

Complaint

IN THE MATTER OF

EDWARD I. FRANKEL, TRADING AS HI-POTE PRODUCTS
AND AS EDWARD I. FRANKEL AND ASSOCIATESCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 5472. Complaint, Dec. 2, 1946—Decision, May 14, 1947*

Where an individual engaged in the interstate sale and distribution of his "Hi-Pote" drug preparation which contained calcium pantothenate—

- (a) Represented, directly and by implication, through advertisements in newspapers and periodicals, that gray hair is caused by a vitamin deficiency; notwithstanding that such is not known to be the case;
- (b) Falsely represented, as aforesaid, that his said product was effective in restoring the original natural color to gray hair;
- (c) Falsely represented, as aforesaid, that it improved the condition of the fingernails; and
- (d) Represented in circulars and other advertising material and in circular letters that purchasers of the said product received free merchandise, through such statements as, "Just for telling us that you will begin again to give Hi-Pote a fair trial by taking one tablet a day, and sending us an order not later than June 30, 1943, we will include, with the order, absolutely free, a Full Month's Supply (\$1 value) of Hi-Pote and Anti-Gray Hair Tablets. You don't need to order a lot. Just mail your order in the enclosed self-addressed envelope, which don't even need a postage stamp;" etc.;

The fact being that in order to obtain the merchandise in question the recipient was required to purchase a quantity of the product Hi-Pote, and the price of the so-called free merchandise was included in the price charged for the quantity purchased;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of such representations were true, and thereby induce it to purchase said products:

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.

Mr. Berry W. Stanley 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 Edward I. Frankel, an individual trading as Hi-Pote Products and as Edward I. Frankel and Associates, hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a pro-

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ceeding 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, Edward I. Frankel, is an individual trading and doing business as Hi-Pote Products and as Edward I. Frankel and Associates, with his principal place of business located at 418 Seventh Street, Des Moines, Iowa.

PAR. 2. Respondent, Edward I. Frankel, is now and for several years last past has been engaged in the offering for sale, sale, and distribution of a drug preparation as "drug" is defined in the Federal Trade Commission Act.

The designation used by said respondent for his said preparation and the formula and directions for its use are as follows:

Designation: Hi-Pote.

Formula: Calcium pantothenate 10 mg.

Directions: 1 to 2 tablets daily, or as directed by a physician.

Take at any time of day, preferably during or after meals.

The said respondent causes his preparation when sold to be transported from his place of business in the State of Iowa to purchasers thereof located in various other States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his business respondent, subsequent to March 21, 1938, has disseminated and caused the dissemination of certain advertisements concerning said preparation by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including but not limited to circulars and advertisements appearing in the October 11, 1942, issue of the Denver, Colo., Denver Post headed "Anti-gray Hair Vitamin"; the March 14, 1943, issue of the Los Angeles, Calif., Los Angeles Times, headed "Anti-Gray Hair Vitamin"; and the May 1943, issue of Holland's published in Dallas, Tex., headed "Have you Gray Hair?" all of which advertising matter was distributed by the United States mails and by other means in commerce as "commerce" is defined in the Federal Trade Commission Act and respondents have disseminated and caused the dissemination of advertisements concerning the preparation Hi-Pote by various means, including but not limited to the advertisements referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the said preparation in commerce as "commerce" is defined in the Federal Trade Commission Act.

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PAR. 4. Among the statements and representations contained in the said advertisements disseminated as aforesaid are the following:

HI-POTE (Anti-Gray Hair Vitamin).

ANTI-GRAY HAIR Vitamin tested on persons to 60, 88% had color restored.

The important thing is **TAKE ONE HI-POTE HIGH-GRADE HAIR TABLET A DAY, EVERY DAY**, if you want to restore your gray hair to natural color.

Natural Hair Color Restored with Hi-Pote Anti-Gray Hair Vitamin.

Good Housekeeping Magazine, long known for its excellent scientific laboratories, states that this vitamin is the one called Calcium Pantothenate, and that 88 percent of those who tested this vitamin to correct gray hair, found it successful.

"My hair shows such great improvement that these friends also want to take \$1.00 trial bottle. I also find my fingernails better."

PAR. 5. Through the use of the advertisements containing the statements and representations hereinabove set forth and others similar thereto not specifically set out herein, respondent has represented directly and by implication, that gray hair is caused by a vitamin deficiency; that the product Hi-Pote is effective in restoring the original natural color to gray hair; and that the product improves the condition of the fingernails.

PAR. 6. The said advertisements are misleading in material respects, and are "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, gray hair is not known to be due to a vitamin deficiency. The product Hi-Pote will not restore the original natural color or any color resembling the original natural color to gray hair. The said product is not effective in improving the condition of the fingernails.

