

IN THE MATTER OF
RADIATOR SPECIALTY COMPANY ET AL.

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

*Docket 5790. Complaint, June 27, 1950—Decision, Dec. 4, 1952*¹

Where a corporation and its two officers, engaged in the interstate sale and distribution of a gasoline additive designated as "Nu-Power" and "Nu-Power Upper Cylinder Lubricant"; and also of its "Nu-Power Tune-Up Solvent", supplied with a "Vacuumatic Injector"; in advertisements and pamphlets, leaflets, and copies of testimonial letters and on labels on containers—

- (a) Falsely represented that "Nu-Power Upper Cylinder Lubricant", used as directed, would increase mileage obtained from gasoline and oil, add motor power and improve engine performance, create faster pick-up, and cause smoother motor idling;
- (b) Falsely represented that it would keep spark plugs cleaner, free sticky valves, reduce gas knocks and ping, supply requisite lubrication for valves, valve stems, upper cylinders and piston rings; and keep valves and rings free;
- (c) Falsely represented that it would lengthen the life of spark plug and valves, reduce friction and prevent wear, protect metal surfaces, cause quicker starting, and increase compression; and
- (d) Falsely represented that it was a special combination of heat-resisting oils and would prevent wear and scuffing of cylinder walls;

With tendency and capacity to deceive a substantial portion of the purchasing public into the erroneous belief that such representations were true and thereby induce its purchase of their said product:

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

As respects a formal stipulation executed by respondent Blumenthal, president of the corporate respondent, on May 12, 1944, and accepted by the Commission, namely, as Stipulation No. 03215, 38 F. T. C. 819, in which respondents admitted, among other things, that the fuel value or energy of gasoline was not affected by the addition of "Nu-Power", that tests had not conclusively demonstrated that a 25% increase in mileage might be obtained by its use, that it would not keep spark plugs clean or eliminate knocks from motor ping; and agreed, in the event of a future complaint and formal proceedings that such stipulation might be received as evidence of the prior use by respondent corporation of the acts and practices referred to: such stipulation was relevant and was received in evidence.

¹ "Decision", etc. announcing failure of appeal, and fruition of initial decision, dated June 9, 1953.

In the aforesaid connection, despite respondents' assertions that there had been no violations of said stipulation, partly because of the change in the formula of "Lubrizol", the asserted effective solvent ingredient of "Nu-Power", the weight of the testimony was to the contrary and to the effect that "Nu-Power" would have none of the qualities or virtues ascribed to it no matter what quantity or formula of "Lubrizol" was used in its composition.

In said general connection, it was realized that the proceeding was not brought specifically to enforce the terms of the stipulation, which was a link in the chain of evidence, pertinent to be considered in the premises and to receive the weight which was its due, especially concerning the admissions against interest therein contained.

In considering the test made by four experts of the Bureau of Standards, who testified at the instance of the Commission—without interest in the outcome of the proceeding, insofar as known to or observed by the examiner and the four witnesses who testified for respondents, the examiner noted that the latter were all officers or employees of the corporation which made the aforesaid patented product "Lubrizol"—the main and active ingredient of respondents' "Nu-Power"—and from which, as its sole supplier, respondent corporation had for years purchased the same, and the interest of respondents' witnesses in retaining the business of respondents' customer, as reflected in their testimony.

In further appraising the testimony of the experts of the Bureau and that of the witnesses testifying for respondents, involving tests which were highly technical in character and, as respects the latter, the absence of any allowance, in connection with various infinitesimal measurements, for many imponderables and for normal range of experimental errors; it was concluded that even under the selected conditions, reduced gasoline consumption was not significant, and that remaining conclusions were likewise not sufficient, on the basis of actual tests or otherwise, to justify to the public the broad, unequivocal and unqualified claims set out in behalf of the product.

As respects the charges of the complaint with regard to respondents' other product, namely its "Nu-Power Tune Up Solvent": there was a total failure of proof, no tests were made, and inconclusive expressions of opinion wholly failed to substantiate the same; and while the product was composed essentially of the same or similar active ingredients as the "Nu-Power Upper Cylinder Lubricant", the formulae differed as did the method of application and use.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Mr. Maurice A. Weinstein, of Charlotte, N. C., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that Radiator Specialty Company, a corporation, and I. D. Blumenthal, Herman Blumenthal, and Edward F. Morgan, individually and as officers of

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Radiator Specialty Company, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Radiator Specialty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina and respondents I. D. Blumenthal, Herman Blumenthal and Edward F. Morgan, individuals, are President, Vice-President and Secretary, respectively, thereof. The individual respondents have dominant control of the advertising policies and business activities of said corporate respondent, and all of said respondents have cooperated with each other and have acted in concert in doing the acts and things hereinafter alleged. Respondents' office and principal place of business is located at 1700-1900 Dowd Road, Charlotte, North Carolina.

PAR. 2. Respondents are now and have been for more than a year last past engaged in the sale and distribution of a solution, for mixing or blending with gasoline when gasoline is to be used as a motor fuel, called Nu-Power and also called Nu-Power Upper Cylinder Lubricant, and another solution called Nu-Power Tune-Up Solvent with which is supplied a device called a Vacuumatic Injector.

The respondents cause, and have caused, each of their said products, when sold, to be shipped from their factory or said place of business in the State of North Carolina to the purchasers thereof at their respective residences located in various other States of the United States and in the District of Columbia. The respondents maintain, and at all times mentioned herein have maintained, a course of trade in each of said products, in commerce, among and between the various States of the United States and in the District of Columbia. Respondents' volume of business in each of said products in commerce is and has been substantial.

PAR. 3. (a) Respondents' directions for the use of Nu-Power are to add 4 ounces thereof to each 10 gallons or less of gasoline; to "Pour in Tank—It Mixes Itself." Directions for Nu-Power Upper Cylinder Lubricant are to "use regularly in proportion of 4 ounces to each 5 gallons of gasoline * * * particularly while breaking in a new car. If car is in excellent condition, use 4 ounces to each 10 gallons of gasoline."

The formula for Nu-Power is the same as the formula for Nu-Power Upper Cylinder Lubricant; viz, "Latus 22, 308 lbs., and Lubrizol 506, 82 lbs."

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(b) Respondents' directions for applying Nu-Power Tune-Up Solvent with the Vacuumatic Injector are as follows:

Just attach the Injector to the carburetor throat, remove the spark plug and in its place insert the correct size Adaptor. (Three Adaptors are furnished to fit all spark plug openings). With the motor running at smooth idling speed, an accurately measured amount (2 ounces) of Nu-Power Tune-Up Solvent is slowly atomized, full strength, directly into the cylinder. Each cylinder is treated individually, thereby insuring results not possible with any other method. This treatment should be given every 5,000 miles.

