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IN THE MATTER OF

AMERICAN CHEMICAL PAINT COMPANY

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

Docket 5135. Complaint, Mar. 2, 1944—Decision, July 12, 1948

While the rule is now well settled in many decisions by the Commission and by the courts that actual deception of purchasers need not be proven in proceedings before the Commission, such fact does not mean that actual deception of the public is not present in the instant or other similar cases, since if a seller falsely advertises a product and thereafter sells a substantial amount thereof, it is obvious that members of the purchasing public who read the advertisements and who purchased that product were misled or unfairly influenced by the false statements made by the seller in his advertising. And in such cases it is unnecessary to expend public funds and to cause the respondents to incur the expense of being represented at hearings for the sole purpose of placing in the records the testimony of purchasers who were actually deceived by false representations which are clear and not ambiguous. *Charles of the Ritz Distributors v. Federal Trade Commission*, 143 F. (2d) 676; 39 F. T. C. 657.

As to the question of the decision of the Commission as to what a respondent actually represents in a particular advertisement, it is reasonable to conclude that the Commission can, without the assistance of the testimony of others, correctly construe advertisements phrased in simple understandable English. *Zenith Radio Corporation v. Federal Trade Commission*, 142 F. (2d) 29; 38 F. T. C. 903; *Federal Trade Commission v. Cement Institute et al.*, 333 U. S. 683, 727; 44 F. T. C. 1460.

To say that objectionable representations in advertisements which invite prospective purchasers to send their money directly to the seller-advertiser and thereby purchase the product by mail must be construed with reference to a "non-warranty" printed on the package containing the product, which (1) states that since the product is used under conditions beyond the seller's control, the seller makes no warranty of any kind, expressed or implied, concerning the product or its effects, and (2) states that the buyer assumes all risks of use whether in accord with directions or not, and which (3), printed in small type, is not seen by purchasers, if at all, until after they have bought the product relying on the representations in the advertisements; propounds a proposition which, simply stated, is its most effective refutation; namely: may a seller publish unlimited false advertisements but avoid liability therefor by inserting in small print a disclaimer on the package of his product? To hold otherwise is to make the law which protects the consuming public by prohibiting false advertising, practically impotent.

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Testimonials have a stronger appeal to members of the purchasing public than other types of advertising, and for this reason, where statements are made in testimonials which are proven by expert witnesses to be false, they are, in the language of the court, more, not less, obnoxious to the law. Accordingly, as respects the use in advertising of testimonials by laymen, apparently in good faith, which make claims for products that the testimony of experts prove are not true, such permitted publication by sellers would render ineffective efforts by the Commission to prevent false advertising. In other words, if a well-meaning layman, suffering from a disease, takes a medicinal preparation and thereafter writes to the seller that it cured him, although expert witnesses prove that the preparation has no value at all in the treatment of the disease, the seller may not thereafter publish such testimonial. *U. S. v. John J. Fulton Co.*, 33 F. (2d) 506.

As respects improper use of testimonials involving false and misleading advertising, it is unnecessary that the Commission proscribe in detail in orders directed against such advertising the various media which might be used as a vehicle for the false advertising, even though the order may, as in the instant case, specifically prohibit respondent from using the representations proved by the record to be false, in testimonials or in any other type of advertising. It is sufficient that the order prohibit the use of the representations at issue in the proceeding and proven and found to be false, and such a type of order prohibits the respondent from using such false representations in newspapers, radio continuities, periodicals, published testimonials or in any other advertising subject to the jurisdiction of the Commission and within the purview of the order.

Where a corporation engaged in the manufacture, among other chemical specialties, of a plant hormone powder designated "Rootone," and in the interstate sale and distribution of said product for a number of uses, including stimulation of root formation on bulbs, slips, and cuttings, and improvement of the germination and production of vegetables, flowers, and pasture grass seed; through statements in advertising said product also for use in connection with field crops (including representations based on testimonials from users), in magazines, booklets, and leaflets distributed generally among the purchasing public—

- (a) Represented falsely that said product had a definite proven value in increasing field crop production, that treatment of field crop seed therewith could be depended upon to cause a bigger crop yield, and that it would cause an increase in cotton yield of 250 pounds per acre;

The facts being that, although it appeared that noticeable increases in growth of plants and in crop yields had occasionally been observed when seed was treated with such product, the product could not be depended upon to cause either an increase in plant growth or an increase in crop yield; and

- (b) Represented that actual field tests showed that treating seed with said Rootone had caused increases of 500 pounds per acre in the production of cotton, 1,104 pounds per acre in the production of sorghum, and 11.2 tons per acre in the production of sugar beets;

The facts being that the field tests relied on did not in fact support such claims, and its advertising statements purportedly based thereon were without foundation and false: actually tests in question, namely, certain experiments conducted by a professor of agronomy in a state school of agriculture—and his testimony pertaining thereto—showed a higher yield for untreated than for treated cotton, and a very modest increase for grain sorghum and sugar beets treated therewith as compared with untreated plants;

With tendency and capacity to mislead and deceive a substantial portion of the public into the erroneous belief that such representations were true and into the purchase of substantial quantities of its 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.

