

Syllabus

IN THE MATTER OF

P. LORILLARD COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4922. Complaint, Mar. 2, 1943—Decision, Mar. 31, 1950*

While the first few puffs from an extra-long cigarette might be somewhat cooler than the smoke from a shorter cigarette and contain less of the irritating properties in the smoke, when an extra-long cigarette is smoked to the same butt length as a shorter cigarette, there is no difference in the temperature of the smoke from the two cigarettes and no lessening of the irritating properties in the smoke entering the smoker's mouth. And, in fact, if the longer cigarette is smoked to the same butt length as the shorter one, the amount of nicotine and tarry substances entering the mouth is probably greater for the former, due to the accumulation of the harmful substances in the butt of the longer one during the first few puffs, and also due to the fact that the longer cigarette contains more tobacco and therefore more of the harmful substances.

The nicotine content of the smoke of a cigarette is in direct proportion to the nicotine content of the tobacco contained in the cigarette, and the nicotine content of the tobaccos used in the manufacture of the popular brands varies greatly, not only as among the several types of tobaccos used, but also as among the individual plants of the same types of tobacco on the same farm and in the same field, and even as among the leaves on the same plant, due to a number of variable factors, including weather conditions, type of soil, method of fertilization and cultivation, and others.

There is no index by which the tobacco buyers for any cigarette manufacturer can judge the nicotine content in tobacco leaves by visual inspection; and, due to the above-mentioned variations in the nicotine content of tobacco, consistency in said content of the tobaccos purchased by any cigarette manufacturer cannot be maintained through the purchase of only the leaves in a certain position on the tobacco plant, or by sampling specimens of the tobaccos, or in any other manner. Furthermore, there is no known practical process by which the nicotine in the tobacco leaf may be removed or substantially reduced without at the same time destroying the tobacco for commercial use, and it is not practically possible for the cigarette manufacturers to maintain a consistency of nicotine in the finished cigarette, due to the large amount of tobacco leaves used in the manufacture thereof, and the extreme variation in their nicotine content.

As respects tars and resins in the tobaccos from which popular cigarettes are made, these vary considerably, as does the nicotine content, and for the same reasons. And here too it is not practically possible for the manufacturers to determine the amount of tars and resins in the tobaccos purchased, or to remove or substantially reduce the amount therein, or to maintain consistency in the amount thereof in the finished cigarettes.

Tarry substances or irritating properties in smoking tobaccos generally have an irritating effect on the membrane inside a person's mouth or throat, which varies as between individuals, but not essentially as respects the irritating properties in all common brands of such tobacco, and the temperature of the smoke from such tobacco as it enters the mouth is governed by the length of the stem of the pipe and not by the tobacco.

Where a corporation engaged in manufacturing and processing tobacco products, including its Old Gold cigarettes and its Friends smoking tobacco, and also previously, its Beech-Nut and Sensation cigarettes, and in the competitive interstate sale and distribution thereof; in advertising their said products in magazines of Nation-wide circulation, by local radio broadcasts and Nation-wide hookups, and by other means, directly and by implication—

- (a) Represented that its Beech-Nut cigarettes, with their extra length, were "easy on the throat," provided a "bonus on throat ease," filtered out "heat and bite, completely cooling the smoke," provided "definite defense against throat irritation," and that the extra length filtered out—eliminated "heat and bite, completely cooling the smoke";

The facts being that neither the extra length nor any other property of its said cigarettes prevent the irritating properties in the smoke, common to all cigarettes, from reaching the mouth and throat of the smoker, and did not provide any defense against throat irritation;

- (b) Represented falsely that its Sensation cigarettes were made of "extra choice imported and domestic tobaccos," were "top quality cigarettes," and were "made from the finest tobacco you can buy";

The facts being that the tobaccos used in the manufacture of said cigarettes were primarily lower grades of flue-cured and Burley tobaccos;

- (c) Represented that, of the seven leading brands of cigarettes, its Old Gold cigarettes were lowest in nicotine content and lowest in throat-irritating tars and resins; and that the July 1942 issue of Reader's Digest contained a report of tests which showed that the smoke from its Old Gold cigarettes had less nicotine than the smoke from the other six tested, and contained less throat-irritating tars and resins and were easier on the throat than the other six;

The facts being that said cigarettes and the smoke therefrom contained no less nicotine, tars, or resins than did the cigarettes and smoke from the other leading brands; and with respect to the Reader's Digest article it failed to disclose that the results of the tests reported therein showed that the differences in amount and percentage of harmful substances in the tobacco and in the smoke of the cigarettes tested were insignificant; and that the smoke from the Old Gold cigarettes was no less harmful than was that from the six other brands tested; and

- (d) Represented that its Friends smoking tobacco was rum-cured by special processes and that rum curing enriched said tobacco; and that said tobacco smoked "without bite or burn," free from bite and heat," always * * * without irritation," was always "cool under fire," etc.;

The facts being that the tobacco in question was cured before being purchased by it; addition of the rum flavoring during the processing caused no chemical change or temperature reaction in the tobacco, but affected only the aroma and taste of the tobacco and smoke therefrom, and did not enrich the tobacco or cause the smoke to be less irritating to the mouth; and the smoke from

said tobacco, like other smoking tobaccos, had an irritating effect on the mouth or throat; and said tobacco was not cool under fire or without irritation;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the false belief that said representations were true, and into the purchase of its said brands of cigarettes and smoking tobacco; whereby substantial trade was diverted unfairly to it from its competitors;

