

and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Commissioners Anderson and MacIntyre dissenting.

IN THE MATTER OF
MAGNAFLO COMPANY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 8422. Complaint, June 2, 1961—Decision, Dec. 26, 1963

Order requiring Youngstown, Ohio, manufacturers of a battery additive known as "Lifetime Charge" designed to be used in both new and used lead acid storage batteries, to cease making a variety of false claims for their product in advertising in newspapers, trade publications and sales literature and on labels, cartons and other advertising material—including misrepresentations concerning its effectiveness, guarantees, demand and use, endorsements, government approval and tests, as in the order below set forth; and to cease using the trade name "Lifetime Charge" for their said product.

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

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Complaint

Trade Commission, having reason to believe that Magnaflo Company, Inc., a corporation, and Webster B. Harpman, individually and as an officer of said 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 Magnaflo Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 4132 West Market Street, Youngstown, Ohio.

Respondent Webster B. Harpman is President of said corporation and his address is the same as that of the corporate respondent. Said respondent Webster B. Harpman formulates, directs and controls the acts, policies and practices of said corporate respondent, including those hereinafter alleged.

PAR. 2. Respondents are now, and for the past several years have been, engaged in the manufacture, sale and distribution of a battery additive known as "Lifetime Charge", designed to be used in both new and used lead acid storage batteries. Its chief constituents are magnesium sulphate and potassium sulphate.

Respondents cause, and have caused, said product to be shipped from their place of business in Youngstown, Ohio to dealers and others, including members of the public, located in the various States of the United States and in the District of Columbia.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business therein is, and has been, substantial.

PAR. 3.* In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their product, respondents have made numerous statements and claims concerning said product in advertisements inserted in newspapers and trade publications, in sales literature, circulars, testimonials, letters, and on labels, cartons, and other advertising material circulated and distributed generally throughout the United States. Among and typical, but not all inclusive, of such claims and representations are the following:

1. The Guaranteed Battery Additive. The original guaranteed.
2. Is Backed by Ohio Farmers Indemnity Co.

*Reported as amended by order of Jan. 18, 1962.

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3. Two million users of Lifetime Charge have found it will do everything we say. Proved by a million car owners.

4. One of the Nation's leading battery makers agrees BATTERY LIFE CAN BE INCREASED WITH A CHEMICAL ADDITIVE

5. Get original Lifetime Charge today and drive confidently all year long.

6. "Lifetime Charge" gives a permanent charge to battery.

7. U.S. Government Approved. Now it's Lifetime Charge in Fort Knox

8. Lifetime-Charged Batteries hold charge Three Times longer in Ford Plant

9. Free Winter Start Insurance You start or we pay

PAR. 4. Through the use of the foregoing statements and claims, and others of similar import not specifically set out herein, respondents represented, directly or by implication, that:

1. Said product is unconditionally guaranteed.

2. Respondents' guarantee of performance is backed by the Ohio Farmers Indemnity Company.

3. Respondents' product has been used by one million to two million car owners.

4. A battery manufacturer agrees that battery life can be increased with a chemical additive.

5. Respondents' product will enable the purchaser thereof to operate his car for a year without battery trouble.

6. Respondents' product will permanently charge a battery.

7. Respondents' product is United States Government approved.

8. Batteries treated with respondents' product have been found by the Ford Motor Company to hold a charge three times longer than normal.

9. Respondents insure winter starting or will pay the cost of starting purchasers' automobiles.

PAR. 5. The aforesaid statements and representations were false, misleading and deceptive. In truth and in fact:

1. The guarantee provided was and is subject to certain conditions and limitations not disclosed in the advertisements in which such guarantee representations were made.

2. Respondents' guarantee of performance or "insurance" against failure to start is not backed by the Ohio Farmers Indemnity Company as respondents' insurance policy with this company is in fact a vehicle and product liability policy only.

3. Respondents' product has not been used and proved by one to two million car owners.

4. No battery manufacturer has agreed that the life of a battery can be increased by the addition of a chemical additive to the battery.

5. Respondents' product will not insure the purchaser thereof a year's operation of his automobile without battery trouble.

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6. Respondents' product will not charge a battery.

7. Respondents' product has not been approved by the United States Government.

8. No test has been made by the Ford Motor Company which found that respondents' product caused a battery to hold a charge longer than normal.

9. The purchaser of respondents' product will not be insured winter starting of his car as respondents will pay for the starting of the car only once.

PAR. 6* Through the use of the trade name "Lifetime Charge" respondents have represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged. The name "Lifetime Charge" is false and deceptive. Among other things, said product will not of itself charge or recharge a battery, and it is not a lifetime charge.

PAR. 7. The use by respondents of the foregoing false, misleading and deceptive claims, statements and representations has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such claims, statements and representations were, and are, true, and to induce the public to purchase substantial quantities of respondents' said product as a result of such erroneous and mistaken 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.

Mr. John W. Brookfield, Jr. supporting the complaint.

Mr. Albert A. Carretta, of *Carretta & Counihan*, for respondent *Magnaflo Company, Inc.*

Mr. Webster B. Harpman, pro se.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

MAY 24, 1962

The main respondent here is Magnaflo Company, Inc. The other respondent is Webster B. Harpman, its president up to the time of the issuance of the complaint, June 2, 1961, and apparently up to June 13, 1961. In resigning he apparently sold his ownership stock interest to the present principals of the corporation.

*Reported as amended by order of Feb. 20, 1962.

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THE PROCEEDINGS

The complaint herein alleges that respondents have been engaged in the manufacture and sale in commerce of a battery additive known as Lifetime Charge.

Paragraph THREE of the complaint sets forth the alleged representations—numbered, by amendment, as 1 to 9—made by respondents in conducting their business. The representations are, or were, that the additive—(1) is guaranteed, (2) is backed by an insurance company, (3) is approved by millions of users, (4) is in effect approved by a leading battery maker, (5) will result in year-long driving without battery trouble, (6) will charge and permanently charge a battery, (7) is Government approved, (8) has been found by a Ford Plant to hold a charge three times the normal time, and (9) is backed by free winter start insurance.

