

Syllabus

IN THE MATTER OF
JOHN H. OESTERHAUS, TRADING AS FARMERS VACCINE
& SUPPLY COMPANY

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

Docket 4137. Complaint, May 21, 1940—Decision, June 30, 1941

Where an individual engaged in competitive interstate sale and distribution of his "Abortion Vaccine" to render cattle immune to Bang's Disease; by means of advertisements disseminated through the mails and numerous newspapers and periodicals of general circulation, and by circulars, pamphlets, and other advertising literature—

(a) Represented, directly or by implication, that by the injection of his vaccine into each animal of a herd of cattle the entire herd and each treated animal was rendered immune to Bang's Disease, that these results might be obtained in all cases regardless of the age of the animal and of whether it was infected with said disease at the time of treatment, that the use of said preparation gave lasting protection and that animals treated therewith, although later exposed, would not become infected, and that a substantial degree of protection was afforded within 2 weeks after treatment was administered;

The facts being that his said preparation, in common with practically all others on the market for treatment of disease in question, was made of "Strain 19," used generally by veterinarians and stockmen for prevention of such disease; the value and effectiveness of the vaccine were limited chiefly to cases of calves of from 4 to 8 months of age, the treatment not being generally recognized as effective in the case of mature cattle and being possibly harmful, and being also ineffective as to cattle already infected; immunity afforded was not in all cases permanent and was lost by a substantial percentage of animals after a certain period; and no substantial degree of protection was usually afforded within 2 weeks after treatment; and said individual, for a substantial period of time, made no change in his advertising material—to certain of which, however, he attached advisory notice—to comply with the regulation of the Department of Agriculture of May 26, 1938, requiring that such vaccines should be recommended only for treatment of calves from 4 to 8 months of age;

(b) Represented that abortion would be prevented in all females treated with the vaccine and that such females would carry their calves for the full period, and might safely be bred at any time after treatment; and

(c) Represented that he guaranteed that a calf would be born to each breeding cow treated with the vaccine;

The facts being that the fact that a cow had received the treatment did not necessarily mean that abortion would be prevented, and that a period of 2 or 3 months should be allowed to elapse before such animals were bred, since time was needed to develop immunity, and in some cases there is a virulent reaction from the treatment which might produce the disease; and the only guaranty made in fact by said individual was that the purchase price of the vaccine would be refunded in cases where a calf was not born;

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With tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and to cause it, because of such erroneous belief, to purchase his said preparation, and with result that trade was diverted unfairly to him from his competitors, many of whom do not misrepresent their products:

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

Before *Mr. William C. Reeves*, trial examiner.

Mr. Randolph W. Branch 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 John H. Oesterhaus, an individual trading under the name of Farmers Vaccine & Supply Co., hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is an individual trading and doing business under the name of Farmers Vaccine & Supply Co., and maintaining an office and principal place of business at 1619 West Sixteenth Street, Kansas City, Mo.

PAR. 2. Respondent is now, and has been for more than 2 years last past, engaged in the business of selling a certain preparation containing drugs, described by him as "Abortion Vaccine," and recommended by him for use as a means of rendering cattle immune to an ailment known as "Bang's Disease." Respondent causes said preparation, when sold, to be transported from his aforesaid place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent at all times mentioned herein has maintained a course of trade in said preparation in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his aforesaid business, the respondent had disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning his said product by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said product; and

respondent has also disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning his said product, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of his said product in commerce, as commerce is defined in the Federal Trade Commission Act. Among, and typical of, the false, misleading, and deceptive statements and representations contained in said false advertisements, disseminated and caused to be disseminated as hereinabove set forth, by the United States mails, by advertisements in newspapers and periodicals, and by circulars, pamphlets, catalogs, and other advertising literature are the following:

* * * inject * * * each animal in your herd.

IMMUNIZE YOUR HERD WITH ABORTION VACCINE.

* * * your heifer or cow is made immune against Bang's Abortion Disease.

* * * one dose of which gives lasting protection.