In said proceeding in which respondent made such typical statements or representations in advertising its said product as "Big Corn Crops! Treat Open Pollinated Seed With Rootone the plant hormone powder and get amazing yields," "Sensational! Would you like to Grow 250 lbs. More Cotton per acre? at a cost of 15¢ per acre? with longer staple and higher tensile strength? It has been done by dusting the seed with ROOTONE the plant hormone powder, just before planting. That's all there is to do! . . ." etc.; and in which respondent denied that its advertising representations were correctly subject to the interpretation alleged and charged in the complaint, namely, that said product had a definite proven value in increasing crop production, that crop seed treated therewith could be depended upon to cause a bigger crop yield, and that it would cause an increased yield of 250 pounds of cotton per acre; contending that they must be read in the light of the directions for use which accompanied the product when sold, and in the light of a statement on the package in which it disclaimed responsibility for the effects of said product whether used in accordance with directions or not, its position being that when so considered the representations were true—

Said contentions were held wholly untenable and rejected, it appearing that it would be difficult to imagine language that would more positively assure the prospective user of definite results; that the advertisements in no wise limited or qualified the implications of increase in crop yields to be obtained from the use of said product, inherent in the published statements, did not even suggest that it was important to use the product in accordance with the directions for use, and accompanied the affirmative statement of the alleged increase in cotton obtained by the simple process of dusting the seed with Rootone by the words "That's all there is to do"; and that neither the directions for use, nor the so-called "Non-Warranty" on the package, were seen by a purchaser, if at all, until after he had bought the product in reliance upon the published advertisements, and that, accordingly, neither could have any bearing whatever on the nature and effect of the advertisements.

As regards the fact that certain of respondent's advertising claims for Rootone were based upon testimonials it had received from individual farmers who were said to have actually used the product, and its insistence that the use in advertising of such testimonials, if bona fide, was not in violation of the Federal Trade Commission Act; it appeared that such testimonials,

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even though written in good faith by well-meaning individuals, were wholly insufficient to overcome the expert testimony concerning the lack of effectiveness of its product, and that it could not in such circumstances escape responsibility for the dissemination of statements which falsely represented results that might be expected from use thereof, by hiding behind the testimonials.

With respect to respondent's contention of the absence of public interest in said proceeding, inasmuch as the annual dollar volume of sales of said product for use on field crops amounted only to from \$1,500 to \$2,000; but in which it further appeared that sales of 94,000 packages of said product in 1940 increased to 104,000 in 1941, and to 182,000 in 1942, when it began to advertise the same for use on field crops; that it was only because of the Commission's investigation of its advertising in said respect that the use of a number of the claims here involved were discontinued; and that it still contended that all of such claims were true:

It was manifestly in the public interest for the Commission to prevent the continuation or resumption of the practices charged in the complaint and proved by the evidence to be false and deceptive.

In said proceeding in which respondent did not offer the testimony of any expert witness to rebut the testimony of certain expert witnesses in support of the complaint, but did offer in evidence, two rolls of motion-picture film which allegedly depicted results obtained from the treatment of corn and other seed with Rootone, offering the same through an employee who had no personal knowledge as to whether or not the seeds of the growing crops depicted were actually treated therewith, and without calling as witnesses the farmers who planted and tended the crops depicted; the Commission, on an interlocutory appeal by the respondent from the ruling by the trial examiner that the film not be received in evidence, affirmed said ruling; and in said proceeding also made appropriate rulings upon the record, on the exceptions to the recommended decision of the trial examiner.

In said proceeding which was considered by the Commission on the basis of the testimony and other evidence in the record, the recommended decision of the trial examiner, and the briefs and oral argument of counsel, and in which proceeding the trial examiner who prepared the recommended decision—most of the testimony and other evidence in the case having been heard by two other trial examiners who had the opportunity to observe the demeanor of the principal witnesses, but were not available to the Commission at the time of preparation of such decision—recommended that the complaint be dismissed, counsel supporting the complaint duly excepting to certain portions thereof:

The majority of the Commission found that the trial examiner was in error in his finding that the allegations of the complaint were not sustained by the record and in his recommendation that the complaint be dismissed, it appearing that the great preponderance of the testimony and other evidence in the record supported said allegations.

The contention that respondent had discontinued false advertising and that the public interest therefore did not require the issuance of an order to cease and desist—it appearing further that the matter involved might have been stipulated by informal agreement without litigation if respondent had not

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insisted that it had the right to publish in its advertisements testimonials which might contain representations shown not to be true by the available scientific evidence, and continued to insist upon such right, notwithstanding the testimony of experts who had made controlled tests of respondent's product—was not tenable, since, should the complaint be dismissed, the respondent might thereafter assert its claimed right and publish the objectionable testimonials, in which event it would be necessary for the Commission to again spend public funds to initiate a proceeding against respondent to protect the public interest, pending which proceeding farmers would again be misled into believing that they could get increased crop yields by purchasing respondent's products.

As respects the question of an absence of an "intent" to deceive purchasers, in a proceeding under section 5, it is not a pleasant duty to find that a business concern has engaged in unfair practices, particularly when it may not have had such an intent, nor is it a pleasant duty to issue an order to cease and desist against a business concern. The issue, however, is not the question of the intention to deceive, but whether or not the advertisements were in fact false; and, the Congress having concluded that an effective deterrent against the resumption of practices proven to be unfair in litigated cases is the issuance by the Commission of findings as to the facts and order to cease and desist, the majority of the Commission, being of the opinion that the record unquestionably showed that respondent had violated section 5 of the act, was of the opinion that the public interest required, in accordance with the provision thereof, the issuance of such appropriate findings and order.

Before *Mr. Miles J. Furnas*, *Mr. J. Earl Cox* and *Mr. Charles B. Bayly*, trial examiners.