Paragraph FIVE of the complaint alleges that said representations 1 to 9 are false and misleading and states the alleged actual facts.

Respondents eventually stipulated that these representations are misleading, except as to 9, and agreed to a cease and desist order, with the limitation, however, as to 9 that the order applied only if respondents do not pay for starts as often as necessary.

Paragraph SIX, as amended by leave of the hearing examiner, alleges that by their use of the trade name Lifetime Charge respondents have represented that the additive will keep a battery charged for life, that actually it will not charge a battery nor is it a lifetime charge, and that the name is therefore false and misleading. The use of this trade name, by itself, which respondents finally stipulated "may be deceptive", or its use with other wording, which respondents contend cures any deception, presents the chief issue in this case. The trade name Lifetime Charge, and the other wording, chief of which is Doubles Battery Life, appear on the front of the paper box (RX 1) in which the additive has been packaged.

The first answer to be interposed herein was that by respondent Harpman, who is also an attorney. A motion was also made by him to dismiss the complaint, issued June 2, 1961, on the ground that he was not connected with the corporation when served, but the motion was denied.

The next answer to be filed was that of the corporate respondent appearing without attorney although the answer is fairly comprehensive. Finally, pursuant to leave, an amended answer was served in behalf of the corporation by Albert A. Carretta, Esq., attorney of record here. Both answers in behalf of the corporation deny responsibility for acts prior to June 13, 1961.

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Various issues raised by the answers in this case need not be discussed in view of the stipulation thereafter made herein.

A prehearing conference, with 154 pages of minutes, brought about consents and stipulations on the record, noted in a prehearing order of February 19, 1962, practically dispensing with the hearing, and consenting to a cease and desist order as to representations 1-9, as well as agreeing that the name Lifetime Charge "may be deceptive". As to Lifetime Charge it was stipulated that the question is whether Doubles Battery Life and other accompanying wording removes the possible deception in the trade name. The oral stipulation made on the record at the prehearing conference is quoted on p. 2 of the prehearing order.

Counsel on both sides are to be commended for their cooperation in avoiding what could have been an unduly protracted hearing with extensive expert as well as consumer testimony.

Stipulation—Re 1 to 9

As contemplated in the prehearing proceedings a formal stipulation, dated March 1, 1962, was executed by counsel supporting the complaint, and by Albert A. Carretta, Esq., for respondent corporation, as well as by respondent Harpman individually. The stipulation sets forth the facts much the same as alleged in the complaint, except that it makes explicit that respondent Harpman was president of the corporation, controlling its practices, and owning its stock, only up to June 13, 1961.

The stipulation admits that respondents in conducting their business made the representations 1 to 9 as alleged, although "some have not been used since 1959"; that representations 1 to 9 have, in general, the meaning severally attributed to them by the complaint, and that Commission witnesses could adequately establish the facts allegedly contradicting said representations.

As to 9, representing that respondents insure "winter starting" — although, as alleged in the complaint, the actual guarantee insured starting the car only once — it is stipulated that respondents in some instances did pay more than once, and it is further stipulated that the new officers of the corporate respondent do not intend to limit the number of starts to one.

It is further agreed in the stipulation that CX 1-15, 17 and 18, all attached to the stipulation, were used by respondents during the years 1959 to 1961. The exhibits are mostly advertisements, but include some posters and displays. They establish, in general, that commencing in 1959 respondents have been using the trade name Lifetime

Charge only in conjunction with Doubles Battery Life plus other wording.* However, these exhibits show that the conjunctive wording is secondary not only on the container, as appears by looking at the container, but, as will be demonstrated, also in the advertisements, posters, and displays, all of which maximize, emphasize, and reiterate the name Lifetime Charge at the expense of Doubles Battery Life and the other wording.

It is also agreed in the written stipulation that the advertisements reproduced in CX 16, which show the use in 1959 of the representations Permanent Charge and Government Approved (both now discontinued), were placed by certain reselling retailers, and that RX 3 is respondents' explanation, namely, the use by mistake of old mats by the retailers, promptly corrected at respondents' insistence. Much the same applies to CX 19 and 20, showing use in 1959 and 1960, of the representation Permanent Charge (also now discontinued), and similarly explained by the statement in RX 2.

It is also agreed in the written stipulation that CX 21 is the paper box container used by respondents in 1959 for packaging. The front contains the old and discarded conjunctive representation Gives a Permanent Charge, instead of Doubles Battery Life, the present wording.

It is also provided in the written stipulation that, on the facts as agreed, a cease and desist order, in the wording set forth in said stipulation, may be issued as against representations 1 to 8 — and also as against representation 9, "unless respondents will pay for the starting of automobiles the number of times required." (No. 10 in the stipulation.)

Stipulation — Re Lifetime Charge

Finally, and very importantly, it is stipulated in Paragraph VII of the stipulation that (a) the trade name Lifetime Charge by itself "may be deceptive", (b) that for the past two years respondents have not used it in their advertising (including the container) without other language such as Doubles Battery Life, Gives New Power to Battery, and Helps Keep Battery Fully Charged, and (c) that the efficacy of the additive does not exceed the claims set forth in (b).

It is agreed that the hearing examiner may decide whether the additional language removes from the trade name the tendency to deceive, and that he may issue an order accordingly. The exact wording of this part of the stipulation will be quoted in the discussion below.

* Apparently this was pursuant to an informal arrangement with Commission personnel.

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A hearing was held herein on March 6, 1962, wherein the stipulation above described and the various exhibits were received in evidence. Apart from this, the hearing was used to receive oral argument on the legal issues involved in that respondents' contention that any deceptiveness in the name Lifetime Charge is cured by Doubles Battery Life and the other wording.

Proposed findings and conclusions, as well as proposed order, were submitted by complaint counsel on March 16, 1962, and by counsel for corporate respondent on March 19, 1962, no proposals being submitted by respondent Harpman. The submitted proposals were limited, however, to the question as to whether any deceptiveness of Lifetime Charge was cured by Doubles Battery Charge and the other wording.