PAR. 7. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his product Hi-Pote, in commerce, the respondent has circulated letters, circulars, and other advertising material in which false, misleading, and deceptive statements and representations in regard to the sale of said product are made. Typical of such representations are the following:

Just for telling us that you will begin again to give Hi-Pote a fair trial by taking one tablet a day, and sending us an order not later than June 30th, 1943, we will include, with the order, **ABSOLUTELY FREE**, a Full Month's Supply (\$1 value) of Hi-Pote anti-Gray Hair Tablets. You don't need to order a lot. Just mail your order in the enclosed self-addressed envelope, which don't even need a postage stamp. Order either a Month's Supply for \$1, a 100 Day's Supply for \$3.25 to avoid running out so soon again and save the trouble of re-ordering every month, or the Big Family Size of 200 for \$6, or enough for one person to outlast the period of the Good Housekeeping test. With any order, in the enclosed self-addressed, postage paid envelope by June 30th, 1943, you will receive an additional Full Month's supply **ABSOLUTELY FREE**.

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PAR. 8. Through the use of the statements and representations set forth in paragraph 7 and others of similar import not specifically set out herein, the respondent has represented that purchasers of the product Hi-Pote received merchandise absolutely free.

PAR. 9. The foregoing statements and representations are false, misleading, and deceptive. In truth and in fact the merchandise offered as free was not given free, but the recipient of the same was required as a consideration to purchase respondent's product Hi-Pote, and the price of such so-called free merchandise was included in the price charged for said product.

PAR. 10. The use by the respondent of the foregoing statements and representations disseminated as aforesaid has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of such statements and representations are true, and to induce a substantial portion of the purchasing public because of such erroneous and mistaken belief, to purchase said product.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute 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 December 2, 1946, issued and thereafter served its complaint in this proceeding upon respondent, Edward I. Frankel, charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. On December 23, 1946, the respondent filed his answer, in which answer he admitted all the material allegations of fact set forth in said complaint and waived all intervening procedure and further hearings as to said facts. Thereafter, the proceeding regularly came on for final hearing before the Commission on the complaint and the answer thereto, 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, Edward I. Frankel, is an individual trading and doing business as Hi-Pote Products and as Edward I.

Frankel and Associates, with his principal place of business located at 418 Seventh Street, Des Moines, Iowa.

PAR. 2. Respondent is now and for several years last past has been engaged in the offering for sale, sale, and distribution of a drug preparation, as "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for his preparation and the formula and directions for its use are as follows:

Designation: Hi-Pote.

Formula: Calcium Pantothenate 10 Mg.

Directions: 1 to 2 tablets daily, or as directed by a physician.

Take at any time of day, preferably during or after meals.

Respondent causes his preparation, when sold, to be transported from his place of business in the State of Iowa to purchasers thereof located in various other States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his business, respondent, subsequent to March 21, 1938, has disseminated and caused the dissemination of certain advertisements concerning said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements appearing in the October 11, 1942, issue of the Denver Post, Denver, Colo., headed "Anti-gray Hair Vitamin"; the March 14, 1943, issue of the Los Angeles Times, Los Angeles, Calif., headed "Anti-Gray Hair Vitamin"; and the May 1943 issue of Holland's, published in Dallas, Tex., headed "Have You Gray Hair?", all of which advertising matter was distributed by the United States mails and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act; and respondent has disseminated and caused the dissemination of advertisements concerning his preparation by various means, including but not limited to the advertisements referred to above, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of his preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the statements and representations contained in the said advertisements disseminated as aforesaid are the following:

HI-POTE (Anti-Gray Hair Vitamin):

ANTI-GRAY HAIR Vitamin tested on persons to 60, 88% had color restored.

The important thing is TAKE ONE HI-POTE HIGH-GRADE HAIR TABLET A DAY, EVERY DAY, if you want to restore your gray hair to natural color.

Natural Hair Color Restored with Hi-Pote Anti-Gray Hair Vitamin.

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Good Housekeeping Magazine, long known for its excellent scientific laboratories, states that this vitamin is the one called Calcium Pantothenate, and that 88 percent of those who tested this vitamin to correct gray hair, found it successful.

"My hair shows such great improvement that these friends also want to take \$1.00 trial bottle. I also find my fingernails better."

PAR. 5. Through the use of the advertisements containing the statements and representations hereinabove set forth and others similar thereto not specifically set out herein, respondent has represented directly and by implication, that gray hair is caused by a vitamin deficiency; that the product Hi-Pote is effective in restoring the original natural color to gray hair; and that the product improves the condition of the fingernails.

PAR. 6. The said advertisements are misleading in material respects and are "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, gray hair is not known to be due to a vitamin deficiency. The product Hi-Pote will not restore the original natural color or any color resembling the original natural color to gray hair. The product is not effective in improving the condition of the fingernails.