Our experience indicates that a considerable degree of protection is afforded within two weeks from the use of our Abortion Vaccine.

* * * an Immune Herd; which even though exposed later will not become infected.

Start now on your yearlings, heifers and two-year olds and vaccinate the balance as convenient.

* * * since 1932 * * * Abortion Vaccine has been used on the entire herd at once—heifers, open cows and bred cows at all stages of pregnancy, and the results on thousands of animals in hundreds of herds apparently justified the practice.

Abortion Vaccine will immune animals against Bang's Disease and result in full term calves * * *.

* * * end abortion losses from already infected animals.

Breeding may be commenced at any time you choose after vaccination * * *.

Now to prove our own faith in our Abortion Cure we are insuring you a calf from each cow.

PAR. 4. Through the use of the statements and representations hereinabove set forth, and others similar thereto not specifically set out herein, respondent has represented that by one injection of his abortion vaccine into each animal of a herd of cattle, the herd and each treated animal is rendered immune to Bang's Disease and will not, although later exposed, become infected therewith; that one dose does, in fact, give lasting protection; and that a considerable degree of protection is afforded in 2 weeks' time; that the product may be advantageously used and these results attained in all cases regardless of the age of the animals and of whether or not they are infected at the time of treatment; that all treated females will carry their calves for the full term; that treated females may be bred at any time after injection; that respondent guarantees a calf to be born to each female treated with his vaccine.

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PAR. 5. The foregoing representations are grossly exaggerated, misleading, and untrue. In truth and in fact, the use of the respondent's vaccine does not in all cases render animals to whom it is administered immune to, or protected against, Bang's Disease. Immunity is not attained in 2 weeks after treatment. When administered to uninfected mature cows, a considerable period, sometimes as long as 2 years, must elapse before immunity from the disease may be anticipated, and such immunity is not always attained; when administered to infected mature animals, the vaccine in no way contributes to the gaining of immunity which may result, however, from a natural recovery. The use of this vaccine on mature females will not assure or assist full term gestation and parturition of calves in any cases except those in which pregnancy occurs after immunity has been gained from the use of the vaccine. Abortion or premature birth may be due to other factors as well as to Bang's Disease. Treated, mature uninfected females should not, under the accepted principles of animal husbandry, be bred until a reasonable time has elapsed after treatment. Respondent's alleged guarantee that a calf will be born to each cow treated with his vaccine is not in fact such a guarantee, but merely an announced undertaking to refund the price of the vaccine if a treated cow does not bear a calf.

PAR. 6. The use by the respondent of the foregoing, false, deceptive, and misleading statements and representations with respect to his preparation disseminated as aforesaid has had and now has the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such false statements and representations are true and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's vaccine.

PAR. 7. In the course and conduct of his said business, respondent is now, and has been for more than 1 year last past, in substantial competition with other individuals and with firms, partnerships, and corporations engaged in the sale and distribution of abortion vaccines in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 8. The United States Department of Agriculture, through its Bureau of Animal Industry, has, since 1934, been engaged in a program for the better control and ultimate eradication of Bang's Disease. Abortion vaccines, under the provisions of "An act making appropriations for the Department of Agriculture for the fiscal year ending June thirteenth, nineteen hundred and fourteen" (37 Stat. 832), may be legally manufactured only in establishments licensed by

the Department of Agriculture. Respondent is not a manufacturer of vaccine, but his product is manufactured for him by a licensed establishment. Many of those engaged in the sale and distribution of such vaccine, as set forth in paragraph 7 hereof, are also licensed manufacturers thereof.

PAR. 9. On May 26, 1938, the said Department of Agriculture, through its Bureau of Animal Industry, as a part of its program mentioned in paragraph 8 hereof, ordered such licensed establishments to recommend the use of abortion vaccine only for the treatment of calves from 4 to 8 months of age, inclusive. Many licensed manufacturers complied with said order. Respondent, however, by means of various of the representations and statements set forth in paragraph 3 hereof, and others not specifically set out herein, has continued to recommend his vaccines for use regardless of the age of the animal.