The hearing examiner considers that the agreed facts and proposed order in the written stipulation—particularly as they relate to representations 1 to 9 and to jurisdictional matters basic to the entire complaint—are further proposals herein submitted jointly by both sides. In general, the hearing examiner accepts them, as appears in the Findings, Conclusions, and Order below.

This, as contemplated by the parties, leaves over only the issuance of further findings and conclusions, namely, as to the deceptiveness or non-deceptiveness of Lifetime Charge with or without additional wording, and the insertion of possible additional provisions accordingly in the cease and desist order.

DISCUSSION

As stated in Paragraph II of the written stipulation herein, respondents' battery additive Lifetime Charge was designed to be used in both new and used lead acid storage batteries. The complaint, as amended, alleges:

Paragraph SIX: Through the use of the Trade name Lifetime Charge respondents have represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged. The name Lifetime Charge is false and deceptive. Among other things, said product will not charge or recharge a battery, and it is not a lifetime charge.

The written stipulation states the following:

VII. It is further stipulated with reference to the charges set forth in paragraph Six of the complaint relating to the use of the trade name Lifetime Charge:

- (a) That the trade name Lifetime Charge by itself as descriptive of respondents' products may be deceptive to the purchasing public.
- (b) Respondents for the past two years have not used the trade name Lifetime Charge in their advertising without the addition of other language, such

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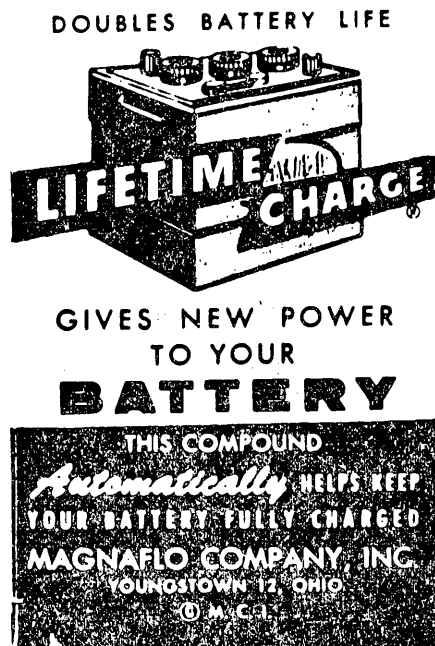
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as Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged.

(c) That the efficacy of respondents' product does not exceed the claims set forth in (b) hereof and that counsel supporting the complaint concedes that he has no testimony to offer as to the efficacy of the product with reference to the above three statements in view of the fact that the efficacy of the product relating to these three statements is not questioned in the complaint.

VIII. It is further stipulated that on the basis of the statements stipulated in Paragraph VII, above, the hearing examiner may make his determination as to Paragraph Six of the complaint and issue his order based thereon after arguments, oral and written, as to the contention of counsel supporting the complaint that the trade name Lifetime Charge is deceptive whether or not it is modified by other language and the contention of respondents that the phraseology now used on the Lifetime Charge package, Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged, removes from the trade name Lifetime Charge, the tendency to deceive.

The trade name Lifetime Charge appears prominently in conjunction with Doubles Battery Life, as well as the other two items of explanatory wording, on the front of the paper box container (RX 1), which is the principal, although not the only, exhibit in determining the questions now being considered. There is reproduced here a facsimile representation, except for color, of said RX 1.



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The name Lifetime Charge, usually further emphasized, and the conjunctive wording, or portions thereof, also appear on or in advertisements, posters, and displays, as will be detailed in a later portion of this discussion.

A

Lifetime Charge.—Lifetime.—Charge.

Lifetime Charge

In the opinion of the hearing examiner the express stipulation of the respondents that the trade name Lifetime Charge, used apart from any other wording, “may be deceptive” to the purchasing public is tantamount to an admission that the name constitutes misrepresentation within the meaning and scope of Section 5 of the *Federal Trade Commission Act*. On this stipulation, the hearing examiner finds that Lifetime Charge does constitute such misrepresentation. The stipulation was apparently so intended. It is well settled that tendency to deceive is all that is necessary to prove deception under Section 5, as contrasted with actual deception. However, it will also be shown now that the same result flows from other stipulated matters and from other considerations.

Lifetime

Respondents in the written stipulation agreed that “the efficacy of respondents’ product does not exceed the claims set forth in (b) hereof”—the said claims being Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged.

It thus seems to be almost expressly agreed that the lifetime efficacy or longevity promised by Lifetime Charge is no more than Doubles Battery Life and the other two conjunctive claims. Respondents in effect further agree to this by arguing that Doubles Battery Life and the two other claims limit the meaning of Lifetime Charge.

Furthermore, respondents again seem expressly to admit that the lifetime promise of Lifetime Charge is false (as distinguished from Doubles Battery Life) by a further item in the written stipulation. This is the consent to a cease and desist order as to representation 6, of 1 to 9, directing them to cease and desist from representing that the “product will charge or *permanently* charge a battery” (our emphasis).—It is true that Paragraph VIII of the written stipulation seems to limit the examiner to matters stated in Paragraph VII, but it was agreed at the hearing (Minutes p. 22) that the hearing exam-

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iner could consider "all the evidence", which would include the parts of the stipulation relating to representation 1 to 9.

* * * * *

Moreover, the hearing examiner believes and finds that Lifetime Charge means lifetime in a broad sense such as lifetime of the user, of the car, or of the structural battery. The hearing examiner believes that this would be a normal and reasonable construction on the part of an altogether substantial and significant number of consumers.

Charge

There is nothing in Paragraph VII of the stipulation whereby respondents claim that their product is a charge, i.e., in the ordinary sense of introducing an electrical current into a battery.

Actually, in Paragraph V (subdivision 6) it is expressly stipulated: "Respondents' product will not charge a battery". In referring here to Paragraph V of the stipulation, the hearing examiner again feels that he is not confined to Paragraph VII, relating only to the three legends appearing with Lifetime Charge.

There can be no doubt, therefore, that the Charge part of Lifetime Charge is clearly deceptive.