The formula for Nu-Power Tune-Up Solvent is: "Drip Oil, 5 lbs.; Latus 22, 84 lbs.; Lubrizol, 10 lbs.; Shell Penetrating Oil, 1 lb.; and Black Dye."

PAR. 4. In the course and conduct of their said business and for the purpose of inducing the purchase of their said product called Nu-Power and Nu-Power Upper Cylinder Lubricant respectively, hereinafter referred to as Nu-Power, and their product Nu-Power Tune-Up Solvent, in commerce, respondents have made many statements and representations relative to their value and effectiveness by means of advertisements in the form of pamphlets, leaflets, copies of testimonial letters, and labels on the containers thereof. Among and typical of the statements and representations contained in said advertisements concerning the said product Nu-Power are the following:

Nu-Power * * * INCREASES Gasoline Mileage and Improves Engine Performance.

Create Faster Pick-Up.

Develop Better Pull.

Keep Spark Plugs Cleaner.

Free Sticky Valves.

Reduce Gas Knocks and "Ping".

Achieve Greater Economy of Operation.

INCREASE MILEAGE—PEP—POWER.

Nu-Power UPPER CYLINDER LUBRICANT * * * For A SMOOTHER, MORE POWERFUL MOTOR * * * with increased gasoline and oil mileage.

INSTANT LUBRICATION FOR VALVES, * * * valve stems, upper cylinders and piston rings—parts that motor oils can't reach.

Keeps Valves and Rings Free.

Lengthens Spark Plug and Valve Life.

Reduces Friction * * * Prevents Wear.

Protects Metal Surfaces.

Smoother Idling.

Improves Pick-Up.

Quicker Cold-Weather Starting.

Increases Power and Compression.

* * * assures easy starting. * * *

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Nu-Power Upper Cylinder Lubricant is a special combination of heat resisting oils * * *.

* * * prevents wear and scuffing of cylinder walls * * *.

Among and typical of the statements and representations contained in said advertisements concerning Nu-Power TUNE-UP SOLVENT are the following:

Continually Raises Compression.

Insures Quicker Starting.

PAR. 5. By the use of the statements and representations hereinabove set forth and others similar thereto, not specifically set out herein, respondents have represented and now represent, directly or indirectly, that their product Nu-Power, when used as directed, increases the mileage obtained from gasoline and oil; causes a motor to be more powerful and improves engine performance; creates faster pick-up; causes smoother idling; keeps spark plugs cleaner; frees sticky valves; reduces gas knocks and ping; supplies the necessary lubrication for valves, valve stems, upper cylinders and piston rings, which are parts that oils do not reach; keeps valves and rings free; lengthens the life of spark plugs and valves; reduces friction and prevents wear; protects metal surfaces; causes quicker starting; increases compression; is a special combination of heat-resisting oils and prevents wear and scuffing of cylinder walls.

Through the use of the aforesaid statements and representations and others similar thereto, not specifically set out herein, concerning their product Nu-Power Tune-Up Solvent, respondents have represented, and now represent, that when used as directed, said product raises compression and insures quicker starting.

PAR. 6. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, the use of the product Nu-Power, as directed, or otherwise, will not increase the mileage obtained from oil or gas, will not increase the power or improve the engine performance or result in faster pick-up or smoother idling to any significant degree. In the ordinary sense spark plugs become fouled because of deposits accumulated in the operation of the engine and sticky valves are also ordinarily caused by these deposits. This product will not prevent the accumulation of such deposits and accordingly will not keep the spark plugs cleaner nor free sticky valves caused by such deposits. Its use will not reduce gas knocks or pings. Valves, valve stems, upper cylinders and piston rings are adequately lubricated by the oiling systems of automobile engines and the additional use of this product will not result in any benefit to such parts. Said product will not keep the valves and rings free nor will it lengthen the life of

spark plugs or valves. Friction and resulting wear on engine parts are caused by the rubbing of moving parts. This product added to gasoline enters the combustion chamber and is practically all burned during the power stroke of the engine. It consequently would have little effect as a lubricant in reducing friction and preventing wear. Nu-Power is not effective in protecting metal surfaces. The ease of starting an engine is ordinarily determined by the volatility range of the gasoline. The volatility of Nu-Power is such that it can have no effect upon the starting quality of gasoline and consequently its use will not cause engines to start easier or quicker. The heat resisting properties of the oils in this product are not as great as ordinary lubricating oil and from the standpoint of its lubricating value is not as great as lubricating oil. Scuffing and unusual wear of the cylinder walls are usually not caused by lack of lubrication and when they occur are generally caused by poor materials and methods of manufacture. Under these conditions this product would not be of value in preventing wear and scuffing of the cylinder walls.

The product Nu-Power Tune-Up Solvent, used as directed or otherwise, will not raise compression or insure quicker starting.

PAR. 7. The aforesaid false, misleading and deceptive statements and representations made by respondents have had and now have the tendency and capacity to deceive and mislead a substantial portion of the public into the erroneous belief that such representations were and are true and to induce a substantial portion of the public to purchase respondents' said products because of such erroneous belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to "Decision of the Commission and Order to File Report of Compliance," dated June 9, 1953,¹ the initial decision in the instant

¹ Said Decision of the Commission, follows:

The initial decision of the hearing examiner having been filed in this proceeding on May 2, 1952, and counsel for respondents having seasonably filed a notice of respondents' intention to appeal therefrom and having filed in addition a motion for an extension of time within which to file an appeal brief; and

The Commission, on November 7, 1952, having duly entered an order the effect of which was to extend to December 3, 1952, the time within which an appeal brief may have been filed; and

No appeal brief having been filed within the time so provided and hence no matters having been presented for determination by the Commission:

Therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the initial decision of the hearing examiner, a copy of which is hereto attached, did on December 4, 1952, become the decision of the Commission; and, accordingly:

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matter of hearing examiner James A. Purcell, as set out as follows, became on December 4, 1952 the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 27, 1950, issued and subsequently served its complaint in this proceeding upon respondents Radiator Specialty Company, a corporation, and I. D. Blumenthal, Herman Blumenthal and Edward F. Morgan, individually and as officers of the corporate respondent, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of joint answers by the corporate respondent and two of the individual respondents, I. D. Blumenthal and Herman Blumenthal, hearings were held at which testimony and other evidence in support of the complaint and in opposition to the allegations of said complaint were introduced before the above-named Hearing Examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel in support of the complaint and counsel for the respondents, oral argument thereon not having been requested; and said Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Radiator Specialty Company is a corporation, existing and doing business by virtue of the laws of the State of North Carolina; respondents I. D. Blumenthal and Herman Blumenthal, individuals, are President and Vice-President, respectively, of the corporate respondent, and as such have dominant control of the advertising policies and business activities of the said corporate respondent. All of said respondents have cooperated with each other and acted in concert in doing the acts and things hereinafter