Mr. Joseph Callaway for the Commission.

Caesar & Rivise, of Philadelphia, Pa., 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 American Chemical Paint Co., a corporation, hereinafter referred to as respondent, has 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. Respondent American Chemical Paint Co. is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business located in Ambler, Pa.

PAR. 2. Respondent is now and for more than 1 year last past has been engaged in the manufacture, sale and distribution of a plant

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hormone powder, designated as Rootone, advertised as effective in increasing the yield of various field crops.

In the course and conduct of its business the respondent causes said product when sold to be transported from its place of business in the State of Pennsylvania to the 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 product 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 its business, and for the purpose of inducing the purchase of said product in commerce, respondent has made and is now making certain false, deceptive, and misleading statements and representations regarding the value of said product and the results to be obtained by the use thereof by means of advertisements inserted in magazines and leaflets, circulated generally among the purchasing public, and in various other ways. Typical representations are as follows:

BIG

CORN CROPS!

TREAT OPEN POLLENATED SEED WITH

ROOTONE

the plant hormone powder

and get amazing yields

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SENSATIONAL!

Would YOU like to Grow

250 LBS MORE

COTTON

per acre?

at a cost of 15¢ per acre?

with longer staple and higher tensile strength?

It has been done by dusting the seed with

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the plant hormone powder, just before planting.

That's all there is to do! These wonderful plant hormones make seed germinate faster and stimulate the plants so they bear more and better cotton with longer, stronger staple.

Look at these results from ROOTONE treatment of seed.

	<i>Untreated Seed</i>	<i>Rootone Treated Seed</i>	
* *	* *	* *	* *
Cotton-----	1,050	Lbs. per acre	1,550
Sorghum-----	2,411	Lbs. per acre	3,515
* *	* *	* *	* *
Sugar beets-----	5.6	tons per acre	16.8
* *	* *	* *	* *

(Actual Field Tests)

In other advertisements respondent has been and is now making exaggerated and misleading claims for its product based on testimonials from users where there was no accurate check to determine the real cause of the crop increase reported. Among and typical of such exaggerated and misleading claims are the following:

CORN—Three to twenty bushels more per acre with Rootone seed treatment in Oklahoma, Pennsylvania, Maryland.

COTTON—A North Carolina farmer got 650 pounds of lint cotton per acre from Rootone treated seed under draught conditions, when neighbors had crop failure from untreated seed.

PAR. 4. Through the use of the foregoing statements and representations and others of similar import and meaning, not specifically set out herein, the respondent has represented and is now representing that Rootone has a definite proven value in increasing crop production; that treating crop seed with Rootone can be depended upon to cause a bigger crop yield; that it will cause an increased yield of 250 pounds of cotton per acre; that actual field tests show that treating crop seed with Rootone caused an increase in production of 500 pounds of cotton per acre, 1,104 pounds of sorghum per acre and 11.2 tons of sugar beets per acre.

PAR. 5. The foregoing representations are false, deceptive, and misleading. Treatment of crop seed with Rootone cannot be depended upon to increase crop production or to cause any definite yield. There are many factors that influence crop yield, such as weather, quality and

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fertility of the soil as well as the seed. Rootone has no proven value in producing crop yield. In instances where Rootone treated seed have shown increased production, such increase cannot be definitely attributed to the use of Rootone. There are many instances where, under similar conditions, Rootone treated seed showed decreased production. In truth and in fact there is no dependable data from which the conclusion may be drawn that Rootone will increase crop yield.

The field tests referred to in respondent's advertising set out above were tests conducted during the year 1941 by Dr. J. C. Ireland, of the Oklahoma School of Agriculture at the school experiment station located near Stillwater, Okla. These tests did not show that the treatment of seed with Rootone caused an increase in production of 500 pounds of cotton per acre, 1,104 pounds of sorghum per acre or 11.2 tons of sugar beets per acre. In truth and in fact these tests showed that, without dusting with other materials, Rootone treated seed produced 850 pounds of seed cotton per acre, compared with 1,050 pounds per acre produced from untreated seed; 2,513 pounds of sorghum per acre compared with 2,411 pounds per acre from untreated seed and 5.2 tons of sugar beets per acre as compared with 5.6 tons per acre from untreated seed.

PAR. 6. The use by the respondent of the foregoing false, deceptive, and misleading statements and representations, disseminated as aforesaid, in connection with the offering for sale and sale of its product in commerce 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 statements and representations are true and into the purchase of substantial quantities of such product in commerce because of such erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of the respondent 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 March 2, 1944, issued and subsequently served its complaint in this proceeding upon the respondent American Chemical Paint Company, a corporation, charging said respondent with the use of unfair and deceptive acts and practices in

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commerce in violation of the provisions of said act. After the filing of respondent's answer to the complaint, testimony, and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, respondent's answer, testimony, and other evidence, the trial examiner's recommended decision and exceptions thereto filed by counsel supporting the complaint, briefs in support of and in opposition to the allegations of the complaint and oral argument; 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, American Chemical Paint Co., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Ambler, Pa.