* * * * *

Actually, the hearing examiner's construction of the Charge part of Lifetime Charge, and he so finds, is that it is a representation that the additive keeps a battery charged without the necessity of charging it with an electrical current—and that it represents that this is true even after the battery has run down, perhaps completely or almost so. Again it would seem that this would be a normal and reasonable construction of a substantial and significant number of consumers.

This construction made by the hearing examiner is not too unlike the third item of additional wording, Automatically Helps Keep Your Battery Fully Charged.

B.

Doubles Battery Life Gives New Power Keeps Fully Charged

The discussion under A has fully disposed of the question as to whether Lifetime Charge, apart from the addition of other wording, is deceptive. It has been found that it definitely is.

But the real question in this case, of course, is whether the allegedly qualifying wording such as Doubles Battery Life, more par-

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ticularly, "removes from the trade name Lifetime Charge the tendency to deceive" (Stipulation, Paragraph VIII).

Doubles Battery Life

There is no doubt in the hearing examiner's mind that, as contended by respondents, the meaning of Doubles Battery Life, at least its primary and more natural meaning, is doubles the normal life or longevity of a battery—figured, perhaps, at eighteen months for normal usage. This is not the only meaning, but it deserves serious consideration in connection with respondents' claim that the wording sufficiently qualifies any deceptiveness in Lifetime Charge.

As already found, of course, Lifetime Charge means a product that will keep the battery in action for life, that is, for the life of the user, the car, or the structural battery; and it means a product which obviates recharge with an electrical current.

What does Doubles Battery Life, in its primary meaning of doubling battery longevity, do to explain, qualify, or delimit this deceptive meaning of Lifetime Charge, as herein found?

In the hearing examiner's opinion, the wording Doubles Battery Life in its primary sense, at least, of doubling battery longevity does indeed qualify and limit the wording of Lifetime Charge, as respondents contend. It limits the claim for the additive to doubling the ordinary longevity of a battery. It negates the claim in Lifetime Charge of greater longevity than double the ordinary battery longevity than double the ordinary battery longevity.—To be sure, the Charge part of Lifetime Charge is not negated, but this may not be too important if the word Charge represents merely that the battery can be kept charged without an electrical current.

However, this conclusion that there is adequate qualification is not beyond question or doubt. It may well be argued that Doubles Battery Life, in its primary meaning of doubling longevity, simply adds confusion to confusion, and it may be argued that it strikes such a discordant note in relation to Lifetime Charge, playing the word Life against Lifetime, as reasonably to cause this confusion. It may further well be argued that such possible confusion is greatly increased by reason of the fact that Lifetime Charge is a somewhat technical and functional representation for laymen to grasp and also because it is not categorically denied, in fact not denied at all as to the Charge part, the deceptiveness of which seems to be admitted by the stipulation. On this argument, Lifetime Charge in its full meaning might still, in spite of Doubles Battery Life, be believed by the consumer, perhaps psychologically motivated by the "big lie" tech-

nique, even if not used deliberately, and further influenced by the low price of \$1.69 for the additive.

Moreover, and even more importantly, Doubles Battery Life also has a secondary meaning of doubles the liveliness or strength of the battery — an alleged additional effect which respondents have expressly claimed for the additive in some of their advertisements. This secondary meaning is consistent, or at least not inconsistent, with Lifetime Charge, and therefore when used in conjunction with Lifetime Charge, it might be designated as the natural meaning of Doubles Battery Life.

This secondary meaning of doubling battery liveliness may well be the one that a consumer will give to Doubles Battery Life when it appears in conjunction with Lifetime Charge. The consumer need hardly have to assume that he is being told two different and contrary things on the same label. Nor, of course, need he assume that Lifetime Charge is false or that it means anything less than it says, as found here. The consumer may well assume that Doubles Battery Life does not contradict or negate Lifetime Charge, but that it simply alludes to an additional effect of doubling battery liveliness or vigor, entirely apart from battery longevity.

This secondary meaning of Doubles Battery Life ascribed thereto in this discussion is corroborated by Gives New Power To Your Battery. Moreover, respondents have advertised (CX 7) their product as making the Battery Run Stronger, Last Longer (printed in this order), and have also advertised it as making the battery Snap and Snarl, a clear reference to liveliness rather than to longevity. It can not be seriously contended, therefore that the secondary meaning ascribed here to Doubles Battery Charge is unrealistic.

Accordingly, the hearing examiner affirmatively finds that as a matter of wording alone, and even apart from other considerations such as insufficient display prominence, which will be discussed later, Doubles Battery Life does not remove from Lifetime Charge the tendency to deceive.

Gives New Power To Your Battery

This wording represents nothing about the lifetime of the battery, and thus in no way can be construed as limiting the deception contained in Lifetime Charge, as contrasted with Doubles Battery Life in its primary meaning. This Gives New Power wording definitely refers to the liveliness of the battery, rather than its life expectancy. Its meaning, as already noted, is more like the secondary meaning of Doubles Battery Life, which also relates to the quality of battery action. This meaning also fits in with the advertisements of respondents, as above referred to, stating that the additive makes the battery

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Snap and Snarl, Makes It Run Stronger as well as Last Longer. Accordingly, the Gives New Power wording possibly adds to the deceptiveness of Lifetime Charge, at least to the extent that it does not qualify the Lifetime Charge, but unmistakably and unequivocally adds another claim, namely additional power or liveliness.

Helps Keep Your Battery Fully Charged

This wording *does* represent something about the duration of battery life, although perhaps somewhat haltingly, particularly in view of the inclusion of the word Helps. Actually the wording is consistent with Lifetime Charge, although less categorical, and it seems fairly clear that many consumers could reasonably construe it as affirming, rather than qualifying, the full deceptive representations of Lifetime Charge.

At the very least this Fully Charged wording adds confusion to confusion in respect to the Lifetime Charge claim as used.

* * * * *

It is hereby affirmatively found that the second and third legends appearing with Lifetime Charge, to wit, Gives New Power To Your Battery and Automatically Helps Keep Your Battery Fully Charged, do not remove from the trade name Lifetime Charge the tendency to deceive — whether these two legends are considered separately, together, or both joined with Doubles Battery Life.