PAR. 10. As a direct result of this recommendation by respondent, many members of the consuming public have purchased substantial amounts of respondent's vaccine, and in consequence trade has been diverted unfairly to respondent from competitors likewise engaged in the business of selling and distributing abortion vaccines who, in compliance with the order of the Department of Agriculture, recommend their vaccines for use only on calves from 4 to 8 months of age. As a result thereof, injury has been done and is now being done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 11. The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice of the public and respondent's competitors, and constitute unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on May 21, 1940, issued and thereafter served its complaint in this proceeding upon respondent John H. Oesterhaus, an individual, trading as Farmers Vaccine & Supply Co., charging him with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of the complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of the complaint were introduced by Randolph W. Branch, attorney for the Commission,

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and in opposition to the allegations of the complaint by the respondent, appearing in his own behalf, before William C. Reeves, trial examiner of the Commission theretofore duly designated by it, and the 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 complaint, the answer thereto, testimony and other evidence, report of the trial examiner upon the evidence and the exceptions thereto, and briefs in support of the complaint and in opposition thereto (oral argument not having been 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, John H. Oesterhaus, is an individual trading as Farmers Vaccine & Supply Co., with his office and principal place of business at 1619 West Sixteenth Street, Kansas City, Mo. Respondent is now, and for more than 3 years last past has been, engaged in the sale and distribution of a certain drug preparation designated by him as "Abortion Vaccine" and intended for use as a means of rendering cattle immune to a certain ailment or disease known as "Bang's Disease."

In the course and conduct of his business respondent causes, and for more than 3 years last past has caused, his preparation, when sold, to be transported from his place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in his preparation in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. Respondent is now, and for more than 3 years last past has been, in substantial competition with other individuals and with corporations, firms, and partnerships engaged in the sale and distribution, in commerce among and between the various States of the United States and in the District of Columbia, of similar preparations and other preparations intended for the same purpose.

PAR. 3. In the course and conduct of his business the respondent has disseminated and is now disseminating, and has caused, and is now causing the dissemination of, advertisements concerning his product by the United States mails and by various other means in commerce as commerce is defined in the Federal Trade Commission

Act; and respondent has also disseminated and is now disseminating, and has caused and is now causing the dissemination of, advertisements concerning his product by various means for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of his product in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in such advertisements, disseminated and caused to be disseminated as herein set forth, by the United States mails, by advertisements in numerous newspapers and periodicals having a general circulation in various States of the United States, and by circulars, pamphlets, and other advertising literature, are the following:

IMMUNIZE YOUR HERD WITH ABORTION VACCINE.

Simply inject one ample dose well under the skin on the side of neck of each animal in your herd; * * *.

We have shown you that Vaccine will save you more than twice what you pay in infected herds simply for the increased milk flow and the comparative freedom from afterbirth troubles alone. Besides this, and at no extra cost, your heifer or cow is made immune against Bang's abortion disease.

You can Control Infectious Abortion and have an immune herd in a short time best by using our Abortion Vaccine, one dose of which gives a lasting protection.

Our experience indicates that a considerable degree of protection is afforded within two weeks from the use of our Abortion Vaccine.

Dairymen should, however, start at once to build an immune herd—a herd that not only will be a Bang's Disease Free Herd, but which is much more important also an Immune Herd; which even though exposed later will not become infected.

Start now on your yearlings, heifers and two-year olds and vaccinate the balance as convenient.

Since 1932 in herds where abortion losses were heavy, and something had to be done, our Abortion Vaccine has been used on the entire herd at once—heifers, open cows and bred cows at all stages of pregnancy, and the results in thousands of animals in hundreds of herds apparently justified the practice.

* * * let us say again that the use of Abortion Vaccine will immune animals against Bang's disease and result in full term calves, but it will NOT make a reactor cow a non-reactor; at least not for a long time, sometimes 18 months to two years being required.