It is ordered, That the respondent, Radiator Specialty Company, a corporation, and the respondents, I. D. Blumenthal and Herman Blumenthal 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 the order contained in said decision.

found. Respondent's office and principal place of business is located at 1700-1900 Dowd Road, city of Charlotte, North Carolina. Named as a respondent in the complaint was one Edward F. Morgan, individually and as Secretary of the corporate respondent, but approximately one year prior to issuance thereof he severed his connection as Secretary and one J. J. Duckworth now serves in his place and stead. Therefore, the order herein will provide for dismissal of the complaint as to said Morgan and, while J. J. Duckworth will not be mentioned *eo nomine* therein, said order will be effective as to all officers, present and future, of the corporate respondent.

PAR. 2. Respondents are now and have been for more than a year last past engaged in the sale and distribution of a solution for mixing or blending with gasoline, when gasoline is to be used as a motor fuel, designated as "Nu-Power" and also as "Nu-Power Upper Cylinder Lubricant," as also another solution called "Nu-Power Tune-Up Solvent" with which is supplied a device called a "Vacumatic Injector," causing said products to be shipped from their place of business in the State of North Carolina to the purchasers thereof in various other States of the United States and in the District of Columbia, maintaining at all times herein mentioned a constant course of trade in commerce between the several States.

PAR. 3 (a) Respondents' directions for the use of Nu-Power are to add 4 ounces thereof to each 10 gallons or less of gasoline; to "Pour in Tank—It Mixes Itself." Directions for Nu-Power Upper Cylinder Lubricant are to "use regularly in proportion of 4 ounces to each 5 gallons of gasoline . . . particularly while breaking in a new car. If car is in excellent condition, use 4 ounces to each 10 gallons of gasoline."

The formula for Nu-Power is the same as the formula for Nu-Power Upper Cylinder Lubricant; viz, "Latus 22, 308 lbs., and Lubrizol 506, 82 lbs."

Prior to the year 1947 "Lubrizol 506" was changed to "Lubrizol 509" now currently in use, 30% or 40% thereof being the active ingredient described as a halogenated hydrocarbon, the remainder being a diluent vehicle of petroleum oil or solvent. "Lubrizol 509" comprises about 20% of Nu-Power and thus the active ingredient of "Lubrizol 509" constitutes approximately 8% of the Nu-Power product.

(b) Respondents' directions for applying Nu-Power Tune-Up Solvent with the Vacumatic Injector are as follows:

Just attach the Injector to the carburetor throat, remove the spark plug and in its place insert the correct size Adaptor. (Three Adaptors are furnished to fit all spark plug openings.) With the motor running at smooth idling speed, an accurately measured amount (2 ounces) of Nu-Power Tune-Up Solvent is

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slowly atomized, full strength, directly into the cylinder. Each cylinder is treated individually, thereby insuring results not possible with any other method. This treatment should be given every 5,000 miles.

The formula for Nu-Power Tune-Up Solvent is: "Drip Oil, 5 lbs.; Latus 22, 84 lbs.; Lubrizol, 10 lbs.; Shell Penetrating Oil, 1 lb.; and Black Dye."

PAR. 4. In the course and conduct of their said business and to promote and induce the purchase of their Nu-Power and Nu-Power Upper Cylinder Lubricant in commerce, respondents have, by means of advertisements, pamphlets, leaflets, copies of testimonial letters and labels on product containers, made many statements and representations concerning these products, typical of which are the following:

Nu-Power * * * INCREASES Gasoline Mileage and Improves Engine Performance.

Creates Faster Pick-Up.

Develop Better Pull.

Keep Spark Plugs Cleaner.

Free Sticky Valves.

Reduce Gas Knocks and "Ping".

Achieve Greater Economy of Operation.

INCREASE MILEAGE—PEP—POWER.

Nu-Power UPPER CYLINDER LUBRICANT * * * For a SMOOTHER, MORE POWERFUL MOTOR * * * with increased gasoline and oil mileage.

INSTANT LUBRICATION FOR VALVES, * * * valve stems, upper cylinders and piston rings—parts that motor oils can't reach.

Keeps Valves and Rings Free.

Lengthens Spark Plug and Valve Life.

Reduces Friction * * * Prevents Wear.

Protects Metal Surfaces.

Smoother Idling.

Improves Pick-Up.

Quicker Cold-Weather Starting.

Increases Power and Compression.

* * * assures easy starting. * * *.

Nu-Power Upper Cylinder Lubricant is a special combination of heat resisting oils * * *.

* * * prevents wear and scuffing of cylinder walls * * *.

Among and typical of the statements and representations contained in said advertisements concerning Nu-Power TUNE-UP SOLVENT are the following:

Continually Raises Compression.

Insures Quicker Starting.

PAR. 5. By use of the foregoing statements respondents represent that Nu-Power and Nu-Power Upper Cylinder Lubricant, when used as directed, will: Increase the mileage obtained from gasoline and oil; add motor power and improve engine performance; create faster pick-

up; cause smoother motor idling; keep spark plugs cleaner; free sticky valves; reduce gas knocks and ping; supply requisite lubrication for valves, valve stems, upper cylinders and piston rings; keep valves and rings free; lengthen the life of spark plugs and valves; reduce friction and prevent wear; protect metal surfaces; cause quicker starting; increase compression; is a special combination of heat-resisting oils, and will prevent wear and scuffing of cylinder walls.

Referring to Nu-Power Tune-Up Solvent, respondents represent that such product, when used as directed, raises motor compression and insures quicker starting.

PAR. 6. At the outset of considering the testimony herein had concerning the truth or falsity of respondents' representations, the record shows that on May 12, 1944, a formal stipulation was tendered by the corporate respondent, executed by respondent I. D. Blumenthal, its president, accepted by this Commission and designated "Stipulation No. 03215," wherein respondents admit use of the following representations concerning their product "Nu-Power" manufactured according to the formula then in use:

* * * builds up your gasoline * * *.

Do not confuse Nu-Power with tune-up oils. It is a concentrate that increases mileage as much as 25% regardless of the quality of gas used.

