

Syllabus

IN THE MATTER OF
THE ELMO COMPANY, INC.

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

Docket 5959. Complaint, Feb. 28, 1952—Decision, June 10, 1952

Where a corporation engaged in the interstate sale and distribution to the public of a combination of drug preparations and a device referred to by it as "Home Treatment"; in advertisements in newspapers and periodicals and through circulars and other advertising media—

- (a) Represented that use of its said preparations and device in combination, as directed, would cure or constitute an effective treatment for deafness and impaired hearing, and particularly deafness and impaired hearing with ear and head noises due to catarrh, including dry catarrh;

The facts being that such treatment would have no beneficial effect upon deafness not caused by catarrh, and no such effect upon deafness or impaired hearing, together with head or ear noises caused by discharging catarrh, in excess of affording temporary relief; in case of dry catarrh the benefits were limited to softening of the dried exudates, which would have to be removed by other means for relief;

- (b) Falsely represented that its said method of treatment was based on the findings of accepted medical authorities specializing in the treatment of the eye, ear, nose and throat;
- (c) Represented falsely that catarrh is the most common cause of deafness;
- (d) Represented that said preparations and device might be used safely and without harm to the user; when in fact the directed procedure might cause infectious materials to be forced into the deeper structures of the ear, and might even result in injury to the ear drum;
- (e) Failed to reveal that the cotton on which its product was used should not be pushed into the ear so far that it would not be easily removed with the fingers, and that when infection was present, the cotton pushed deeply into the ear might result in injury, including the extension of infection into the deeper ear structures; and
- (f) Failed to reveal that use of aforesaid device might similarly result in extending infection into the deeper structures of the ear and in serious injury; and
- (g) Represented falsely in sales literature advertising a booklet or circular entitled "Diet—Foods and Vitamins", which it sold, "that Vitamin A in proper quantities helps materially to prevent colds";

With tendency and capacity to deceive a substantial portion of the purchasing public into the mistaken belief that said statements and advertisements were true and to induce it because of such belief to purchase said products:

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

Complaint

48 F. T. C.

Before *Mr. J. Earl Coe*, hearing examiner.

Mr. John M. Russell and *Mr. J. W. Brookfield, Jr.* for the Commission.

Mr. Clinton Robb and *Mr. H. E. Manghum*, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Elmo Company, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Elmo Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its principal place of business in Davenport, Iowa.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the business of selling and distributing to the public certain preparations containing drugs and a device as "drug" and "device" are defined in the Federal Trade Commission Act. The combination of the preparations and the device are referred to by respondent as "Home Treatment."

The designations used by respondent for its said preparations and the formulas and directions for use thereof and the designation, description and directions for use of its said device are as follows:

Designation: Elmo Ear Oil No. 1

Formula:

	Gal.	Pts.	Ozs.
Alcohol.....		1	4
Menthyl Salicylate U. S. P.....			2½
Oil Eucalyptus.....			2½
Chloroform (technical).....		1	14
White Mineral Oil.....	2½		
Capsicum.....			1¾

Directions for use:

Put two or three drops of this oil on a small piece of absorbent cotton. Place well down in the ear canal with finger. Remove cotton in 10 to 15 minutes. Use night and morning.

Designation: Elmo Nasal Cleanser No. 2

Formula:

Sodium Chloride.....	95 lbs. 5 oz.
Powdered Sodium Borate.....	100 lbs.
Oil Eucalyptus.....	3 pts.

1379

Complaint

Menthyl Salicylate.....	2 pts.
Menthol approximately.....	8 ozs.
Aniline Pink #7264.....	1 gr. to each lb.
Potassium Iodide.....	6 lbs. 2 oz. 350 gr.
Sodium Salicylate.....	2 lbs. 1 oz. 146 gr.
Sodium Benzoate.....	2 lbs. 1 oz. 146 gr.

Elmo Nasal Cleanser No. 2 is applied by means of a U-shaped glass tube designated Elmo No. 7 Nasal Douche.

Directions for use:

Fill Nasal Douche three-fourths full with No. 2 solution. Insert tapered end in nose, holding head WELL FORWARD and DOWN. Snuff up contents of douche. Repeat in other nostril. Retain solution for a minute or two before gently blowing nose. Use twice daily, night and morning.

Designation: Elmo Throat Gargle No. 3

Formula:

To each ounce:

Salicylic Acid.....	2½ gr.
Carbolic Acid (Phenol U. S. P.).....	⅞ gr.
Eucalyptol U. S. P.....	⅞ gr.
Menthol U. S. P.....	⅞ gr.
Thymol U. S. P.....	⅞ gr.
Zinc Sulphate.....	55 gr.
Boric Acid.....	378½ gr.

Directions for use:

Preparation No. 3 is to be placed in a clean pint bottle and filled with water that has been boiled and let cool, and used as a throat gargle, to help remove the catarrhal secretions of the throat. About a teaspoonful at a time of this preparation should be enough. Use twice a day.

Designation: Elmo Vapor Inhaler No. 4

Formula:

	Gal.	Pts.	Ozs.
Oil Peppermint.....	--	3	2
Oil Eucalyptus.....	--	5	--
Oil Mustard (synthetic).....	--	--	2
White Mineral Oil.....	½	½	3

Directions for use:

Remove corks from both ends. Place tapered end into nostril, close other nostril tight with finger, then GENTLY inhale through tube. Repeat same operation in both nostrils several times a day. Keep inhaler tightly corked when not in use. See direction sheet for inflation of Eustachian tubes.

Designation: Elmo Massage Ointment No. 5

Formula:

Cream White Petrolatum.....	5 lbs.
Oil Capsicum.....	¾ oz.

Directions for use:

Apply small quantity behind, in front and below ears. Rub into the skin from ears downward to angle of jaw on throat to promote warm glow. Use twice daily.

Complaint

48 F. T. C.

Designation: Elmo Nasal Ointment No. 6

Formula:

Cream White Petrolatum.....	10 lbs.	
32 oz. Oil Eucalyptus.....		} 20 oz. of this mixture
20½ oz. Menthyl Salicylate.....		
16½ oz. Oil Peppermint.....		
Oil of Pine Needles.....	1 oz.	
Oil of Sassafras.....	1 oz.	

Directions for use:

Place small quantity well up each nostril, spread over mucous membrane and snuff back. Use twice daily.

Designation: Elmo No. 8 Ear-Vibrator

Elmo No. 8 Ear-Vibrator is a glass tube device with a plunger or piston. The bulb which is at one end of this tube contains a small opening.

Directions for use:

Place glass bulb into hole in ear, holding so air cannot escape around bulb. Then draw piston slowly in and out ten or twelve times. Use once a day. When ear becomes accustomed to Ear-Vibrator, use morning and night. For indicated ear condition only. DO NOT USE IF EAR DISCHARGES.

Designation: Elmo Recharge Liquid No. 9.

Elmo Recharge Liquid No. 9 is the liquid used in the "Elmo Vaper Inhaler No. 4," and is sold for the purpose of recharging the Inhaler. The formula for this preparation is set out under the Inhaler.

PAR. 3. In the course and conduct of its said business respondent causes and has caused its said preparations and device, when sold, to be shipped from its said place of business in the State of Iowa to the purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in its said preparations and device in commerce between and among the various States of the United States. The volume of said business in such commerce is substantial.

PAR. 4. In the course and conduct of its business respondents, subsequent to March 21, 1938, has disseminated, and caused the dissemination of, certain advertisements concerning its said preparations and device by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said products, including but not limited to advertisements inserted in newspapers and periodicals and by means of circulars and other advertising media; and respondent has disseminated, and caused the dissemination of, advertisements concerning its said products by various means including, but not limited to, the media above referred to, for the purpose of inducing and which

1379

Complaint

were likely to induce, directly or indirectly, the purchase of its said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among the statements and representations contained in said advertisements disseminated as aforesaid are the following:

THE ELMO HOME TREATMENT HAS HELPED TO IMPROVE OR RETURN THE HEARING OR REMOVE THE NERVE RACKING HEAD NOISES OF A GREAT MANY PEOPLE IN ONE OR MORE MONTHS TIME. Many have claimed one month was enough.

If you have Dry Catarrh you will need LONGER TREATMENT to try and help your hearing or head noises.

Catarrh is, by far, the most common cause of deafness and head noises.

My head noises are all gone now and my hearing is as good as it used to be before I had the Catarrh. I feel like I am well * *.

I have regained my hearing and the head noises have stopped. That was what I hoped for but also what I had never expected to have happen * *.

Only those who are hard of hearing know what a handicap it is to them in every day life—and these people should do everything they can to correct this condition.

Your hearing is so precious to keep on losing it, if there is a chance to improve or recover it.

Head Noise Misery?

Try this simple Home Treatment. Many people have written us that our home treatment brought them blessed relief from the miseries of Hard of Hearing and Head Noises due to catarrh of the head. Many were past 70. For proof of these amazing results, write us today. Nothing to wear. Treatment used right in your own home—easy and simple.