PAR. 7. In the course and conduct of his business, and for the purpose of inducing the purchase of his product in commerce, respondent has circulated letters, circulars, and other advertising material in which false, misleading, and deceptive statements and representations in regard to the sale of said product are made. Typical of such representations are the following:

Just for telling us that you will begin again to give Hi-Pote a fair trial by taking one tablet a day, and sending us an order not later than June 30th, 1943, we will include, with the order, ABSOLUTELY FREE a Full Month's Supply (\$1 value) of Hi-Pote and Anti-Gray Hair Tablets. You don't need to order a lot. Just mail your order in the enclosed self-addressed envelope, which don't even need a postage stamp. Order either a Month's Supply for \$1, a 100 Days' Supply for \$3.25 to avoid running out so soon again and save the trouble of reordering every month, or the Big Family Size of 200 for \$6, or enough for one person to outlast the period of the Good Housekeeping test. With any order, in the enclosed self-addressed postage-paid envelope by June 30th, 1943, you will receive an additional Full Month's Supply ABSOLUTELY FREE.

PAR. 8. Through the use of the statements and representations set forth in paragraph 7 and others of similar import not specifically set out herein, the respondent has represented that purchasers of the product Hi-Pote received merchandise absolutely free.

PAR. 9. The foregoing statements and representations are false, misleading, and deceptive. In truth and in fact, the merchandise offered as free was not given free. In order to obtain such merchan-

dise the recipient was required to purchase a quantity of the product Hi-Pote, and the price of the so-called free merchandise was included in the price charged for the quantity purchased.

PAR. 10. The use by the respondent of the foregoing statements and representations disseminated as aforesaid has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of such statements and representations are true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said product.

CONCLUSION

The aforesaid acts and practices of respondent, as herein found, are all to the prejudice and injury of the public and constitute 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 and the answer of the respondent, in which answer respondent admits all the material allegations of fact set forth in said complaint and states that he waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the facts and its conclusion that respondent has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent, Edward I. Frankel, individually and trading as Hi-Pote Products and as Edward I. Frankel and Associates, or trading under any other name, and his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of respondent's product Hi-Pote, or any other product of substantially similar composition or possessing substantially similar properties, 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 by implication:

- (a) That it has been established that gray hair results from a vitamin deficiency.

(b) That said product will restore the original natural color on any color resembling the original natural color to gray hair.

(c) That said product is effective in improving the condition of the fingernails.

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 product, which advertisement contains any representation prohibited in paragraph 1 hereof.

It is further ordered, That the respondent, Edward I. Frankel, individually and trading as Hi-Pote Products and as Edward I. Frankel and Associates, or trading under any other name, and his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of respondent's products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the word "free," or any other term of similar import, to describe or refer to any product which is not in fact given free of charge, but the price of which is included in the price charged for the same or other products.

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.

Syllabus

IN THE MATTER OF

TAG MANUFACTURERS INSTITUTE, FRANK H. BAXTER,
SECRETARY-TREASURER AND EXECUTIVE DIRECTOR
THEREOF, AND TAG CO. T AL.

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

Docket 4496. Complaint, May 2, 1941—Decision, May 19, 1947

Where some 29 corporations and 2 firms, engaged in the manufacture of "tag products"; i. e., tags, pin tickets, and like marking and pricing devices, universally used for marking purposes by manufacturers of consumer goods; selling and distributing about 95 percent of the tag products purchased and used in the United States, and, in competition with each other and with others except as below described; and who were members—and with the exception of four—had been members, since its organization in 1933, of their unincorporated association (secretary-treasurer and executive director of which was and had always been one B, engaged in promoting, organizing, and managing trade associations)—

Acting in cooperation with their said institute and said B, developed and maintained, by mutual understandings and agreements, substantial uniformity of action among themselves with respect to maintaining and fixing uniform prices for tags and tag products; and, as a part of said conspiracy—

- (1) Agreed upon and adopted an elaborate system of price reporting under a so-called open price plan of selling, and continued, after the National Industrial Recovery Act was declared unconstitutional, the price reporting plan which had had its inception in the industry's N. R. A. code of fair competition:
- (2) Acting under the auspices of their institute, in 1935, 1936, 1937, and 1940 entered into tag industry agreements between the members and said B (except for that of 1937 which was between the members), which provided for their filing with him of all price lists, invoices and other intimate details of their business, including price information and terms and conditions of sale, allowed him to inspect their books and records, and provided penalties for failure to file price lists and invoices within the period of time provided, usually, 24 hours after the becoming effective of a general price, or the allowance of a special price; and

Where said B, in accordance with said agreements—

- (3) Combined, under the 1935 agreement, the price information contained in the price lists, offers, and invoices filed with him, and promptly disseminated to all member subscribers thereto the lowest prices and most favorable terms and conditions of sale for all products of the industry or component elements thereof, and, under the 1936 agreement, with its more elaborate member reports, compiled and disseminated information as to all prices and terms of sale; and

Where said members—

- (4) Provided through their 1936 agreement for the filing with said B of all "general offers" to sell products of the industry immediately after prices, terms or conditions of sale constituting the general offer had become effective,