Lifetime Charge the Dominant Wording
Doubles Battery Life Merely Small Print

The deception in this case is enhanced by the dominance of Lifetime Charge on the paper box with only one line assigned to Doubles Battery Life, and indeed by the dominance, as well, of the other two legends over Doubles Battery Life.

There can be no doubt, as already indicated, that respondents rely primarily on the wording Doubles Battery Life to show elimination of any deceptive effect of Lifetime Charge.

However, even if Doubles Battery Life could be given the most favorable meaning and construction respondents could ask for, it is doubtful, because of its "small print" character, that it could remove the deceptiveness of Lifetime Charge.

The front panel of the paper box (RX 1) is 3½" x 2¼", and, as will be seen by the illustration above, shows the following:

(1) At the top of the panel and in simple printed black letters 3/16" high on a single line, narrower than the width of the box, appears the wording Doubles Battery Life.

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(2) Immediately below this single line appears respondents' standard cut, 1" high, depicting a battery with the trade name Lifetime Charge prominently spread out in front and actually stretched to the full width of the box, in large white letters on a blue background. The word Lifetime is, significantly, the larger of the two words and it appears on the upper level, left, and the word Charge is somewhat smaller and appears on the lower level, right.

(3) Below the standard cut appears the wording Gives New Power To Your Battery, but in large printed black letters spread on three lines and occupying a space over $\frac{1}{2}$ " high — thus minimizing the single line of Doubles Battery Life at the top of the box, or consolidating with the latter's small black lettering to give it the secondary meaning of liveliness.

Below this New Power wording there in turn appears the wording Helps Keep Your Battery Fully Charged, in white letters on a blue background $1\frac{1}{4}$ " high, and itself occupying two lines — thus definitely minimizing the single line of Doubles Battery Life at the top of the box, and, with its color print and its longevity implication, consolidating with the color print and the Lifetime of Lifetime Charge.

* * * * *

Accordingly it is clear that Doubles Battery Life is completely dwarfed and rendered quite inconsequential by all the other wording on the box, including Lifetime Charge in particular; or at the very best for respondents it is relegated to its secondary meaning of battery power or liveliness.

It is dwarfed by Lifetime Charge, with its admitted deceptiveness as to the effect of the additive on the longevity of the battery.

It is dwarfed by the New Power wording, or merged into this wording, which states nothing about the longevity of the battery and in effect tends to relegate Doubles Battery Life to its secondary meaning of increasing power and liveliness.

It is dwarfed by the Battery Fully Charged wording, which supports the deceptive representation in Lifetime Charge and visually merges into Lifetime Charge.

Increased Dominance of Lifetime Charge In Advertisements and Posters

The hearing examiner has taken pains to study and compare all of the exhibits (CX 1-15, 17, 18) stipulated as used by respondents in the period 1959-1961. These are largely advertisements or "mats"

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of advertisements, as well as posters and displays. The advertisements and mats disclose the following general pattern:

(1) There is a picturization of the entire front of the box container, RX 1, as heretofore described, although there may be no color as on RX 1 itself. First, in this picturization, there is the small top line Doubles Battery Life, which, however, becomes unreadable or almost unreadable in the reduced form of some of the picturizations. Second, as in RX 1, underneath Doubles Battery Life is a reproduction of respondents' standard cut showing Lifetime Charge prominently spread out in front of a battery for the full width of the box. Third, below the standard cut, as in RX 1 appears successively the wording Gives New Power To Your Battery and Automatically Helps Keep Your Battery Fully Charged, each for more than one line, as well as in large type, and definitely more prominent than Doubles Battery Life.

(2) Respondents' standard cut, again featuring the name Lifetime Charge spread out in front of a battery, is repeated, (CX 2) for example — this time appearing, of course, without the one-line wording Doubles Battery Life found on the box. Furthermore, sometimes the name Lifetime Charge is so repeated twice, by showing two standard cuts, or it is repeated quite a few times, *i.e.*, by showing a cut of a number of boxes assembled in a cardboard box display tray (CX 17), which itself further features the name Lifetime Charge.

(3) The name Lifetime Charge may be featured once more, this time entirely apart from using the standard cut, but usually by means of large display printing, perhaps white on black or white on blue (CX 2), for example.

(4) The wording Doubles Battery Life, inconspicuous as it appears, is either not repeated or, if repeated, is definitely subordinate to Lifetime Charge (CX 3,4,5 mat 40), (CX 6 mat 34), 10, (somewhat contra, CX 5 mat 37). It may be noted that a number of these exhibits play up the secondary meaning of Doubles Battery Life, consistent with Lifetime Charge in its broad sense — particularly CX 7 mat 30, displaying the picture of a snarling dog and the claim of Snap and Snarl, as well as CX 1 stating that Your Battery Leaps With New Life, and CX 5 mat 38, stating that It Puts Your Car On The Go.

It is thus clearly apparent that as actually used in advertisements the wording Doubles Battery Life has little mitigating effect on Lifetime Charge, and at the very least is quite confusing.

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The same conclusion is reached from an examination of the posters and other materials included in the Commission Exhibits enumerated above:

CX 3 is a poster 3' x 1'. Step (1), *supra*, which would show the box front containing at least the words Doubles Battery Life is completely omitted. Step (2), showing the standard cut featuring Lifetime Charge is, of course, included. Step (3), giving independent prominence to Lifetime Charge, is accomplished by setting up the trade name in huge blue letters in a space measuring approximately 2' x 1/2'. Step (4), relating to the minimization of Doubles Battery Life is accomplished by printing the wording in ordinary black ink in a space 3" x 3", as further contrasted with the brilliant red lettering, in a space 2' x 1/2', reading Makes Your Car Battery Run Stronger — Last Longer and actually giving Doubles Battery Life its secondary meaning of liveliness.

CX 9 is a poster in red, black and green, 3' x 2/3', using no cuts at all, and simply displaying the trade name Lifetime Charge in large red letters, with no reference to Doubles Battery Life whatever, or to the other two legends.

Similarly on the very small exhibits CX 11(A), (B) and (C), relating to free winter starts insurance, only the trade name Lifetime Charge appears, without any reference whatever to Doubles Battery Life or the other two legends.