Abortion Vaccine, is an immunizing agent and as such its purpose is as much to prevent the spread of infection in a herd as to end abortion losses from already infected animals.

Breeding may be commenced at any time you choose after vaccination, but we like to wait a few weeks.

Now to prove to you our own faith in our Abortion Vaccine we are insuring you a calf from each cow.

PAR. 4. Through the use of these statements and representations, and others of a similar nature, the respondent has represented, directly

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or by implication, that by the injection of his vaccine into each animal of a herd of cattle the entire herd and each treated animal is rendered immune to Bang's Disease; that these results may be obtained in all cases, regardless of the age of the animal and regardless of whether the animal is infected with Bang's Disease at the time of the treatment; that the use of the preparation gives lasting protection and that animals treated with the preparation, although later exposed, will not become infected with the disease; that a substantial degree of protection is afforded within 2 weeks after the treatment is administered; that abortion will be prevented in all females treated with the vaccine and that such females will carry their calves for the full period of time; that females treated with the vaccine may safely be bred at any time after treatment; and that respondent guarantees that a calf will be born to each breeding cow treated with the vaccine.

PAR. 5. The evidence shows, and the Commission finds, that the disease or condition among cattle known as Bang's Disease is an infectious condition caused by certain organisms or bacteria. The principal and most harmful effect of the disease is that when it is present in a pregnant cow it is likely to cause an abortion; that is, cause the premature birth of the calf. In fact, while there are other causes of abortion among cows, probably the greater percentage of such cases are due to the presence of Bang's Disease.

PAR. 6. The method in general use among veterinarians and stockmen for the prevention of Bang's Disease is the injection of a vaccine known as "Strain 19." Respondent's preparation is made of this vaccine, as are practically all other preparations on the market which are intended for the treatment of this disease. It has been found however that the value and effectiveness of the vaccine are limited chiefly to the case of calves of from 4 to 8 months of age. The indiscriminate vaccination of entire herds of cattle with the vaccine is not recommended by veterinarians or stockmen generally. The treatment is not generally recognized as effective in the case of mature cattle, and in fact may prove harmful, in that the use of the vaccine for pregnant cows has the tendency to cause such cows to abort. The treatment is also ineffective as to cattle which are already infected with the disease. In dealing with herds of cattle the generally approved and recognized method of combating Bang's Disease, in addition to the vaccination of the young calves, is to test the members of the herd for the disease and to slaughter those found to be infected.

PAR. 7. The United States Department of Agriculture, through its Bureau of Animal Industry, has been engaged for a number of years in a program for the prevention, control, and ultimate eradication of Bang's Disease. Abortion vaccines may be legally manufactured

only in establishments licensed by the Department of Agriculture. Respondent is not a manufacturer of vaccines, but he obtains his vaccine from a laboratory which is a licensed establishment. Many of respondent's competitors are also licensed manufacturers and manufacture the vaccines sold by them.

On May 26, 1938, the Department of Agriculture issued a regulation addressed to "Licensed Establishments and Others," which read in part as follows:

In order that in the marketing and use of bovine abortion vaccine there need be no interference with the Cooperative Control of Bang's Disease, it is hereby ordered: 1. That this vaccine shall be recommended only for the treatment of calves from four to eight months of age, inclusive. * * *

There was a general compliance with this regulation on the part of licensed manufacturers and others engaged in the sale of abortion vaccines. Respondent attached to certain of his advertising literature a notice calling attention to the regulation, but for a substantial period of time he made no change in the advertising material itself; that is, the advertising material continued to carry the representations referred to above.

PAR. 8. The evidence shows, and the Commission finds, that where respondent's preparation is effective the immunity afforded is not in all cases permanent. The period of time during which a vaccinated animal will retain its immunity varies, but a substantial percentage of animals will lose their immunity after the lapse of certain periods of time. No substantial degree of protection is usually afforded within 2 weeks after the treatment. While the immunizing process begins soon after the vaccination, several weeks must elapse in the usual case before any substantial degree of protection develops, the maximum degree of protection being reached about 3 months after the treatment.

The fact that a cow has received the treatment does not necessarily mean that abortion will be prevented and that she will be able to carry her calf for the full period. Nor may treated cows safely be bred at any time after treatment; a period of some 2 or 3 months should be allowed to elapse before such animals are bred. The reason for this is that the animal needs time to develop immunity. In some cases also there is a virulent reaction from the treatment and this reaction might produce the disease.

With respect to respondent's representation that he guarantees that a calf will be born to each breeding cow treated with the preparation, the evidence shows that respondent does not in fact guarantee that result. The only guaranty made by the respondent is that in those cases where a calf is not born the purchase price of the vaccine will be refunded to the purchaser.

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PAR. 9. The Commission is therefore of the opinion, and finds, that the representations made by the respondent with respect to his preparation and its effectiveness are exaggerated and misleading, and constitute false advertisements.

PAR. 10. The Commission further finds that the use of these advertisements by respondent has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the therapeutic value of respondent's preparation and with respect to the effectiveness of the preparation, and to cause such portion of the public to purchase respondent's preparation as a result of the erroneous and mistaken belief so engendered. In consequence, trade has been diverted unfairly to the respondent from his competitors, many of whom do not misrepresent the therapeutic value of effectiveness of their products.

CONCLUSION

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

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, testimony and other evidence taken before William C. Reeves, trial examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, report of the trial examiner upon the evidence and the exceptions thereto, and briefs filed by Randolph W. Branch, attorney for the Commission, and by the respondent, appearing in his own behalf (oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, John H. Oesterhaus, individually and trading as Farmers Vaccine & Supply Co., or trading under any other name, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of his drug preparation designated "Abortion Vaccine," or any preparation of substantially similar composition or possessing substantially similar properties,

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whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or through inference:

(a) That the use of said preparation upon entire herds of cattle will immunize such herds against the disease known as Bang's Disease, or that said preparation is effective in all cases;

(b) That the immunity afforded by said preparation against Bang's Disease is in all cases permanent;

(c) That said preparation affords in the usual case any substantial degree of protection against Bang's Disease within 2 weeks after its use;

(d) That by the use of said preparation abortion will be prevented in all cases, or that cows treated with said preparation will in all cases carry their calves for the full period of time;

(e) That cows treated with said preparation may safely be bred immediately after such treatment;

(f) That respondent guarantees that a calf will be born to each breeding cow treated with said preparation.

2. Disseminating or causing to be disseminated any advertisement by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparation, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

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

IN THE MATTER OF

HENRY M. SALISBURY AND FRANK R. JOHNSON, TRADING AS SMOKE CONDITIONER COMPANY

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

Docket 4166. Complaint, June 19, 1940—Decision, June 30, 1941

Where two individuals engaged in the interstate sale and distribution of their "Smoke Conditioner" cigarette holder; in advertising matter distributed by them, expressly and by implication—

Represented that their said product embodied entirely new and revolutionary principles in cigarette holders, never had a bad odor or taste, and prevented nicotine and irritating substances in the cigarette from reaching the smoker, and that use thereof promoted health by eliminating all deleterious substances from the smoke;

Facts being that said "Smoke Conditioner" was not new or revolutionary in its principle of operation; had, after use, both a bad odor and taste; would not prevent nicotine and other irritating substances from reaching the smoker, or promote health by the elimination of all deleterious substances from tobacco smoke; and use thereof eliminated only a small percent of nicotine and other aforesaid substances present in tobacco;

With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such misleading statements were true and into the purchase of their said product because of such mistaken belief:

Held, That such acts and practices 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*, trial examiner.

Mr. R. A. McOuat for the Commission.

Mr. Crichton Clarke, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission having reason to believe that Henry M. Salisbury and Frank R. Johnson, trading as Smoke Conditioner Co., hereinafter referred to as respondents, have violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondents Henry M. Salisbury and Frank R. Johnson are individuals trading as Smoke Conditioner Co. with their office and principal place of business at 254 West Thirty-first