

Syllabus

IN THE MATTER OF
STERLING DRUG, INC.

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

Docket 5441. Complaint, June 4, 1946—Decision, Sept. 25, 1950

Where a corporation engaged in the manufacture and competitive interstate sale and distribution of its "Bayer Tablets of Aspirin," "Bayer Aspirin Tablets," "Bayer Aspirin," "Phillips Milk of Magnesia Cleansing Cream" and "Phillips Milk of Magnesia Skin Cream"; in weekly broadcasts, during the period from the spring of 1936 until April or May of 1944 over a Nation-wide hookup of a certain radio musical program known as the "American Melody Hour," which promoted and advertised the sale of its Bayer Aspirin—

- (a) Falsely represented to the radio listening public through opening announcements, that the druggists of America sponsored and presented said program, and through such representations in said connection as "presented" or "brought to you" by or with "the compliments or best wishes of the druggists of America" imported that said druggists were recommending such products; with the potentiality, necessarily, of injuring manufacturers and sellers of competitive products and of deceiving the public; and
- (b) Falsely represented that the retail price of its said product had only recently been reduced through such statements as "Get it at any drugstore * * * now for only 15 cents for 12 tablets" or "only 15 cents now, for 12 tablets"; the facts being that while said representation was true, when first made in 1934, it was deceptive as continued for 9 years thereafter; and

Where said corporation, in advertising its said creams in newspapers and periodicals and by radio, directly or by implication—

- (c) Represented that the use of its said cleansing and skin creams would keep the skin free of enlarged pores and prevent enlarged pore openings; the facts being that said creams would have no value in the reduction in size of pore openings except to the extent that use thereof would facilitate the removal of blackheads from the follicles and thus apparently reduce the size of the latter; and they would not under any circumstances "keep the skin free of enlarged pores" or "prevent enlarged pore openings";
- (d) Represented falsely that said skin creams would control oiliness of the skin or oily shine or dull shine; the facts being that while application thereof followed by vigorous rubbing would temporarily remove the accumulated oil from the skin, persistent use thereof would result in over activity of the sebaceous glands and increased oiliness; and
- (e) Represented falsely that its said creams would keep the skin free of dry, scaly roughness; the facts being that any possible improvement would be only temporary, the duration thereof depending largely upon the degree of perspiration to which the skin was subjected after application thereof; said condition, when resulting from pathological causes would not be appreciably affected; and in no case would they "keep the skin free of dry, scaly roughness";

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With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true and thereby induce the purchase of its said products; and with tendency and capacity by reason thereof to unfairly direct substantial trade in commerce 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 constituted unfair methods of competition in commerce, and unfair and deceptive acts and practices therein.

As respects charges in the complaint that respondent had falsely represented that its agreements would (a) help neutralize any excess fatty acid accumulations in the pore external openings of the skin, (b) help to retain moisture in the skin, (c) help to ease out blackheads, and (d) seems to smooth out tiny lines of the skin: the Commission was of the opinion, and found, that the allegations of the complaint with respect to the falsity of said representations had not been sustained by the greater weight of the evidence.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. Edward L. Smith for the Commission.

Rogers, Hoge & Hills, of New York City, 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 Sterling Drug, 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. The respondent, Sterling Drug, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 170 Varick Street, in the city of New York, State of New York.

PAR. 2. Respondent is now, and for more than 3 years last past has been, engaged in the sale and distribution of various products, among such products being "Bayer-Tablets of Aspirin," "Bayer Aspirin Tablets," and "Bayer Aspirin," and cosmetic preparations designated by it as "Phillips' Milk of Magnesia Cleansing Cream" and "Phillips' Milk of Magnesia Skin Cream," 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 3 years last past has caused, such products when sold by it to be shipped to the purchasers

thereof located in various States of the United States other than those in which such shipments originate and in the District of Columbia, and there is now, and for more than 3 years last past has been, a constant current of trade and commerce in such products between and among the various States of the United States and in the District of Columbia.

PAR. 3. The respondent is now, and for more than 3 years last past has been, one of the largest manufacturers of tablets of aspirin, aspirin tablets, and aspirin and of cleansing creams and skin creams in the United States, and is now, and for more than 3 years last past has been, in substantial competition with other corporations and with persons, firms, and partnerships engaged in the sale of tablets of aspirin, aspirin tablets, and aspirin and cleansing creams and skin creams in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business described in paragraph 1 hereof, and for the purposes of aiding and promoting the sale by it in the commerce aforesaid of its said "Bayer-Tablets of Aspirin," "Bayer Aspirin Tablets," and "Bayer Aspirin," respondent has represented, in magazines of Nation-wide circulation, in newspapers of interstate circulation, by local radio broadcasts and by Nation-wide hook-ups of broadcasts, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

(a) that the druggists of America sponsor and present a radio program promoting and advancing the sale of "Bayer-Tablets of Aspirin," "Bayer Aspirin Tablets," and "Bayer Aspirin," and

(b) that the retail price of "Bayer-Tablets of Aspirin," "Bayer Aspirin Tablets," and "Bayer Aspirin" has only recently been reduced to 15¢ for a dozen tablets.

PAR. 5. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, the druggist of America did not present or sponsor, and have never presented or sponsored, any radio program aiding or promoting the sale of such products; and in truth and in fact, the retail price of said products at the time of such advertisements had not been only recently reduced to 15 cents per dozen tablets, but such products for a number of years prior to the use of such representation had been continuously and regularly sold at the retail price of 15 cents per dozen tablets.

PAR. 6. The aforesaid representations made by the respondent have had, and still have, the tendency and capacity to mislead and deceive the purchasing public into the erroneous belief that such representa-

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tions were true and had the capacity and tendency to induce the purchasing public to purchase such products in such erroneous beliefs. Thereby, substantial injury has been done and is being done by respondent to substantial competition in interstate commerce.

PAR. 7. In the course and conduct of its aforesaid business, the respondent has disseminated, and is now disseminating, and has caused, and is now causing, the dissemination of false advertisements concerning its said products, Phillips' Milk of Magnesia Cleansing Cream and Phillips' Milk of Magnesia Skin Cream, by the United States mails, and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act; and respondent has disseminated and is now disseminating, and has caused, and is now causing the dissemination of, false advertisements concerning its said products by various means for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and deceptive statements and representations, contained in said false advertisements disseminated and caused to be disseminated by the United States mails, by insertion in newspapers and periodicals, by radio continuities and also in circulars, leaflets and other advertising, are the following:

(a) In respect to Phillips' Milk of Magnesia Face Creams:

Ladies, if the natural radiance of your skin is marred by enlarged pores, oily shine and dry scaly roughness, get Phillips' Milk of Magnesia Cleansing Cream and Phillips' Milk of Magnesia Skin Cream. See how they soften and smooth your skin * * * and help neutralize any excess fatty acid accumulations in the pore openings. Try Phillips' Milk of Magnesia Face Creams today.

(b) In respect to Phillips' Milk of Magnesia Skin Cream:

It contains special beneficial ingredients which do special constructive work for your skin—(1) softening and neutralizing any acid accumulations often found in the external pore openings; (2) help to retain moisture in the skin and thus help to keep it soft, supple, free from dryness.

What are these ingredients? First something no other cream contains—genuine Phillips' Milk of Magnesia. And there is cholesterol to hold moisture in the skin. And there are finest oils to soften and supple.

A cream to Use At Night. Let these beneficial beautifying ingredients work at night—to soften, to neutralize any acid accumulations in the outer pore openings, to supply moisture and oils.

* * * More than a luxurious cosmetic. * * * What a cream does for your skin depends upon what's in it. * * * It skillfully combines the cosmetic and pharmaceutical arts by offering special ingredients. * * * Work special benefits on the skin—control oiliness, dull shine—help to ease out black-

heads and prevent large pore openings—supply needed moisture and oils to dry flaky skin.

Many a woman and girl may be missing many really thrilling moments of life because oily shine, enlarged pores or scaly roughness are robbing her skin of its natural beauty. * * * You may easily make your skin lovelier to look at. * * * The only beauty creams made from genuine Phillips' Milk of Magnesia.