Keeps spark plugs clean.

Nu-Power Eliminates Gas Knocks and "Ping."

Respondents therein admitted, among other things, that the fuel value or energy of gasoline is not affected by the addition of Nu-Power; that tests have not conclusively demonstrated that a 25% increase in mileage may be obtained by use of Nu-Power; that Nu-Power will not keep spark plugs clean or eliminate knocks or motor "ping," and agreed, upon the basis of their admissions, to forthwith cease and desist from use of the representations hereinabove recited and further:

* * * in the event the Commission should issue its complaint and institute formal proceedings against Radiator Specialty Company as provided herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence of the prior use by Radiator Specialty Company of the acts and practices herein referred to.

The Hearing Examiner ruled that the stipulation was relevant and received same in evidence. Respondents asserted there had been no violation of the stipulation, partly because of the change in formula of "Lubrizol," the asserted effective solvent ingredient of Nu-Power Upper Cylinder Lubricant as now in use, from "Lubrizol" as used in Nu-Power at the time the stipulation was executed.

(NOTE.—"Lubrizol" is a patented chemical product, rights to which are owned by the Lubrizol Corporation. In the past ten years its

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formula has been changed two or three times by increasing the chemical constituents thereof to improve its solvent properties and, when such changes are effected, the name or designation of the product is changed. We deal here with "Lubrizol 506" as charged in the complaint, although "Lubrizol 509" is the designation used to indicate the product currently in use. However, the chemical constituents of the product have remained the same throughout its existence, the only changes being quantitative increases of such chemicals.)

Despite respondents' assertions that there have been no violations of said stipulation, the weight of the testimony is to the contrary and that Nu-Power would have none of the qualities or virtues ascribed it no matter what quantity or formula of "Lubrizol" was used in its composition, and, in fact, the claims would be false and misleading even though Nu-Power were used in its pure and unadulterated state, let alone as diluted in proportion of four ounces to each five gallons of gasoline, as recommended.

It is realized that this proceeding is not brought specifically for enforcing the terms of the stipulation or that the stipulation, without more, is sufficient to sustain all of the charges of the complaint. The stipulation is a link in the chain of evidence which is pertinent to be considered herein and to receive the weight which is its due, especially concerning the admissions against interest therein contained.

Reviewing the testimony and exhibits received during the course of the hearings:

Nu-Power and Nu-Power Upper Cylinder Lubricant are identical and the terms are used interchangeably herein.

Testimony was adduced in support of the charges of the complaint through experts from the U. S. Bureau of Standards and in opposition through several experts on behalf of the respondents. Such testimony, as to each group of experts, was based upon actual tests of Nu-Power and upon their independent expert knowledge. The tests were highly technical in character, and to conduct an exhaustive and detailed analysis thereof in this decision would entail unwarranted length and serve no good purpose, so therefore only the pertinent testimony and conclusions expressed by the witnesses will be considered and the examiner's appraisal thereof expressed.

These two groups of witnesses were made up of the following: The four witnesses who testified at the instance of the Commission were all experts in the employ of the U. S. Bureau of Standards who were not, so far as known to or observed by the examiner, in any wise interested in the outcome of this proceeding. The four witnesses who testified for respondents were all officers or employees of the Lubrizol Corporation and were, respectively, its Vice-President, its Chief Chemist, its

Head of Mechanical Testing Department and its Personnel Director in Charge of Sales Department. When it is borne in mind that Lubrizol Corporation is now, and has been from the time Nu-Power was first marketed, the sole supplier of the main and active ingredient of Nu-Power, to wit, "Lubrizol 506" and "Lubrizol 509," it is apparent that all of respondents' witnesses are, to a greater or lesser extent, interested that Lubrizol Corporation retain the business of its customer, Radiator Specialty Company, and to this end render such aid as was possible by attempting to substantiate the respondents' representations. As a fact, Lubrizol Corporation appeared to regard the charges of the complaint as a direct reflection on the product "Lubrizol," so much so that during his testimony on one occasion the examiner found it necessary to caution an officer of Lubrizol Corporation that it was not here on trial and that he was injecting himself and his company into the proceedings, to which admonition respondents' counsel tacitly agreed by observing:

I am sure Mr. Winch does not realize. His feeling is, of course, that the manufacturers of the main component of our product feel like they are (on trial).

While it is not found that any of respondents' witnesses have exceeded the bounds of propriety in giving their testimony, the examiner avails of his discretion to consider all of the surrounding circumstances in arriving at his decision.

Jesse T. Duck testified that he has a Bachelor of Science degree from Union University, Jackson, Tennessee, and that he has taken a number of graduate courses in automotive engineering, including the basic engineering course in automotive engines, courses in fuel, combustion. He is an automotive engineer. He has been engaged in testing fuels and engine components for the Bureau of Standards for eight years and previous to that, had been in other test work for the Bureau of Standards five years.

Nu-Power Upper Cylinder Lubricant was tested by this witness to determine its effect, if any, on power, gasoline mileage, acceleration and factors related thereto. The engine that he used to make these tests was a Ford V-8. It was coupled directly to an electric dynamometer, a device for measuring the torque and power output of an engine. A load was placed on the engine electrically, the amount of the load measured by means of a scale and, by use of appropriate formula, it was possible to transform its scale readings into power. The engine set up was also equipped with a volumetric fuel-measuring device by which the amount of fuel used during any specified time was measured.

He measured the power of the engine before any Nu-Power was added to the fuel and made tests for speed and load on the dynamom-

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eter adjusted to simulate road operation, at various speeds at 30, 40, 50, and 60 miles per hour, and measured the fuel consumption by use of appropriate calculations. These readings were translated into the equivalent mileage of a car on the road.

After completing the tests on the engine not using Nu-Power in the fuel, he repeated the tests, using Nu-Power as directed on the bottle of Nu-Power, four ounces to ten gallons, and the directions on the bottle of Nu-Power Upper Cylinder Lubricant, four ounces to five gallons, and in these tests, he used three ounces to five gallons, which was half-way between the most and the least called for in the directions.

Upon completion of this step, the engine was run four days at the speed and load that was equivalent to 40 miles per hour and again repeated the test in which Nu-Power was used in the fuel. This test was run with six ounces to ten gallons. Using another sample of Nu-Power Upper Cylinder Lubricant, he used four ounces to ten gallons.

Before any tests were made it was determined that the engine was operating under steady conditions, that is, it was warmed up, so that it would give consistent results.

Horsepower was computed from the dynamometer scale readings and also specific fuel consumption was determined by use of appropriate formulas. The power of the engine was the same at each speed with and without Nu-Power added to the fuel.