PAR. 2. The respondent is now, and for a number of years last past has been, engaged in the manufacture and in the sale and distribution of chemical specialties. Among the products it manufactures and sells is a plant hormone powder designated "Rootone." This product, when sold, is transported from the respondent's place of business in Ambler, Pa., to purchasers thereof located in various other States of the United States and in the District of Columbia. The respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. The product Rootone is sold by the respondent for a number of uses, including those of stimulating the root formation processes on bulbs, slips, and cuttings and improving the germination and production of vegetable, flower, and pasture grass seed. Beginning in 1942, the respondent began to advertise the product also for use in connection with field crops. Typical of the advertisements recommending the product for this use, which were inserted mainly in maga-

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zines, booklets, and leaflets and distributed generally among the purchasing public, were the following:

BIG
CORN CROPS!
TREAT OPEN POLLENATED SEED WITH
ROOTONE

the plant hormone powder
and get amazing yields

SENSATIONAL!
Would YOU like to Grow
250 LBS. MORE
COTTON
per acre?
at a cost of 15¢ per acre?
with longer staple and higher tensile strength? It has been done by
dusting the seed with

ROOTONE

the plant hormone powder, just before planting.

That's all there is to do! These wonderful plant hormones make seed germinate faster and stimulate the plant so they bear more and better cotton with longer, stronger staple.

Look at these results from ROOTONE treatment of seed.

Untreated Seed (Rootone Treated Seed)

*	*	*	*	*	*	*
Cotton.....				1050 Lbs. per acre		1550
Sorghum.....				2411 Lbs. per acre		3515
*	*	*	*	*	*	*
Sugar beets.....				5.6 tons per acre		16.8
*	*	*	*	*	*	*

(Actual Field Tests)

In other advertisements the respondent has been and is now distributing various claims and representations concerning the effects of said product based on testimonials from users of Rottone. Among and typical of these are the following:

CORN—Three to twenty bushels more per acre with Rootone seed treatment in Oklahoma, Pennsylvania, Maryland.

COTTON—A North Carolina farmer got 650 pounds of lint cotton per acre from Rootone treated seed under drought conditions, when neighbors had crop failure from untreated seed.

The respondent contends that some of the foregoing advertising statements have now been discontinued, but admits that representations to the effect that Rootone will produce an increase in yield of certain field crops are still being used.

PAR. 4. The complaint alleged, among other things, that through the use of the foregoing statements and representations, and others of similar import and meaning, the respondent represented that Rootone has a definite proven value in increasing crop production; that treating crop seed with Rootone can be depended upon to cause a bigger crop yield, and that it will cause an increased yield of 250 pounds of cotton per acre. The respondent denies that its advertising representations are subject to this interpretation, contending that the representations must be read in the light of the directions for use which accompany the product when it is sold and in the light of a statement on the package in which the respondent disclaims responsibility for the effects of Rootone whether the product is used in accordance with directions or not, its position being that when so considered the representations are true. The respondent's contentions in this respect are wholly untenable and are rejected. The advertising statements here involved are printed in magazines and other periodicals having general circulation among farmers, and it would be difficult to imagine language that would more positively assure the prospective user of Rootone of definite results. The advertisements do not in any manner limit or qualify the implications of increases in crop yields to be obtained from the use of Rootone which are inherent in the published statements. The advertisements do not at any place even suggest that it is important to use the product in accordance with the directions for use, and the affirmative statement that 250 pounds more of cotton per acre has been obtained by the simple process of dusting the seed with Rootone, accompanied by the words, "That's all there is to do," can mean but one thing to the reader, and that is that by the use of Rootone he can obtain the same results. Neither the directions for use of the product nor the so-called "Non-Warranty," which is printed on the package in which the product is sold and delivered, is seen by a purchaser, if at all, until after he has purchased the product in reliance upon the representations made in the published advertisements. In such circumstances neither the directions for use nor the so-called "Non-Warranty" has any bearing whatever on the nature and effect of the advertisements.

The Commission is of the opinion, therefore, and finds that through the use of the foregoing statements and representations the respondent has represented and (except for the statements concerning specific

increases which the respondent claims are not now being used) now represents as follows: (1) that Rootone has a definite proven value in increasing field crop production, (2) that treating field crop seed with Rootone can be depended upon to cause a bigger crop yield, (3) that Rootone will cause an increase in cotton yield of 250 pounds per acre, (4) that actual field tests show that treating seed with Rootone has caused increases of 500 pounds per acre in the production of cotton, 1,104 pounds per acre in the production of sorghum and 11.2 tons per acre in the production of sugar beets.

PAR. 5. The product Rootone is a powder consisting essentially of thiourea, naphthalene acetamide, and naphthalene thio-acetamide. In connection with field crops it is used by dusting it on the seed before they are planted. While it appears that occasionally when seed is treated with this product noticeable increases in growth of plants and in crop yields have been observed, it has been rather clearly demonstrated in the record that the product cannot be depended upon to cause either an increase in plant growth or an increase in crop yield. This fact was readily admitted by the manager of the respondent's Horticulture Department and it has been substantiated by a number of experiments conducted at various places over the United States by experts in the field of plant physiology.

The experiments referred to were conducted at the United States Bureau of Plant Industry Station, Beltsville, Md., at the University of Chicago, and at Lake Geneva, Wis., by Dr. William S. Stewart and Dr. Charles L. Hamner, plant physiologists of the United States Department of Agriculture; at the Agriculture Experiment Station, State College, Miss., by Dr. O. A. Leonard and Dr. J. A. Pinckard, plant physiologists of the Mississippi State College Agriculture Experiment Station; and at the United States Cotton Field Experiment Station, at Stoneville, Miss., by Dr. J. W. Neely, plant geneticist of the Delta Branch Experiment Station at Stoneville, Miss. Copies of the published reports of all these experiments were identified and explained by the individuals who conducted the respective experiments and are in the record in this case, and on the bases of the experiments the witnesses expressed their opinions concerning the effectiveness of respondent's product on field crops. Without exception these witnesses were of the definite opinion that Rootone cannot be depended upon to increase the production of field crops, and the reports of the experiments show that in these tests Rootone, when used according to the manufacturer's directions, was wholly ineffective to cause an increase in crop production.