* * * A skin free of enlarged pores, oily shine, dry scaly roughness * * *. Well, you can achieve thrilling results right in your home using the remarkable care. * * * A care that employs two unique creams * * *.

If your skin shows wayward tendencies at times, don't fret. Even the loveliest, the freshest, may stray—roughen a bit with wind and weather—give way to minor blemishes. * * * Curb such waywardness by special daily care. * * *

For it removes oiliness, softens scaly roughness and even seems to smooth out those tiny lines that so often spoil the appearance of the skin.

PAR. 8. Through the use of the aforesaid statements and representations, and others of the same import but not specifically set out herein, respondent represents, directly and by implication, that the milk of magnesia in its said cream acts to neutralize acid accumulations in pore openings, that such accumulation is an unnatural condition and the neutralization thereof is of special benefit to the skin; that the use of said creams helps to prevent enlarged pores and reduces their size once they have developed, prevents oily skin and dry, scaly roughness of the skin. Respondent further represents that the use of its Skin Cream helps to ease out blackheads, prevents and corrects minor skin blemishes and smooths out tiny lines in the skin.

PAR. 9. The aforesaid statements and representations are exaggerated, false, and misleading. In truth and in fact the skin, including the pore openings, normally has an acid reaction and the neutralization of this acid condition will not benefit the skin or make it more attractive. The use of these preparations will not prevent enlarged pores or reduce the size of enlarged pores. While the application and removal of said preparations will remove excessive oil from the skin, their use will have no effect upon the conditions which cause an excessive accumulation of oil on the skin and no influence upon the tendency of certain skins to be oily and shiny. They will, therefore, not control or prevent oily shine or oiliness of the skin except in the sense that they will remove excessive oil from the skin and the skin will be free of excessive oil temporarily. There are many conditions which cause a dry, scaly skin, some of them being of a systemic nature. The use of respondent's creams will smooth or otherwise benefit rough, scaly skin only when caused by excessive

IN THE MATTER OF
ASCO VENDING MACHINE EXCHANGE CORP. 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 5681. Complaint, July 14, 1949—Decision, Mar. 14, 1951

Where a corporation and two individuals, its president and controlling stockholder and its sales manager, engaged in the interstate sale and distribution of nut-vending machines to members of the public through traveling salesmen who contacted prospective purchasers through advertisements in the local papers—

- (a) Represented in such advertisements that employment as an agent, sales representative, or employee was offered, with stated earnings, through such statements as "Route Supervisor—To deliver merchandise and make weekly collections from route 5¢ automatic merchandisers to be established by well-rated concern. Work done evenings and Sundays. Cash investment \$930 to \$2,325 required * * *," and "Exceptional Opportunity—Part time routeman wanted; national concern will establish reliable man in cash business of his own; no selling or canvassing required * * *"

The facts being that their sales plan contemplated no employment at all in the usual sense, as was the general import of their advertisement, notwithstanding the reference to the necessity of a cash investment, but rather the outright sale of vending machines;

- (b) Falsely represented in said advertisements that the cash investment required to obtain their machines was "secured" or "secured by inventory," when in fact the money paid represented an outright purchase;
- (c) Represented, through advertising and statements of salesmen, that the weekly net income to the purchaser from the operation of the machines would be approximately \$1.65 for a single-column dispenser "Asco" machine, and about \$4.15 for the "Ajax" three-column dispenser, and that satisfactory locations for the machines would be obtained by them;

The facts being that while theoretically the machines might be capable of producing the promised income if the locations were ideal and all other factors were favorable, in actual practice the income never approached the amounts represented, and the profits, if any, were usually but a small fraction of the amounts represented; and the locations were almost always unsatisfactory and unprofitable;

- (d) Represented that the territory allotted purchasers would be exclusive, and that the machines delivered would be complete; that is, conform in all respects with those pictured in their advertising material and displayed by the agent;

The facts being that in a number of instances, contrary to their agreement, they allotted the same so-called exclusive territory to more than one purchaser, and there were numerous instances in which the machines were delivered with certain attachments and parts missing; and while such parts were usually supplied upon request of the purchaser, substantial delay, incon-

venience and even financial loss frequently were suffered by purchasers because of the deficiencies in the original shipment:

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

As respects various other charges in the complaint, such as that respondents falsely represented that under certain circumstances they would prepay the shipping charges, that other prospects had applied for so-called exclusive territory, that they would help a purchaser who desired to sell vending machines purchased before they had been placed in use, and that in the case of defective machines by reason of broken or missing parts they frequently required the purchaser to forward cash to cover cost or advised him that he must look to the manufacturer, that the major portion of their business came from repeat orders, and that they made use of the names Asco Vending Machine Exchange and Ajax Distributing Co., and that their salesmen made use of certain other trade names for the purpose of concealing their true identity: the Commission was of the opinion and found that such additional charges were not sustained by the evidence.

Before *Mr. William L. Pack*, trial examiner.

Mr. Charles S. Cox for the Commission.

Mr. Louis H. Solomon, of New York City, for respondents.

Mr. George R. Sommer, of Newark, N. J., also represented Charles W. Smith.

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 Asco Vending Machine Exchange Corp., a corporation, and Alexander S. Cohen, individually and as an officer of Asco Vending Machine Exchange Corp., and Charles W. Smith, and Frank A. Osborne, individually, hereinafter referred to as respondents, have violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Asco Vending Machine Exchange Corp., is a corporation existing under the laws of the State of New Jersey. Respondent, Alexander S. Cohen, is president and controlling stockholder of said corporation and also trades under the names Asco Vending Machine Exchange, Asco Vending Machine Exchange, Inc., Asco Packing Co., and Ajax Distributing Co. Both respondents, Asco Vending Machine Exchange Corp. and Alexander S. Cohen, have their offices and principal place of business at 55 Branford Street, Newark, N. J. Respondent, Charles W. Smith, during the years 1944 to 1947, inclusive, was employed as the national distributor for re-

spondents Asco Vending Machine Corp. and Alexander S. Cohen, with his offices and principal place of business at 55 Branford Street, Newark, N. J. His present place of business and address is 1060 Broad Street, Newark, N. J. Respondent, Charles W. Smith, during said time, along with respondent Alexander S. Cohen, traded as Asco Vending Machine Exchange with offices and principal place of business at 55 Branford Street, Newark, N. J. Respondent, Frank A. Osborne, for some time prior to November 1948, was employed by respondents Asco Vending Machine Exchange Corp., Alexander S. Cohen, and Charles W. Smith, as a salesman and is currently in the employ of respondents Asco Vending Machine Exchange Corp. and Alexander S. Cohen as distributor.

PAR. 2. Respondents, Asco Vending Machine Exchange Corp. and Alexander S. Cohen, individually, have been, for more than 8 years last past, and respondent, Charles W. Smith, during 1944 through 1947, inclusive, engaged in the sale and distribution of peanut-vending machines. Said product is sold directly to purchasers through salesmen who travel in various States of the United States and in the District of Columbia.

In the course and conduct of said business, respondents cause said product, when sold, to be transported from Newark, N. J., and other places of manufacture, to purchasers thereof located in various other States of the United States other than those in which such shipments originate and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce between and among the various States of the United States, and in the District of Columbia. Respondents' volume of business in such commerce is substantial.

PAR. 3. Respondents supply their salesmen with advertising literature and circulars, with reproductions of letters received from customers, evidence of Asco Vending Machine's membership in the Newark, N. J., Chamber of Commerce, a listing of the Mercantile-Newark Trust Co., South Street Branch, Newark, N. J., as a bank reference, and Dun & Bradstreet, as a credit reference, along with a format for a proposed advertisement for use by said salesmen for insertion in local papers. Respondents also supply said salesmen with order blanks, resale listing agreements, service and location agreements, and with a completely assembled vending machine with all attachments, as pictured in said literature, for display to prospective purchasers. Respondents permit their salesmen to use various names other than Asco Vending Machine Exchange and Asco Vending Machine Ex-

change Corp. and including the names United Sales Co., Merit Distributing Co., Precision-Built Co., and U. S. Sales Co. Respondents have acted in concert and cooperation each with the other in the acts and practices hereinafter set forth.