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

In said proceeding, tests made by the Food and Drug Administration, at the instance of the Commission, to determine, among other things, the nicotine content of the tobacco in and the smoke from a number of cigarettes of six of the largest selling brands, including Old Golds, showed that the nicotine content of both the tobacco in and the smoke from the individual cigarettes involved in the tests varied greatly both in actual weight and in percentage by weight of the cigarettes, not only as among the six different brands, but also as among the individual cigarettes of the same brand; and that for the individual cigarettes involved in the tests, the amount of tars and resins in the smoke varied greatly both in actual weight and in percentage by weight of the cigarettes, not only as between the six different brands tested, but also as among the individual cigarettes of the same brand.

Before *Mr. Webster Ballinger* and *Mr. John L. Hornor*, trial examiners.

Mr. J. R. Phillips, Jr., for the Commission.

Perkins, Daniels & Perkins, of New York City, and *Bingham, Collins, Porter & Kistler*, of Washington, D. C., 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 P. Lorillard Company, Inc., 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, P. Lorillard Company, Inc., is a corporation organized and existing and doing business under and by virtue of the law of the State of New Jersey with its principal office at 15 Exchange Bldg., Jersey City, in said State, and with its executive office at 119 West 40th Street, New York City, State of New York. It is now, and for more than 5 years last past has been, engaged in the manufacture and processing of tobacco products,

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including cigarettes branded "Beech-Nut," "Sensation," and "Old Gold," and pipe tobacco branded "Friends" smoking tobacco; and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia. It now causes, and for more than 5 years last past has caused, such tobacco products, when sold by it, to be transported from its factories located in various cities of the United States, including Jersey City, N. J.; Louisville, Ky.; Richmond, Va.; Middletown, Ohio; Danville, Va.; and Lancaster, Pa.; to the purchasers thereof, some located in such States and other located in various other States of the United States and in the District of Columbia, and there is now and has been for more than 5 years last past a constant current of trade and commerce conducted by said respondent in such tobacco products, between and among the various States of the United States and in the District of Columbia. Respondent is now, and for more than 5 years last past has been, one of the largest manufacturers of the tobacco products in the United States, and is now, and for more than 5 years last past has been in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of tobacco products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale by it in the commerce aforesaid of its said Beech-Nut brand of cigarettes, respondent has disseminated and caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

- (a) That said Beech-Nut cigarettes are "easy on your throat";
- (b) That such Beech-Nut cigarettes provide "plenty of bonus on throat ease";
- (c) That such Beech-Nut cigarettes "filter out heat and bite, completely cooling the smoke";
- (d) That such Beech-Nut cigarettes provide "definite defense against throat irritation"; and
- (e) That the extra length of such Beech-Nut cigarettes "filters out—eliminates heat and bite, completely cooling the smoke."

PAR. 3. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale

by it in the commerce aforesaid of its said Sensation brand of cigarettes, respondent has disseminated and caused to be disseminated by the United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

(a) That Sensation cigarettes are made of "extra choice imported and domestic tobaccos";

(b) That Sensation cigarettes are "top-quality cigarettes";

(c) That Sensation cigarettes are "made from the finest tobacco you can buy."

PAR. 4. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale by it in the commerce aforesaid of its said Old Gold brand of cigarettes, respondent has disseminated and caused to be disseminated by United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts, and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

(a) That "ever fresh Old Golds give you a finer, fresher flavor";

(b) That "you can't buy, beg, or borrow a stale Old Gold";

(c) That "double mellow Old Golds not only give you prize crop tobacco, the finest money can buy, but give you cigarettes of guaranteed freshness, no matter where you buy them";

(d) That the smoking of Old Gold cigarettes will assist students in preparing for examinations;

(e) That "something new has been added" to the tobacco content of Old Gold cigarettes;

(f) That of the seven leading brands of cigarettes, Old Gold cigarettes are lowest in nicotine content and are lowest in throat-irritating tars and resins; and

(g) That the July 1942 issue of a monthly magazine published in the United States and having a Nation-wide and international circulation contains a report of tests of "seven leading cigarettes"; that "the cigarette whose smoke was lowest in nicotine was Old Gold. The cigarette with the least throat-irritating tars and resins was Old Gold. On both of these major counts, Old Gold was best among all seven cigarettes tested"; that Old Gold cigarettes are "easier on the throat than are the other six brands of cigarettes"; and that "Old Gold

cigarettes are easier on the throat than is any other brand of cigarettes."

PAR. 5. In the course of its business described in paragraph 1 hereof, and for the purpose of inducing the purchase of its tobacco products in the commerce aforesaid, the respondent now uses, and since 1940 has used and has published in commerce, paid testimonials from users and purported users of its Old Gold cigarettes which do not present or reflect the actual personal experiences, knowledge, or beliefs of the signers thereof, and in some of such cases the testimonialists smoke not only Old Gold cigarettes, but also other brands of cigarettes and in some of such cases the testimonialists not only do not and have not smoked Old Gold cigarettes, but have not and do not smoke cigarettes of any kind or make. Many of such testimonials are prewritten by representatives of respondent and are signed by the testimonialists without their knowing or being advised by the respondent or by any of its representatives of the contents of them; and many of such testimonials are false and are known by the respondent to be false; and all of such testimonials so obtained by respondent are given and secured in sole consideration of the payments which respondent makes therefor.