The Commission therefore finds that, contrary to the respondent's advertising claims, Rootone does not have a definite proven value in increasing field crop production, and that treating field crop seed with this product cannot be depended upon to cause a bigger crop yield.

PAR. 6. According to the testimony of the manager of respondent's Horticulture Department, the field tests referred to in the respondent's advertising were certain experiments conducted during the year 1941 by Dr. J. C. Ireland, Professor of Agronomy in the School of Agriculture, Oklahoma Agriculture and Mechanical College, Stillwater, Okla. Both the testimony of Dr. Ireland (which was stipulated by counsel) and copies of the published reports of his experiments are in the record, and neither the testimony nor the reports supports the claims respondent has made concerning the results that have been obtained in field tests from the use of Rootone.

In the experiments conducted by Dr. Ireland it was found that cottonseed dusted with Rootone where neither the seed nor the plants were otherwise treated produced 850 pounds of cotton (seed not removed) per acre, whereas cottonseed untreated with any plant hormone or other substance (and where the plants were otherwise untreated) produced 1,050 pounds of cotton per acre. The lint cotton ginned was 348 pounds per acre from plants grown from seed treated with Rootone (and the plants otherwise untreated), and 514 pounds per acre where neither the seed nor the plants were treated with any plant hormone or other substance. In the same series of experiments it was found that sorghum plants grown from Rootone-treated seed (where neither the seed nor the plants were otherwise treated) yielded 2,513 pounds of grain sorghum per acre and that plants grown where neither the seed nor the plants were treated with any plant hormone or other substance yielded 2,411 pounds of grain sorghum per acre. Without being dusted with any other materials (and without having the plants dusted with anything) Rootone-treated sugar beet seed yielded 5.2 tons of beets per acre, and plants grown where neither the seed nor the plants were treated with any plant hormone or other substance produced a yield of 5.6 tons of beets per acre.

The Commission therefore finds that the field tests relied on by the respondent in support of its claims of specific increases in field crop production resulting from the use of Rootone do not in fact support such claims and that respondent's advertising statements purporting to reveal the results of the use of its product in actual field tests are without foundation and false.

PAR. 7. Certain of the respondent's advertising claims for Rootone are based upon testimonials it has received from individual farmers who are said to have actually used this product. The respondent earnestly insists that the use in advertising of such testimonials, if bona fide, is not a violation of the Federal Trade Commission Act. It appears, however, that these testimonials, even though written in good faith by well-meaning individuals, are wholly insufficient to overcome the expert testimony concerning the lack of effectiveness of respondent's product, and the respondent cannot in such circumstances escape responsibility for the dissemination of statements falsely representing results that may be expected from the use of its product by hiding behind the testimonials.

PAR. 8. The respondent further contends that inasmuch as the annual dollar volume of sales of Rootone for use on field crops amounted only to from \$1,500 to \$2,000 there is no public interest in this proceeding. The Commission is of the opinion, however, that even though the business actually developed for Rootone in connection with field crops is relatively small there is present in this proceeding a definite public interest. The evidence shows that in 1940 there were sold for all purposes 94,000 packages of Rootone; in 1941 there were sold 104,000 packages of the product; and in 1942 the sales amounted to 182,000 packages. It was in 1942 that the respondent began to advertise Rootone for use on field crops, and according to the testimony it was only because of the Commission's investigation of its advertising in this respect that the use of a number of the claims here involved were discontinued. The respondent contends even yet that all of these claims are true, and in these circumstances it is manifestly in the public interest for the Commission to prevent the continuation or resumption of the practices charged in the complaint and proved by the evidence to be false and deceptive.

PAR. 9. The use by the respondent of the false and misleading statements and representations, as set forth herein, has the tendency and capacity to mislead and deceive a substantial portion of the public into the erroneous and mistaken belief that such statements and representations are true and into the purchase of substantial quantities of the respondent's product.

CONCLUSION

The acts and practices of the 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.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence in support of and in opposition to the allegations of the complaint taken before a trial examiner of the Commission theretofore duly designated by it, the trial examiner's recommended decision and exceptions to such recommended decision filed by counsel supporting the complaint, briefs in support of and in opposition to the allegations of the complaint, and oral argument; 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 American Chemical Paint Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of the respondent's plant hormone powder designated "Rootone," 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:

1. Representing, directly or by implication, including by or through the use of testimonials, that said product has a definite proven value in increasing field crop production, or that treating field crop seed with said product can be depended upon to cause a bigger crop yield.

2. Representing in any manner that field crop seed treated with said product has produced any certain yield unless such yield was actually produced under controlled test conditions.

It is further ordered, That the respondent shall, within 60 days after 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.

Commissioner Mason dissenting.

OPINION OF COMMISSIONER EWIN L. DAVIS

The respondent, American Chemical Paint Co., has its principal place of business in Ambler, Pa., and is engaged in the sale and distribution of a plant hormone powder designated "Rootone." The complaint in this proceeding alleged that respondent was disseminat-

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ing various representations which falsely represented the efficacy of the use of said preparation and that respondent because of such false representations was engaged in unfair and deceptive acts and practices in violation of section 5 of the Federal Trade Commission Act.