These tests failed to disclose increased power or increased miles per gallon of fuel caused by the addition of Nu-Power over fuel without Nu-Power.

The tests further demonstrated that use of Nu-Power would not cause a quicker pickup; that there was no apparent difference in the idling characteristics of the engine with or without Nu-Power; that Nu-Power did not show an increase in the mileage obtained from gasoline when it was added thereto.

The witness considered, and so testified, that the use of but one engine for the making of comparative tests is recognized as acceptable procedure with respect to the results secured and testified to, and does not believe that additional tests could be performed which would show more conclusive results.

As a result the tests conducted by the Bureau of Standards experts showed:

- (1) That power of the engine was not increased and the miles per gallon remained the same with or without the use of Nu-Power;
- (2) Pick-up of an engine is dependent entirely upon power, *ergo*, increased pick-up could be occasioned only by increased power; that the use of Nu-Power does not increase power and therefore cannot impart a quicker pick-up or improve the pick-up of an engine in anywise;

(3) The engine used in the tests was a laboratory motor in good mechanical condition which had been run some 40,000 miles. The particular test, being to determine the motor's idling characteristics, disclosed that it idled smoothly both with and without Nu-Power, the addition of the latter showing no apparent difference.

(4) No economy was shown by the use of Nu-Power when used according to directions supplied by respondents.

(5) There was no apparent difference in the smoothness of operation during the tests.

(6) The tests disclosed no apparent difficulty in starting the motor, no difficulties in this particular were encountered and there were no differences in starting either with or without the use of Nu-Power. The celerity with which a motor starts is determined principally by fuel properties and proper vaporization thereof to engender an explosive mixture, a condition frequently adversely encountered in cold weather. The boiling point of the components of Nu-Power is so low that it will not evaporate in a cold engine and therefore is not an aid in starting. In fact, given an engine in good condition with clean upper cylinders, good fuel, carburetion, and hot spark, nothing additional is required to insure prompt starting.

(7) Speaking generally on the subject of motor lubrication: Although there are different systems in use, the majority have the same characteristics, and oil reaches the valves, valve stems, piston rings and upper cylinders. Oil from the crankcase lubricates the cylinder walls and oil vapor lubricates the lower parts of the valve stems, although some systems provide for direct forced lubrication of valve stems, but this is the exception. In the opinion of the expert so testifying it would be a disadvantage to introduce lubricant into the upper cylinder of a motor, and he knows of no manufacturer of automobiles who recommends this procedure.

(8) On the subject of carbon deposits: In the opinion of the witness who ran the tests at the Bureau of Standards, carbon deposits are of very minor importance in the average automobile. During the tests, which were of sufficient duration, said the witness, to accord Nu-Power a fair test on this phase, the engine accumulated a considerable deposit of carbon despite the fact Nu-Power was used as directed throughout the tests, and because of this had to operate the engine at high load to retrieve the power it had at the start of the tests. In other words, it was necessary occasionally to run the engine at high speeds to clear away carbon deposits and thus increase engine power. Witness further stated his opinion to be that, to the best of his knowledge and experience, no carbon deposits, whether new or old, can be removed by any solvent, which general statement applies to Nu-Power;

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that once the gum, which binds the carbon deposit to any surface, becomes hardened and baked on by high temperatures, solvents are ineffective; that, referring to gum deposits, the average motor is not significantly affected thereby, the reason being that present-day gasoline is treated with gum inhibitors which retard formation of gum in sufficient quantity and concentration to cause valves or valve stems to stick, excepting only under unusual circumstances.

An examination and close analysis of the testimony and evidence offered on behalf of respondents (in connection wherewith attention is invited to comments appearing herein on page 7, first paragraph), it is found that the weight to be accorded thereto, insofar as supporting the respondents' representations is concerned, is negligible. Quite apart from the apparent partiality of these witnesses to respondents, the testimony as to results of tests, and testimony of the experts generally, aside from tests, is wholly inadequate to overcome the convincing array of evidence to the contrary. The record discloses that the main tests relied upon by respondents comprized such considerations as "Piston Ring Gap Increase," "Piston Ring Weight Loss," "Weight of Deposits on Valve," "Bearing Weight Loss," "Oil Consumption," "Weight of Deposits on Pistons," "Weight of Deposits in Combustion Chambers" and the like. All such were carried on under optimum laboratory conditions and such measurements as ".005 inch" were considered in piston ring gaps, ".031 gms." in piston ring weight loss, ".527 gms." in weight of deposits on valves and other infinitesimal measurements, to determine percentage of variation in reduction or increase of engine characteristics and conditions, without allowance for many imponderables and allowance for normal range of experimental errors, would appear to be delving into minutiae. Even under the selected conditions and protocol of these experiments the reduced gasoline consumption was not significant, nor were any of the remaining conclusions expressed on the basis of actual tests, or otherwise, sufficient to justify to the public such broad, unequivocal and unqualified claims as hereinabove set out.

The statements and representations hereinabove set forth in Paragraph Five are false, misleading and deceptive. It is found that the use of Nu-Power as directed or otherwise will not increase the mileage obtained from oil or gas; will not increase the power or improve engine performance; will not effect faster pick-up or smoother idling to any significant degree; will not prevent accumulation of deposits which foul spark plugs and will not free sticky valves caused by such deposits; will not reduce gas knocks or pings; that engine valves, valve stems, upper cylinders and piston rings are adequately lubri-

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cated by the standard built-in oiling systems of automobile engines and Nu-Power will prove of no aid or benefit in rectifying any defects or deficiencies in said oiling systems; that said product will not keep the valves and rings free nor extend the life of spark plugs or valves. Inasmuch as Nu-Power, when added to gasoline, as directed, upon entering the combustion chamber is practically all burned during the power stroke of the engine, such product would have no significant effect as a lubricant to reduce friction and prevent wear; that the ease or celerity with which an engine starts is determined by the volatility range of the gasoline used and Nu-Power, having no ability to alter this volatility, hence has no effect upon ease of starting; that because the heat resisting properties of the oils contained in this product are not as great as ordinary lubricating oils, from the standpoint of its lubricating value Nu-Power is not as good a lubricant as ordinary lubricating oil, hence will not prevent scuffing and unusual wear of cylinder walls.