* * * * *

In the hearing examiner's opinion, the above review thus shows quite beyond doubt that even if the combined representations on the box (RX 1) did not constitute deception, and would be saved from deception particularly by the legend Doubles Battery Life, their extension and projection into the general advertising, poster, and display field lead to such an emasculation of the claimed Doubles Battery Life qualification, and result in such clear emphasis on Lifetime Charge alone, that deception indeed does result or becomes full-blown.

It is obvious, therefore, that the use of the name Lifetime Charge is the very seed, and potently so, of deception in this case, irrespective of the claimed qualifications allegedly brought about by Doubles Battery Life or other legends, and that the trade name Lifetime Charge is the instrumentality of deception or further deception.

When one considers that what consumers must ask for and talk about, particularly under the impact of this kind of advertising, is the trade name Lifetime Charge, and not any other wording, there

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can be little doubt as to the conclusion here made that the name is indeed an instrumentality of deception.

LAW

In view of the facts in this case, showing, among other things, such confusion of meaning as well as complete de-emphasis of the allegedly qualifying wording, it is doubtful that cases cited for respondents by able counsel herein can be of much assistance to them, however plausible a legal argument they might present on different facts.

Moreover, there is the curious factor in this case that there is no actual proof whatever as to the truthfulness of Doubles Battery Life or of the other two legends, or, for that matter, of the additive's having any beneficial effect whatever. Entirely apart from the undoubted burden of proof resting on complaint counsel to prove a case on all the relevant facts, it would be at least somewhat anomalous if the respondents could obtain what in effect might be deemed to be affirmative equitable relief solely by the use of allegedly qualifying wording the truthfulness of which is an unknown quantity.

The leading case cited for respondents is *F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933). It held that a misleading trade name (there in use some 30 years) should not be completely excised where a less drastic remedy is available. However, the case must be read in the light of subsequent cases, at least as to the finality of the Commission's determination of the propriety of excision of a trade name. *Parke, Austin, & Lipscomb, Inc., v. F.T.C.*, 142 F. 2d 437 (C.C.A. 2nd 1944), *cert. denied*, 323 U.S. 753 (1944). *Herzfeld v. F.T.C.*, 140 F. 2d 207, 9 (C.C.A. 2nd, 1944) *Bakers Franchise Corporation, v. F.T.C.* (C.A. 3rd, May 1, 1962). *Elliot Knitwear, Inc., v. F.T.C.*, 266 F. 2d 787 (C.C.A. 2nd 1959), actually cited in behalf of respondents. In the last case named the Commission, after remand, adhered to its decision excising the name Cashmora in its entirety (Docket No. 6637, October 24, 1961; no appeal taken).

There are some earlier and therefore, perhaps, less persuasive cases cited for the respondents. These cases are also distinguishable from the present case by the simplicity of their product facts — Satinized qualified by Cotton Fabric (*Fluegelman*, 37 F. 2d 59), White Shellac by Shellac Substitute (*Casoff*, 38 F. 2d 790), and Good-Grape qualified by Imitation Grape (*Good-Grape*, 45 F. 2d 70).

In all cases cited by respondents sufficient prominence of the qualifying words is made a prerequisite.

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In *Algoma Lumber*, 291 U.S. 67, complete excision of part of the trade name was held proper to prevent confusion. As to confusion, it was stated in *Ford Motor Co.*, 120 F. 2d 175, 182, as if directed at facts such as in the present case:

The advertisement herein questioned is susceptible to the construction that it contains two ideas. * * * Either idea is so obscure that one blends into the other.

In *Atlanta Sponge & Chamois Corp.*, 52 F.T.C. Decisions 500, 531, relating to the trade name Chamois and allegedly qualifying wording, it was stated:

After reading both, the ordinary consumer would still not know the truth about the product without resort to specialized information he does not possess.

In determining whether or not there is confusion it must be remembered that the law on unfair trade practices protects the gullible and credulous, as well as the cautious and prudent person. As stated in *Florence Mfg. Co.*, 178 F. 73, 75 (C.C.A. 2nd, 1910),

The law is not made for the protection of experts, but for the public—that vast multitude which include the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but are governed by appearances and general impressions.

See also *F.T.C. v. Standard Education Society* 302 U.S. 112, 116 (1937).

The following are the Findings of Fact and Conclusions of Law herein, which summarize the findings and conclusions in the decision proper:

FINDINGS OF FACT

I. Respondent Magnaflo Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 2714 Montclair, N.E., Warren, Ohio. Prior to the issuance of the complaint its office and principal place of business was located at 4132 West Market Street, Youngstown, Ohio.

Respondent Webster B. Harpman is an individual and at the time the complaint was issued was president of said corporation. His address is 4132 West Market Street, Youngstown, Ohio. Up to June 13, 1961, said respondent Webster B. Harpman formulated, directed and controlled the acts, policies and practices of the said corporate respondent, including those hereinafter alleged.

II. Respondents are now, and for the past several years have been, engaged in the manufacture, sale and distribution of a battery additive known as "Lifetime Charge", designed to be used in both

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new and used lead acid storage batteries. Its chief constituent is magnesium sulphate.

Respondent Magnaflo Company, Inc., now causes its products to be shipped from its place of business in Warren, Ohio to dealers and others, including members of the public located in the various states of the United States and in the District of Columbia. Prior to the issuance of the complaint said products were shipped by respondents from their place of business in Youngstown, Ohio.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business therein has been substantial.

III. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their product, respondents have made numerous statements and claims concerning said product in advertisements inserted in newspapers and trade publications, in sales literature, circulars testimonials, letters, and on labels, cartons, and other advertising material circulated and distributed generally throughout the United States. Among and typical, but not all-inclusive of such claims and representations are the following:

1. The Guaranteed Battery Additive. The original guaranteed.
2. Is backed by Ohio Farmers Indemnity Co.
3. Two million users of Lifetime Charge have found it will do everything we say.
Proved by a million car owners.
4. One of the Nation's leading battery makers agrees BATTERY LIFE CAN BE INCREASED WITH A CHEMICAL ADDITIVE.
5. Get original Lifetime Charge today and drive confidently all year long.
6. "Lifetime Charge" gives permanent charge to battery.
7. U.S. Government Approved. Now it's Lifetime Charge in Fort Knox.
8. Lifetime-Charged Batteries hold charge Three Times longer in Ford Plant.
9. Free Winter Start Insurance
You start or we pay.