In advertising its preparation to the consuming public respondent used such representations as "Big Corn Crops ! Treat Open Pollenated Seed With Rootone, the plant hormone powder and get amazing yields" and "Sensational! Would You Like To Grow 250 lbs. More Cotton per acre?" The complaint alleged that by the above representations and others disseminated by respondent, the latter falsely represented the effectiveness of its preparation in increasing crop yields.

The proceeding was considered by the Commission on the basis of the testimony and other evidence in the record, the recommended decision of the trial examiner, and the briefs and oral argument of counsel.

In the trial of the case on the issues presented by the complaint and the answer thereto of the respondent, a number of expert witnesses who had conducted tests of respondent's product, testified as to the value, if any, of the use of said product in causing an increased crop yield. An outline of the testimony of these expert witnesses is contained in the Findings as to the Facts of the Commission in this case. Suffice to say these expert witnesses who, at the time of the hearings, were members of the staffs of such agencies as the United States Bureau of Plant Industry Station at Beltsville, Md., the Mississippi Agricultural Experiment State College, Mississippi, and the United States Cotton Field Experiment Station at Stoneville, Miss., testified, in effect, that the use of respondent's product is ineffective in causing an increased crop yield. Respondent did not offer the testimony of any expert witness to rebut the testimony of the expert witnesses described above. During the course of the hearings, an employee of the respondent offered in evidence two rolls of motion-picture film which allegedly depicted the results obtained from the treatment of corn and other seed with Rootone. As this employee of respondent had no personal knowledge as to whether or not the seeds of the growing crops depicted were actually treated with Rootone and as the farmers who planted and tended the crops depicted were not called as witnesses by respondent, the Commission has heretofore affirmed the ruling of the trial examiner that this film not be received in evidence. This ruling by the Commission was made on an interlocutory appeal by the respondent from the ruling by the trial examiner.

Opinion

The trial examiner in his recommended decision recommended that the complaint be dismissed. Counsel supporting the complaint duly excepted to certain portions of this recommended decision. Most of the testimony and other evidence in this case was heard by two trial examiners other than the trial examiner who submitted the recommended decision. These two trial examiners who had the opportunity to observe the demeanor of the principal witnesses in this proceeding were not available to the Commission at the time for preparation of the recommended decision.

In the light of the whole record, the majority of the Commission has found that the trial examiner was in error in his finding that the allegations of the complaint were not sustained by the record and in his recommendation that the complaint be dismissed. The great preponderance of the testimony and other evidence in the record supports the allegations of the complaint. Appropriate rulings have been made on the record by the majority of the Commission on the exceptions to the recommended decision of the trial examiner.

There are presented in this proceeding certain questions as to the powers and discretion of the Commission which are common to many cases before this Commission involving alleged false advertising. In view of certain statements made in this case in the recommended decision of the trial examiner and elsewhere, it is appropriate and pertinent to point out certain basic and well settled principles relating to such proceedings before this Commission.

The trial examiner stated in his recommended decision that there is no evidence supporting the charge in the complaint that respondent's representations created the implied meaning or imported that Rootone has a proven value in increasing crop yield, as alleged in the complaint. The trial examiner further states that there is no evidence whatsoever of any purchaser having been misled as a result of the respondent's representations or the implications arising therefrom. It is elsewhere contended that the evidence shows that no one was deceived.

The rule is now well settled in many decisions by this Commission and by the courts that actual deception of purchasers need not be proven in proceedings before this Commission. In *Charles of the Ritz Distributors vs. Federal Trade Commission*, 143 F. (2d) 676, the court stated:

That the Commission did not produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown in Federal Trade Commission proceedings.

This does not mean that actual deception of the public is not present in this case or other similar cases. If a seller falsely advertises a product and thereafter sells a substantial amount of such product, it is obvious that members of the purchasing public who read the advertisements and who purchased that product were misled or unfairly influenced by the false statements made by the seller in his advertising. Although actual deception of the public is present in these cases, it is unnecessary to expend public funds and to cause respondents to incur the expense of being represented at hearings for the sole purpose of placing in the record the testimony of purchasers who were actually deceived by false representations in advertisements which are clear and not ambiguous.

As to the question of the Commission deciding what a respondent actually represents in a particular advertisement, reference is made to *F. T. C. vs. Cement Institute, et al.* decided April 26, 1948, which involves very complicated legal and other problems and in which the majority opinion of the United States Supreme Court stated:

In the present proceeding the Commission has exhibited the familiarity with the competitive problems before it which Congress originally anticipated the Commission would achieve from its experience.

Accepting with due modesty this observation by the United States Supreme Court, it is reasonable to conclude that the Commission can, without the assistance of the testimony of others, correctly construe advertisements phrased in simple understandable English. In *Zenith Radio Corp. vs. F. T. C.*, 143 F. (2d) 29 the U. S. Circuit Court of Appeals for the Seventh Circuit stated:

The Commission was not required to sample public opinion to determine what the petitioner was representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by petitioner were unfair or deceptive, as charged in the complaint.

