

Complaint

IN THE MATTER OF

BAUSCH & LOMB OPTICAL COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4903. Complaint, Feb. 9, 1943—Decision, May 9, 1944*

Where a corporation engaged in manufacture of ophthalmic and optical products, including spectacle lenses, and in competitive interstate sale and distribution of such spectacle lenses to wholesalers for resale to retailers, ophthalmologists, optometrists and opticians for distribution to the public through resale or use in filling prescriptions; having from 1913 to 1928 advertised its "Balcor" six-base meniscus and six-base toric lenses—which, respectively, provided a high degree of marginal correction, and a lesser degree thereof—through display advertising comparing photographic images taken through the old-fashioned flat lenses—largely supplanted since 1900 by the toric and meniscus lenses—with images taken through meniscus lenses, showing the picture produced by the flat lens clear in the center but blurred near the edges, and same area taken through the latter, clear throughout—

In advertising thereafter its "Orthogon" series of meniscus and toric lenses, introduced about 1928, through continued dissemination of photographic comparisons, in which the figure produced by the flat lens was clear on the center but blurred near the edges while that produced through the Orthogon meniscus lens was clear throughout its entire area,—

Represented, through use of word "ordinary" in matter accompanying said photographic comparison, in which it described the marginal blurred photograph, made with flat lens, as "made through an ordinary spectacle lens," not further described, with its "needless eye strain," as contrasted with that made through its "Orthogon spectacle lens" with its "extra margin of safety" and "same perfect vision" at the edge as at the center," that its said Orthogon lenses provided a greater degree of marginal correction as compared with the six-base meniscus and six-base toric lenses than they in fact did, through word's capacity and tendency to mislead into belief that comparison was between its "Orthogon" and other toric and meniscus lenses sold through same channels;

With capacity and tendency to cause members of the public in said erroneous belief to purchase its said Orthogon lenses in preference to products of its competitors and thereby unfairly divert trade from them to it:

Held, That such acts and practices were all to the prejudice of the public and constituted unfair methods of competition in commerce and unfair acts and practices therein.

Before *Mr. Miles J. Furnas*, trial examiner.

Mr. R. P. Bellinger for the Commission.

Goodwin, Nixon, Hargrave, Middleton & Devans, of Rochester, N. Y., for respondent.

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 Bausch & Lomb Optical Company, a corporation, hereinafter referred to as respondent, has violated the pro-

visions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Bausch & Lomb Optical Company, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located in Rochester, N. Y.

PAR. 2. Respondent is now and for many years last past has been engaged in the manufacture and sale of optical products, including spectacle lenses, which it sells and has sold to dealers, opticians and optometrists who are engaged in reselling and distributing said products to the consuming public.

Respondent causes said products when sold to be transported from its place of business in the State of New York 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 said products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. Respondent is now and at all times referred to herein has been in substantial competition with other corporations and with firms, partnerships and individuals engaged in the sale of optical products, including spectacle lenses, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. Prior to the advent of the twentieth century the bulk of spectacle lenses was made of flat pieces of glass ground to different powers. These were known as flat lenses and also as double convex or double concave lenses. They afforded correction in the central portion of the lens, but did not supply equal correction in the outer portion near the edge of the lens. Early in the decade which began with the year 1920 two types of improved lenses were developed from curved glass which secured a degree of correction throughout the entire lens area superior to and higher than that previously supplied by the old flat lens, and these two improved types of lens practically supplanted the flat lens in the market. One of said improved types is known as the Meniscus, the other as the Toric. The two now comprise the vast majority of all lenses sold in this country, and the flat lens above referred to is now seldom sold on prescription to the consuming public.

PAR. 5. For a number of years subsequent to the introduction of the Meniscus and the Toric lenses the respondent sold the said two lenses throughout the country, and the larger portion of the lenses which it now sells are Meniscus and Toric lenses. For the purpose of inducing purchases thereof, the respondent has disseminated or caused the dissemination in commerce, as commerce is defined by the Federal Trade Commission Act, of advertisements and advertising material among retail dealers, opticians and optometrists for their use, and which they have used and displayed, in selling and offering to sell the said lenses to their customers. The said advertising included photographic comparisons of images taken through different types of lenses to illustrate the improvements in marginal correction. In 1913, or thereabout, such comparisons were used in its advertising by respondent to indicate the difference between the flat lens and the more modern Meniscus lens or the Toric lens. In these illustrations the flat lens produced a clear picture through the center thereof

but was faded or blurred nearer the edges, while the Meniscus or Toric lenses produced a clear picture throughout the entire lens area.

About 1928 the respondent began to market a lens which it designed and designated as Orthogon, representing that this lens further improved marginal correction. Thereafter the advertising disseminated by respondent in commerce as aforesaid has continued to feature photographic comparisons of various pairs of objects. In some instances one of each pair is made to appear under the words "ordinary lens" and the other under the words "Orthogon lens." Each of said comparisons is accompanied by the following language:

LEFT: Actual photograph made through an ordinary spectacle lens. The eye can overcome some of this marginal blur, but only at the expense of needless eyestrain.