However, some of the above quoted statements have not been used since 1959.

Commission Exhibits 1 to 15, inclusive, 17 and 18 were used by respondents during the years 1959 to 1961.

Commission Exhibits 16, 19 and 20 are advertisements of retailers reselling respondents' products to the public, and Respondents' Exhibits 2(a), (b) and 3(a), (b) are respondents' expression as to the publication of Commission Exhibits 16, 19 and 20; and Commission Exhibit 21 is a box used by respondents for packaging their product in 1959.

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IV. Through the use of the statements quoted under Paragraph III hereof respondents have represented that:

1. Said product is unconditionally guaranteed.
2. Respondents' guarantee of performance is backed by the Ohio Farmers Indemnity Company.
3. Respondents' product has been used by one million to two million car owners.
4. A battery manufacturer agrees that battery life can be increased with a chemical additive.
5. Respondents' product will enable the purchaser thereof to operate his car for a year without battery trouble.
6. Respondents' product will permanently charge a battery.
7. Respondents' product is United States Government approved.
8. Batteries treated with respondents' product have been found by the Ford Motor Company to hold a charge three times longer than normal.
9. Respondents insure winter starting or will pay the cost of starting purchasers' automobiles.

V. In respect to the foregoing representations, it is hereby found as follows:

1. The guarantee provided was and is subject to certain conditions and limitations not disclosed in the advertisements in which such guarantee representations were made.
2. Respondents' guarantee of performance or "insurance" against failure to start is not backed by the Ohio Farmers Indemnity Company, as respondents' insurance policy with this company is in fact a vehicle and product liability policy only.
3. Respondents' product has not been used and proved by one to two million car owners.
4. No battery manufacturer has agreed that the life of a battery can be increased by the addition of a chemical additive to the battery.
5. Respondents' product will not insure the purchaser thereof a year's operation of his automobile without battery trouble.
6. Respondents' product will not charge a battery.
7. Respondents' product has not been approved by the United States Government.
8. No test has been made by the Ford Motor Company which found that respondents' product caused a battery to hold a charge longer than normal.
9. Commission Exhibit 11(c) shows that respondents' guarantee insures winter starting only once. However, in some instances respondents did pay for one or more starts when requested by the pur-

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chaser of their product, and the new officers of the corporate respondent do not intend to limit the number of starts to one, as set forth in Commission Exhibit 11(c).

VI. The parties hereto have stipulated that there is a legal and factual basis for issuing a cease and desist order as to the above-numbered items 1 through 9 in form and wording hereinafter adopted and followed in the order issued below.

Lifetime Charge

VII. As further stipuated by the parties herein, it is hereby found as follows in regard to the use of the trade name Lifetime Charge:

(a) That the trade name Lifetime Charge by itself as descriptive of respondents' product may be deceptive to the purchasing public.

(b) Respondents for the past two years have not used the trade name Lifetime Charge in their advertising without the addition of other language, such as Doubles Battery Life, Gives New Power To Your Battery and Automatically Helps Keep Your Battery Fully Charged.

(c) That the efficacy of respondents' product does not exceed the claims set forth in (b) hereof.

VIII. Supplementing VII(a), in the prior paragraph, it is hereby found and determined that the trade name Lifetime Charge used by itself is false, misleading, and deceptive. The respondents' product is neither a charge nor is it effective for a lifetime.

IX. As to VII(b), it is hereby found and determined that the supplementary language Doubles Battery Life, Gives New Power To Your Battery, and Automatically Helps Keep Your Battery Fully Charged does not qualify the trade name Lifetime Charge so as to remove the deceptiveness thereof.

The wording is even possibly altogether consistent with the deceptive misrepresentations made by the trade name.

To the extent that the wording may be inconsistent with the trade name it is confusing and adds confusion to confusion.

Furthermore, the main part of the wording relied on, Doubles Battery Life, is merely "small print" on the box container, and it has been completely de-emphasized in general advertising, posters, and displays.

CONCLUSIONS

1. The acts and practices of respondents, particularly the designation of their product as Lifetime Charge, are all to the prejudice and injury of the public.

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2. Such acts constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

3. The deceptiveness of the name Lifetime Charge is not cured by the legend Doubles Battery Life and other legends used, and is reinforced by the way the name and legends have been used.

4. All the allegations of the complaint have been proved, based on all the facts in evidence, including use of the legends relied on by respondents to qualify and cure any deceptive meaning of the name.

ORDER

It is ordered, That Magnaflo Company, Inc., a corporation, and its officers, and Webster B. Harpman, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their product now known as Lifetime Charge, or any other battery additive of substantially similar composition or possessing substantially similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A

Representing, directly or by implication, that:

(1) Said product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(2) Ohio Farmers Indemnity Company, or any other insurance company, insures the performance of respondents' product.

(3) Said product has been used by one million, two million, or any other number of automobile owners in excess of that which has used such product.

(4) Any battery manufacturer agrees or states that the use of a chemical battery additive will increase the life of a battery, unless such statement is unequivocally made by a battery manufacturer.

(5) The use of respondents' product will enable the purchaser thereof to operate his car free from battery trouble for a year or any other specific period of time.

(6) Respondents' product will charge or permanently charge a battery.

(7) Respondents' product has been approved by the United States Government.

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(8) Said product has been tested by the Ford Motor Company and found to cause a battery to hold a charge longer than normal. Respondents' product has been approved or has been tested by any organization or agency which has not in fact approved or tested such product; or misrepresenting in any manner the results of tests conducted on respondents' product.

(9) Respondents insure winter starting of automobiles or will pay the cost of starting the automobiles of purchasers of their product, unless respondents will pay for starting of the automobiles the number of times that may be required.

B

Using the trade name Lifetime Charge, or any other name of the same or similar import, for said product.