PAR. 4. In the course and conduct of said business and for the purpose of inducing the purchase of said products, respondents have made various statements and representations regarding their said product and business methods through its salesmen and through advertisements inserted in newspapers, magazines, circulars, letters, and other advertising literature circulated generally among the purchasing public. Typical newspaper advertisements are as follows:

ROUTE SUPERVISOR

To deliver merchandise and make weekly collections from route 5¢ automatic merchandisers. Work may be done evenings or Sundays. Cash investment \$790 to \$1,975 required which is secured. Earning \$50.00 weekly and up, after expansion. No experience necessary. Give telephone. Box.

OFFER

To reliable party, man or woman, to own and operate a chain of 20 or more of these modernistic aluminum cast dispensers. Spare or full time. No selling. \$930 immediate cash required for 20 dispensers.

PAR. 5. Through the use of the foregoing statements, respondents represented that employment as an agent, sales representative, or as an employee is offered, with stated earnings.

PAR. 6. Said statements and representations are false, misleading, and deceptive. In truth and in fact, respondents do not employ persons who respond to said advertisements and have no employment available for such persons and do not offer them employment but instead when persons respond to said advertisements, respondents attempt to sell them their peanut-vending machines.

PAR. 7. In the course and conduct of their said business respondents have made various other statements in newspapers, magazines, circulars, letters, and orally by its salesmen, of which the following are typical:

- (a) That money invested in respondents' machines is secured;
- (b) That the weekly net income per vending machine is from \$1.67 to \$2 and above;
- (c) That respondents will obtain satisfactory locations for the vending machines for purchasers prior to or on the date of delivery of the vending machines;

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(*d*) That respondents will place the vending machines on location for purchasers so desiring;

(*e*) That the prepayment of the entire purchase price will save the purchaser c. o. d. and shipping charges;

(*f*) That in the event a purchaser desires to dispose of the vending machines, respondents will dispose of same for such purchaser for a sum not less than the original purchase price, less a commission of 10 percent;

(*g*) That the purchaser will be given exclusive territory for vending machines purchased;

(*h*) That one or more persons have applied for the designated exclusive territory and that it is necessary to act at once, if the prospect desires to obtain the designated exclusive territory;

(*i*) That if the prospect places an order immediately, respondent's salesmen will not call on, or sell such other prospect or prospects the designated exclusive territory;

(*j*) That the vending machines will be shipped within a specified time after placing the order;

(*k*) That the vending machines delivered will be complete, as pictured and displayed to the purchaser;

(*l*) That most of the respondents' business is from repeat orders; and

(*m*) That all of the purchasers of respondents' vending machines report satisfactory results from the operations of such machines.

PAR. 8. The statements and representations set-out in paragraph 7 are false, misleading, and deceptive. In truth and in fact, money invested in respondents' machines is secured in no manner by respondents. The average weekly net income per vending machine is less than that represented. The locations obtained by respondents for purchasers are generally unsatisfactory and the selection of the same are made without having a survey made to ascertain whether or not the likelihood of the location selected will yield a satisfactory return. In some instances locations are not secured until long after the machines are received. Respondents do not place said vending machines on location for purchasers desiring such service. In the event a purchaser prepays the entire purchase price, respondents do not prepay the shipping charges thereon. Respondents do not aid and assist purchasers in any practical manner to dispose of vending machines in the event such purchasers so desire. When, for any reason, a purchaser desires to have respondents sell the vending machines

purchased before said vending machines are placed in use, respondents advise the purchaser to place the machines on location as it is easier to sell the machines as a going business and that respondents will then render the purchaser every assistance possible. In truth and in fact, respondents' advice to such purchasers is only a ruse and respondents are only interested in having a purchaser take up the c. o. d. shipment of vending machines. After the purchaser pays the balance on the c. o. d. shipment of vending machines, respondents do not render any practical assistance to the purchaser in the resale of said vending machines. After agreeing to give exclusive territory to purchasers of its machines, respondents frequently sell machines to others in the same territory. Respondents do not have one or more persons who have applied for so called exclusive territory and this representation is made only for the purpose of obtaining the immediate closing of the order for the vending machines. Respondents have failed to ship said vending machines, in many instances, within the specified time after the placement of the order, and, in many cases, long delays have been incurred between the time of the placement of the order and that in which said vending machines were shipped to the purchaser. When shipment of vending machines is not made in accordance with that promised the purchaser, respondents refuse to cancel the order therefor when requested by said purchaser and refuse to make refunds thereon. When a purchaser for any reason refuses to take up the c. o. d. shipment for the balance due on the order, respondents resell said shipment of vending machines and refuse repayment of any portion of the 50 percent deposit required by respondents on orders prior to shipment of the order and retain the same as alleged liquidated damages. In many instances, the vending machines which respondents deliver to purchasers are not complete, as pictured and displayed to the purchaser, and, in many instances, the same arrive with broken or missing parts and cannot be placed in operation until the same are repaired. Respondents, in many instances, require the purchaser to forward cash to cover the cost of replacing the broken or missing parts for said vending machines purchased or advise the purchaser that said vending machines are fully guaranteed by the manufacturer and that matters involving shortages of parts should be taken up with the manufacturer; and that claims for broken parts must be made to the carrier of said shipment. The major portion of respondents' orders for said vending machines are not from repeat orders of business, but from purchasers who only order 10 to 25 such vending machines. In truth and in fact, all operators of said vending machines purchased from respondents do

not report satisfactory returns from the operation thereof, and, in many instances, said vending machines do not cover the expense of operating the same.

Respondents' use of the names Asco Vending Machines Exchange and Ajax Distributing Co. in connection with the sale of said vending machines was for the purpose of concealing the true identity of respondents. The use of the names United Sales Co., Merit Distributing Co., U. S. Sales Co. and Precision-Built Co. by respondents' salesmen is for the purpose of concealing respondents' true identity in connection with the sale of said vending machines.

PAR. 9. The use by respondents of the foregoing false, deceptive, and misleading statements, representations and practices, disseminated as aforesaid, in connection with the sale and distribution in commerce of said products has had and now has the tendency and capacity to and does mislead and deceive a substantial portion of the purchasers and prospective purchasers of such products into the erroneous and mistaken belief that such statements and representations are true and to the purchase of substantial quantities of the products offered for sale in commerce by respondents.

PAR. 10. The aforesaid acts and practices of respondents 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 July 14, 1949, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the filing of respondents' answer, 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 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 aforesaid complaint, the respondents' answer thereto, the testimony and other evidence, the recommended decision of the trial examiner and exceptions thereto by counsel for respondent Charles W. Smith (briefs having been waived and oral argument not having been requested); and the Com-

mission having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the trial examiner, 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 conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Asco Vending Machine Exchange Corp., is a corporation organized under the laws of the State of New Jersey, with its principal place of business located at 55 Branford Street, Newark, N. J. Respondent, Alexander S. Cohen, is president and controlling stockholder of the respondent corporation and participates actively in the operation, management, and control of its business. Respondent, Charles W. Smith, was for a period of some 3 years, beginning in 1945 and ending in the spring of 1947, sales manager of the corporation and was in active charge of its sales activities and policies. The Commission having concluded that the complaint has not been sustained as to respondent, Frank A. Osborne, and that he should be dismissed from the proceeding, the term "respondents" as used hereinafter will not include respondent Osborne.

PAR. 2. Respondents, Asco Vending Machine Exchange Corp. and Alexander S. Cohen, are now and for a number of years last past have been, and respondent, Charles W. Smith, was, during the period beginning in 1945 and ending in the spring of 1947, engaged in the sale and distribution of nut-vending machines. In the course and conduct of their business respondents cause or have caused their machines, when sold, to be transported to purchasers thereof located in various States of the United States other than those in which such shipments originated, and in the District of Columbia. Respondents maintain or have maintained a course of trade in their machines in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. The machines sold by respondents are of two types: the Asco machine, which is a single-column dispenser and handles only one variety of nuts at a time, usually peanuts, and the Ajax machine, which is somewhat more complicated, being a three-column dispenser and handling, if desired, three different varieties or mixtures of nuts simultaneously. The sale of the Ajax machine was not begun until the latter part of 1948 or the first part of 1949, and as respondent, Charles W. Smith, severed his connection with the respondent corpora-

tion in 1947 he appears to have had no connection with the sale of that machine.