PAR. 6. In the course and conduct of its business described in paragraph 1 hereof, and for the purpose of aiding and promoting the sale by it in the commerce aforesaid of its said Friends smoking tobacco, respondent has disseminated and caused to be disseminated by United States mails, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts and by other means in commerce, advertisements in which it has represented and still represents directly and by implication:

(a) That rum curing of Friends smoking tobacco "puts out bite and burn";

(b) That Friends smoking tobacco is "rum-cured by special process";

(c) That rum curing enriches "Friends smoking tobacco";

(d) That Friends smoking tobacco "always smokes cool under fire";

(e) That Friends smoking tobacco "smokes without bite or burn" and "free from bite and heat";

(f) That "we rescue from tongue distress. Free of harshness, burn and bite. For bite-free coolness"; and

(g) That "Friends tobacco smokes always * * * without irritation."

PAR. 7. In truth and in fact: (1) Said Beech-Nut cigarettes are not easy on one's throat and do not provide "plenty of bonus on throat ease"; (2) such Beech-Nut cigarettes do not "filter out heat and bite" completely cooling the smoke, when and if such cigarettes are smoked to the same butt length to which other brands of cigarettes are smoked; (3) such Beech-Nut cigarettes do not provide "definite defense against throat irritation"; (4) the extra length of such Beech-Nut cigarettes does not filter out or eliminate heat and bite or completely or in any degree cool the smoke from such cigarettes, when and if such cigarettes are smoked to the same butt length to which other brands of cigarettes are smoked.

PAR. 8. In truth and in fact: (1) Said Sensation cigarettes are not made from extra choice imported and domestic tobaccos; (2) they are not top-quality cigarettes; (3) they are not made from the finest tobacco one can buy.

PAR. 9. In truth and in fact (1) Old Gold cigarettes do not give one a finer or fresher flavor; (2) Old Gold cigarettes are not "ever-fresh"; (3) Old Gold cigarettes become stale by reason of age and for other reasons; (4) Old Gold cigarettes contain tobaccos other than "prize crop" tobacco; (5) the tobaccos in such cigarettes are not the finest money can buy; (6) the smoking of Old Gold cigarettes will not assist students in preparing for examinations; (7) nothing has been added to the tobacco of Old Gold cigarettes which was not known and used in the manufacture of cigarettes prior to the manufacturing and marketing of such Old Gold cigarettes; (8) of the so-called seven leading brands of cigarettes referred to in subparagraphs (f) and (g) of paragraph 4 hereof, Old Gold cigarettes are not lowest in nicotine content nor lowest in throat irritating tars and resins; and (9) while the July 1942 issue of the magazine referred to in subparagraph (g) of paragraph 4 hereof contains a report of tests of "seven leading cigarettes" and while, according to the report of the tests the amount of nicotine in the smoke of Old Gold cigarettes average 2.04 milligrams per cigarette, the amount of nicotine in the smoke of each of two other brands of cigarettes mentioned in such report averaged 2.20 milligrams per cigarette and the greatest amount of nicotine in smoke of all the brands of cigarettes reported tested was an average of 3.02 milligrams per cigarette of that brand, these differences in the amount of nicotine in the brands of cigarettes tested and reported were and are insignificant, which the said respondent in its said advertising conceals and fails to disclose; and the said respondent in its said ad-

vertising of the report of tests contained in said issue of said magazine conceals and fails to disclose the fact that the said report states:

The laboratory's general conclusion will be sad news for the advertising copy writers but good news for the smoker, who need no longer worry as to which cigarette can most effectively nail down his coffin. For one nail is just about as good as another. Says the laboratory report: "*The differences between brands are, practically speaking, small, and no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful.*" How small the variations are may be seen from the data tabulated on page 7.

The difference between the average amount of nicotine per cigarette in the smoke of each of two other brands of cigarettes reported in the said magazine, and the average amount of nicotine per cigarette in the smoke of Old Gold cigarettes reported in said magazine amounted to only 1/177,187 of an ounce, which fact the said respondent has concealed and still conceals and has failed and still fails to disclose in its advertising mentioned in subparagraph (g) of paragraph 4 hereof; and the difference between the average amount of nicotine per cigarette in the smoke of the brand of cigarettes reported in the said magazine as having the highest average of nicotine per cigarette, and the average amount of nicotine per cigarette in the smoke of Old Gold cigarettes reported in said magazine, amounted to only 1/28,928 of an ounce, which fact the said respondent has concealed and still conceals and has failed and still fails to disclose in its advertising mentioned in subparagraph (g) of paragraph 4 hereof. The difference shown in the said report between the amount of tar in the smoke of the cigarette shown in the said report to have the greatest amount of tars, and the amount of tars shown by the said report to be contained in the smoke of Old Gold cigarettes is only 0.39 of 1 percent, which fact the said respondent has concealed and still conceals and has failed and still fails to disclose in its advertising mentioned in subparagraph (g) of paragraph 4 hereof. In truth and in fact the content of nicotine, or tarry matter and of other substances, irritating to the throat and nasal passages of the smoker and otherwise harmful, varies continually in respondent's cigarettes and the smoke therefrom, as they are offered for sale to the general public; and the relative content of nicotine, of tarry matter, and of such substances in respondent's cigarettes as compared with that of competing brands of cigarettes likewise varies continually. The number of variable factors involved in the growing of tobacco for cigarettes, in the blending and processing of such tobacco into cigarettes, and in the packing, handling, and distribution of such cigarettes to the consumer make it impossible for respondent or any of its