RIGHT: Actual photograph made through an Orthogon spectacle lens. Note the extra margin of safety . . . The same perfect vision at the edge of the lens as at the center.

A variation of the above advertisements and representations which has been and is being used by respondent is that under the "Left" illustration the words "flat" or "double convex" are substituted for the word "ordinary" so that it reads: "LEFT: Actual photograph made through a flat (or double convex) lens. The eye can overcome some of this marginal blur, but only at the expense of needless eyestrain."

PAR. 6. In truth and in fact the said photographic illustrations and other representations are deceptive and misleading, in that the "ordinary" lens now used, and for some time past used, is and has been either the Toric or the Meniscus, and in that a substantial part of the public is not informed of a distinction between the flat or double convex lens and the commonly used Toric and Meniscus lens. There exists, therefore, a tendency for a substantial part of the public to believe that the "ordinary" lens and the "flat" or "double convex" lens with which respondent in its advertising compares its Orthogon lens is the commonly used and competing Toric or Meniscus lens. The said photographic representations are further misleading and deceptive in that they have the capacity and tendency to and do convey the false impression that marginal blur and figure distortion are characteristic of or attributed to the refractive qualities of the Meniscus and the Toric lens.

PAR. 7. The aforesaid acts and practices of the respondent have had and now have the tendency and capacity to and do mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said photographic illustrations and other similar representations used by respondent afford an accurate and true comparison of the superiority of the Orthogon lens over the Meniscus and Toric lenses. As a result of such erroneous and mistaken belief many members of the purchasing and consuming public have been induced to and have purchased substantial quantities of respondent's said product, in consequence of which trade has been unfairly diverted to respondent from its competitors, and thereby substantial injury has been done and is being done by the respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 8. The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 9, 1943, issued and subsequently served its complaint in this proceeding upon respondent, Bausch & Lomb Optical Company, a corporation, charging it 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 said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner 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. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, report of the trial examiner, 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. Respondent, Bausch & Lomb Optical Company, is a corporation, organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located in Rochester, N. Y. It is now, and for many years has been, engaged in the manufacture and sale of ophthalmic and optical products, including spectacle lenses. For many years respondent has sold, and now sells, its spectacle lenses to wholesale distributors who resell and distribute said lenses to retail dealers, ophthalmologists, optometrists, and opticians who, in turn, distribute said lenses to the public by resale or through use in filling prescriptions for spectacles.

PAR. 2. In the course and conduct of its aforesaid business, respondent causes its products, when sold, to be transported from its place of business in the State of New York to purchasers at their points of location in various other States of the United States and in the District of Columbia. Respondent maintains, and has maintained, a course of trade in its said products in commerce between and among the various States of the United States and in the District of Columbia, and in the course thereof is now, and at all times material to this proceeding has been, in substantial competition with other firms and corporations engaged in the sale of ophthalmic and optical products, including spectacle lenses, in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. For more than 200 years prior to 1900 spectacle lenses were generally made of flat pieces of glass ground to different powers. Such lenses are known as flat lenses, and also as double convex or double concave lenses. They afford correction in the central portion of the lens but

do not give equal correction in the outer portion near the edge of the lens. Substantial quantities of flat lenses are still sold in the United States, but not generally on prescription by the optical professions. For more than a hundred years marginally corrected lenses in spherical powers have been known and used. Such lenses are known as meniscus lenses because of their shape, and they afford a wider useful field of view than a flat lens of the same power. About 1900, marginal correction in lenses of cylindrical and compound powers became a practical reality with the development of commercial means of producing toric surfaces on glass. Since that time toric lenses for cylindrical and sphero-cylindrical corrections and meniscus lenses for spherical corrections have largely supplanted the old-fashioned flat lenses insofar as their use by the optical professions is concerned. Currently there are two types of meniscus lenses and two types of toric lenses in general use: one is known as the six-base meniscus or six-base toric, and the other is known as the marginally corrected meniscus or marginally corrected toric. For many years respondent has manufactured and sold meniscus and toric lenses, and the larger portion of the ophthalmic lenses which it now sells are of these types. Its six-base meniscus and six-base toric lenses are known by the trade name "Balcor." Its Balcor meniscus lenses provide a high degree of marginal correction, and its Balcor toric lenses provide a substantially lesser degree of marginal correction. Its second type of marginally corrected meniscus or toric lenses were first introduced and sold by the respondent in 1928. This type of lens is known by the trade name "Orthogon" and provides the highest degree of marginal correction of any lens manufactured by respondent. The Orthogon toric lens represents a substantial improvement over the six-base toric and the Orthogon meniscus lens a lesser improvement over the six-base meniscus.