PAR. 4. The machines are sold to members of the public through traveling salesmen. To locate prospective purchasers in any given town the salesman first inserts an advertisement in the local paper. One advertisement which is fairly typical of those used reads as follows:

ROUTE SUPERVISOR—To deliver merchandise and make weekly collections from route 5¢ automatic merchandisers to be established by well-rated concern. Work done evenings and Sundays. Cash investment \$930 to \$2,325 required which is secured. Good earnings from start. No selling necessary. Give telephone. Write Box 51 State Journal.

Another form of advertisement used reads as follows:

EXCEPTIONAL OPPORTUNITY—Part time routeman wanted; national concern will establish reliable man in cash business of his own; no selling or canvassing required; all accounts established for you; earnings up to \$100 weekly and more through expansion; full factory cooperation; clean, outdoor work; must be able to devote 5 hours weekly. If you are willing to follow instructions you may become financially independent in a few years; must be reliable, of unquestionable reputation and be able to invest \$1,700 and up cash immediately which is secured by inventory. Unless you are ready to do business do not answer. State qualifications and phone number for personal interview with district manager. Box 81-H, Star.

Persons answering the advertisement are contacted by the salesman, who demonstrates a sample machine to the prospect and supplies the prospect with advertising circulars and other sales literature furnished by respondents. If the sale is consummated the purchaser signs an order for the number of machines agreed upon (usually 20) and the machines are subsequently shipped to the purchaser either by respondents direct or by the factory which manufactures the machines for respondents. Under the terms of sale respondents assume the responsibility (either in the written contract itself or by oral representations of the salesman) for obtaining satisfactory locations for the operation of the machines (in taverns, bowling alleys, filling stations, etc.). The actual placing of the machines at the locations is the responsibility of the purchaser.

PAR. 5. The first charge made in the complaint herein with respect to respondents' business practices is that respondents' newspaper advertisements, which constitute the first step in the sales campaign, are misleading in that the advertisements represent "that employment as an agent, sales representative or as an employee is offered, with stated earnings." In the opinion of the Commission this charge is well founded. Despite the reference in the advertisements to the

necessity of a cash investment, the general import of the advertisements is that regular employment is offered or contemplated. Actually, respondents' sales plan contemplates no employment at all in the usual sense, but rather the outright sale of vending machines.

The advertisements also represent that the cash investment required to obtain respondents' machines is "secured" or "secured by inventory." Obviously these statements are erroneous and misleading, as the money paid for the machines represents an outright purchase of them and is not secured either by inventory or otherwise.

PAR. 6. Other representations made to prospective purchasers by respondents either through their printed advertising material or through oral statements of salesmen were: (a) That the weekly net income to the purchaser from the operation of the machines would be approximately \$1.67 for the Asco machine and approximately \$4.15 for the Ajax machine; (b) that satisfactory locations for the machines would be obtained by respondents; (c) that the territory allotted purchasers of the machines would be exclusive; that is, that respondents would not sell to others machines to be operated in that same territory; and (d) that the machines delivered would be complete; that is, conforming in all respects with the machines pictured in respondents' advertising material and displayed by respondents' agents.

PAR. 7. The record establishes and the Commission therefore finds that these representations were erroneous and misleading. While theoretically the machines might be capable of producing the promised income if the locations were ideal and all other factors favorable, in actual practice the income from the machines almost never approached the amounts represented. Usually the profits, if any, from the operation of the machines were but a small fraction of the amounts represented by respondents. The locations obtained for the machines by respondents were almost always unsatisfactory and unprofitable. A number of instances are disclosed by the record in which respondents, contrary to their agreement, allotted the same so-called exclusive territory to more than one purchaser. Numerous instances are also disclosed in which the machines delivered by respondents were incomplete and failed to conform with the sample machine displayed and demonstrated by the salesman, in that certain attachments and parts were missing. While the missing attachments and parts were usually supplied by respondents upon request of the purchaser, substantial delay, inconvenience, and even financial loss frequently were suffered by purchasers because of the deficiencies in the original shipment.

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PAR. 8. While the complaint contained certain charges in addition to those discussed above, the Commission is of the opinion and finds that such additional charges are not sustained by the evidence.

PAR. 9. The use by respondents of the erroneous and misleading representations referred to above has the tendency and capacity to mislead and deceive a substantial portion of the public with respect to respondents' products, and the tendency and capacity to cause such portion of the public to purchase such products as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the respondents' answer thereto, testimony, and other evidence in support of and in opposition to the allegations of the complaint introduced before a trial examiner of the Commission theretofore duly designated by it, the trial examiner's recommended decision and exceptions thereto by counsel for respondent, Charles W. Smith (briefs having been waived and oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That respondents, Asco Vending Machine Exchange Corp., a corporation, and its officers, and Alexander S. Cohen, individually and as an officer of said corporation, and Charles W. Smith, individually and as sales manager of said corporation, and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of vending machines in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using advertisements which represent directly or by implication that employment is offered by respondents, when in fact the real purpose of the advertisement is to obtain purchasers for respondents' machines.

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2. Representing that the cash investment required to purchase respondents' machines is secured, either by inventory or otherwise.

3. Representing as customary or regular earnings or profits to be derived from the operation of respondents' machines any amount in excess of that which has in fact been customarily and regularly earned by operators of such machines.

4. Representing that respondents will obtain satisfactory locations for said machines, unless such locations are in fact obtained by respondents.

5. Representing that the territory allotted purchasers of such machines is exclusive, unless respondents do in fact refrain from selling machines to other purchasers for operation in such designated territory.

6. Representing that vending machines will be complete and will conform with sample machines displayed to prospective purchasers, unless the machines delivered are in fact complete and conform in all respects with such sample machines.

It is further ordered, That the respondents named above shall, within 60 days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent Frank A. Osborne.

IN THE MATTER OF
AUTOMATIC VOTING MACHINE CORP. ET AL.

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

Docket 5776. Complaint, May 10, 1950—Decision, Mar. 19, 1951

Where a corporation engaged in the manufacture and interstate sale and distribution of voting machines in competition with one or more concerns and, potentially, with others; and a number of its officers and employees who were active in the manufacture and sale of its product; through oral and written statements and depictions disseminated among prospective purchasers—

- (a) Made disparaging and false and misleading representations concerning its competitor through such typical representations as that said competitor's financial stability was questionable and that said competitor lacked adequate experience in the business of manufacturing and servicing voting machines;

The facts being that said competitor's financial stability had been such as to enable it reasonably well to perpetuate itself in business, except to the extent that it might have been handicapped by said corporation and individuals as herein set forth; and the servicing of its machines had been adequate; and

- (b) Made disparaging and false and misleading representations concerning said competitor's product through such typical representations as that use thereof, through improper and undetectable manipulations and other means, was conducive to and encouraged, fraud in elections; that its life was from 5 to 6 years, in contrast to their machine, which, allegedly, had a life expectancy of from 40 to 50 years; and that the electric motor in its machine served merely to close and open the curtains which enclosed the voter;

The facts being that the voting machines of said competitor were and had been for some time past in use by the public, and their adaptability and convenience had been such as to warrant and occasion the purchasing of additional voting machines by the same purchasers; where such machines had been in use there were no public records or other evidence to indicate fraud in elections; the competitive machines had been in use well in excess of 5 to 6 years; and the electric motor in said competitive machines served purposes in addition to those of operating the curtains; and,

- (c) Disparagingly, falsely, and misleadingly represented that it was necessary for voters to assume ungainly positions when voting by means of said competitor's vertical closure voting machine; that the punching machine equipment used in conjunction therewith was unusually expensive; that with said competitor's electrically or manually operated voting machines, voting was slower than with the use of their corresponding voting machines; that secrecy in voting for write-in candidates was rendered impossible when using said competitor's machine; and that the cost for the actual printing was greater for competitor's machine than it was for their own; and,

