delay—First Come, First Served. ONLY ONE SET TO A PERSON," facts being such offer was not special but constituted the usual and customary method of distribution used by them in the ordinary and usual course of business, and as many sets as were desired were sold to any one person without limitation;

With effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that such false representations were true, and of inducing it, because of said belief, to purchase their cosmetic preparations:

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

Before *Mr. Miles J. Furnas* and *Mr. John W. Addison*, trial examiners.

Mr. S. Brogdyne Tew, II, for the Commission.

Mr. John A. Bolles, of New York City, for respondents.