PAR. 7. Respecting the product Nu-Power Tune-Up Solvent, the representations concerning same and the charge of their falsity: There is a total failure of proof of these charges—no tests were made, and the inconclusive expressions of opinion thereon wholly fail to substantiate the charges. Assertions to the contrary may be urged to the effect that this Solvent compound, being composed essentially of the same or similar active ingredients as Nu-Power Upper Cylinder Lubricant, the same findings as to the latter should apply to the former. However, it is pointed out that the formulae of the two products are different as to proportional ingredients, in addition to which the Lubricant is added to the gasoline so that it reaches the combustion chamber in a highly diluted state, while the Solvent is mechanically introduced in its natural, full strength, directly into the combustion chamber of individual cylinders through the spark plug aperture.

PAR. 8. The aforesaid false, misleading and deceptive statements and representations made by respondents have had and now have the tendency and capacity to deceive and mislead a substantial portion of the public into the erroneous belief that such representations were and are true, and to induce a substantial portion of the public to purchase respondents' said products because of such erroneous belief.

CONCLUSION

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

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ORDER

It is ordered, That the respondent Radiator Specialty Company, a corporation, and its officers, I. D. Blumenthal and Herman Blumenthal, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their product designated "Nu-Power" or "Nu-Power Upper Cylinder Lubricant," or any product of substantially similar composition, whether sold under the same or any other name in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly representing:

1. That the use of their product "Nu-Power" or "Nu-Power Upper Cylinder Lubricant," used as directed or otherwise, will increase the mileage obtained from gasoline or oil;

2. That the use thereof will increase the power or improve the engine performance to any significant degree, or result in faster pick-up, or cause smoother idling;

3. That the use thereof will keep spark plugs cleaner or will free sticky valves caused by the residuum or by-products of combustion;

4. That the use thereof will reduce gas knocks and pings;

5. That said product supplies the necessary lubrication for valves, valve stems, upper cylinders and piston rings, or that the lubrication requirements of all or any of the parts named are not adequately supplied by the ordinary, conventional lubricating systems in general use;

6. That the use of said product keeps valves and rings free of gum, carbon or other deposits;

7. That the use of said product will lengthen the life of spark plugs or valves;

8. That the use of said product will reduce friction and prevent wear;

9. That the use of said product "protects metal surfaces";

10. That its use will cause quicker starting of automotive engines or increase the compression thereof;

11. That said product is composed of heat resisting oils different from, or more effective than, ordinary lubricating oil;

12. That the use of said product will prevent wear or scuffing of cylinder walls.

It is further ordered, That the charges of the complaint relating to respondents' product designated "Nu-Power Tune-Up Solvent," because of the absence of reliable, probative and substantial evidence to sustain such charges, be, and they hereby are, dismissed without

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prejudice to the right of the Commission to institute further proceedings, should future facts warrant.

It is further ordered, That the charges of the complaint, insofar as they affect the named respondent, Edward F. Morgan, be, and they hereby are, dismissed.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent, Radiator Specialty Company, a corporation, and the respondents, I. D. Blumenthal and Herman Blumenthal 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 the order contained in said decision [as required by said decision and order of June 9, 1953].

IN THE MATTER OF
HYMAN KATZ ET AL. DOING BUSINESS AS PENN UP-
HOLSTERING COMPANY

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

Docket 5993. Complaint, May 21, 1952—Decision, Dec. 5, 1952

Where two partners doing as interstate business of more than \$1,000,000 annually in the reupholstering of furniture and the furnishing of material therefor; in advertising through radio and television continuities, and in newspapers of general circulation—

- (a) Falsely represented that their work was expertly done, notwithstanding the fact that furniture reupholstered by them was returned to the owners in a soiled condition, with hammer marks and split framework where tacks had been carelessly driven, with finish not renewed, with thread stitching of a color which did not blend with the upholstering materials, and slip covers that did not fit;
- (b) Falsely represented that materials of superior quality were used in said work and that furniture reupholstered by them would be in a better condition than when new; the facts being that "highest quality materials" and "finest workmanship" were available to their customers only at substantially higher prices than those mentioned in their advertising; the quality of materials used varied with the prices and the uniformity of quality which the public might expect from their representations was lacking;
- (c) Represented that the filling they used in reupholstering furniture would not become lumpy or lose its shape; the facts being that a latex-covered sheet filling advertised was not used in all their work; other fillings did become lumpy, and the cushions in which they were used did become out of shape and uncomfortable; and their advertising representations in the aforesaid respects were not limited to cushions in which the special sheet filling was used;
- (d) Represented that the charge for foam rubber cushions was no greater than for cushions filled with any other material; the facts being that while they did furnish foam rubber cushions at no extra cost for a brief period, their said representations as to the availability and use of such cushions at no extra cost were general in nature and without any time limitation;
- (e) Represented that their materials and workmanship were guaranteed; the facts being that while in some cases the guarantee was so worded as to be clearly applicable to the foam rubber sheet filling or the steel webbing used, many of their advertisements contained no such clear limitation or modification, and they did not comply with the ordinary interpretation, i. e., that the guarantee was applicable to all their workmanship and materials; and
- (f) Falsely represented that they gave away slip covers and rugs "free" with certain advertised orders;

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With tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous belief that such representations were true and with effect of thereby causing it to purchase reupholstering and the materials used in connection therewith:

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.

As respects cases in which customers' furniture, after having been reupholstered by respondents, was returned to them in a soiled condition with hammer marks, etc., and respondents' insistence that such cases were isolated instances: they were sufficient to show an absence of finest workmanship which respondents advertised and to belie the representation that furniture reupholstered by them was in a better condition than when new.

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

Mr. Jesse D. Kash for the Commission.

Mr. K. Michael Jeffrey, of Baltimore, Md., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hyman Katz and Louis Ginsberg, individually and as copartners doing business as Penn Upholstering Company, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Hyman Katz and Louis Ginsberg are copartners doing business as the Penn Upholstering Company with their office and principal place of business located at 1103 North Washington Street, Baltimore, Maryland.

PAR. 2. The respondents are now and for several years last past have been engaged in the business, among other things, of selling materials for reupholstering and in reupholstering furniture for consumers in various States of the United States and the District of Columbia. All of respondents' work is done at the respondents' factory in the State of Maryland, and when particular work is completed, it is shipped to the consumer thereof located in other States of the United States and the District of Columbia.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said business in commerce between and among the various States of the United States and in the District of

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Columbia. Their volume of trade in said business in such commerce is and has been substantial.

PAR. 3. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their reupholstering and the materials therefor, respondents have made and are now making certain statements and representations concerning the quality, value and nature of said materials and the reupholstering work done by them by means of advertisements in newspapers, radio and television continuities and other advertising media of general circulation in various States of the United States and the District of Columbia. Among and typical of said statements, representations and claims, but not all inclusive, are the following:

And when I think that all this expert workmanship and fine quality material costs as little as \$89 * * *.