Where said corporation, acting through and by means of said individuals—

- (d) Secured or attempted to secure an unfair competitive advantage by instigating and financing vexatious and groundless taxpayers' law suits against

purchasers of said competitive machine, with intent or effect of preventing or restraining purchasers from paying said competitor for its machines which had been ordered by or delivered to them, or of restraining prospective purchasers from ordering machines from said competitor, through said suits wherein it was generally alleged, among other things, that the purchases were void and not according to law; or that contracts were not awarded to the lowest bidder; or that counters of the competitive machine could be manipulated without leaving a trace; or that fraud was possible with its use; or that the privacy for voting for write-in candidates with said machine was destroyed;

The facts being that their own voting machines and those of said competitor had been examined and studied by engineers and governmental officials throughout many parts of the United States, and it had been determined both through such examinations and studies and through actual use, that both machines reasonably served the purpose for which they were devised and met statutory requirements established as safeguards against fraud in elections; and no judgment had been rendered by any court upon the merits of an issue declaring that the voting machines of said competitor could be manipulated without leaving a trace, were conducive to fraud in elections, or were unlawful and did not meet statutory requirements;

Tendency and capacity of which acts and practices and methods, as hereinabove described, had been and were:

1. Unlawfully to divert trade in voting machines to said corporation from its competitors;
2. To lessen and suppress competition in the distribution and sale of voting machines in commerce;
3. To threaten the existence of all potential competition in such distribution and sale;
4. To create in respondent corporation a complete monopoly in such distribution and sale;
5. To deprive the public of the natural advantages inherent in a competitive market where voting machines may be purchased upon their merits;
6. Unduly to hinder, embarrass, and place in a disadvantageous competitive position said competitor who was harassed with vexatious and groundless lawsuits;
7. To mislead the public into the erroneous and mistaken belief that with the use of said competitor's voting machine voters would be caused to suffer inconvenience and hardships, fraud would be present in elections, and elections would be costly and slow; and
8. To mislead and deceive a substantial portion of the purchasing public (a) into the erroneous belief that the false, misleading, and disparaging representations concerning said competitor and its voting machines were true, and (b) into the purchase of respondent's voting machines in preference to those of said competitor:

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

In said proceeding while it appeared that 90 percent of all communities in the United States used voting machines made and sold by respondent corpora-

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tion, it appeared that in 8 States, in which its voting machines and those of its competitor were used, it had sold, as of July 2, 1949, 11,699 machines as compared with 3,702 machines sold by its competitor, and that while to all intents and purposes said corporation and its said competitor were the only companies in the United States which sold voting machines, other concerns were preparing to enter the business of manufacturing and selling the same.

Before *Mr. William L. Pack*, trial examiner.

Mr. Leslie S. Miller and *Mr. Fletcher G. Cohn* for the Commission.

Duane, Morris & Heckscher, of Philadelphia, Pa., and *Mr. Ralph J. Gutgsell*, of Chicago, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Automatic Voting Machine Corp., a corporation, its officers, its board of directors, and its employees, hereinafter referred to as respondents, have violated the provisions of section 5 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 as follows:

PARAGRAPH 1. Respondent, Automatic Voting Machine Corp., is a Delaware corporation, with its principal office and place of business Jamestown, N. Y. It will be referred to hereinafter as respondent corporation.

The individual respondents serving and acting as officers or members of the board of directors of respondent corporation, each individually, not only participated in the alleged acts and practices herein-after set forth, but each also participated in the domination and control of respondent corporation in its performing the alleged acts and practices. Each of the said officers and directors named herein as individual respondents and the respective positions held by each are:

Alaric R. Bailey, 484 Fairmount Ave., Jamestown, N. Y.	President and member of the board.
Burton G. Tremaine III, % The Miller Co., Meriden, Conn.	Vice president and member of the board.
Paul A. Ahlstrom, 162 Euclid Ave., Jamestown, N. Y.	Secretary and treasurer.
William H. Staring, 13415 Shaker Blvd., Cleveland, Ohio.	Chairman of the board.
George S. Stevenson, % New Haven Savings Bank, New Haven, Conn.	Member of the board.

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Burton G. Tremaine, Jr., % The Miller Co., Meriden, Conn. Member of the board.
 W. G. McKetterick (first name known) Do.
 18208 Shelburne Rd., Shaker Heights, Ohio.

The other individual respondents also are in the employment or service of respondents corporation, and as such, each has been engaged in the acts and practices hereinafter alleged. These other individual respondents are:

Frank P. Stone, % Automatic Voting Machine Corp., Jamestown, N. Y. Sales manager.
 Raymond C. Anderson, % Automatic Voting Machine Corp., Jamestown, N. Y. Assistant sales manager.
 Alvin N. Gustavson, % Automatic Voting Machine Corp., Jamestown, N. Y. Superintendent of production.
 Oscar F. Swanson, % Automatic Voting Machine Corp., Jamestown, N. Y. Foreman of the experimental department.

PAR. 2. The respondent corporation is now, and has been at all times herein referred to, engaged in the business of manufacturing and selling voting machines, which are, and have been, known by the trade name Automatic Voting Machines.

The individual respondents are and have been at all times herein referred to affiliated with respondent corporation in their respective positions or capacities as hereinbefore set forth. As such, each is and has been actively engaged in the management of said corporation or in formulating, directing or executing the policies and methods of said corporation pertaining to the manufacturing and selling of its voting machines.

Furthermore, each of said respondents individually is and has been engaged in initiating, actively participating in or knowingly acquiescing in one or more of the illegal acts or practices hereinafter alleged.

Each of the said individual respondents hereinbefore named and described in paragraph 1 hereof is proceeded against as a party respondent in his individual capacity and in his respective capacity as an officer, director, or employee of respondent corporation.

PAR. 3. A voting machine is a device which is operated manually or electrically by an individual voter to record and tabulate mechanically his vote with the votes of all other individuals using such machine. Said device also tabulates mechanically the total number of persons voting and the total number of votes cast for each candidate and the total number of votes cast for or against each issue on the ballot.

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PAR. 4. The respondent corporation, in the course and conduct of its business, as aforesaid, sells and transports, or causes to be sold and transported, its voting machines from its place of business to purchasers thereof located in the various States of the United States, other than the State of origin.

Respondent corporation, acting in, through and by means of the individual respondents herein named maintains, and at all times herein referred to has maintained, a course of trade in said voting machines in commerce, as commerce is defined in the Federal Trade Commission Act, among and between the various States of the United States.

PAR. 5. In the course of its aforesaid business of selling and offering for sale its voting machines in commerce, as hereinbefore described, respondent corporation is in competition with one or more firms or corporations which sell or offer for sale in said commerce voting machines which are designed and sold for the same general use and purpose as those of the respondent corporation.

In addition to these competitors, other firms or corporations are contemplating the manufacture and sale in commerce of voting machines designed for the same general use and purpose as those of respondent corporation.

Because of the close relationship between the franchise possessed by American voters and the voting machines which are used as mechanical devices on which to register and record their respective votes, and because of the right of the American public to enjoy the advantages inherent in free and open competition which would make available to the citizens and taxpayers the best voting machines possible at the lowest prices which can only be achieved on an open competitive market, there resides great public interest in maintaining such competition.

PAR. 6. In the course and conduct of its business, as aforesaid, respondent corporation and the individual respondents, acting individually and in their respective official capacities, are now, and have been at all times therein referred to, disparaging and making false and misleading representations concerning a competitor of respondent corporation and its competitive voting machines. This is, and has been, accomplished directly or inferentially by the use of words, statements, and depictions, both oral and written, disseminated to and among prospective purchasers of voting machines. Among and typical of the disparagements, and the false and misleading representations concerning this competitor or its product, are the following:

(a) This competitor's financial stability is questionable;

(b) The use of the competitor's voting machine, through improper and undetectable manipulations, and other means, is conducive to, and encourages, fraud in elections;

(c) This competitor lacks adequate experience in the business of manufacturing, or having manufactured for it and selling and servicing voting machines;

(d) The life of the competitor's voting machine is from 5 to 6 years, in contrast to respondent corporation's voting machine, which allegedly has a life expectancy of from 40 to 50 years;

(e) The electric motor in the competitor's voting machine serves merely to close and open the curtains which enclose the voter while he is voting.