competitors to produce and market the large volume of cigarettes, which they respectively sell, with a standard or constant content of nicotine, tarry matter, and other harmful substances. Among these variable factors are differences in weather conditions during the tobacco-growing season in different localities in which tobacco of the same variety is grown; differences in such weather conditions from year to year; differences in the soil in which cigarette tobacco is grown and in the cultivation and fertilization thereof; variation in the mixing and blending of the varieties of tobacco incorporated in the cigarettes; variations in the changes brought about in cigarette tobacco in the processing thereof; deviations in the density with which the tobacco is packed in cigarettes and in the weight of the cigarettes themselves; variations in methods of handling and distribution of cigarettes and changes and differences in climatic conditions affecting cigarettes after they leave the factory where made. In truth and in fact, there is no practicable method whereby the content of nicotine, tarry matter, and other harmful substances in the general run of respondent's cigarettes as they reach the consumer or in those of its competitors, or in the smoke therefrom, can be ascertained with any degree of accuracy for any appreciable length of time. Any test which may be made to determine such content must, as a practical matter, be limited to a few samples, infinitesimal in number as compared with the total number of such cigarettes on sale at any one time, and the results obtainable from any such test are indicative of nothing more than the facts sought to be ascertained as of the particular time and place of the initiation of the test. In truth and in fact, the differences in the content of nicotine, tarry matter and other harmful substances to be found in respondent's cigarettes as compared with those of competing cigarettes, and such differences among the cigarettes of such competitors, are so minute as to be insignificant and undetectable from the standpoint of the effect which such substances have on the smoker of respondent's cigarettes as compared to that experienced by the smoker of competing brands. For the above reasons, among others, the representations which respondent has made concerning the content of nicotine, tarry matter and other harmful substances in its cigarettes and the smoke therefrom are false and deceptive, and mislead the public into erroneously believing that respondent's cigarettes are less injurious, when smoked, than are other and competing brands of cigarettes.

PAR. 10. In truth and in fact (1) Friends smoking tobacco does not "put out bite and burn"; (2) Friends smoking tobacco is not rum-

cured; (3) there is no enriching of Friends smoking tobacco by any rum curing; (4) such tobacco does not smoke "cool under fire," it does not smoke without bite or burn; (5) it is not free from bite or heat; (6) it does not relieve a smoker from tongue distress nor from harshness, burn, and bite; (7) it does not afford bite-free coolness; (8) it does not smoke without irritation.

PAR. 11. The aforesaid representations made by the respondent as set out in paragraph 2, 3, and subparagraphs (a), (b), (c), (d), (e), and (f) of paragraph 4 hereof and those set out in paragraph 6 hereof have the capacity and tendency to mislead and deceive the purchasing public into the beliefs that such representations are true and to induce the purchasing public to purchase respondent's products Beech-Nut cigarettes, Sensation cigarettes, Old Gold cigarettes, and Friends smoking tobacco in such erroneous beliefs. Thereby, substantial injury has been done and is being done by respondent to substantial competition in interstate commerce. The failure of the respondent in its advertising described in subparagraph (g) of paragraph 4 hereof to disclose that the results of the tests show that Old Gold cigarettes are no less harmful than are the other brands of cigarettes mentioned in such report referred to in subparagraph (g) of paragraph 4 hereof, and the failure of the respondent to disclose that the report of such tests shows that the differences between Old Gold cigarettes and such other brands of cigarettes are insignificant, have the capacity and tendency to mislead and deceive the purchasing public into the beliefs that Old Gold cigarettes are less harmful than are the other cigarettes mentioned in said report, and that the differences between Old Gold cigarettes and the other cigarettes mentioned in such report are significant and to induce the purchasing public to purchase respondent's Old Gold cigarettes in such erroneous beliefs. Thereby, substantial injury has been done and is being done by respondent to substantial competition in interstate commerce.

PAR. 12. The use by respondent of testimonials, as alleged in paragraph 5 hereof, has the capacity and tendency to mislead and deceive the purchasing public into the beliefs that the statements in such testimonials are true; that some of the testimonialists furnishing such testimonials prefer Old Gold over other brands of cigarettes; that some of such testimonialists smoke Old Gold cigarettes to the exclusion of all other brands of cigarettes; that such testimonials have been furnished to the respondent voluntarily and without compensation and that the persons giving such testimonials have known and did know the contents thereof when signing the same. The aforesaid use by the respondent of such testimonials has the capacity and tendency to induce

and has induced the purchasing public to purchase Old Gold cigarettes in such erroneous beliefs. Thereby, substantial injury has been done and is being done by respondent to substantial competition in interstate commerce.

PAR. 13. The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice of the public and of 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.