MEMORANDUM-OPINION

DECEMBER 26, 1963

By the Commission:

Before coming to grips with the immediate problem, a short review of the prior proceedings in this case is in order.

The complaint, issued June 2, 1961, and amended February 20, 1962, charges that respondents violated Section 5 of the Federal Trade Commission Act by falsely advertising a product designed to be added to the electrolyte in lead acid storage batteries. Respondents were alleged to have made nine false or deceptive claims for their product and, through use of the trade name "Lifetime Charge," to have falsely "* * *" represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged."

In proceedings before the hearing examiner eight of the separate allegations of deception were disposed of by respondents' stipulation that the challenged representations were, in fact, misleading. The ninth allegation was settled by agreement as to the form of prohibition to be entered with respect to it. As to the charge that the trade name itself is misleading, the parties stipulated:

VII. It is further stipulated with reference to the charges set forth in Paragraph Six of the complaint relating to the use of the trade name "Lifetime Charge":

(a) That the trade name "Lifetime Charge" by itself as descriptive of respondents' product may be deceptive to the purchasing public.

(b) Respondents for the past two years have not used the trade name "Lifetime Charge" in their advertising without the addition of other language, such

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as "DOUBLES BATTERY LIFE", "GIVES NEW POWER TO YOUR BATTERY" and "AUTOMATICALLY HELPS KEEP YOUR BATTERY FULLY CHARGED".

(c) That the efficacy of respondents' product does not exceed the claims set forth in (b) hereof, and that the counsel supporting the complaint concedes that he has no testimony to offer as to the efficacy of the product with reference to the above three statements in view of the fact that the efficacy of the product relating to these three statements is not questioned in the complaint.

In a reasoned and persuasive initial decision the hearing examiner held "* * * the trade name Lifetime Charge used by itself is false, misleading, and deceptive. The respondents' product is neither a charge nor is it effective for a lifetime." He further held that the language used or suggested by respondents for use along with the trade name did not ameliorate, but possibly actually added to the deception. Accordingly, he ordered respondents to cease using the trade name, and respondents appealed to the Commission.

In their brief and argument before the Commission, respondents stoutly maintained that the trade name was not deceptive when accompanied by such phrases as "Doubles Battery Life", "Gives New Power to Your Battery", and "Automatically Helps Keep Your Battery Fully Charged". And while contending that the truthfulness of these statements was not attacked in the complaint, respondent Harpman at a pretrial conference had stated that respondents were possessed of proof that the product would in fact prolong the useful life of a battery.¹ No such proof was introduced, however, and the Commission, feeling that evidence on this point would be helpful, on March 29, 1963, directed that the matter be remanded to the hearing examiner for the receipt of

* * * such additional evidence as may be required for a finding on the issue of whether or not respondents' product will preserve an existing charge in a battery to the extent necessary to give a purposeful and truthful meaning to the word "Lifetime" in the trade name.

In the subsequent proceedings before the hearing examiner the matter became bogged down in a welter of conflicting contentions as to which party had the burden of proof, the directed scope of the remand and other procedural difficulties. An interlocutory appeal was taken from the examiner's ruling, and the Commission, on July 12, 1963 [p. 2201 herein], issued an order in which it attempted to define with some particularity the fashion in which the case

¹ E.g., at page 57 of the record the following colloquy appears:

"Mr. HARPMAN. We can prove that it does exceed that particular phrase. We have laboratory tests that prove it, and we had actual tests—"

"Hearing Examiner KAUFMAN. That will prove what?"

Mr. HARPMAN. More than double the life."

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should be processed under the order of remand. On July 19, 1963, respondents' counsel petitioned us to reconsider our order of July 12, 1963, and that is the present posture of the matter.

The proceedings before the hearing examiner on the remand have persuaded the Commission to reconsider not only its order of July 12, 1963, but also its decision and order of remand issued on March 29, 1963 [62 F.T.C. 1531]. This determination is based primarily upon the respondents' disclosure to the hearing examiner that they have "* * * no scientific or similar tests to submit to the Commission" (statement filed August 5, 1963) and that a minimum of three years would be required to conduct such tests. It thus appears that the minimum time in which the case could be concluded would be three years and it is more than probable that four or five years would pass before it could be finally disposed of. In the meantime the public would have no protection from the nine misleading claims concerning which there is no dispute and use of the name Lifetime Charge would continue its possible deception.

As the record now stands, respondents have admitted that the trade name when unqualified may be deceptive²; that it is ambiguous in that it does not disclose the "lifetime" which will be affected³ (*i.e.*, the battery's, the car's or the user's); and that the product will not impart a charge to a battery.⁴

To continue the trial of this case before the hearing examiner as we originally ordered obviously would not serve the public interest, for the respondents have made it plain that they presently have no evidence on the issue of the extent, if any, to which their product will preserve an existing charge in a battery and could produce such evidence only after a period of prolonged testing. It would be only after such testing that respondents themselves would know if "Lifetime Charge" could in fact preserve an existing charge in a battery. In view of this development, we are setting aside our orders of March 29, 1963, and July 12, 1963, and are adopting the order contained in the initial decision, prohibiting, *inter alia*, the future use of the trade name "Lifetime Charge."

An appropriate order in conformity with this opinion will be entered. If in the future the respondents can satisfactorily demonstrate to the Commission that the trade name may be used non-deceptively, they, of course, are free to request appropriate modification of the order.

² Paragraph VII(a), Stipulation.

³ Pages 17-21, oral argument transcript.

⁴ Item 6, Paragraph V, Stipulation.

Complaint

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FINAL ORDER

For the reasons set forth in the accompanying memorandum-opinion, *It is ordered*,

1. That the orders issued March 29, 1963 [62 F.T.C. 1531], and July 12, 1963 [p. 2201 herein], vacating the hearing examiner's initial decision and remanding this case to the hearing examiner for further proceedings be, and they hereby are, set aside.

2. That the initial decision, filed May 25, 1962, be, and it hereby is, adopted as the decision of the Commission.

3. That the respondents, Magnaflo, Inc., a corporation, and Webster B. Harpman, an individual, shall, within sixty (60) days after service upon them of this order, file with the Commis-