PAR. 7. Furthermore, in the course and conduct of its business, as aforesaid, respondent corporation, acting through and by means of the individual respondents, has secured, or attempted to secure, an unfair competitive advantage over its competitor in the sale and distribution in commerce of said competitor's voting machines, by instigating and financing vexatious and groundless lawsuits against purchasers or prospective purchasers of said competitor's voting machines. The respondents have instigated and financed or have been instrumental in instigating and financing taxpayers' lawsuits against purchasers of said competitor's voting machines for the purpose or with the effect of preventing or restraining purchasers from paying the said competitor for the voting machines thus ordered by or delivered to the said purchasers, or to restrain prospective purchasers from ordering from said competitor its voting machines. The said lawsuits have generally followed a similar pattern in certain respects in that within the bills of complaint or the petitions filed with the courts in the several jurisdictions, it has been or is alleged, among other things, that:

(a) The purchases are void and not according to law; or

(b) The contracts were not awarded to the lowest bidder; or

(c) The counters of the voting machines of the competitor can be manipulated without leaving a trace or visible evidence of such manipulation; or

(d) Fraud is possible with the use of the voting machine; or

(e) The privacy for voting for write-in candidates with the competitor's voting machine is destroyed; or

(f) A combination of two or more of the immediate factors ((a) to (e), inclusive) are present.

PAR. 8. In truth and in fact, the voting machines of respondent corporation and the voting machines of said competitor have been

examined and studied by engineers and governmental officials throughout many parts of the United States, and it has been determined, both through the examinations and studies aforesaid and through actual usage of the said voting machines, that they both reasonably serve the purpose for which they were devised, constructed, and sold and that both meet the statutory requirements established as safeguards against fraud in elections.

A judgment has not been rendered by any court of law or equity upon the merits of an issue declaring that the voting machines of the competitor of respondent corporation can be manipulated without leaving a trace or visible evidence of such manipulation or that the said machines are conducive to fraud in elections or that they are unlawful and do not meet statutory requirements.

Also, in truth and in fact, the representations hereinbefore set forth are disparaging, false, misleading, and deceptive in many respects and for various reasons, among which are:

(a) The competitor's financial stability has been such as to enable it reasonably well to perpetuate itself in business, except to the extent it may have been handicapped by the acts and practices of respondents, as herein alleged;

(b) This competitor's voting machines are now and have been for some time past in use by the public, and the adaptability and convenience thereof has been such as to warrant and occasion the purchasing of additional voting machines by the same purchasers;

(c) The servicing of the competitor's machines has been adequate;

(d) When this competitor's voting machines have been in use, there are no public records nor other evidence to indicate nor establish that fraud in elections through the use thereof has been prevalent or potential;

(e) Voting machines produced by or for this competitor have been in use for periods well in excess of 5 to 6 years;

(f) The electric motor in this competitor's voting machine serves purposes additional to those of opening and closing the curtains which seclude the voter while he is voting.

PAR. 9. To all intents and purposes, respondent corporation and its said competitor are the only companies in the United States which sell voting machines, but other firms or corporations are preparing to enter the business of manufacturing and selling voting machines.

Ninety percent of all communities in the United States using voting machines have the automatic voting machine manufactured and sold by respondent corporation. In 8 States where both the respondent corporation's voting machines and the voting machine of the afore-

said competitor are used, as of July 22, 1949, respondent corporation has sold 11,699 voting machines as compared to 3,702 voting machines sold by its said competitor.

PAR. 10. The tendency, capacity, and effects of the acts, practices, and methods of respondents, as hereinbefore alleged, have been and are:

(1) To unlawfully divert trade in voting machines to the respondent corporation from its competitor;

(2) To frustrate, lessen, hinder, and suppress competition in the distribution and sale of voting machines in commerce;

(3) To threaten the existence of all potential competition in such distribution and sale;

(4) To create in respondent corporation a complete monopoly in such distribution and sale;

(5) To deprive the public of the natural advantages inherent in a competitive market where voting machines may be selected and purchased by the duly elected or appointed representatives in Government, competitively and openly upon the merits of the respective competitive products;

(6) To unduly hinder, embarrass, and place in a competitive disadvantageous position the competitor who is harassed with vexatious and groundless lawsuits brought in bad faith;

(7) To mislead the public into the mistaken, erroneous, and false belief that with the use of said competitor's voting machine the voters will be caused to suffer inconvenience and hardships, fraud will be present in elections and said elections will be costly and slow;

(8) To mislead and deceive a substantial portion of the purchasing public (a) into the erroneous belief that the false, misleading, deceptive, and disparaging statements and representations concerning respondent corporation's competitor and said competitor's voting machines are true, and (b) into the purchase of respondent corporation's voting machines in preference to the voting machines of said competitors.

PAR. 11. The aforesaid acts, practices, and methods of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair and deceptive acts or practices in commerce, within the intent and meaning of section 5 of the Federal Trade Commission Act.

ORDERS AND DECISION OF THE COMMISSION

Order denying respondents' appeal from initial decision of the trial examiner and decision of the Commission and order to file report of compliance, Docket 5776, March 19, 1951, follows:

This matter coming on to be heard by the Commission upon the respondents' appeal from the trial examiner's initial decision in this proceeding, and the brief in opposition thereto filed by counsel in support of the complaint; and

It appearing to the Commission that the grounds relied upon in support of said appeal are (1) that the alleged unfair methods of competition and unfair or deceptive acts and practices making up the alleged violation of law constitute a private controversy between the respondents and their competitor, redressable in the courts, and do not involve or affect the public interest; and (2) that certain of the trial examiner's findings of fact and conclusions are improper in that they are not supported by the record; and

It further appearing that the question of the public interest in this proceeding was specifically adjudicated by the Commission in its order of March 19, 1951, denying the respondents' motion to stay further proceedings and to stay the issuance of an order to cease and desist herein; and

It further appearing also that the trial examiner's findings of fact and conclusions are all fully supported by the record wherein the respondents against whom the order to cease and desist was directed admitted all of the material allegations of fact set forth in the complaint, waived all hearings and further procedure as to said facts, including their right to submit to the trial examiner proposed findings as to the facts, and agreed that the Commission might make any findings as to the facts and conclusion it deemed advisable and proper regarding the acts and practices admitted to have been engaged in and might issue any order it deemed appropriate to prevent the respondents from thereafter engaging in such acts and practices; and

The Commission being of the opinion that the respondents' appeal is without merit and that the trial examiner's initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the respondents' appeal from the initial decision of the trial examiner and their request for oral argument in support of said appeal be, and they hereby are, denied.

It is further ordered, That the attached initial decision of the trial examiner shall on the 19th day of March 1951, become the decision of the Commission.

It is further ordered, That the respondents (except Burton G. Tremaine, III, George S. Stevenson, Burton G. Tremaine, Jr., and W. G. McKetterick, in their individual capacities, and respondent William H. Staring, now deceased) shall, within 60 days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY WILLIAM L. PACK, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 10, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of that act. After the filing by respondents of their original answers to the complaint, respondents requested leave to withdraw said answers and to substitute therefor answers admitting (with certain exceptions as to certain directors of the respondent corporation in their individual capacities and as to one deceased respondent) all of the material allegations of fact in the complaint. Such leave being granted, the substitute answers were in due course filed as a part of the record in this proceeding. Also filed and made a part of the record herein were certain affidavits executed by said directors of the respondent corporation and a stipulation as to certain matters involved in the proceeding but not specifically set forth in the complaint. Counsel supporting the complaint and counsel for respondents also agreed upon and submitted to the trial examiner a proposed order to cease and desist. Thereafter, the proceeding regularly came on for final consideration by the above-named trial examiner, theretofore duly designated by the Commission, upon the complaint, substitute answers, affidavits, stipulation, and proposed order (the filing of proposed findings and conclusions having been waived by counsel and oral argument not having been requested), and the trial examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order.