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, 1943, issued and subsequently served its complaint in this proceeding upon the respondent, P. Lorillard Co., a corporation of the State of New Jersey, charging said respondent with the use of unfair methods of competition in commerce and unfair and deceptive acts and practises in commerce in violation of the provisions of that Act. After the filing of the respondent's answer to the complaint, testimony and other evidence were introduced before trial examiners 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, the respondent's answer, testimony and other evidence, the trial examiner's recommended decision and exceptions thereto by counsel supporting the complaint, and brief in support of the allegations of the complaint (no brief having been filed by respondent and oral argument not having been requested); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, P. Lorillard Co., is a corporation organized and existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office at 15 Exchange Place, Jersey City, N. J., and with its executive office at 119 W. 40th Street, New York, N. Y. It is now, and at all times mentioned herein has been, engaged in manufacturing and processing tobacco products, including cigarettes branded "Old Gold" and pipe

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tobacco branded "Friends" smoking tobacco, and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia. For several years prior to March 2, 1943, respondent was also engaged in manufacturing and processing cigarettes branded "Beech-Nut" and "Sensation" and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Respondent now causes and has caused its tobacco products when sold by it to be transported from the places of manufacture in various cities of the United States, including Jersey City, N. J.; Louisville, Ky.; and Middletown, Ohio; to purchasers thereof located in other States of the United States and in the District of Columbia, and now maintains and has maintained a constant current of trade and commerce in such tobacco products between and among the various States of the United States and in the District of Columbia. Respondent is now, and at all times mentioned herein has been, in substantial competition with other corporations and with persons, firms, and partnerships also engaged in the sale of tobacco products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its aforesaid business and for the purpose of aiding and promoting the sale of its said Beech-Nut brand of cigarettes, respondent disseminated and caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation, by local radio broadcasts, by Nation-wide hookups of broadcasts, and by other means in commerce, advertisements in which it represented directly and by implication that said Beech-Nut cigarettes were "easy on the throat"; provided a "bonus on throat ease"; filtered "out heat and bite, completely cooling the smoke"; provided "definite defense against throat irritation"; and that the extra length of such Beech-Nut cigarettes filtered out—eliminated "heat and bite, completely cooling the smoke."

PAR. 4. The Beech-Nut cigarettes manufactured and sold by respondent from 1940 until 1944 were 84 millimeters in length, as compared with 70 millimeters for respondent's Old Gold brand and other popular brands of cigarettes. This extra length was stressed by respondent in its advertisements of Beech-Nut cigarettes containing the representations set forth in paragraph 3. Respondent's Beech-Nut cigarettes were made from Virginia Bright, Burley, and so-called Turkish and Macedonian tobaccos and were sold at retail at a lesser

price than respondent's Old Gold brand of cigarettes. There is expert testimony in the record to the effect that, due to the extra length of Beech-Nut cigarettes, the first few puffs of smoke therefrom might be somewhat cooler than the smoke from a shorter cigarette and also less of the irritating properties in the smoke might enter the smoker's mouth with the first few puffs. However, when an extra-length cigarette is smoked to the same butt length as a shorter cigarette, there is no difference in the temperature of the smoke from the two cigarettes and no lessening of the irritating properties in the smoke entering the smoker's mouth. In fact, according to the testimony of experts, if a longer cigarette is smoked to the same butt length as a shorter cigarette, the amount of nicotine and tarry substances entering the mouth of the smoker is probably greater for the longer cigarette, due to the accumulation of the harmful substances in the stump or butt of the longer cigarette during the first few puffs and also the fact that the longer cigarette contains more tobacco and therefore more of the harmful substances. The smoke from the tobacco in all cigarettes contains varying amounts of throat irritating properties. The extra length of respondent's Beech-Nut brand of cigarettes, or any other characteristic or property of same, did not prevent the irritating properties in the smoke from such cigarettes from reaching the mouth and throat of a smoker and did not provide any defense against throat irritation. The Commission finds from the evidence of record that the aforesaid representations by respondent concerning its Beech-Nut brand of cigarettes were false, misleading, and deceptive.

PAR. 5. In the course and conduct of its aforesaid business and for the purpose of aiding and promoting the sale of its aforesaid Sensation brand of cigarettes, respondent disseminated and caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation and newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts, and by other means in commerce, advertisements in which it represented directly and by implication that said Sensation cigarettes were made of "extra choice imported and domestic tobaccos," were "top quality cigarettes," and were "made from the finest tobacco you can buy."

PAR. 6. The Sensation cigarettes manufactured and sold by respondent from 1938 until about 1943 were made from Virginia Bright, Burley, and so-called Turkish and Macedonian tobaccos, and were sold at retail at a lesser price than respondent's Old Gold brand of cigarettes. Respondent graded the tobaccos purchased according to quality and in connection with such grading used certain symbols, in-

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cluding D, E, G, M, and L for Virginia Bright or flue-cured tobacco, and G-2, LS, X, XX, S-2, S-3, S-4, ML, OL, PL, HL, H, HH, 10, 11, 12, and 14 for Burley tobacco. The top or best quality of flue-cured tobacco was designated as Grade D, and the top or best quality of Burley tobacco was designated as Grade G-2. Respondent generally paid more for the higher or top grades of tobaccos than for the lower grades. The tobaccos used in the manufacture of Sensation cigarettes were primarily flue-cured, Grades L and M, with a small percentage of Grade G, and Burley, grades lower than XX. They were not made from respondent's top quality tobacco or from the finest tobacco respondent could and did buy. From the evidence of record the Commission finds that the aforesaid representations by respondent as to its Sensation brand of cigarettes were false, misleading, and deceptive.