Penn can still give you the finest workmanship * * * highest grade materials * * * for just \$89.

The filling * * * will not lose its shape * * * get lumpy * * * because IT'S CUT IN ONE PIECE TO FIT YOUR FURNITURE * * *.

Even after many years of rough use * * * your furniture will not sag.

* * * Will not stretch, sag or break down.

Delivered to you * * * BETTER THAN NEW.

* * * NEW FOAM RUBBER CUSHIONS * * * AT NO EXTRA CHARGE.

Other companies charge from \$50 to \$60 more for foam rubber cushions * * * but only Penn gives you foam rubber cushions at no extra charge.

* * * Penn gives you a three year written guarantee * * * believe me * * * It's iron clad. If anything doesn't meet with your approval * * * Penn will take care of it at no extra cost.

* * * the entire workmanship is guaranteed unconditionally for three years.

* * * washable slip covers that you receive * * * ABSOLUTELY FREE.

* * * Penn Upholstering Company will give FREE * * * a * * * rug.

PAR. 4. Through the use of the aforesaid statements and others of the same import but not specifically set out herein, respondents represented: that their work was expertly done and materials of superior quality were used in said work; that the filling used by them in reupholstering furniture would not become lumpy or lose its shape; that furniture reupholstered by respondents would not sag after years of hard use and would be in a better condition than when new; that the charge for foam rubber cushions was no greater than the charge for cushions filled with any other type of material that their materials and workmanship were guaranteed satisfactory to the customer and that respondents gave away slip covers and rugs "free."

PAR. 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact, in many instances, the work done by respondents was extremely poor, the materials used were of inferior quality, the filling used soon lost its shape and became lumpy, and the

furniture frequently sagged a short time after delivery. Not only was the furniture reupholstered by respondents not better than new but in many cases was returned in worse condition than when received by them. Foam rubber cushions were not furnished for the same price as other materials but on the contrary, a substantially higher price was charged. In many instances the materials and the workmanship were not satisfactory to purchasers and respondents refused to make satisfactory adjustments. Slip covers or rugs were not furnished free. In truth and in fact, it was necessary to pay for the upholstering of three pieces of furniture before the purchaser was entitled to receive the slip covers or a rug and the cost thereof was included in the price charged for the material and work.

PAR. 6. The use by respondents of the foregoing false, misleading and deceptive statements and representations, has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to enter into contracts with respondents for the purchase of, and to purchase, reupholstering of furniture and the materials used in connection therewith.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rule of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated December 5, 1952, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission; Commissioners Carretta and Mason dissenting as to paragraph 6 of the initial decision order as set forth on page 678, following the "Order to File Report on Compliance".

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 21, 1952, issued and subsequently served its complaint upon the respondents Hyman H. Katz, referred to in the complaint as Hyman Katz, and Louis Ginsberg, individually and as copartners doing business as Penn Upholstering

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Company, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, a hearing was held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested, and said hearing examiner having duly considered the record herein finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondents Hyman H. Katz and Louis Ginsberg are copartners doing business as the Penn Upholstering Company, with their office and principal place of business located at 803 North Washington Street, Baltimore, Maryland.

PAR. 2. Respondents are now and since January 1949 have been engaged in the business, among other things, of reupholstering furniture and of furnishing the materials used in connection therewith. The volume of their business has amounted to more than one million dollars annually of which 80 or 85 percent has been with customers located in Maryland and the balance of 15 or 20 percent with customers located in Virginia and in the District of Columbia. The reupholstering work is done at respondents' place of business in Baltimore, Maryland.

Furniture which is reupholstered for customers living in Virginia and in the District of Columbia is picked up by respondents at the homes of such customers, transported to respondents' place of business in Maryland and when finished returned by respondents from Maryland to those customers at their respective places of abode in Virginia and the District of Columbia.

PAR. 3. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said business in commerce between and among various States of the United States and in the District of Columbia. Their volume of trade in said business in commerce is and has been substantial.

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their reupholstering and the materials therefor, respondents have made, and are now making, certain statements and representations concerning the quality, value and nature of said materials and the reupholstering work done by them by means of radio and television continuities over broadcasting facilities whose field of effectiveness extends beyond the boundaries of the State of Maryland, and by advertisements in newspapers of general circulation in various States of the United States and in the District of Columbia. Among and typical of said statements, representations and claims are the following:

For a limited time ONLY * * * Penn can still give you the finest workmanship * * * and highest grade materials in Reupholstering for just \$89.

ONLY PENN gives you NEW FOAM RUBBER CUSHIONS * * * AT NO EXTRA CHARGE! Penn uses genuine Rubber Tulatex filling. The filling that will not lose its shape * * * get lumpy * * * because IT'S CUT IN ONE PIECE TO FIT YOUR FURNITURE.

Other companies ask from \$59 to \$60 more for foam rubber cushions * * * but only Penn gives you foam rubber cushions at no extra charge.

Every Penn Upholstering job includes use of genuine foam rubber oversprings. NO EXTRA CHARGE for this valuable feature.

Liberal Terms! Lifetime Guarantee.

Your furniture is rebuilt with patented lifetime guaranteed resilient steel bottom webbing. Even after many years of rough use * * * your furniture will not sag.

Penn gives you a three year written guarantee. And believe me * * * it's iron-clad. If anything doesn't meet with your approval for the next three years * * * Penn will take care of it at no extra charge.

This is your great chance to have your suite made over so that it's better than new.

This set of beautiful * * * adjustable * * * washable slip covers comes to you * * * ABSOLUTELY FREE * * * with your job.

FREE! A beautiful 27' x 48' wool-face AXMINSTER RUG with every three piece order.

PAR. 5. Through the use of the aforesaid statements and others of the same import but not specifically set out herein, respondents have represented that their work is expertly done; that materials of superior quality are used in said work; that the filling used by them in reupholstering furniture will not become lumpy or lose its shape; that furniture reupholstered by respondents will be in a better condition than when new and will not sag after years of hard use; that the charge for foam rubber cushions is no greater than the charge for cushions filled with any other type of material; that their materials and workmanship are guaranteed to customers; and that respondents give away slipcovers and rugs "free."

PAR. 6. The aforesaid representations, excepting that the furniture reupholstered by respondents will not sag after many years of hard use, are false, misleading and deceptive.

There is no reliable, probative, and substantial evidence in this proceeding to substantiate the charge that furniture reupholstered by respondent sagged after any period of years or after any kind of usage.