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FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Automatic Voting Machine Corp. (hereinafter frequently referred to as respondent corporation), is a Delaware corporation, with its principal office and place of business located in Jamestown, N. Y.

The following respondents are officers of the respondent corporation and/or members of its board of directors as set forth below:

Alaric R. Bailey, 484 Fairmount Ave., Jamestown, N. Y.	President and member of the board.
Burton G. Tremaine, III, % The Miller Co., Meriden, Conn.	Vice president and member of the board.
Paul A. Ahlstrom, 162 Euclid Ave., Jamestown, N. Y.	Secretary and treasurer.
George S. Stevenson, % New Haven Savings Bank, New Haven, Conn.	Member of the board.
Burton G. Tremaine, Jr., % The Miller Co., Meriden, Conn.	Do.
W. G. McKetterick, 18208 Shelburne Rd., Shaker Heights, Ohio.	Do.

Respondents, Alaric R. Bailey and Paul A. Ahlstrom, have participated as individuals in the acts and practices hereinafter set forth and have also participated in the domination and control of respondent corporation in its performance of said acts and practices.

Respondents, Burton G. Tremaine III, George S. Stevenson, Burton G. Tremaine, Jr., and W. G. McKetterick, have not as individuals participated in or had actual knowledge of said acts and practices. It is therefore concluded that while these four respondents are properly joined in this proceeding in their respective capacities as officers and/or directors of said corporation, the complaint should be dismissed as to them in their individual capacities. The term respondents or individual respondents as used hereinafter will not include these four respondents in their individual capacities.

The following respondents are in the employ of respondent corporation, holding the respective positions set forth below:

Frank P. Stone, % Automatic Voting Machine Corp., Jamestown, N. Y.	Sales manager.
Raymond C. Anderson, % Automatic Voting Machine Corp., Jamestown, N. Y.	Assistant sales manager.
Alvin N. Gustavson, % Automatic Vot- ing Machine Corp., Jamestown, N. Y.	Superintendent of production.
Oscar F. Swanson, % Automatic Voting Machine Corp., Jamestown, N. Y.	Foreman of the experimental depart- ment.

Respondent, William H. Staring, has died since the institution of this proceeding and the terms respondents and individual respondents will, therefore, not include this respondent.

PAR. 2. The respondent corporation is now and at all times referred to herein has been engaged in the manufacture and sale of voting machines, such machines being known by the trade name Automatic Voting Machines.

With the exception of respondents, Burton G. Tremaine III, George S. Stevenson, Burton G. Tremaine, Jr., and W. G. McKetterick, as set forth in paragraph 1, each of the individual respondents is and has been actively engaged in the management of said corporation or in formulating, directing or executing the policies and methods of said corporation pertaining to the manufacture and sale of its voting machines. With said exceptions, each of the individual respondents is and has been also engaged in initiating, actively participating in or knowingly acquiescing in one or more of the acts and practices hereinafter set forth.

PAR. 3. A voting machine is a device which is operated manually or electrically by an individual voter to record and tabulate mechanically his vote with the votes of all other individuals using such machine. The device also tabulates mechanically the total number of persons voting and the total number of votes cast for each candidate and the total number of votes cast for or against each issue on the ballot.

PAR. 4. In the course and conduct of its business the respondent corporation causes its machines, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in the various States of the United States. The corporation maintains and has maintained a course of trade in its machines in commerce among and between the various States of the United States.

PAR. 5. In the course of its business of selling and offering for sale its voting machines in commerce, as hereinbefore described, respondent corporation is in competition with one or more firms or corporations which sell or offer for sale in said commerce voting machines which are designed and sold for the same general use and purpose as those of the respondent corporation.

In addition to these competitors, other firms or corporations are contemplating the manufacture and sale in said commerce of voting machines designed for the same general use and purpose as those of respondent corporation.

PAR. 6. In the course and conduct of its business respondent corporation and the individual respondents, acting individually and in

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their respective official capacities, are now, and have been at all times herein referred to, disparaging and making false and misleading representations concerning a competitor of respondent corporation and its competitive voting machines. This is, and has been, accomplished directly or indirectly by the use of statements, both oral and written, and depictions disseminated to and among prospective purchasers of voting machines. Among and typical of such disparagements and such false and misleading representations are the following:

- (a) This competitor's financial stability is questionable;
- (b) The use of the competitor's voting machine, through improper and undetectable manipulations, and other means, is conducive to, and encourages, fraud in elections;
- (c) This competitor lacks adequate experience in the business of manufacturing, or having manufactured for it, and selling and servicing voting machines;
- (d) The life of the competitor's voting machine is from 5 to 6 years, in contrast to respondent corporation's voting machine, which allegedly has a life expectancy of from 40 to 50 years;
- (e) The electric motor in the competitor's voting machine serves merely to close and open the curtains which enclose the voter while he is voting.

PAR. 7. Furthermore, in the course and conduct of its business, as aforesaid, respondent corporation, acting through and by means of the individual respondents, has secured, or attempted to secure, an unfair competitive advantage over its competitor in the sale and distribution in commerce of said competitor's voting machines, by instigating and financing vexatious and groundless lawsuits against purchasers or prospective purchasers of said competitor's voting machines. The respondents have instigated and financed, or have been instrumental in instigating and financing, taxpayers' lawsuits against purchasers of said competitor's voting machines for the purpose or with the effect of preventing or restraining purchasers from paying the said competitor for the voting machines ordered by or delivered to the said purchasers, or to restrain prospective purchasers from ordering voting machines from said competitor. The said lawsuits have generally followed a similar pattern in certain respects in that within the bills of complaint or petitions filed with the courts in the several jurisdictions, it has been alleged, among other things, that:

- (a) The purchases are void and not according to law; or
- (b) The contracts were not awarded to the lowest bidder; or

(c) The counters of the voting machines of the competitor can be manipulated without leaving a trace or visible evidence of such manipulation; or

(d) Fraud is possible with the use of the voting machine; or

(e) The privacy for voting for write-in candidates with the competitor's voting machine is destroyed; or

(f) A combination of two or more of such factors ((a) to (e), inclusive) are present.

PAR. 8. In truth and in fact, the voting machines of respondent corporation and the voting machines of said competitor have been examined and studied by engineers and governmental officials throughout many parts of the United States, and it has been determined, both through these examinations and studies and through actual usage of the said voting machines, that they both reasonably serve the purpose for which they are devised, and that both meet the statutory requirements established as safeguards against fraud in elections.

A judgment has not been rendered by any court of law or equity upon the merits of an issue declaring that the voting machines of the competitor of respondent corporation can be manipulated without leaving a trace or visible evidence of such manipulation, or that the said machines are conducive to fraud in elections, or that they are unlawful and do not meet statutory requirements.

Also, in truth and in fact, the representations hereinbefore set forth are disparaging, false, and misleading in many respects and for various reasons, among which are:

(a) The competitor's financial stability has been such as to enable it reasonably well to perpetuate itself in business, except to the extent it may have been handicapped by the acts and practices of respondents, as herein set forth;

(b) This competitor's voting machines are now and have been for some time past in use by the public, and the adaptability and convenience thereof has been such as to warrant and occasion the purchasing of additional voting machines by the same purchasers;

(c) The servicing of the competitor's machines has been adequate;

(d) Where this competitor's voting machines have been in use, there are no public records or other evidence to indicate or establish that fraud in elections through the use thereof has been prevalent or potential;

(e) Voting machines produced by or for this competitor have been in use for periods well in excess of 5 to 6 years;

(f) The electric motor in this competitor's voting machine serves purposes additional to those of opening and closing the curtains which seclude the voter while he is voting.

PAR. 9. Other representations made by respondents which were disparaging, false, and misleading were the following:

(a) That it is necessary for voters to assume or be in ungainly positions when voting by means of said competitor's vertical column voting machine;

(b) That the punching machine equipment used in conjunction with competitor's vertical type voting machines is unusually expensive;

(c) That with competitor's electrically or manually operated voting machines, voting is slower than with the use of respondent corporation's electrically or manually operated voting machines, respectively;

(d) That secrecy in voting for write-in candidates is destroyed or rendered impossible when using competitor's voting machine;

(e) That the cost for the actual printing is greater for the competitor's voting machine than it is for the voting machines of respondent corporation.

PAR. 10. To all intents and purposes, respondent corporation and its said competitor are the only companies in the United States which sell voting machines, but other firms or corporations are preparing to enter the business of manufacturing and selling such machines.

Ninety percent of all communities in the United States using voting machines have the Automatic Voting Machine manufactured and sold by respondent corporation. In 8 States where both the respondent corporation's voting machines and the voting machine of the aforesaid competitor are used, as of July 22, 1949, respondent corporation has sold 11,699 voting machines as compared with 3,702 voting machines sold by its competitor.

PAR. 11. The tendency and capacity of the acts, practices, and methods of respondents, as hereinbefore described, have been and are:

(1) Unlawfully to divert trade in voting machines to the respondent corporation from its competitors;

(2) To frustrate, lessen, hinder, and suppress competition in the distribution and sale of voting machines in commerce;

(3) To threaten the existence of all potential competition in such distribution and sale;

(4) To create in respondent corporation a complete monopoly in such distribution and sale;

(5) To deprive the public of the natural advantages inherent in a competitive market where voting machines may be selected and purchased by the duly elected or appointed representatives in Government, competitively and openly upon the merits of the respective competitive products;

(6) Unduly to hinder, embarrass, and place in a disadvantageous competitive position the competitor who is harassed with vexatious and groundless lawsuits;

(7) To mislead the public into the erroneous and mistaken belief that with the use of said competitor's voting machine voters will be caused to suffer inconvenience and hardships, fraud will be present in elections, and elections will be costly and slow;

(8) To mislead and deceive a substantial portion of the purchasing public (a) into the erroneous belief that the false, misleading, and disparaging representations concerning respondent corporation's competitor and said competitor's voting machines are true, and (b) into the purchase of respondent corporation's voting machines in preference to the voting machines of said competitor.

CONCLUSION

The acts and practices of respondents as hereinabove set out are all to the prejudice of the public and of the competitors of the respondent corporation, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent, Automatic Voting Machine Corp., a corporation, its officers and directors, and respondent Alaric R. Bailey, individually and as an officer and director of said corporation, and respondent Paul A. Ahlstrom, individually and as an officer of said corporation, and respondents Frank P. Stone, Raymond C. Anderson, Alvin N. Gustavson, and Oscar F. Swanson, individually and as employees of said corporation, and respondent Burton G. Tremaine, III, as an officer and director of said corporation, and respondents George S. Stevenson, Burton G. Tremaine, Jr., and W. G. McKetterick, as directors of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and dis-

tribution of voting machines in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner or by any means, directly or by implication:

(a) That the financial condition of the competitor of respondent corporation is unstable.

(b) That the voting machines of said competitor or the counting mechanism of said machines can be improperly manipulated without detection.

(c) That the use of said competitor's voting machines is conducive to, or encourages, fraud in elections.

(d) That said competitor lacks adequate experience in, or facilities for, servicing its voting machines.

(e) That the life expectancy of said competitor's voting machines is shorter than is the fact.

(f) That the electric motor in said competitor's voting machine serves no purpose other than to close and open the curtains which enclose the voter.

(g) That it is necessary for voters to assume ungainly positions when voting by means of said competitor's vertical column voting machine.

(h) That the punching machine equipment used in conjunction with said competitor's vertical type voting machines is unusually expensive.

(i) That where said competitor's voting machine is used the cost for printing is greater than is such cost where the voting machine of respondent corporation is used.

(j) That with said competitor's electrically or manually operated voting machines, voting is slower than with the respondent corporation's electrically or manually operated voting machines, respectively.

(k) That secrecy in voting for write-in candidates is destroyed or rendered impossible when said competitor's voting machine is used.

(l) That said competitor's voting machines do not fully, properly, or secretly record or tabulate a voter's choice.

2. Instigating or financing, directly or indirectly, lawsuits by others against purchasers or prospective purchasers of the voting machines of the competitor of respondent corporation with the purpose, intent, or effect of hindering or obstructing the business or sales of said competitor, or of impounding, or having impounded, moneys payable to or due said competitor, or of injuring the credit or reputation of said competitor; provided that nothing contained herein shall im-

pair any rights accorded respondents by state law openly and publicly to cooperate in, support, finance, or otherwise encourage or promote litigation affecting contracts or awards for said competitor's voting machines where the respondent corporation is the lower bidder for electrically operated voting machines as against the electrically operated voting machines of its competitor, or for manually operated voting machines as against manually operated voting machines of its competitor, and where such litigation is brought in good faith:

(a) To test and determine judicially the validity of any such contracts awarded to said competitor in any jurisdiction where the law now requires, or where in the future it may require, that the contract-awarding authority or governmental purchasing agency, without the right to exercise discretion, shall make its award only to the lowest bidder; or

(b) To test and determine judicially questions of fraud, deceit or trickery; or

(c) To question judicially the discretionary action of public officials in awarding a contract for voting machines to a higher bidder where it is apparent or in good conscience believed that such public officials acted arbitrarily or capriciously, and where, upon request by the losing bidder or by any taxpayer within the jurisdiction affected, such public officials fail or refuse to furnish a valid reason for making such award to the higher bidder.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondents Burton G. Tremaine III, George S. Stevenson, Burton G. Tremaine, Jr., and W. G. McKetterick in their individual capacities but not in their respective capacities as officers or directors of respondent corporation, and that the complaint be, and it hereby is, dismissed as to respondent William H. Staring, deceased since the institution of this proceeding.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That the respondents (except Burton G. Tremaine III, George S. Stevenson, Burton G. Tremaine, Jr., and W. G. McKetterick, in their individual capacities, and respondent William H. Staring, now deceased) shall, within 60 days after service upon them of this order file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by aforesaid orders and decision of the Commission].

IN THE MATTER OF
SOUTHERN SPRING BED COMPANY 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 5796. Complaint, July 12, 1950—Decision, Mar. 22, 1951

Where the name Red Cross and the emblem of the Greek red cross had long been familiar to the American public and were associated in their minds with the Red Cross organization; and thereafter a corporation engaged in the manufacture of mattresses, bedsprings, bedding, and related products and in the interstate sale and distribution thereof—

- (a) Used and displayed as a trade name for its wares the words "Red Cross" and in connection therewith a red Creek cross, in advertisements in newspapers and periodicals of general circulation, on letterheads, invoices, tags, labels, containers, and in radio continuities and advertising matter disseminated since 1904, and thereby represented that its products were designed, endorsed, approved, or sponsored by the American Red Cross; that the Red Cross was financially interested in their sale; that they were manufactured in accordance with sanitary standards or specifications set up by the Red Cross organization; or that they had some other connection with the Red Cross;

The facts being said use was unauthorized; and said products were in no way associated with the American Red Cross; and

Where said corporation, engaged in the manufacture and interstate sale and distribution of a mattress and box spring which were substantially more rigid than normal mattresses and boxsprings; through statements in advertising—

- (b) Represented that its said "orthopedic" mattresses and box spring were specially built and scientifically designed to meet the exacting specifications of leading orthopedic surgeons and physicians and had their approval;
- (c) Represented that they might be effectively used indiscriminately as a cure or competent treatment for lumbago, sacroiliac, sciatica, neuritis, or sprained back; and
- (d) Represented through the use of said word "orthopedic" to describe or identify its said mattresses or springs that they were specially designed to and would correct certain deformities, diseases, and disorders of the body;

The facts being that while they were more rigid and provided a firmer and more level sleeping surface than conventional mattresses and springs, they were, nevertheless, stock mattresses and springs and could not be relied upon to correct any deformity, disease, or disorder of the body when used indiscriminately by the general public; their use did not constitute a cure or competent treatment for the aforesaid or any other ailment or condition, and their efficacy was limited to providing help in the alleviation of pain and in contributing to the comfort of the patient in cases in which a smooth, firm, and level sleeping surface is recommended or prescribed by a reputable physician;