PAR. 7. In the course and conduct of its aforesaid business and for the purpose of aiding and promoting the sale of its aforesaid Old Gold brand of cigarettes, respondent disseminated and caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation and newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts, and by other means in commerce, advertisements in which it represented directly and by implication that of the seven leading brands of cigarettes, Old Gold cigarettes are lowest in nicotine content and are lowest in throat-irritating tars and resins; and that the July 1942 issue of Reader's Digest, a monthly magazine of Nation-wide and international circulation, contained a report of tests of seven leading cigarettes, which tests showed that the smoke from Old Gold cigarettes had less nicotine than the smoke from the other six brands tested and that Old Gold cigarettes contained less throat-irritating tars and resins and were easier on the throat than the other six brands tested.

PAR. 8. Through the use of the aforesaid representations respondent has represented to the public that both the tobacco in Old Gold cigarettes and the smoke therefrom contain less nicotine than the tobacco and the smoke therefrom of any of six other leading brands of cigarettes and that Old Gold cigarettes contain less tars and resins and are therefore less irritating to the throat than any of six other leading brands of cigarettes. It is established by scientific evidence that the nicotine content of the smoke of a cigarette is in direct proportion to the nicotine content of the tobacco contained in the cigarette itself. It is further established by scientific evidence that the nicotine content of the tobaccos used in the manufacture of popular brands of cig-

arettes, including respondent's Old Gold brand and the six other brands with which respondent's Old Gold cigarettes were compared, varies greatly, not only as among the several types of tobaccos used (principally flue-cured, Burley, and Maryland) but also as among the individual plants of the same types of tobacco on the same farm and in the same field, and even as among the leaves on the same plant. These variations are due to a number of variable factors, including weather conditions, type of soil, method of fertilization and cultivation, method of harvesting, and handling after harvesting. There is no index by which the tobacco buyers for any cigarette manufacturer can judge the nicotine content in tobacco leaves by visual inspection. Also due to the afore-mentioned variations in the nicotine content of tobacco, constancy in the nicotine content of the tobaccos purchased by any cigarette manufacturer cannot be maintained through the purchase of only the leaves in a certain position on the tobacco plant, or by sampling specimens of the tobaccos, or in any other manner.

There is no known practical process by which the nicotine in the tobacco leaf may be removed or substantially reduced without at the same time destroying the tobacco for commercial use. Because of the large amount of tobacco leaves used in the manufacture of cigarettes and the extreme variability in nicotine content of the leaves, it is not practically possible for respondent, or any of the other manufacturers of leading brands of cigarettes, to maintain a constancy of nicotine in the finished cigarette. The record contains certain testimony and reports concerning a series of tests which were made by the Food and Drug Administration, at the instance of the Commission, for the purpose of determining, among other things, the nicotine content of the tobacco in and the smoke from a number of cigarettes of six of the largest selling brands, including respondent's Old Gold brand. The results of these tests showed that the nicotine content of both the tobacco in and the smoke from the individual cigarettes involved in the tests varied greatly, both in actual weight and in percentage by weight of the cigarettes, not only as among the six different brands but also as among the individual cigarettes of the same brand.

Since the nicotine content of the tobaccos used by respondent in the manufacture of its Old Gold cigarettes as well as those used by the manufacturers of other leading brands of cigarettes varies materially, and since it is not practically possible for respondent, or any of its principal competitors, to know the nicotine content of the tobaccos purchased, or to remove or substantially reduce such nicotine content, or to maintain constancy in the amount of nicotine in the finished

cigarette or in the smoke therefrom, it follows that respondent's Old Gold cigarettes and the smoke therefrom do not contain any less nicotine than do the cigarettes and the smoke therefrom of other leading brands on the market.

With respect to the aforesaid representations that Old Gold cigarettes contain less tars and resins and are therefore less irritating to the throat than any of six other leading brands of cigarettes, it is established by scientific evidence that the tars and resins in the tobaccos from which respondent's Old Gold cigarettes, as well as other popular brands of cigarettes are made, vary considerably, as does the nicotine content, and for the same reasons. It is not practically possible for respondent, or any of its principal competitors, to determine the amount of tars and resins in the tobaccos purchased, or to remove or substantially reduce the amount of tars and resins in such tobaccos, or to maintain constancy in the amount of tars and resins in the finished cigarettes. The testimony and reports concerning a series of tests made by the Food and Drug Administration, mentioned hereinabove in connection with the nicotine content of cigarettes, also show that for the individual cigarettes involved in the tests the amount of tars and resins in the smoke varied greatly, both in actual weight and in percentage by weight of the cigarettes, not only as between the six different brands tested but also as among the individual cigarettes of the same brand. The tars and resins in the smoke from all cigarettes have an irritating effect on the human body. Respondent's Old Gold cigarettes contain no less tars and resins than other leading brands of cigarettes and, therefore, the smoke from respondent's Old Gold cigarettes is no less irritating to the human body, or easier on the throat, than the smoke from other leading brands of cigarettes.