PAR. 4. For the purpose of inducing the purchase of its meniscus and toric lenses, respondent began about 1913 to disseminate, and cause the dissemination, in commerce of advertisements and advertising material among optical wholesalers and retailers, ophthalmologists, optometrists, and opticians which they used in displaying for sale and selling such lenses to the trade and to the public. This advertising included comparisons of photographs of images taken through flat lenses with the same images taken through meniscus lenses. In these illustrations the picture produced through the flat lens was clear in the center but blurred near the edges, while the picture of the same area taken through the meniscus lens was clear throughout, and such comparisons were made to illustrate the improvement in marginal correction. If the pictures taken through these lenses had covered a wider angle of view, the marginal portion of the picture taken through the meniscus lens would have shown some blur, but to a lesser degree than that taken through the flat lens. In the photographic comparisons made in 1913 the useful field of vision of the flat lens was shown as 16 degrees and that of the meniscus lens as 52 degrees. When its Orthogon series of meniscus and toric lenses was introduced in 1928, respondent continued to disseminate, in the manner heretofore described, advertising featuring photographic comparisons in which the useful field of vision of flat lenses was shown as 20 degrees, of six-base toric lenses from 36 degrees to 50 degrees, and of the Orthogon series of meniscus and toric lenses as 60 degrees in all powers. Respondent in this advertising subsequent to 1928 featured comparisons of photographic images taken through flat lenses with those taken through an Orthogon meniscus lens.

In these comparisons the picture produced by the flat lens was clear in the center but blurred near the edges, while the picture produced through the Orthogon meniscus lens was clear throughout its entire area. In some instances respondent in its advertisements accurately described the lenses which were being compared. In other instances, continuously from the year 1928 until the end of the year 1941, the images taken through a flat lens were described as taken through an "ordinary lens" and the other as being taken through an "Orthogon lens." These comparisons were described thus:

LEFT: Actual photograph made through an ordinary spectacle lens. The eye can overcome some of this marginal blur, but only at the expense of needless eye strain.

RIGHT: Actual photograph made through an Orthogon spectacle lens. Note the extra margin of safety. . . . The same perfect vision at the edge of the lens as at the center.

PAR. 5. The comparisons of photographs taken through an Orthogon lens with those taken through a flat lens show a much greater superiority for the Orthogon lens than would have been the case in a comparison between an Orthogon lens and the six-base type of toric or meniscus lenses. The description of the flat lens used in making such comparisons as an "ordinary" lens has the capacity and tendency to mislead and deceive the purchasing public into the erroneous belief that the comparison was between an Orthogon lens and other lenses ordinarily sold through the same channels; namely, other toric and meniscus lenses. Such comparisons thereby serve as representations that Orthogon lenses have a far greater degree of superiority over six-base meniscus and six-base toric lenses than they in fact have, and have the capacity and tendency to cause members of the public, acting upon the aforesaid erroneous belief, to purchase respondent's Orthogon lenses in preference to products of its competitors, and thereby unfairly to divert trade from respondent's competitors to respondent.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition 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 an examiner of the Commission theretofore duly designated by it, report of the trial examiner, and briefs in support of and in opposition to the complaint, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That respondent, Bausch & Lomb Optical Company, a corporation, its officers, representatives, agents, and employees, directly

or through any corporate or other device, in connection with the offering for sale, sale, and distribution of spectacle lenses in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing by means of comparative photographs in which the lenses or types of lenses compared are not clearly and accurately identified, or in any other manner, that the marginal correction provided by respondent's Orthogon lenses is substantially greater in comparison with other toric or meniscus lenses than it is in fact.

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

IN THE MATTER OF

IMPERIAL DRUG EXCHANGE, INC., ALSO TRADING AS
DUPREE MEDICAL COMPANY, AND ABRAHAM PARODNEYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 5094. Complaint, Dec. 9, 1943—Decision, May 9, 1944*

Where a corporation and its president, engaged in the interstate sale and distribution of its "Dupree Brand New Formula Pills" and "Dupree Pills, Double Strength, New and Improved Formula"; in advertisements thereof which it disseminated through the mails and to dealers who distributed them among the purchasing public—

- (a) Falsely represented that their said preparations constituted a competent and effective treatment for delayed menstruation arising from colds, nervous strain, poor nutrition, anemia, fright, over-exposure, inadequate clothing, and change of climate; and
- (b) Failed to reveal facts material in the light of such representations or material with respect to the consequences which might result from the use of said preparations under prescribed or usual condition, in that they were irritant laxatives and as such potentially dangerous when taken by persons suffering from abdominal pain, nausea, vomiting or other symptoms of appendicitis;

With result that said advertising matter, disseminated by dealers, served as instrumentalities through which members of the purchasing public were deceived and misled as to the therapeutic value and safety of their said preparations, whereby such public was induced to purchase substantial quantities thereof:

Held, That said 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.

Mr. William L. Taggart 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 Imperial Drug Exchange, Inc., a corporation, Imperial Drug Exchange, Inc., a corporation, trading as Dupree Medical Company and Abraham Parodney, individually, and as an officer of Imperial Drug Exchange, Inc., a corporation, herein referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Imperial Drug Exchange, Inc., is a corporation, chartered and doing business under the laws of the State of New York with its principal place of business located at 20 East 17th Street, New York, N. Y. Said corporation trades and carries on certain of its business under the name of Dupree Medical Company, particularly that part of its business referred to in this complaint.

Abraham Parodney, is an individual, and is President, of the corporate respondent, Imperial Drug Exchange, Inc. This individual respondent