As to workmanship, the record shows that furniture upholstered by respondent has been returned to its owners—respondents' customers—in a soiled condition, with hammer marks and split framework where tacks have been carelessly driven, with finish not renewed, with the thread used in stitching of a color which did not blend with the upholstering materials, with lumpy, hard cushions, and with slip covers that did not fit. Respondents urge that these were isolated instances but they are sufficient to show an absence of the "finest workmanship" which respondents advertise and belie the representation that furniture reupholstered by the respondents is in a better condition than when new.

"Highest grade materials" are available to respondents' customers but at substantially higher prices than those mentioned in their advertising. As is reasonably to be expected the quality of materials used varies with the price and hence there is not the uniformity of quality the public might expect from the representations made by respondents.

Foam rubber cushions were not furnished by respondents at no extra cost except for a brief period of time although the representations as to the availability and use of foam rubber cushions at no extra cost have been general in nature and without any time limitation.

Respondents have advertised use of Tulatex, a latex covered sheet filling which, when cut to fit the cushions in which it is placed, lays flat and does not become lumpy. However, this type of filling is not used in all of respondents' work and the other fillings do become lumpy and the cushions in which they are used become out of shape and uncomfortable. Respondents' advertisements with respect to cushions not becoming lumpy and not losing their shape have not been limited to those in which the special sheet filling is used.

It is urged that the guarantee mentioned in their advertising refers specifically to the foam rubber, sheet filling or steel webbing used by respondents. In some advertisements the guarantee was worded so as to be clearly applicable to one or more of these particular materials but in many of the advertisements there was no such clear limitation or modification and the ordinary interpretation would be that the guarantee is applicable to all phases of the workmanship and mate-

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rials furnished by respondents. Such a general and complete guarantee was not complied with by the respondents.

Respondents have advertised that slipcovers and rugs are given "free" with certain upholstering orders. The use of the term "free" to designate articles of merchandise made available to customers, presumably without extra cost, in connection with certain upholstering jobs has been discontinued permanently according to statements made by the respondents but, in view of the past activities of respondents and their active advertising campaigns, it cannot be taken for granted that sometime in the future they may not desire to resume this type of representation.

PAR. 7. The use by respondents of the aforementioned false, misleading and deceptive statements and representations, has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and has caused and now causes a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to enter into contracts with respondents for the purchase of, and to purchase, reupholstering of furniture and the materials used in connection therewith.

CONCLUSION

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

ORDER

It is ordered, That the respondents, Hyman H. Katz and Louis Ginsberg, individually and as copartners doing business as Penn Upholstering Company or under any other name, their representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation of orders for the reupholstering of furniture shipped or transported in commerce, as "commerce" is defined in the Federal Trade Commission Act, and in the distribution of respondents' upholstering materials in such commerce, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondents' reupholstering is expertly done when such is not the fact or that materials of inferior quality are of superior quality, or misrepresenting, in any manner, the quality of materials or workmanship afforded by respondents;

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2. Representing, directly or by implication, that the filling used by respondents will not become lumpy or lose its shape unless filling is used which has qualities and characteristics which will in all cases and under all circumstances prevent it from becoming lumpy or losing its shape;

3. Representing, directly or by implication, that furniture reupholstered by respondents will be in better condition than when new;

4. Representing, directly or by implication, that foam rubber cushions are furnished at the same price as other materials, unless such is the fact;

5. Representing, directly or by implication, that the materials or workmanship afforded by respondents in their reupholstering of furniture are guaranteed satisfactory to the purchaser unless respondents in all instances comply with such representations; or misrepresenting in any manner the nature of respondents' guarantee of workmanship or materials;

6. Using the word "free," or any other word or words of similar import or meaning, to designate, describe or refer to articles of merchandise which are not in truth and in fact a gift or gratuity or are not given to the recipient thereof without requiring the purchase of other merchandise, or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondents.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein 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 the order to cease and desist [as required by said declaratory decision and order of December 5, 1952].

DISSENT OF COMMISSIONERS CARRETTA AND MASON

As noted in the "Decision of the Commission and Order to File Report of Compliance" Commissioner Carretta, Commissioner Mason joining, dissents only as to paragraph 6 of the Order which is part of the Initial Decision of the hearing examiner herein because said paragraph orders the respondents to cease and desist from using the word "free," in advertising, to designate articles of merchandise which are given without additional charge to customers of the respondents when orders are placed with the respondents. The cost of the "free" gift herein was not included in the cost of the reupholstering job to be done by the respondents, and the public was not deceived in any way.

Syllabus

IN THE MATTER OF

WARD S. AND JESSIE A. HILL TRADING AS GEPPERT
STUDIOS

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

Docket 5180. Complaint, June 16, 1944—Decision, Dec. 12, 1952

Where two partners engaged in the production, sale and distribution of plain and colored photographic enlargements; in conducting, in connection therewith, a mail-order business by means of advertisements in which they stated that, to get acquainted with new customers, they would beautifully enlarge free a snapshot or negative to make an 8 x 10 picture, that information on hand-tinting in natural colors would be sent immediately, and that the customer's picture would be returned with the free enlargement;

In follow-up material which they mailed the customer, following receipt of his name and address along with the print or negative submitted for free enlargement, which included a return postal card for ordering a hand-tinted, framed second enlargement of the print or negative submitted—

- (a) Implied that they would not send the free enlargement or return the original picture unless the hand-tinted enlargement was ordered through statements that they could not find the original picture (often of great sentimental value to the customer) without the order number on the postal card order blank, that they were waiting to recheck the address, that nothing could be sent out until the customer was heard from, and that pictures were not kept after they were finished and might be destroyed if the customer delayed sending in the postal card order blank;

With tendency and capacity through such coercive practices to cause the customer to order a hand-tinted enlargement which he would not otherwise have ordered through fear of loss of his original valued picture (which, failing to receive such order, they returned together with the promised free enlargement after a twenty-day period);

- (b) Represented that their black-and-white 8 x 10 inch enlargement of any submitted picture would be beautifully done in the sense that it would be a sharp, clear reproduction of the subject matter originally photographed;

The facts being that the said black-and-white enlargements were made without retouching, spotting, or any other treatment other than enlargement by photographic process, in the course of which, lacking an excellent original, any defects were magnified and made more apparent than they were in the original; many of the photographs submitted were defective and could not be beautifully enlarged without retouching, spotting, or other treatment by skilled persons; and certain of the enlargements produced by them from such photographs were blurred and indistinct and not beautifully enlarged by any standards;