The Commission finds from the evidence that the aforesaid representations by respondent that the tobacco in Old Gold cigarettes and the smoke therefrom contain less nicotine than the tobacco and the smoke therefrom of any of six other leading brands of cigarettes on the market, and that its Old Gold cigarettes contain less tars and resins and are therefore less irritating to the throat than any of six other leading brands of cigarettes, are false, misleading, and deceptive.

The July 1942 issue of Reader's Digest contained an article entitled "Cigarette Ad Fact and Fiction," which was based on a report by a research laboratory on certain tests of seven commercial brands of cigarettes. Respondent in its advertising made representations concerning said article and the report on which it was based, as set out in paragraph 7 hereof, without disclosing significant facts contained

therein. Said article showed that the average amount of nicotine per cigarette and the percentage of tars in the smoke from the cigarettes tested varied but little as between the different brands of cigarettes, and contained the following statement with respect to the tests reported on therein:

The laboratory's general conclusion will be sad news for the advertising copy writers, but good news for the smoker, who need no longer worry as to which cigarette can most effectively nail down his coffin. For one nail is just about as good as another. Says the laboratory report: "The differences between brands are, practically speaking, small, and no single brand is so superior to its competitors as to justify its selection on the ground that it is less harmful."

In fact, the difference shown in said article in the average amount of nicotine content per cigarette in the smoke of the Old Gold cigarettes tested and that in each of two other brands tested was only 1/177,187 of an ounce, and the difference shown in said article between the average amount of nicotine content per cigarette in the smoke of the brand of cigarette reported as having the highest average amount of nicotine content per cigarette and the average amount of nicotine content per cigarette of the Old Gold cigarettes tested was only 1/28,928 of an ounce. The difference shown in said article in the percentage of tars in the smoke of the cigarette reported to have the highest percentage of tars and the percentage of tars reported to be contained in the smoke of the Old Gold cigarettes tested was only 0.39 of 1 percent. The testimony of expert witnesses establishes that these differences in the nicotine content and in the percentage of tars in the smoke of the cigarettes tested are insignificant from a physiological standpoint.

The representations by respondent concerning said article failed to disclose that the results of the tests reported therein showed that the differences in amount and percentage of harmful substances in the tobacco and in the smoke of the cigarettes tested were insignificant and that the smoke from the Old Gold cigarettes tested was no less harmful than was the smoke from the six other brands of cigarettes tested. The Commission finds from the evidence of record that said representations were misleading and deceptive.

PAR. 9. In the course and conduct of its aforesaid business and for the purpose of aiding and promoting the sale of its aforesaid Friends smoking tobacco, respondent disseminated and caused to be disseminated, by the United States mails, in magazines of Nation-wide circulation and newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hookups of broadcasts, and by other means in commerce, advertisements in which it represented directly and by

implication that the rum curing of Friends smoking tobacco "puts out bite and burn"; that Friends smoking tobacco is "rum cured by special process"; that rum curing enriches "Friends smoking tobacco"; that Friends smoking tobacco "always smokes cool under fire"; that Friends smoking tobacco "smokes without bite or burn" and "free from bite and heat"; that "we rescue from tongue distress. Free of harshness, burn and bite. For bite-free coolness"; and that "Friends tobacco smokes always * * * without irritation."

PAR. 10. The aforesaid representations by respondent concerning its Friends brand of smoking tobacco may be segregated into two general groups, namely, those involving respondent's use of rum in the processing of said tobacco and those involving the effect of the smoke from said tobacco on the smoker. As to the first group, the evidence shows that the tobacco used in the manufacture of Friends smoking tobacco is cured before it is purchased by respondent. During the processing of the tobacco a rum flavoring is added. The addition of such rum flavoring causes no chemical change or temperature reaction in the tobacco and affects only the aroma and taste of the tobacco and the smoke therefrom. It does not in any manner enrich the tobacco or cause the smoke therefrom to be any less irritating to the smoker's mouth than it would be if such rum flavoring were not added.

As to the second group of representations, the evidence shows that the tarry substances or irritating properties in the smoke from tobacco used in the manufacture of Friends smoking tobacco, as well as that used in the manufacture of other smoking tobaccos, have an irritating effect on the membranes inside a person's mouth or throat. The terms "bite," "burn," and "harshness" as used by respondent in the aforesaid representations referred to such irritating effect. The degree of irritation varies as between individuals but there is essentially no difference in the irritating properties of the smoke from the tobacco in all common brands of smoking tobacco. Friends smoking tobacco, or any other tobacco, is not cool under fire. The temperature of the smoke from smoking tobacco as it enters the smoker's mouth is governed by the length of the stem of the pipe and not by the tobacco.

The Commission finds from the evidence that the aforesaid representations by respondent as to its Friends smoking tobacco are false, misleading, and deceptive.

PAR. 11. The complaint in this proceeding listed a number of advertising statements and representations in addition to those referred to herein which have been used by respondent in promoting

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the sale of its Old Gold brand of cigarettes, and charged that such statements and representations were also false, deceptive, and misleading. The Commission finds that the charges with respect to these additional statements and representations have not been sustained by the evidence.

PAR. 12. The use by the respondent of the false, deceptive, and misleading representations, as set forth in paragraphs 3, 5, 7, and 9, hereof, has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the false and erroneous belief that said representations were true and into the purchase of the Respondent's Beech-Nut, Sensation, and Old Gold brands of cigarettes, and Friends smoking tobacco. In consequence thereof, substantial trade has been diverted unfairly to the respondent from its competitors.