It is contended that respondent's representations should be construed in relation to the "Non-Warranty" which is printed on the package containing respondent's product. This "Non-Warranty" states that since Rootone is used under conditions beyond the seller's control, the seller makes no warranty of any kind, expressed or implied, concerning Rootone or its effects. It is stated that the buyer assumes all risks of use whether in accord with directions or not. The advertisements of respondent which contain the objectionable representations invite prospective purchasers to send their money directly

to respondent and thereby purchase the product by mail. Such purchasers do not see the "Non-Warranty," if at all, until after they have bought the product relying on the representations in the advertisements. The "Non-Warranty" is printed in small type. This proposition simply stated is, may a seller publish unlimited false advertisements but avoid liability for the same by inserting in small print a disclaimer on the package of his product. The mere statement of this proposition is its most effective refutation. To hold otherwise would make the law which protects the consuming public by prohibiting false advertising practically impotent.

Counsel for the respondent made the point in his oral argument that respondent would have stipulated the entire case if the stipulation did not cover testimonials used by respondent in its advertising. The trial examiner stated in his recommended decision that there is a presumption that the testimonials from farmers who used Rootone are true, as these testimonials were apparently made in good faith.

The efforts by the Commission to prevent false advertising would be rendered ineffective if sellers were permitted to publish testimonials received by them regardless of the fact that these testimonials made claims for products that the testimony of experts prove are not true. In other words, if a well meaning layman is suffering from a disease and takes a certain medicinal preparation, and some time thereafter he does not have the disease may he write to the seller of the medicinal preparation stating that the latter cured him and may the seller thereafter publish that testimonial, although expert witnesses prove that the preparation has no value at all in the treatment of the disease. The United States Circuit Court of Appeals for the Ninth Circuit in *United vs. John J. Fulton Co.*, 33 F. (2d) 506 had under consideration representations of a seller which stated "We have received many letters from physicians reporting, etc." The sellers' contention in that case was that such letters had been received and this fact constituted a complete defense. The court answered this contention in very vigorous language and stated:

Couched in such language undoubtedly the printed matter makes a more persuasive appeal to the credulity of sufferers from these diseases than if the representations thus implied were made directly upon the authority alone of the proprietors, and for that reason they are not less, but more obnoxious to the law.

In other words, testimonials have a stronger appeal to member of the purchasing public than other types of advertising and for this reason, where statements are made in testimonials, which are proven by expert witnesses to be false, they are, in the language of the court, more, not less, obnoxious to the law.

The order to cease and desist issued in this case does specifically prohibit respondent from using the representations, which were proved by the record to be false, in testimonials or in any other type of advertising. However, it is unnecessary in orders to cease and desist issued by this Commission to proscribe in detail in the order the various media which might be used as a vehicle for the false advertising.

It is sufficient that the order to cease and desist prohibit the use by a respondent of the representations at issue in the proceeding and proven and found to be false. That type of order prohibits the respondent from using such false representations in newspapers, radio continuity, periodicals, published testimonials, or in any other advertising subject to the jurisdiction of the Commission and within the purview of the order.

It is contended that respondent has discontinued the false advertising and the public interest therefore does not require the Commission to issue an order to cease and desist. As stated above, this matter might have been stipulated by informal agreement without litigation if respondent had not insisted that it had the right to publish in its advertisements testimonials regardless of the fact that these testimonials may contain representations which the available scientific evidence shows are not true. Notwithstanding the testimony of experts who made controlled tests of respondent's product, the respondent continues to claim that it has a right to publish such testimonials.

Let us consider the situation if the Commission dismisses this complaint. The respondent may thereafter again assert its claimed right and may publish the objectionable testimonials. In such event, it would be necessary for the Commission to again spend public funds to initiate a proceeding against respondent to protect the public interest. In the meantime while such proceeding was going forward, farmers would again be misled into believing they could get increased crop yields by purchasing respondent's product. For these reasons it is not in the public interest to dismiss this complaint.

It is not a pleasant duty to find that a business concern has engaged in unfair practices particularly when such concern may not have had an "intent" to deceive purchasers. The question of the intention to deceive is not at issue in this proceeding. The issue is whether or not the advertisements are in fact false. It is not a pleasant duty to issue an order to cease and desist against a business concern. However, the Congress wisely, we believe, concluded that an effective deterrent against the resumption of unfair practices proven to be unfair in

litigated cases is the issuance by this Commission of findings as to the facts and order to cease and desist.

The majority of the Commission is of the opinion that the record unquestionably shows that respondent has violated section 5 of the Federal Trade Commission Act and that the public interest requires in accordance with the provisions of said act the issuance of appropriate findings as to the facts and order to cease and desist.

OPINION OF COMMISSIONER LOWELL MASON

In my opinion, there are two collateral rules and one principal rule of law which should be considered in the determination of this matter.

The collateral rules relate to false and misleading advertising and are commonly misunderstood by the public. Many believe (1) that someone must actually be deceived and suffer thereby before the Federal Trade Commission may prohibit a challenged ad, and (2) that the discontinuance of a misleading ad is a bar to prosecution.

Neither is true. The Commission may anticipate an injury to the public before it becomes an actuality. The Commission can also prognosticate a future injury and protect against a recurrence if it finds former ads were bad, and that "a proceeding by it in respect thereof would be to the interest of the public" (even though present ads are innocuous).

No one need be actually deceived, nor is discontinuance of a bad ad a bar to prosecution. Then why is this misconception of the law so commonly abroad and why does it continue?

To my mind, the persistence of these misunderstandings has some valid basis in both morals and common sense.

Most business men know in a general way that the Federal Trade Commission is supposed to stop unfair practices in commerce. It is difficult for them to understand why the Federal Trade Commission should concern itself with ordering a person to stop doing something he is not doing or, to put it frankly, if a defendant has already given up a practice that the Commission has challenged, how can the Federal Trade Commission stop it again?

There is some sense to this because the Commission exists to prevent unfair practices in commerce. Under the statute, we have no punitive function. We do not penalize someone for a wrongful act. We are prophylactic and preventive in our authority.

In those cases where the Commission doubts the efficacy of a voluntary discontinuance of challenged ads, we may proceed to an order. Do the facts in this case warrant any such doubt? Counsel prosecut-

ing the complaint points out the defendant changed its ads to comply with the Federal Trade Commission's criticism after the Commission had called its attention to the challenged advertisements.

Some consider such prompt compliance as an admission of guilt. On the contrary, it connotes, in my opinion, a desire to cooperate and to follow a Government agency's suggestion. The respondent wanted to rectify a practice which it had theretofore assumed was entirely proper, but which it was willing to modify in order to obviate any question as to its legality.

The reasonableness of such an assumption is forcefully demonstrated by the fact that our trial examiner, after hearing all the testimony in the case, came to the same conclusion himself; namely, that there was nothing wrongful in the ads even before they were changed.

In passing judgment on this case the Commission should not pick out isolated words and phrases to impute false and misleading tendencies. The Administrative Procedure Act of 1946 amends the Federal Trade Commission Act and expressly provides that no finding can be made by any commission or board "except upon consideration of the whole record as supported by and in accordance with the reliable, probative and substantial evidence."

The hearing examiner who heard all witnesses and studied the exhibits in connection with the oral testimony, made recommended findings and conclusions which showed no wrongful inferences could be reasonably drawn, and, in my opinion, the greater weight of the evidence would not sustain any other findings.

But my dissent to the majority's reversal of the trial examiner's findings is not directed solely to the question—did the defendant prior to 1943 engage in advertising which had a tendency to deceive the public? This dissent points out the lack of public interest which, in my opinion, must be an ingredient in all our work. In the first place, the evidence shows that no one was deceived. The power of the Federal Trade Commission to base orders on tendencies and inferences is leavened with one important ingredient—public interest must justify the proceedings.

In response to a question put to respondent's counsel during final argument of this case, it was shown that in 1943 the Radio and Periodical Division of the Commission conferred with the defendant before suit. A stipulation was drawn up and signed by the defendant correcting the alleged tendencies to deceive. This stipulation was never finally approved by the Commission, but what public interest there was in the matter petered out five years ago when the defendant,

by executing such stipulation, agreed to correct its ads so as to bring them into compliance with the law.

On the basis of public interest alone, one voluntary compliance with the rules of fair play in 1943 is worth more than an enforcement order in 1948. If there had been any injury to the public, we could have obtained protection to purchasers of respondent's product five years sooner with a stipulation than we can today with an order to cease and desist. Besides, voluntary correction leaves a quick good taste in all mouths while cease and desist orders such as the one in the instant case, after taking years to obtain, cost the taxpayer and the litigant more than the bad taste is worth.

Now that we have spent Government funds to prosecute and administratively adjudicate the moot controversy, it might be urged that we may as well enter an order anyway. From an administrative viewpoint, such reasoning would only encourage the continuance of similar litigation if there be more pending.

I am against it.

IN THE MATTER OF
AMERICANA CORPORATION AND FRED P. MURPHY,
JOSEPH C. GRAHAM, JR., AND THOMAS J. KIRK

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

Docket 5085. Complaint, Nov. 20, 1943—Decision, July 14, 1948

Where a corporation and its successor, and three officers thereof, engaged in the publication and competitive interstate sale and distribution of an encyclopedia designated "Americana" or "Encyclopedia Americana" and supplements and yearbooks issued in connection therewith; through advertisements, circulars, and pamphlets and also through sales talks, manuals, and radio broadcasts, directly or by implication—

- (a) Represented that said publication was the only national American encyclopedia and was the best known and most authoritative one published in the United States, was "America's Supreme Authority for Over One Hundred Years," and stood "alone as the first National American Encyclopedia";

The facts being that the corporation first referred to was the successor to the publisher of a work thus named in 1904 which was based on a similarly entitled publication first published in 1829; much of the text and many of the articles were similar to or identical with or evolved from those in the 1832 and 1846 editions, as revised and supplemented from time to time; their said publication was not the only national or the best known or most authoritative American encyclopedia, and neither it nor any other encyclopedia had ever been determined to be America's supreme authority;

- (b) Falsely represented that it was the unanimous choice of every government department, educational institution, board of education, and public library as the official reference work, and that it contained more articles and presented more information on subjects of practical, present day interest and importance than any other set of books;
- (c) Represented that the publication offered for sale was a new and revised one, and that prior to its introduction to the public generally it was offered to a few selected individuals in each community at special and reduced prices or under special conditions unavailable to ordinary purchasers;
- (d) Represented, through such statements by them and others as "I am not here to sell you," that the solicitors were not salesmen, and were paid no commission for selling, but were interviewing reputable persons for the purpose of conferring upon them a special favor, that they were authorized to place a few sets with a limited number of prominent people in the community at a normal cost, and that because of the prominence of the prospect they would give him a set at no cost or at a reduced price in return for a letter of recommendation thereafter, and that such special prices would not be offered to the general public but were limited in time and to a selected group as aforesaid, and displayed through some salesmen purchase orders showing the sales price to be as much as \$250;