EAR NOISES

If you suffer from those miserable ear noises and are Hard of Hearing due to catarrh of the head, write us NOW for proof of the good results many people have reported after using our simple home treatment * * *.

DEAF

HARD OF HEARING?

HEAD NOISES? If you suffer from hard of hearing and those miserable head noises, due to catarrh of the head, write us NOW for proof of the good results our simple home treatment has accomplished for a great many people. Many past 70 report head noises gone and hearing fine. Nothing to wear. Send NOW for proof and 30 days trial offer. No obligation.

Different because our method is based on the findings of accepted medical authorities who specialize in the treatment of the eye, ear, nose and throat.

Nothing in the treatment to harm you * * *.

PAR. 6. Through the use of the aforesaid statements and others of the same import, respondent represented, directly and by implication, that the use of its said preparations and device in combination, as directed, will cure or constitute an effective treatment for deafness and

Complaint

48 F. T. C.

impaired hearing and particularly deafness and impaired hearing, together with ear and head noises due to catarrh, including dry catarrh; that the method of treatment including the use of its preparations and device is based on the findings of accepted medical authorities specializing in the treatment of the eye, ear, nose and throat; that catarrh is the most common cause of deafness and that said preparations and device may be used safely and without harm to the user.

PAR. 7. The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the use of respondent's preparations, as directed or otherwise, will have no beneficial value whatsoever in cases of deafness and impaired hearing except when caused by catarrh, that is, a chronic inflammation of, and hypersecretion from, the membranes of the nose, ear or air passages. When deafness or impaired hearing, together with ear or head noises, result from discharging catarrh, the use of respondent's preparations, as directed or otherwise, will have no beneficial effect in the treatment of said conditions in excess of temporarily relieving the catarrhal condition and the resulting deafness or impaired hearing and ear and head noises. In cases of deafness or impaired hearing and head and ear noises resulting from so-called dry catarrh, the benefits derived from the use of said preparations, as directed or otherwise, are limited to the softening of the dried exudates. Respondent's treatment would not usually result in the removal of these exudates and, until removed by other means, the deafness or impaired hearing and head and ear noises due to these exudates would be expected to continue. The use of Elmo No. 8 Ear-Vibrator, as directed or otherwise, will have no beneficial effect in the treatment of deafness or impaired hearing or of ear or head noises due to catarrh. Respondent's method of treatment and the preparations and device employed is not based on the findings of any accepted medical authorities. Catarrh is not the most common cause of deafness. Respondent's Elmo Ear Oil No. 1 and Elmo No. 8 Ear-Vibrator are not safe to use and may cause injury to the user as is more fully set out hereinafter.

PAR. 8. The aforesaid advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act for the further reason that they fail to reveal facts material in the light of such representations and material with respect to the consequences which may result from the use of the preparation Elmo Ear Oil No. 1 and the device Elmo No. 8 Ear-Vibrator, to which the advertisements relate, under the conditions prescribed in said advertisements and the directions for use of said preparations and device, or under such conditions as may be

customary and usual. In truth and in fact, the directed procedure for the use of Elmo Ear Oil No. 1, when the ear is infected, might cause infectious material to be forced into the deeper structures of the ear with the resultant extension of a superficial infection in the external ear canal into the deeper portion of the ear such as the middle ear or even the internal ear. There is a further danger that part of the cotton might become detached during one application of the ear oil and remain in the ear canal and be pushed still farther inward when the next application of oil is made resulting in obstructing the discharge of infectious material and causing its extension into the deeper structures of the ear. The direction to place a small piece of absorbent cotton well down into the ear canal with the finger is particularly likely to result in injury for the reason that cotton saturated with oil and pushed into the ear canal with the finger could not be removed by means of the fingers but would have to be removed by tweezers or some other instrument. The use of such instrumentalities may result in trauma of the ear canal and ensuing infection and in inexperienced hands might even result in injury to the ear drum.

The use of respondent's Elmo No. 8 Ear-Vibrator in the manner directed will produce alternating positive and negative air pressure in the ear canal and in cases where there is infection of the external ear this procedure may force infectious material farther into the ear canal and thus extend the infection. Furthermore, where the ear drum has been punctured or ruptured, the infectious material may be forced into the middle or internal ear and the extension of the infection would further endanger the individual's hearing and might even endanger life itself. Infectious material may be present in the ear canal without discharge from the ear.

PAR. 9. Respondent, in the course and conduct of its business, also sells a booklet or circular entitled "Diet—Foods and Vitamins." It causes said booklet or circular, when sold, to be transported from its place of business in the State of Iowa to the purchasers thereof located in other States of the United States.

PAR. 10. In sales literature describing the benefits which may be expected by following the diet set forth in said booklet, respondent states "We have learned in recent years that Vitamin A in proper quantities helps materially to prevent colds. So from this pamphlet, you may select the foods you like containing high Vitamin A to further assist in our treatment toward good hearing by helping to prevent head colds."

Said statement is false, misleading and deceptive. In truth and in fact, Vitamin A, taken in any quantity, is not effective in preventing head colds.

Consent Settlement

48 F. T. C.

PAR. 11. The use and dissemination by respondent of the foregoing false, misleading and deceptive advertisements, statements and representations had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertisements and statements were true and that its preparation Elmo Ear Oil No. 1 and its device Elmo No. 8 Ear-Vibrator are safe and can be used without harm under the conditions prescribed in its advertisements and the directions for use and under such conditions as may be customary and usual and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase its said products.

PAR. 12. The acts and practices of respondent, as aforesaid, 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.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on February 28, 1952, issued and subsequently served its complaint on the respondent named in the caption hereof, charging it with the use of unfair and deceptive acts and practices in violation of the provisions of said Act.

The respondent, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, is to be withdrawn from the record, hereby:

1. Admits all the jurisdictional allegation set forth in the complaint.
2. Consents that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondent, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrains from admitting or deny-

¹ The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on June 10, 1952, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

1379

Findings

ing that it has engaged in any of the acts or practices stated therein to be in violation of law.

3. Agrees that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondent consents may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

Respondent, The Elmo Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its principal place of business in Davenport, Iowa.

Respondent is now, and for several years last past has been, engaged in the business of selling and distributing to the public certain preparations containing drugs and a device as "drug" and "device" are defined in the Federal Trade Commission Act. The combination of the preparations and the device are referred to by respondent as "Home Treatment".

The designations used by respondent for its said preparations and the formulas and directions for use thereof and the designation, description and directions for use of its said device are as follows:

Designation: Elmo Ear Oil No. 1

Formula:	Gal.	Pts.	Ozs.
Alcohol.....		1	4
Menthyl Salicylate U. S. P.....			2½
Oil Eucalyptus.....			2½
Chloroform (technical).....	1		14
White Mineral Oil.....	2½		
Capsicum.....			1¾

Directions for use:

Put two or three drops of this oil on a small piece of absorbent cotton. Place well down in the ear canal with finger. Remove cotton in 10 to 15 minutes. Use night and morning.

Designation: Elmo Nasal Cleanser No. 2

Formula:

Sodium Chloride.....	95 lbs. 5 oz.
Powdered Sodium Borate.....	100 lbs.
Oil Eucalyptus.....	3 pts.
Menthyl Salicylate.....	2 pts.
Menthol approximately.....	8 ozs.
Aniline Pink #7264.....	1 gr. to each lb.
Potassium Iodide.....	6 lbs. 2 oz. 350 gr.

Findings

48 F. T. C.

Sodium Salicylate..... 2 lbs. 1 oz. 146 gr.
 Sodium Benzoate..... 2 lbs. 1 oz. 146 gr.

Elmo Nasal Cleanser No. 2 is applied by means of a U-shaped glass tube designated Elmo No. 7 Nasal Douche.

Directions for use:

Fill Nasal Douche three-fourths full with No. 2 solution. Insert tapered end in nose, holding head **WELL FORWARD** and **DOWN**. Snuff up contents of douche. Repeat in other nostril. Retain solution for a minute or two before gently blowing nose. Use twice daily, night and morning.

Designation: Elmo Throat Gargle No. 3

Formula:

To each ounce:

Salicylic Acid..... 2½ gr.
 Carbolic Acid (Phenol U. S. P.)..... ⅞ gr.
 Eucalyptol U. S. P..... ⅞ gr.
 Menthol U. S. P..... ⅞ gr.
 Thymol (U. S. P.)..... ⅞ gr.
 Zinc Sulphate..... 55 gr.
 Boric Acid..... 378½ gr.

Directions for use:

Preparation No. 3 is to be placed in a clean pint bottle and filled with water that has been boiled and let cool, and used as a throat gargle, to help remove the catarrhal secretions of the throat. About a teaspoonful at a time of this preparation should be enough. Use twice a day.

Designation: Elmo Vapor Inhaler No. 4

Formula:

	Gal.	Pts.	Ozs.
Oil Peppermint.....		3	2
Oil Eucalyptus.....		5	
Oil Mustard (synthetic).....			2
White Mineral Oil.....	½	½	3

Directions for Use:

Remove corks from both ends. Place tapered end into nostril, close other nostril tight with finger, then **GENTLY** inhale through tube. Repeat same operation in both nostrils several times a day. Keep inhaler tightly corked when not in use. See direction sheet for inflation of Eustachian tubes.

Designation: Elmo Massage Ointment No. 5

Formula:

Cream White Petrolatum..... 5 lbs.
 Oil Capsicum..... ¾ oz.

Directions for use:

Apply small quantity behind, in front and below ears. Rub into the skin from ears downward to angle of jaw on throat to promote warm glow. Use twice daily.

Designation: Elmo Nasal Ointment No. 6

Formula:

Cream White Petrolatum..... 10 lbs.
 32 oz. Oil Eucalyptus.....
 20½ oz. Menthyl Salicylate..... 20 oz. of this mixture
 16½ oz. Oil Peppermint.....
 Oil of Pine Needles..... 1 oz.
 Oil of Sassafras..... 1 oz.

1379

Findings

Directions for use:

Place small quantity well up each nostril, spread over mucous membrane and snuff back. Use twice daily.

Designation: Elmo No. 8 Ear-Vibrator

Elmo No. 8 Ear-Vibrator is a glass tube device with a plunger or piston. The bulb which is at one end of this tube contains a small opening.

Directions for use:

Place glass bulb into hole in ear, holding so air cannot escape around bulb.

Then draw piston slowly in and out ten or twelve times. Use once a day.

When ear becomes accustomed to Ear-Vibrator, use morning and night.

For indicated ear condition only. DO NOT USE IF EAR DISCHARGES.

Designation: Elmo Recharge Liquid No. 9.

Elmo Recharge Liquid No. 9 is the liquid used in the "Elmo Vaper Inhaler No. 4", and is sold for the purpose of recharging the Inhaler. The formula for this preparation is set out under the Inhaler.

In the course and conduct of its said business, respondent causes and has caused its said preparations and device, when sold, to be shipped from its said place of business in the State of Iowa to the purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in its said preparations and device in commerce between and among the various States of the United States. The volume of said business in such commerce is substantial.

In the course and conduct of its business respondents, subsequent to March 21, 1938, has disseminated, and caused the dissemination of, certain advertisements concerning its said preparations and device by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said products, including but not limited to advertisements inserted in newspapers and periodicals and by means of circulars and other advertising media; and respondent has disseminated, and caused the dissemination of, advertisements concerning its said products by various means, including, but not limited to, the media above referred to, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of its said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

THE ELMO HOME TREATMENT HAS HELPED TO IMPROVE OR RETURN THE HEARING OR REMOVE THE NERVE RACKING HEAD NOISES OF A GREAT MANY PEOPLE IN ONE OR MORE MONTHS TIME. Many have claimed one month was enough.

Findings

48 F. T. C.

If you have Dry Catarrh you will need LONGER TREATMENT to try and help your hearing or head noises.

Catarrh is, by far, the most common cause of deafness and head noises.

My head noises are all gone now and my hearing is as good as it used to be before I had the Catarrh. I feel like I am well * * *.

I have regained my hearing and the head noises have stopped. That was what I hoped for but also what I had never expected to have happen * * *.

Only those who are hard of hearing know what a handicap it is to them in every day life—and these people should do everything they can to correct this condition.

Your hearing is too precious to keep on losing it, if there is a chance to improve or recover it.

Head Noise Misery?

Try this simple Home Treatment. Many people have written us that our home treatment brought them blessed relief from the miseries of Hard of Hearing and Head Noises due to catarrh of the head. Many were past 70. For proof of these amazing results, write us today. Nothing to wear. Treatment used right in your own home—easy and simple.

EAR NOISES

If you suffer from those miserable ear noises and are Hard of Hearing due to catarrh of the head, write us NOW for proof of the good results many people have reported after using our simple home treatment * * *

DEAF

HARD OF HEARING

HEAD NOISES? If you suffer from hard of hearing and those miserable head noises, due to catarrh of the head, write us NOW for proof of the good results our simple home treatment has accomplished for a great many people. Many past 70 report head noises gone and hearing fine. Nothing to wear. Send NOW for proof and 30 days trial offer. No obligation.

Different because our method is based on the findings of accepted medical authorities who specialize in the treatment of the eye, ear, nose and throat.

Nothing in the treatment to harm you * * *.

Through the use of the aforesaid statements and others of the same import, respondent represented, directly and by implication, that the use of its said preparations and device in combination, as directed, will cure or constitute an effective treatment for deafness and impaired hearing and particularly deafness and impaired hearing, together with ear and head noises due to catarrh, including dry catarrh; that the method of treatment, including the use of its preparations and device, is based on the findings of accepted medical authorities specializing in the treatment of the eye, ear, nose and throat; that catarrh is the most common cause of deafness and that the said preparations and device may be used safely and without harm to the user.

The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the use of respondent's preparations, as directed or otherwise, will have no beneficial value whatsoever in cases of deafness and impaired hearing except when caused by catarrh, that is, a chronic inflammation of, and hypersecretion from, the membranes of the nose, ear or air passages. When deafness or impaired hearing, together with ear or head noises, result from discharging catarrh, the use of respondent's preparations, as directed or otherwise, will have no beneficial effect in the treatment of said conditions in excess of temporarily relieving the catarrhal condition and the resulting deafness or impaired hearing and ear and head noises. In cases of deafness or impaired hearing and head and ear noises resulting from so-called dry catarrh, the benefits derived from the use of said preparations, as directed or otherwise, are limited to the softening of the dried exudates. Respondent's treatment would not usually result in the removal of these exudates from the ear canal and, until removed by other means, the deafness or impaired hearing and head and ear noises due to these exudates would be expected to continue. The use of Elmo No. 8 Ear-Vibrator, as directed or otherwise, will have no beneficial effect in the treatment of deafness or impaired hearing or of ear or head noises due to catarrh. Respondent's method of treatment and the preparations and device employed is not based on the findings of any accepted medical authorities. Catarrh is not the most common cause of deafness. Respondent's Elmo Ear Oil No. 1 and Elmo No. 8 Ear-Vibrator are not safe to use and may cause injury to the user as is more fully set out hereinafter.

The aforesaid advertisements are misleading in material respects, and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act for the further reason that they fail to reveal facts material in the light of such representations and material with respect to the consequences which may result from the use of the preparation Elmo Ear Oil No. 1, and the device Elmo No. 8 Ear-Vibrator, to which the advertisements relate, under the conditions prescribed in said advertisements, and the directions for use of said preparations and device, or under such conditions as may be customary and usual. In truth and in fact, the directed procedure for the use of Elmo Ear Oil No. 1, when the ear is infected, might cause infectious material to be forced into the deeper structures of the ear with the resultant extension of a superficial infection in the external ear canal into the deeper portion of the ear such as the middle ear, or even the internal ear. There is a further danger that part of the cotton might

Findings

48 F. T. C.

become detached during one application of the ear oil, and remain in the ear canal, and be pushed still farther inward when the next application of oil is made, resulting in obstructing the discharge of infectious material and causing its extension into the deeper structures of the ear. The direction to place a small piece of absorbent cotton well down into the ear canal with the finger is particularly likely to result in injury for the reason that cotton saturated with oil and pushed into the ear canal with the finger could not be removed by means of the fingers, but would have to be removed by tweezers or some other instrument. The use of such instrumentalities may result in trauma of the ear canal and ensuing infection and in inexperienced hands, might even result in injury to the ear drum.

The use of respondent's Elmo No. 8 Ear-Vibrator in the manner directed will produce alternating positive and negative air pressure in the ear canal and in cases where there is infection of the external ear, this procedure may force infectious material farther into the ear canal and thus extend the infection. Furthermore, where the ear drum has been punctured or ruptured, the infectious material may be forced into the middle or internal ear and the extension of the infection would further endanger the individual's hearing, and might even endanger life itself. Infectious material may be present in the ear canal without discharge from the ear.

Respondent, in the course and conduct of its business, also sells a booklet or circular entitled "Diet—Foods and Vitamins". It causes said booklet or circular, when sold, to be transported from its place of business in the State of Iowa, to the purchasers thereof located in other States of the United States.

In sales literature describing the benefits which may be expected by following the diet set forth in said booklet, respondent states "We have learned in recent years that Vitamin A in proper quantities helps materially to prevent colds. So from this pamphlet, you may select the foods you like containing high Vitamin A to further assist in our treatment toward good hearing by helping to prevent head colds".

Said statement is false, misleading and deceptive. In truth and in fact, Vitamin A, taken in any quantity, is not effective in preventing head colds.

The use and dissemination by respondent of the foregoing false, misleading and deceptive advertisements, statements and representations had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertisements and statements were true and that its preparation Elmo Ear Oil No. 1 and its device Elmo No. 8 Ear-Vibrator are safe and can be used without harm under the conditions

1379

Order

prescribed in its advertisements and the directions for use and under such conditions as may be customary and usual and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase its said products.

CONCLUSION

The acts and practices of respondent, as aforesaid, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That the respondent, The Elmo Company, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of its preparations known as Elmo Ear Oil No. 1, Elmo Nasal Cleanser No. 2, Elmo Throat Gargle No. 3, Elmo Vapor Inhaler No. 4, Elmo Massage Ointment No. 5, Elmo Nasal Ointment No. 6, Elmo Recharge Liquid No. 9, or any preparations of substantially similar composition or possessing substantially similar properties, and Elmo No. 8 Ear-Vibrator, or any device of substantially similar construction and operation whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly,

1. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparations and device, which advertisement represents, directly or through inference:

(a) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect upon deafness not caused by a catarrhal condition of the nose, ear or air passages.

(b) That the use of its preparations and device, singly or in combination, as directed, or otherwise, will have any beneficial effect in the treatment of deafness, impaired hearing, or head or ear noises caused by discharging catarrh, in excess of affording temporary relief therefrom.

(c) That the effects of its preparations in the treatment of deafness or impaired hearing or head or ear noises due to dry catarrh is in excess of softening of the dry exudates, or that any benefit can be

Order

48 F. T. C.

expected by reason of this action of respondent's preparations in the treatment of conditions caused by dry catarrh of the ear canal unless the softened exudates are removed by other means.

(d) That said preparations and device constitute a method of treatment based upon the findings of accepted medical authorities.

(e) That catarrh is the most common cause of deafness.

(f) That Elmo Ear Oil No. 1 or Elmo No. 8 Ear-Vibrator are harmless or may be used without ill effects.

2. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of respondent's aforesaid Elmo Ear Oil No. 1, which advertisement fails to reveal that the cotton on which the product is used should not be pushed into the ear so far that it cannot be easily removed with the fingers, and that when infection is present, the use of cotton in connection with said product when pushed deeply into the ear may result in injury to the ear, including the extension of any infection therein present into the deeper structures of the ear.

3. Disseminating or causing to be disseminated any advertisement (a) by means of the United States mails or (b) by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of Elmo No. 8 Ear-Vibrator, which advertisement fails to reveal that, when infection is present in the ear, the use of this device may result in extending such infection into the deeper structures of the ear and in serious injury.

4. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said preparations and device in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representations prohibited in paragraph 1 hereof, or which fails to comply with the affirmative requirement set forth in paragraphs 2 and 3 hereof.

It is further ordered, That respondent, The Elmo Company, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the booklet "Diet—Vitamins and Minerals" in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing that head colds may be prevented by selecting and eating foods which are listed in said booklet as being high in Vitamin A content.

1379

Order

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist.

THE ELMO COMPANY, INC.

(S) P. E. COFFEE,

President.

(S) CLINTON ROBB,

By (S) H. E. MANGHUM,

Counsel.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 10th day of June, 1952.

GAMBLE-SKOGMO, INC., ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AND OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5575. Complaint July 15, 1948—Decision, June 11, 1952

Where a corporation which in the course of the years and as a result of various transactions had come to be engaged in the competitive interstate sale of a great variety of merchandise, including automotive accessories and parts, wearing apparel and other soft goods, major appliances, building supplies and equipment, housewares, farm equipment and parts, and food and confections; sold at retail through some 484 "company-owned" retail stores located in twenty-three Mid-west, Northwestern and far Western states, and 35 such stores in four Western Canadian provinces and Hawaii; and sold at wholesale to 1,735 independently owned retail or "dealer" stores in localities where it had no company owned stores, ranging mostly from five to five thousand in population; and certain responsible officers thereof;

Following the early inauguration of its dealer store program, under which its wholesale business with its "dealer" stores was developed—

- (a) Entered into written and verbal agreements with its "dealer" stores whereby dealers were required to purchase from and deal in merchandise sold by or through said corporation to the exclusion of merchandise sold by competitors;
- (b) Offered to pay and paid bonuses to those dealer stores who complied literally or substantially therewith, and refused bonuses to those who did not make substantial compliance;
- (c) Checked periodically stocks in dealers' stores to discover violations, by means of its representatives who duly reported to it the presence of foreign merchandise;
- (d) In some instances exacted promises that merchandise theretofore procured from other sources would be disposed of within a stated period;
- (e) Cancelled and threatened to cancel, contracts with dealer stores for failure to deal exclusively or substantially, in its merchandise;
- (f) Held meetings of representatives of dealer stores at which it advised the dealers, expressly or by implication, that they were required to purchase all of their merchandise from it;
- (g) Implemented its exclusive dealing policies by instructions to its suppliers advising them that orders should be handled and price quotations given out only through its office, and that it would not be responsible for orders placed by dealers direct to a source of supply; and
- (h) Required an applicant for a contract to purchase its merchandise at wholesale, to fill out a questionnaire in which he agreed to conduct his store "according to the proven policies of the company";

With the result that many of said dealers adhered to and complied with such exclusive dealing understandings and agreements; many independent jobbers and manufacturers who distributed similar merchandise in commerce were consequently unable to sell their products in substantial quantities to said corporation's dealers; and

With the effect (1) that said sales and contracts for sales might substantially lessen competition and tend to create a monopoly in it in the line of com-

1396

Complaint

merce in which it was engaged; and (2) that said acts and practices hindered and prevented competition in the sale in interstate commerce of the afore-said categories of merchandise:

Held, That such acts and practices constituted a violation of Sec. 3 of the Clayton Act, and unfair methods of competition in violation of Sec. 5 of the Federal Trade Commission Act.

As respects respondents' contention that the acts and practices involved in the instant case were not unlawful for the reason, among others, that they affected only an insignificant segment of the total volume of business conducted at wholesale in the entire area of twenty-five states in which said dealers purchased from the corporate respondent, respondents urging, in such connection, that in nineteen states in which the majority of said stores were situated, corporate respondent's business, derived from its dealers, constituted about three-fourths of one per cent of the aggregate volume of wholesale sales by all manufacturers and distributors in the categories of merchandise concerned:

The Commission was of the opinion, assuming without deciding the accuracy of said figure, that the controlling fact in appraising the impact of respondent's practices on competition was the circumstance that corporate respondent's share of the business was a consequential and substantial one in the more than 1600 small communities where it distributed and sold merchandise to dealer stores, and that the area of commerce foreclosed to its competitors by the acts and practices engaged in was a substantial one.

Before *Mr. Randolph Preston* and *Mr. Webster Ballinger*, hearing examiners.

Mr. W. C. Kern, *Mr. William H. Smith* and *Mr. A. C. Goodhope* for the Commission.

Mr. W. P. Berghuis, of Minneapolis, Minn., for respondents.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, the Federal Trade Commission having reason to believe that Gamble-Skogmo, Inc., a corporation, and Bert C. Gamble, Philip W. Skogmo, M. O. Wieby, H. R. Baker, Samuel Mills, and R. C. Teuscher, individually and as officers of said corporate respondent, hereinafter designated and referred to as respondents, have violated the provisions of section 3 of said Act, and pursuant also 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 said respondents, Gamble-Skogmo, Inc., a corporation, and Bert C. Gamble, Philip W. Skogmo, M. O. Wieby, H. R. Baker, Samuel Mills, and R. C. Teuscher, have violated the provisions of the said Act, and it appearing to the Commission

Complaint

48 F. T. C.

that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint stating its charges in such respects as follows:

Count I

PARAGRAPH 1. Each of the parties hereinafter described as a respondent is hereby named and made a party respondent in this proceeding. The respondent, Gamble-Skogmo, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, having its principal office and place of business at 15 North 8th Street, Minneapolis, Minnesota, and branch offices and warehouses located at Denver, Colorado, Chicago, Illinois, Marshalltown, Iowa, Salina, Kansas, Owasso, Michigan, Minneapolis and Moorehead, Minnesota, Billings, Montana, Fremont, Nebraska, Sioux Falls, South Dakota, and Fond du Lac, Wisconsin. Respondent, Bert C. Gamble, is the chairman of the board of directors of corporate respondent; respondent, Philip W. Skogmo, is the president; respondents M. O. Wieby and H. R. Baker are the vice presidents; respondent Samuel Mills is the secretary, and respondent R. C. Teuscher is the treasurer of the corporate respondent, all of whom have their offices for corporate purposes at the same place of business as said corporation. Respondents H. R. Baker and Samuel Mills reside in the city of Los Angeles, State of California. The individual respondents direct and control the sales policies and business activities of the corporate respondent and all of said respondents act together and in cooperation with each other in doing the acts and things hereinafter alleged.

PAR. 2. Corporate respondent acting under the direction of the individual respondents is now, and for many years last past has been, engaged in the sale of various items of goods and merchandise, principally automobile supplies, electrical appliances, radios, light hardware, sporting goods, paints and ready-to-wear clothing. Corporate respondent likewise manufactures batteries, paints and varnishes, and other items of merchandise through Solar Corporation, a wholly owned subsidiary corporation organized and existing under the laws of the State of Wisconsin, a substantial part of such items of goods and merchandise, together with the other above described goods and merchandise which it acquires from other manufacturers, it sells to some 1,600 retail customers for resale by said retail stores within the several States of the United States, and territories thereof, and in the District of Columbia and Canada. Corporate respondent has a regular form of contract with its dealer stores to which it sells merchandise, said contract being denominated "Contract For Sale of Mer-

chandise at Wholesale," and the said dealer stores executing said contracts being denominated therein as "Authorized Dealer Gamble Stores." The rapid growth of corporate respondent and the size of its business is evidenced by the fact that corporate respondent's net sales totaled \$48,969,434 for the year ending December 31, 1945, and totaled \$97,060,657 for the year ending December 31, 1946, a substantial portion of which sales being made to said authorized Gamble dealer stores above described. In the course and conduct of its business, corporate respondent transports the said products or causes the same to be transported from the State and place of their manufacture and/or the State and place where respondent maintains its warehouses as above described to its customers and purchasers thereof located in States other than the place of manufacture or warehousing of said products, and there is now, and has been for many years last past, a constant current of trade and commerce in said products between and among the various States of the United States, the territories thereof, and in the District of Columbia and Canada.

PAR. 3. In the course and conduct of its said business as herein described corporate respondent has been for many years last past, or would have been except for the restrictive conditions, agreements and understandings hereinafter described in Paragraph Four hereof, in substantial competition in the sale of automobile supplies, electrical appliances, radios, light hardware, sporting goods, paints, ready-to-wear clothing and other goods, wares and merchandise in commerce between and among the various States of the United States, the territories thereof, and in the District of Columbia, and Canada, with other corporations and with persons, firms and partnerships.

PAR. 4. In the course and conduct of the business of corporate respondent described in Paragraphs One, Two and Three hereof, corporate respondent, acting under the direction of the individual respondents, in the course of such commerce has made sales and contracts for sale and is still making sales and contracts for the sale of automobile supplies, electrical appliances, radios, light hardware, sporting goods, paints, ready-to-wear clothing and other goods, wares and merchandise, on the conditions, agreements, and understandings that the purchasers thereof shall not use or deal in similar merchandise including automobile supplies, electrical appliances, sporting goods, radios, light hardware, paints, ready-to-wear clothing, or other goods, wares, merchandise, machinery supplies or other commodities of a competitor or competitors of the corporate respondent.

PAR. 5. The effect of said sales and contracts for sale on such conditions, agreements and understandings may be, has been, and still is, to substantially lessen competition; and to injure, destroy and pre-

Complaint

48 F. T. C.

vent competition in the line of commerce in which the respondent is engaged and in the line of commerce in which the customers and purchasers of respondent are engaged; and tends to create, and has created, a monopoly in respondent in the commerce aforesaid, of automobile supplies, electrical appliances, radios, light hardware, sporting goods, paints, ready-to-wear clothing, and other goods, wares and merchandise, in the sale of which corporate respondent has been and now is engaged.

PAR. 6. The aforesaid acts of said respondents Gamble-Skogmo, Inc., Bert C. Gamble, Philip W. Skogmo, M. O. Wieby, H. R. Baker, Samuel Mills, and R. C. Teuscher, constitute a violation of the provisions of section 3 of the hereinabove-mentioned Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (The Clayton Act).

Count II

PARAGRAPH 1. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph One of Count One of this complaint to the same extent and as though the allegations of said Paragraph One of said Count One were set out in full herein, and said Paragraph One of said Count One is incorporated herein by reference and made a part of the allegations of this count.

PAR. 2. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph Two of Count One of this complaint to the same extent and as though the allegations of said Paragraph Two of said Count One were set out in full herein, and said Paragraph Two of said Count One is incorporated herein by reference and made a part of the allegations of this count.

PAR. 3. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph Three of Count One of this complaint to the same extent and as though the allegations of said Paragraph Three of said Count One were set out in full herein, and said Paragraph Three of said Count One is incorporated herein by reference and made a part of the allegations of this count.

PAR. 4. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph Four of Count One of this complaint to the same extent and as though the allegations of said Paragraph Four of said Count One were set out in full herein, and said Paragraph Four of said Count

One is incorporated herein by reference and made a part of the allegations of this count.

PAR. 5. In the course and conduct of the business of corporate respondent as hereinbefore described, and in pursuance of the acts and practices alleged in Paragraph Four hereof, corporate respondent, acting under the direction of the individual respondents, for more than three years last past, has employed and now employs the following methods, acts, and practices in competition in commerce, to-wit:

(a) Corporate respondent's regular form of contract entered into with the retail stores to which it sells its merchandise, said contract being denominated as "Contract For Sale of Merchandise At Wholesale" provides in part as follows:

"It is agreed that unless otherwise authorized in writing, the Retailer shall order, and obtain, his merchandise from the Wholesaler's Store or Warehouse at ----- and shall pay for the same cash on delivery."

At periodic meetings with retail store owners with whom corporate respondent has executed such a "Contract For Sale of Merchandise At Wholesale," such retail owners being denominated in such contracts as "Authorized Dealer Gamble Stores," corporate respondent's officials and representatives in attendance at such meetings have advised, and now advise the said retailers that corporate respondent's policy requires that all merchandise handled by such retailers be purchased of corporate respondent to the exclusion of merchandise sold by persons, firms and corporations other than corporate respondent.

(b) In addition to the coercion, pressure and intimidation of the retail store owners with whom it has contracts through the method of periodic meetings attended by corporate respondent's officials and representatives as aforesaid, corporate respondent, acting under the direction of the individual respondents and through its sales officials or field representatives, has demanded and now demands that the retail store owners with whom it has contracts deal exclusively with corporate respondent and has demanded and now demands that such retail store owners shall not deal in or sell the merchandise of competitors of corporate respondent; in some cases demand is even made that such retail store owners shall not deal in or sell a certain line of products of competitors of respondent even though such products are in scarce supply and cannot be supplied by corporate respondent. Corporate respondent, acting under the direction of the individual respondents, maintains a large force of field representatives who periodically call on all "Authorized Dealer Gamble Stores" and who are instructed to, and who do on such visits, check such retail store owners' stock for the purpose of ascertaining whether such retail stores are using or dealing in the merchandise of competitors of cor-

porate respondent and such field representatives are required to, and do, make reports of any competitor's merchandise found in the stock of such retail stores. That such field representatives of corporate respondent as well as home office officials of corporate respondent threaten retail store owners with cancellation of their contracts with corporate respondent unless all competitors' merchandise is immediately disposed of and unless such retail store owners confine their purchases exclusively to the merchandise procured from corporate respondent. That corporate respondent acting under the direction of the individual respondents, in fact has cancelled some of its contracts with retail stores for no other cause than that they were dealing in merchandise other than that supplied by corporate respondent. That as a result of such threats, intimidation and coercion on the part of respondents, the conditions, agreements and understandings relative to exclusive dealings, as alleged in Paragraph Four hereof, have been and now are being implemented and rigidly policed and enforced by respondents.

(c) Corporate respondent, acting under the direction of the individual respondents, has for many years last past maintained, and now does maintain, an annual bonus system applicable to the retail store owners with whom it has contracts known as "Authorized Dealer Gamble Stores." Under such bonus system an annual bonus of 1 percent of total purchases is paid by corporate respondent to such retail store owners providing such retail store owners comply with certain conditions among which is listed as "giving proper cooperation." Many retail store owners have been threatened with the loss of such annual bonus and such bonuses have been diminished from the full amount of 1 percent or cut off entirely in some cases by reason of the alleged failure of said retail store owners to give proper cooperation for the sole reason that they were purchasing merchandise from sources other than corporate respondent. That the monetary loss inflicted upon such retail store owners by corporate respondent or the threat of such monetary loss due to its interpretation of the condition "giving proper cooperation" contained in its bonus system has not only deprived such retail store owners of bonus payments to which they were properly entitled but has further implemented and enforced the conditions, understandings and agreements to deal exclusively with corporate respondent as described in Paragraph Four hereof.

PAR. 6. The acts and practices of respondents as herein alleged are all to the injury and prejudice of competitors of respondent corporation and of the public; have a tendency to and have actually hindered and prevented competition in the sale of merchandise sold by

corporate respondent as described in Paragraph Two hereof including automobile supplies, electrical appliances, radios, light hardware, paints, sporting goods, ready-to-wear clothing, and other merchandise in commerce within the intent and meaning of the Federal Trade Commission Act; have a tendency to and have obstructed and restrained such commerce in such merchandise, and constitute unfair methods of competition in commerce within the intent and meaning, and in violation of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), and the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 15, 1948, issued and subsequently served its complaint in this proceeding upon respondent Gamble-Skogmo, Inc., a corporation, and respondents Bert C. Gamble, Philip W. Skogmo, M. O. Wei by, Samuel Miles and R. C. Teuscher, charging the respondents named in the complaint with having made sales and contracts for the sale of merchandise on the condition, agreement or understanding that the purchasers thereof should not use or deal in similar merchandise of a competitor or competitors of the respondent Gamble-Skogmo, Inc., in violation of the provisions of Section 3 of said Clayton Act, and with the use of unfair methods of competition in commerce in the distribution and sale of merchandise in violation of the provisions of the Federal Trade Commission Act. After the issuance of said complaint and the filing of joint answer thereto by all the parties named in the caption hereof except H. R. Baker, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission, theretofore designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding came on for final hearing before the Commission on the said complaint, answer, testimony and other evidence, recommended decision of the substitute hearing examiner, theretofore designated by the Commission to act in the place and stead of the original hearing examiner, respondents' exceptions to the recommended decision, briefs in support of and in opposition to the complaint, and oral arguments of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Gamble-Skogmo, Inc., is a corporation incorporated on May 25, 1928, under the laws of the State of Delaware, with its principal office and place of business at 15 North Eighth Street, Minneapolis, Minnesota. Respondent Bert C. Gamble is chairman of the board of the corporate respondent. Respondent M. O. Weiby, erroneously named in the complaint as M. O. Wieby, is a vice president of the corporate respondent, respondent R. C. Teuscher is treasurer, and respondent Samuel Miles, erroneously named in the complaint as Samuel Mills, served as secretary until his resignation on March 1, 1948. Philip W. Skogmo was president of corporate respondent from 1928 until his death on December 31, 1949, and H. R. Baker, named in the complaint also as a respondent herein, died on January 20, 1948, prior to the commencement of this proceeding. Respondents Bert C. Gamble, M. O. Weiby and R. C. Teuscher are members of the board of directors of the corporate respondent, as were Philip W. Skogmo and H. R. Baker prior to and until their deaths, and as was respondent Samuel Miles until the time of his resignation, and these individuals managed, directed and controlled the sales policies and business activities of the respondent corporation.

PAR. 2. The respondent corporation is engaged in the business of selling merchandise ranging from thimbles to farm tractors. The principal merchandise groups are: automotive, including accessories and parts, tires and tubes, batteries, and lubrication items; wearing apparel and other soft goods, including men's, women's and children's clothing and accessories, shoes, bedding, linens and draperies, and notions and piece goods; major appliances, including radios and accessories, refrigerators, washing machines, ironers, vacuum cleaners, electric ranges, and stoves and heaters; sporting goods, wheel goods, toys, and other items; building supplies and equipment, including materials, paints, and varnishes, hardware, and plumbing and heating equipment; housewares, including small electrical goods, crockery, glassware, furniture and floor coverings; farm equipment and parts, farm supplies, and lawn and garden equipment; and foods and confections. The merchandise handled by respondent company is purchased from approximately 300 manufacturers and suppliers with the exception of storage batteries, washing machines, some insulation and paints which products are manufactured by a wholly owned subsidiary, Solar Corporation. The number of items of merchandise handled by the corporate respondent in its hard lines and furniture department ranges from 7,300 to 12,000, which figures do not include the soft lines, such as men's, women's and children's clothing.

Findings

PAR. 3. Respondent Gamble-Skogmo, Inc., has at all times mentioned herein marketed its merchandise at retail through retail stores owned, directly or by a corporate affiliate, and operated by it or its affiliates, hereinafter referred to as "company-owned stores", and at wholesale to independently-owned retail stores, hereinafter referred to as "dealer stores".

Following the incorporation of the respondent company in 1928, it acquired from respondents Gamble and Skogmo title, through the exchange of stock or by purchase, to 55 retail stores located in five states. Prior to and during a part of the year 1946, the company acquired additional interests in stores, the business being operated generally as a single enterprise, but through a number of interrelated corporations, and in that year a general merger of the corporate interests was effected, together with the acquisition by merger of the business then conducted by a corporation known as Western Auto Supply Company, a California corporation, then operating retail stores and conducting wholesale operations in the far West. As a result of the mergers, the respondent corporation in 1948 owned and operated 484 retail stores located in 23 Middle Western, Northwestern and far Western States, and 35 located in 4 western Canadian provinces and Hawaii. The company-owned stores in the United States located east of the Rocky Mountains are operated principally under the name "Gambles"; in the far West, principally under the name "Western Auto Supply Company"; and in Canada, under the name "MacLeod's."

In 1933, the respondent company inaugurated a dealer store program under which a wholesale business was developed, which increased until in February 1948 it was selling merchandise at wholesale to 1,735 dealer stores in localities where the respondent company had no company-owned store. The states and the number of towns in which the stores were located are as follows:

<i>States:</i>	<i>Independently operated dealer stores</i>
Arizona.....	14
Arkansas.....	1
California.....	120
Colorado.....	59
Idaho.....	37
Illinois.....	81
Indiana.....	35
Iowa.....	146
Kansas.....	87
Michigan.....	107
Minnesota.....	260
Missouri.....	46
Montana.....	64
Nebraska.....	130
Nevada.....	2

Findings

48 F. T. C.

<i>States:</i>	<i>Independently operated dealer stores</i>
New Mexico.....	18
North Dakota.....	108
Ohio.....	14
Oregon.....	42
South Dakota.....	107
Texas.....	1
Utah.....	16
Washington.....	53
Wisconsin.....	164
Wyoming.....	23
Total.....	1,735

Of the dealer stores, 297 operating under the name "Western Auto Supply Company Dealers" in Arizona, California, Idaho, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming became dealers of respondent company on November 1, 1946, as a result of the merger in 1946 above referred to. Total sales of the respondent corporation through its company-owned retail stores and to the dealer stores were approximately \$145,000,000 in 1947. It is respondents' acts and practices in the conduct of their business with said dealer stores which are the subjects of this proceeding.

PAR. 4. Respondent Gamble-Skogmo, Inc., transports its merchandise or causes the same to be transported from the factories located in various states of the United States in which it is made, across state lines directly, in some instances, to the purchasers thereof or in other instances to the company-owned stores located in other and different states but usually to warehouses maintained by respondent company at Denver, Colo., Chicago, Ill., Marshalltown, Iowa, Salina, Kans., Minneapolis and Morehead, Minn., Billings, Mont., Fremont, Nebr., Sioux Falls, S. D., Portland, Oreg., Ogden, Utah, and Los Angeles and Stockton, Calif. From these warehouses, the merchandise is transported by respondent company to the company-owned stores and to the dealer stores, some of the dealer stores being located in states other than the states where its warehouses are located, and during its corporate existence respondent company has carried on a constant current of trade and commerce in said merchandise between and among the various states of the United States and the Territory of Hawaii.

PAR. 5. The respondent company in the conduct of its business has had, and now has, many competitors selling similar merchandise in interstate commerce at both the manufacturing and wholesale levels.

PAR. 6. The aggregate annual dollar volume of corporate respondent's sales of merchandise to the dealer stores, the number of dealer stores and the average dollar value of the merchandise sold each dealer store during the years 1941 to and including 1947 were as follows:

1396

Findings

Year	Aggregate sales to dealer stores	Number of units	Average sales
1941.....	\$20,475,082	1472	\$13,910
1942.....	19,349,175	1316	14,703
1943.....	18,240,918	1218	14,976
1944.....	19,602,530	1271	15,423
1945.....	25,605,160	1292	19,818
1946.....	47,348,889	1418	33,391
1947.....	61,071,225	1735	35,200

The substantial increase in the company's wholesale sales in the years 1946 and 1947 was due in part to the acquisition of the additional stores resulting from the reorganization in 1946, in part to the greater availability of merchandise which was not available during the war period and to a lesser extent to the enlargement of the lines of merchandise sold by respondent company and an increase in the dollar volume due to a raise in prices following the lifting of governmental price controls.

PAR. 7. The respondent corporation entered into contracts or had verbal agreements with each of the 1,735 dealer stores situated over an area of 25 states, 1,609 of which stores, upon the basis of census data for the year 1940, were located in hamlets and towns ranging from 5 to 5,000 in population. According to these data, approximately 40 of such stores were located in cities the populations of which exceeded 10,000. Between September 1939 and April 1946 all written contracts were on one form and continued in effect until cancelled, of which there are now 1,088 in force. During the period from April 1946 to March 1948, all contracts entered into by the corporate respondent with dealer stores were on another form which continued in force until cancelled, of which there are now 374 in force. Subsequent to March 1948, a slightly different form was used, of which there are now 97 in force. This respondent has dealt and now deals with those remaining dealer stores located in Colorado, Montana, Idaho and Utah, under verbal agreements but upon the same terms and conditions as it deals with those stores with which it has written contracts, the only difference being the absence of a written contract.

The form of contract used from April 1946 to March 1948 contains, among others, the following provisions:

That whereas, The Wholesaler for many years has been selling merchandise at retail through a large number of stores owned by the Wholesaler and known as Gamble Stores and in addition thereto the Wholesaler for many years has sold merchandise at Wholesale to individuals who own and operate their individual business under the name of Gamble Dealer Stores and through the sale of such merchandise and the establishment of its trade names and good will the Wholesaler has built up a large demand for its merchandise; and

Findings

48 F. T. C.

Whereas, The Retailer has established or will establish a store at-----
----- for the sale at retail of the merchandise of the kinds
offered by the Wholesaler or sources approved by the Wholesaler. In order
to secure the benefits of selling merchandise for which the Wholesaler has
created customer demand and good will, and of purchasing the same on the
advantageous basis granted to Retailers by the Wholesaler, the Retailer desires
to purchase merchandise from the Wholesaler for resale in said store, and
the Wholesaler is willing to sell such merchandise on the terms and conditions
herein stated.

Witnesseth, That in consideration of the agreements herein contained, the
parties hereto mutually agree as follows:

1. The Wholesaler agrees to sell to the Retailer, and the Retailer agrees to
purchase from the Wholesaler, at prices to be established from time to time by
the Wholesaler, such merchandise as the Wholesaler regularly carries for sale
in its own stores. The Wholesaler will use its best efforts to fill orders from the
Retailer, but shall not be liable to the Retailer for any loss or damage occasioned
by the Wholesaler's failure to deliver any merchandise ordered.

2. To enable the Wholesaler to determine the quantity of stock to be carried
on hand from time to time for filling orders of the Retailer, it is agreed that
unless otherwise authorized in writing, the Retailer shall order, and obtain, his
merchandise from the Wholesaler's Store or Warehouse at -----
and shall pay for the same cash on delivery. If merchandise is shipped direct
from other sources authorized by the Wholesaler, the Retailer will pay therefor
cash in advance before shipment.

* * *

7. The Wholesaler will furnish and the Retailer will use the display material,
advertising, and merchandising services including but not limited to the
following items and services for the purpose of assisting the Retailer in the
promotion and sale of merchandise purchased by the Retailer from the Whole-
saler; retail circulars; retail catalogs; retail radio advertising; retail news-
paper mat service; retail display material; national advertising display material;
Planning Guide; window photographs; display photographs; merchandise list-
ing sheets; wholesale catalogs; printed order forms; a stock control system;
bookkeeping forms; monthly report forms; a store manual; educational material;
a Company magazine; merchandising bulletins; store operation bulletins; the
personal assistance of a field representative; dealership certificate of authoriza-
tion; personal advisory service, either by mail or at the Home Office of the
Wholesaler on all problems of the Retailer or his business; local newspaper
advertising at the Wholesaler's expense in accordance with the schedules estab-
lished from time to time by the Wholesaler. All of the above to be paid for and
used by the Retailer in accordance with the prices and policies as established
by the Wholesaler from time to time, it being the intent of the Wholesaler to
provide to the Retailer all of the necessary advertising, counsel and assistance
to assist him in the profitable operation of his own business.

7a. The Wholesaler will pay the retailer an annual bonus out of the net profit,
if any, of the Wholesaler, in an amount to be determined by the Wholesaler in
accordance with its "Dealer Bonus Plan" as may be approved by its Board of
Directors from time to time.

The recitations of the preamble of the foregoing contract appear
also in the form adopted for use subsequent to March 1948 but are
absent from the form of contract first used. The first numbered para-

graph contained in the two forms employed later contains departures from the form employed in the earliest contracts. Among other differences, the mandatory provisions of the paragraphs numbered 4 and 7 are permissive under the form of contract earliest used and a provision similar to Paragraph 7 (a) is absent from both of the other forms.

PAR. 8. As construed by respondents in the general course and conduct of corporate respondent's business relations with dealer customers, these contractual accords have required the dealers to purchase from and deal in merchandise sold by or through the respondent company to the exclusion of merchandise sold by competitors. Compliance with respondent company's exclusive dealing policy has been insisted upon, bonuses have been paid to those dealer stores who complied literally or made substantial compliance therewith and bonuses have been refused to those who have not made substantial compliance. Stocks in dealer stores have been checked periodically by corporate respondent's representatives to discover violations and the presence of foreign merchandise duly reported to the corporate respondent. Respondent corporation, as a condition to continuing the sale of its merchandise to dealers, in instances has exacted promises that merchandise theretofore procured from other sources would be disposed of within a stated period and contracts with dealer stores have been cancelled by this respondent for failure on the part of such retail merchants to deal exclusively, or substantially so, in its merchandise.

PAR. 9. Among the acts and statements of respondents disclosed by the record which furnish bases for the foregoing conclusions are statements appearing in certain instructions disseminated to the dealer stores. Under date of October 13, 1934, approximately one year after the corporate respondent inaugurated its dealer-store program, it forwarded to the dealer stores a mimeographed paper entitled "Special Agency Store Memo to Agency Stores" admonishing the dealer stores in substance that loyalty to the corporate respondent's program necessitated the purchase of its merchandise exclusively, one paragraph being as follows:

BIG NEWS—We are going to reward those who have the proper loyalty by giving a bonus at the end of the year based on purchases for the entire year, but this will be done only to those who carry out our program from this date on in 100% manner. Conflicting merchandise now in stock must be disposed of immediately. Any violations will necessitate the cancellation of contract and the forfeiture of the bonus.

The policy of the respondent corporation in its dealings with the dealer stores, as set forth in the document above referred to, was reaffirmed in a bulletin entitled "LOYALTY", dated December 24, 1938,

Findings

48 F. T. C.

and sent to all dealer stores. Provision for payment, under certain conditions, of the bonus appears in 374 existing contracts although no payments have been in fact made since 1946. The bonus paid consisted of an amount equal to $\frac{3}{4}$ of 1% of the total annual purchases by the dealer, except for one year when it was 1%. The terms and conditions upon which a dealer store was eligible to receive the bonus is stated in the respondent company's announcement of the policy. Failure of the dealer stores to substantially comply with the plan and purchase all, or substantially all, merchandise from the respondent company resulted in denial of the bonus in many cases with resultant financial loss.

Expressions of company policy also occurred at dealers' meetings. During the period covered in the testimony, respondent company called and held meetings of the representatives of the dealer stores at convenient places in various parts of the United States in which the dealer stores were located, at some of which its president was present and at all or substantially all of which it had a representative who addressed the dealers and who advised them, either expressly or by implication, that they were required to purchase all of their merchandise from respondent company.

Respondents' policies were implemented by instructions to corporate respondent's suppliers. In a form letter dated April 4, 1947, sent to some 300 manufacturers from whom the respondent company purchased merchandise, the manufacturers were advised, in part, as follows:

Validation of orders: Any orders received direct from Gamble Stores Authorized Dealers should be mailed to this office without honoring them. We cannot be responsible for orders placed by Authorized Dealers direct to a source of supply. Our plan of operation requires Dealers to place orders either with the Warehouse or with the Minneapolis Home Office.

Price Quotations: No price quotation should be given out to Gamble Stores, Associate Gamble Stores, Gamble Stores Authorized Dealer or Dealer Warehouses. Any request for such information should be forwarded to Gamble-Skogmo, Inc., 700 North Washington Ave., Minneapolis, Minn.

PAR. 10. Adherence or loyalty to corporate respondent's exclusive dealing policies was continuously investigated. Applicants for contracts to purchase at wholesale the merchandise sold by the respondent company were required to fill out a questionnaire on a form furnished by the respondent company headed "APPLICATION FOR GAMBLE AUTHORIZED DEALER STORE." Among the inquiries contained in such application was: "Do you agree to conduct a Gamble Dealer Store according to the proven policies of the company?" Following the applicant's answers to the questions under the heading "INFORMATION TO BE FILLED IN COMPLETELY

BY GAMBLE REPRESENTATIVE", the representative was required to answer, among others, the following questions: "Have you discussed the plan completely and read the contract thoroughly with applicant?" "Do you believe that he will be cooperative and conform to the various policies that have been factors in the success of our company?"

The respondent corporation has established zones for the dealer stores, each zone comprising from twenty to thirty dealer stores. It maintains representatives known as "Superintendents", who visit the dealer stores and, among other things, interpret the company's policies to the dealers. It also maintains about 60 representatives known as "Zone Superintendents" or "field men", who operate in the separate zones and periodically visit the dealer stores. Until within a few months before the complaint in this proceeding issued, the field men worked under the direction of the head of the dealer department in the home office. A change then was made whereby a part of the field men worked under, and reported to, an intermediary known as a "Wholesale Sales Manager." The field men were required to and did check the stock in the dealer stores to ascertain whether competitive merchandise was present, and, if any such merchandise was found, made written report to the home office or an intermediate office.

When visiting the stores of dealers, the field men have threatened dealers with cancellation of their contracts unless competitive merchandise was promptly disposed of and future purchases confined to the products of corporate respondent. The record clearly demonstrates that dealers' desire to handle competitive merchandise has been the reason for cancellation by corporate respondent. Dealing in, or the announced intention to deal in, competitive merchandise has resulted in cancellation by respondents of corporate respondent's contracts with a substantial number of dealers. A number of its letters of cancellation have assigned as reasons therefor the fact that the merchants have been "desirous of representing others in the sale of merchandise." In one instance, corporate respondent's termination of the contract was preceded by less than a year and a half by another letter commending the dealer for the manner in which he was operating the business, and in another case moreover, some time prior to cancellation, the merchant received a certificate designating him as an outstanding dealer and was otherwise commended by representatives of corporate respondent for his competence.

PAR. 11. Many of corporate respondent's dealers have adhered to and complied with the conditions, understandings and agreements imposed by it with respect to exclusive dealing. In instances where dealers have bought from sources other than corporate respondent,

Findings

48 F. T. C.

its insistence on exclusive dealing has caused the greater volume of purchases to be restricted to it. Many independent jobbers and manufacturers distributing similar merchandise in commerce have been unable to sell their products in substantial quantities to Gamble dealers and dealers in declining to purchase from representatives of competing distributors have assigned as reason therefor the fact that they were required by their contractual arrangement or corporate respondent's policy to limit their dealings to it.

Respondents contend that the acts and practices here under consideration are not unlawful for the reason, among others, that it should be concluded that they affect only an insignificant segment of the total volume of business conducted at wholesale in the entire area of 25 states where dealer stores purchasing from corporate respondent are located. In this connection, it is urged that that portion of the business derived by corporate respondent from its dealers in an area of 19 states in which the majority of such dealer stores are situated constitutes approximately $\frac{3}{4}$ of 1% of the aggregate volume of wholesale sales by all manufacturers and distributors there made in the categories of merchandise handled by it. Assuming without, however, deciding that this percentage accurately reflects corporate respondent's share of that volume in the aggregate, it is apparent that this circumstance serves in no way to portray the competitive situation prevailing in those localities where the dealer stores are situated and in which any influence stemming from respondents' practices would be directly exerted.

Omitting from consideration entirely corporate respondent's commercial status incident to its operation in the continental United States of 484 company-owned stores, it is shown by the record that this company's annual sales at wholesale to dealers ranged during the period of 1941 through 1947 from a low of approximately \$18,000,000 to slightly over \$61,000,000. Average sales to dealer stores in 1947 represented \$35,200, and accentuating the significance of this fact is the circumstance that over 1,600 of such business places were located in hamlets and towns ranging from 5 to 5,000 in population, and that the cities where many others were located did not greatly exceed this larger figure. That established outlets for merchandise in communities of this size ordinarily are restricted in number is obvious. The Commission is of the opinion that controlling here, in appraising the impact of respondents' practices on competition, is the circumstance that corporate respondent's share of the business is a consequential and substantial one in the numerous communities where it distributes and sells merchandise to dealer stores and that the area of commerce foreclosed to competitors of corporate respondent by the acts and practices engaged in is a substantial one.

1396

Order

PAR. 12. The effect of respondents' sales as aforesaid and contracts for sale may be and has been to substantially lessen competition in the line of commerce in which the respondent corporation is engaged and has a tendency to create a monopoly in respondent corporation in the commerce aforesaid of automotive supplies, electrical appliances, radios, light hardware, sporting goods, paints, ready-to-wear clothing, and other goods, wares and merchandise in the sale of which the corporate respondent has engaged. Respondents' acts and practices have had a tendency to and have actually hindered and prevented competition in the sale in interstate commerce of those categories of merchandise sold by corporate respondent, and have had a tendency to restrain and obstruct such commerce therein.

CONCLUSION

The acts and practices of respondents Gamble-Skogmo, Inc., Bert C. Gamble, M. O. Weiby, Samuel Miles, and R. C. Teuscher, as hereinabove set out, constitute a violation of Section 3 of the Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act) and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 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 joint answer thereto, testimony and other evidence taken before a hearing examiner of the Commission, theretofore duly designated by it, the recommended decision of the substitute hearing examiner duly designated to act in the place and stead of the original hearing examiner, and the exceptions to the recommended decision filed by respondents, briefs in support of and in opposition to the allegations of the complaint, and oral argument; and the Commission having made its findings as to the facts and its conclusion that the respondents there designated have violated the provisions of Section 3 of that Act of the Congress of the United States, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), and the provisions of Section 5 of the Federal Trade Commission Act:

I. *It is ordered*, That respondents Gamble-Skogmo, Inc., a corporation and its officers, and respondents Bert C. Gamble, M. O. Weiby, R. C. Teuscher, and Samuel Miles, and said respondents' agents, repre-

sentatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

(a) Selling or making any contracts or agreements for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use or deal in or sell the merchandise of a competitor or competitors of corporate respondent.

(b) Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing sales contract which condition, agreement or understanding is to the effect that the purchaser of said products shall not use or deal in the merchandise of a competitor or competitors of the corporate respondent.

II. *It is further ordered*, That respondent Gamble-Skogmo, Inc., a corporation, and its officers, and respondents Bert C. Gamble, M. O. Weiby, R. C. Teuscher, and Samuel Miles, 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 merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Selling or making any contract or agreement for sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use or deal in or sell the merchandise of a competitor or competitors of the corporate respondent.

(b) Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing sales contract or agreement which condition, agreement or understanding is to the effect that the purchaser of said products shall not use or deal in the merchandise of a competitor or competitors of the corporate respondent.

(c) Offering a cash bonus or any other inducement to corporate respondent's independent dealers or other purchasers or prospective purchasers on the condition, agreement or understanding that such independent dealers or other purchasers or prospective purchasers shall not use or deal in the merchandise of a competitor or competitors of the corporate respondent.

(d) Cancelling, or directly or by implication threatening the cancellation of, any contract or franchise or selling agreement with corporate respondent's independent dealers or other customers for the sale of said products because of the failure or refusal of such pur-

1396

Order

chasers to purchase or deal exclusively in the merchandise sold and distributed by the corporate respondent.

(e) The performance of any act of intimidation or coercion either through statements, oral or written, made by representatives of corporate respondent at independent dealer field meetings or during the course of calls made upon independent dealers at their stores or at any other place, or the use of any system or practice, plan, or method of doing business, for the purpose or having the effect of intimidating or coercing such corporate respondent's independent dealers or other purchasers to purchase their merchandise requirements exclusively from corporate respondent.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Philip W. Skogmo and H. R. Baker, both deceased.

It is further ordered, That respondents shall, within sixty (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.

IN THE MATTER OF
ENCYCLOPAEDIA BRITANNICA, INC.

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

Docket 5384. Complaint, Sept. 28, 1945—Decision, June 12, 1952

Where a corporation engaged in the interstate sale and distribution of its "Britannica Junior" encyclopedia under its "15 for 1" plan, pursuant to which its sales agents contacted the superintendent or principal of a school to obtain the names of pupils and their parents and called upon the latter to sell them the books, and the school received a set of said encyclopedia for each fifteen sets sold, or proportionate credit or some other book such as an atlas or dictionary if fewer than fifteen were sold—

- (a) Erroneously and misleadingly represented through the use of the expression "School Advancement Program", that the plan was designed primarily for the benefit and improvement of the school; the facts being that while the schools derived incidental benefit through obtaining the books, the program was essentially a sales plan or campaign for the sale of books to the public;
- (b) Unwarrantedly and misleadingly represented in a substantial number of instances, through statements of its sales agents, that the local school or the superintendent or some other official was sponsoring the sale of the books; when the school's only connection with the matter was that it had supplied the names and addresses of the pupils and parents;
- (c) Erroneously and misleadingly represented through its agents that the books were essential or indispensable to the proper preparation by pupils of their homework; and
- (d) Erroneously and misleadingly represented, as aforesaid, that the price at which the books were offered under said sales plan were special or reduced, applicable for a limited time only; when in fact they were the regular prices;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to their books, and thereby induce its purchase thereof:

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 interlocutory orders of the Commission, no requirement exists that hearing examiners subsequently adopt, verbatim, in the preparation of initial decisions, such language relevant to the matters to be stated as may have appeared in the Commission's own orders.

As respects exceptions by counsel supporting the complaint in the aforesaid matter, which challenged, among other things, the hearing examiner's use of various words and terms such as "erroneous", "inherently erroneous and misleading", and "unwarranted and misleading", to characterize certain of the representations which occurred during respondent's house-to-house sales presentations to the public, counsel urging that they should instead be characterized as false, so that any findings which might issue would not be susceptible to an interpretation that there were but a few misrepresen-