CONCLUSION

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

ORDER TO CEASE AND DESIST¹

This proceeding having been heard by the Federal Trade Commission upon the complaint, answer of the respondent, testimony and other evidence taken before trial examiners of the Commission theretofore duly designated by it, recommended decision of the trial examiner and exceptions filed thereto by counsel supporting the complaint, and brief of counsel supporting the complaint (no brief having been filed by counsel for respondent and oral argument not having been requested), 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 the respondent, P. Lorillard Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of its products, Beech-Nut cigarettes, Sensation cigarettes, Old Gold cigarettes, and Friends smoking tobacco, or any other products possessing the

¹ See footnote on following page.

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same or similar properties or ingredients, do forthwith cease and desist from representing by any means, directly or indirectly:

(1) That Beech-Nut cigarettes or (the smoke therefrom) will not harm or irritate the throat, or will provide any defense against throat irritation; (or that the extra length of such cigarettes) will filter out or eliminate the harmful properties in the smoke from such cigarettes, or will cause the smoke from such cigarettes to be cooler than the smoke from other brands of cigarettes;

(2) That Sensation cigarettes are made of extra-choice imported and domestic tobaccos, or are top-quality cigarettes, or are made from the finest tobacco that can be bought;

(3) That Old Gold cigarettes or the smoke therefrom contains less nicotine, or less tars and resins, or is less irritating to the throat than the cigarettes or the smoke therefrom of any of the other leading brands of cigarettes; or

(4) That Friends smoking tobacco is rum-cured, or that the process by which a rum flavoring is added to such tobacco enriches the tobacco or causes the smoke therefrom to be any less irritating to the throat or any cooler than if such rum flavoring were not added; or that the smoke from Friends smoking tobacco will not irritate the mouth or throat of a smoker, or is cool, or is free from bite, burn, or harshness.

It is further ordered, That respondent shall, within sixty (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.¹

¹ On May 24, 1950, the Commission modified said order as below indicated:

"(1) That Beech-Nut cigarettes, or any other cigarette composed of substantially the same blend of tobaccos, or the smoke therefrom, will not harm", etc.; "or that the extra length of Beech-Nut cigarettes, or of any other cigarette of substantially the same length, will filter out", etc.; "Provided, however, that nothing herein shall be construed to prohibit the respondent from representing that during the time the extra length of any such cigarette is being smoked the smoke therefrom will contain less irritating properties and will be cooler than the smoke from standard length cigarettes;

"(2) That Sensation cigarettes, or any other cigarette composed of substantially the same blend of tobaccos, are made of extra choice imported and domestic tobaccos", etc.;

(3) Unchanged except for insertion of the word "six" before "other leading brands of cigarettes."

"(4) That Friends smoking tobacco, or any other smoking tobacco manufactured in substantially the same manner, is rum-cured," etc.; "or that the smoke from Friends smoking tobacco or from any other smoking tobacco composed of substantially the same blend of tobaccos, will not irritate the mouth or throat of a smoker," etc.

Syllabus

IN THE MATTER OF

ENGLISHTOWN CUTLERY, LTD. ET AL.

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

Docket 5492. Complaint, May 6, 1947—Decision, Apr. 4, 1950

The British Royal coat of arms, which is one of the most widely known national insignia in the world and is unique in certain respects, is the property of the British Government, and the right to its use is limited to said Government and its functions, to the British royal family and to Royal Warranty Holders and members of the Royal Warranty Holders Association, namely, concerns and individuals who as a result of long-continued, faithful service to members of the British royal family, have been granted by said family special permission to use said coat of arms in recognition of such service.

England has been a seat for the manufacture of cutlery for several centuries, and English cutlery has been noted for its excellence; and a substantial portion of the purchasing public, by reason of such reputation, prefers it.

Where a domestic corporation and its president, who controlled its affairs, engaged in New Jersey in the manufacture and advertising of knives, spoons, forks, and other cutlery, and in the competitive interstate sale and distribution thereof—

Made use on certain of their cutlery products, and in their advertising matter in newspapers and other media of general circulation, of a heraldic device or design which simulated the British coat of arms, including the rampant lion on the left and the rampant unicorn on the right, its most distinguishing features, and thereby indicated to the purchasing public and especially to persons of English blood and origin and those with a preference for cutlery and similar products designed and made in England, that said products were there made and were offered for sale under the authority of the Royal Warrant and Royal Warranty Holders Association;

The facts being that neither of them had ever rendered any conspicuous service to the British Government or royal family and neither said Government nor family, or any member of the latter, had granted or consented to their use of the British coat of arms; any use thereof or, of any part by them was without authority, warrant or consent of the rightful owner and users; said corporation was not a British company or association and had no British connections; and the cutlery products concerned were not designed or made in or brought from England, but on the contrary, were made in New Jersey:

With tendency and capacity to mislead and deceive substantial numbers of the purchasing public and thereby to induce them to purchase substantial quantities of said products; whereby trade was unfairly diverted from competitors who do not use such false and misleading representations, to their prejudice; and with effect of placing in the hands of retailers and other distributors means whereby they might deceive members of the purchasing public: