

days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as modified herein.

IN THE MATTER OF
WILSON CHEMICAL COMPANY, INC., ET AL.

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

Docket 8474. Complaint, Mar. 26, 1962—Decision, Jan. 14, 1964

Order requiring Tyrone, Pa., distributors of "White Cloverine Brand Salve" to cease making deceptive offers of "free" merchandise in advertising, directed mainly at children—by such statements as "GENUINE NICKEL SILVER SIGNET RING ABSOLUTELY FREE," "YOURS FREE * * * REAL FOREIGN COINS"—to recruit sales agents for their "White Cloverine Brand Salve," and using threats of legal action and other forms of intimidation to enforce payment of asserted delinquent accounts.

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 Wilson Chemical Company, Inc., a corporation, and George C. Wilson, III, Charles A. Wilson, and Sarah A. Hooker, individually and as officers and directors of said corporation, and Sally Ann Wilson and Michael B. Wilson, individually and as directors of said corporation, and all said individuals also as partners trading and doing business as Wilson Chemical Company, and J. McClellan Davis, an individual, 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 Wilson Chemical Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Tyrone, State of Pennsylvania.

Respondents George C. Wilson, III, Charles A. Wilson, and Sarah A. Hooker are officers and directors of the corporate respondent. Respondents Sally Ann Wilson and Michael B. Wilson are directors of the corporate respondent. Said individuals formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondents George C. Wilson, III, Sally Ann Wilson, Charles A. Wilson, Michael B. Wilson, and Sarah A. Hooker are also partners trading and doing business as Wilson Chemical Company. They formulate, direct and control the acts and practices of said partnership, including the acts and practices hereinafter set forth. Their address is the same as the corporate respondent.

Respondent J. McClellan Davis is the collection attorney for the aforesaid respondents trading and doing business as partners under the name of Wilson Chemical Company. His address is Farmers and Merchants Bank Building, Tyrone, Pennsylvania.

The corporate respondent and the individuals cooperate and act together in carrying out the acts and practices hereinafter alleged.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of a salve designated as "White Cloverine Brand Salve" to sales agents and others for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said

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product, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their product, designated "White Cloverine Brand Salve", respondents have made certain statements and representations in advertisements in comic books of national circulation to which children of tender years are attracted, and by other media, of which the following are typical:

WIN A BEAUTIFUL SIGNET RING. IT'S FUN. IT'S EASY! All You Do Is Name These Famous U.S. Presidents (Pictures)
Just Get All 4 Right * * * We'll Send Your GENUINE NICKEL SILVER SIGNET RING ABSOLUTELY FREE * * *
Win Genuine Nickel Silver SIGNET RING—ABSOLUTELY FREE! Just Name Correctly the 4 Famous American Presidents Pictured Above. Check Names on Coupon—Fill in Rest of Coupon and Mail to us. IT'S EASY TO WIN—ACT NOW!

* * * * *
GIVEN! GIVEN! YES, WE GIVE YOU PREMIUMS or CASH!
YOURS FREE! Genuine Money From Nations of the World * * * For sending coupon Now! REAL FOREIGN COINS.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import but not specifically set forth herein, respondents represented directly or by implication:

- (1) That merchandise is sent free without obligation.
- (2) That free merchandise is being offered for some purpose other than the recruitment of sales agents.

PAR. 6. The aforesaid statements and representations were, and are, false, misleading and deceptive. In truth and in fact:

- (1) Merchandise is not sent free without obligation.
- (2) The free offer is for the sole purpose of recruiting sales agents.

PAR. 7. In the course and conduct of their business, respondents have from time to time shipped merchandise to children of tender years who have by signing and mailing in the said coupon unknowingly ordered merchandise for resale and thereby purportedly obligated themselves as sales agents of respondents. Said merchandise would not have been unknowingly ordered by children of tender years except for the confusing, obscure, and deceptive manner in which the conditions of the free offer were presented in the advertising. Misled by respondents' advertising, such children were not capable of sufficiently understanding or accepting the terms and

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conditions of the offer. In their correspondence with such purported sales agents, respondents have contended that there is an indebtedness resulting from a bona fide order placed by such children. In some instances, in their attempt to enforce payment for their merchandise, respondents have written, or caused to be written, threatening letters on the stationery of the Wilson Chemical Company and attorney's demand letters on the stationery of the respondent J. McClellan Davis, to be sent to children of tender years threatening legal action, thereby frightening said innocent and unsuspecting children into believing that they would be subjected to legal action if no payment were made. Said statements and representations were false and misleading and constituted unfair and deceptive acts and practices.

PAR. 8. Respondents' merchandising program features advertising in comic books directed to children, a consumer group unqualified by age or experience to judge soundly the merits of respondents' offers or to recognize the obligations attending acceptance of shipments of respondents' merchandise for resale. Furthermore, the purpose and objective of respondents' program are to place shipments of respondents' merchandise in the hands of children without the prior knowledge or consent of their parents. Respondents' program is designed and tailored to exploit, unfairly and for commercial purposes, the affection and responsibility that adults, and especially parents, feel for children. Respondents traffic in the affection of adults for children to the exclusion of any significant attempt to sell the product on its merits. Respondents' practices in the foregoing respects are contrary to public policy and constituted unfair and deceptive acts and practices.

PAR. 9. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead children of tender years and other members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the ordering of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now

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constitutes, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Herbert L. Blume and Mr. Robert C. Harrington for the Commission.

Romeika, Hedner, Fish & Scheckter, Philadelphia, Pa., by *Mr. Alphonsus R. Romeika* for the respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

APRIL 25, 1963

1. The respondents are charged with violation of the Federal Trade Commission Act through the use of misleading advertising and other unfair and deceptive practices in promoting the sale and distribution of a medicinal product, a salve intended for use in the treatment of minor skin disorders. The therapeutic properties of the salve are in no way involved in the proceeding; the Commission's complaint relates to entirely different matters. Evidence both in support of and in opposition to the complaint has been received. Proposed findings and conclusions have been submitted by counsel for the parties, oral argument not having been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the record or the applicable law.

2. As will be observed from the names of the parties respondent appearing above, the two business concerns involved have almost identical names. The corporate respondent is Wilson Chemical Company, *Inc.* (emphasis added), and the partnership is Wilson Chemical Company. In referring to them in this decision the terms corporation and partnership will frequently be used. The individual respondents (except J. McClellan Davis) are joined in the proceeding both because of their alleged relationship to the corporation and because they are members of the partnership.

3. One of the principal issues in the proceeding involves the relationship between the corporation and the partnership; that is, whether the business operations and practices here involved were carried on by the corporation and partnership together, as charged in the complaint, or whether such operations and practices were those of the partnership only, as urged by respondents. As will be seen later, the hearing examiner has concluded that, at least insofar as the matters involved in the present proceeding are concerned, the activities of the corporation and of the partnership were inseparable.

The practices in question were carried on by both acting in cooperation each with the other.

4. Respondent Wilson Chemical Company, Inc., is a Delaware corporation, with its principal office and place of business located in Tyrone, Pennsylvania.

5. Respondent George C. Wilson, III, is president of the corporation and has virtually sole responsibility for the operation of its business. He formulates the policies of the corporation and directs and controls all of its major acts and practices.

6. Four of the other individual respondents, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson are officers and/or directors of the corporation. However, they have little to do with the actual operation of the business. None of them resides in or near Tyrone, Pennsylvania, where the corporation's principal office and place of business are located. Actually their main participation in the affairs of the corporation consists of attending a directors or stockholders meeting in Tyrone once or twice a year. It is therefore concluded that the complaint has not been sustained as to these four individuals insofar as their relationship to the corporation in their individual capacities is concerned. They, of course, can properly be held in their official capacities.

7. The failure of the record to establish a case against these four respondents in their individual capacities (insofar as their relationship to the corporation is concerned) would seem to make little practical difference because, as will shortly be seen, all of them are members of the partnership and as such can properly be held in their individual capacities. That is to say, they can properly be held individually as members of the partnership, regardless of what their relationship to the corporation may be.

8. Respondents George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson, and Michael B. Wilson are partners trading and doing business under the name Wilson Chemical Company. The address of the partnership is the same as that of the corporation—Tyrone, Pennsylvania.

9. For reasons which will be set out later, the hearing examiner has concluded that the complaint should be dismissed as to respondent J. McClellan Davis, and the terms respondents or individual respondents as used hereinafter will not include Mr. Davis, unless the contrary is indicated.

10. In summary, the term respondents as used hereinafter will, unless the contrary is indicated, include the corporate respondent, Wilson Chemical Company, Inc.; George C. Wilson, III, individually and as an officer of the corporation; Charles A. Wilson, Sarah

A. Hooker, Sally Ann Wilson, and Michael B. Wilson as officers and/or directors of the corporation; and George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson, individually and as partners trading under the name Wilson Chemical Company.

11. In the course and conduct of their business, respondents cause their salve product, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers located in various other States of the United States. At all times mentioned herein respondents have maintained a substantial course of trade in their product in commerce, as that term is defined in the Federal Trade Commission Act.

12. In the sale and distribution of their product respondents are in substantial competition in commerce with other corporations, partnerships, and individuals engaged in the sale and distribution of products intended for use in the treatment of the same conditions as those for which respondents' products is intended.

13. Respondents' product is known as "White Cloverine Brand Salve". The business of manufacturing and marketing the salve had its inception more than half a century ago and has from the first been operated by members of the Wilson family. Upon the death, in October 1951, of George C. Wilson, Jr. (husband of Mrs. Sarah A. Hooker and father of the other individual respondents), respondent George C. Wilson, III, assumed charge of the business. At that time Mr. Wilson was about twenty years old and was in college. He left college, returned to Tyrone, and has since been the operating head of the business, being not only president of the corporation, but also the managing partner of the partnership.

14. While the salve is to some extent marketed through wholesalers and retail stores, most of the sales are made through members of the public. In order to obtain members of the public to act as sales agents for the salve, respondents make extensive use of advertisements inserted in comic books which have wide distribution throughout the United States. The principal appeal of the advertisements is to children or young people.

15. Under the sales plan, if a member of the public sends in a coupon which is included in the advertisement respondents send him fourteen cans of salve which he is to sell to other members of the public at 65 cents (formerly 50 cents) per can. After all fourteen cans have been sold, the sales agent may deduct from the total amount collected a stated cash commission and remit the remainder to respondents, or he may elect to receive for his services, instead of the cash commission, a premium selected by him from a premium book supplied by respondents. In the latter event, he remits to

respondent the total amount collected from the sale of the fourteen cans of salve. Along with the fourteen cans of salve respondents send to the agent a "free" article offered in the advertisement.

16. Featured in the advertisements are expressions such as "free", "given", "absolutely free", etc. For example, one advertisement reads in part:

LOOK KIDS!
BIG POWERFUL MAGIC MAGNIFIER
For Your Very Own!
IT'S FREE!
Just Mail Coupon
HURRY Get Yours While The Supply Lasts!
Magnifier Sent Absolutely FREE!

Toward the bottom of the advertisement appears the following:

Just Clip and Mail Coupon
for FREE Magnifier, Big Catalog and Order of Salve.
Yes—we'll send you the MAGIC MAGNIFIER absolutely FREE! Also—
we'll send Salve, Pictures and Big Catalog showing dozens of wonderful
premiums you can have. Cameras, Fishing Outfits, Dolls, Rifles, Radios,
Watches, etc. (Sent postpaid). SIMPLY GIVE pictures with WHITE
CLOVERINE brand SALVE easily sold to friends, relatives and neigh-
bors at 50c a Tube (with Picture). Rush coupon to start.

The coupon in the advertisement reads as follows:

MAIL COUPON—Magnifier sent FREE!
Wilson Chemical Co., Dept. 115-12 Tyrone, Pa.
Date -----
Gentlemen: Please send me on trial 14 colorful art pictures with 14 tubes
of White CLOVERINE Brand SALVE to sell at 50c a tube (with pic-
ture). I will remit amount asked within 30 days, select a Premium
or keep Cash Commission as explained under Premium wanted in
catalog sent with order, postage paid to start. Be sure to send my
FREE "MAGIC MAGNIFIER"! [Following are spaces for name and
address of sender.] (CX 1A)

Another advertisement reads in part:

BOYS! GIRLS! LADIES! MEN!
G I V E N ! G I V E N !
Yes, We Give Premiums or Cash!
* * * * *
YOURS FREE!
Genuine Money From Nations of the World For sending coupon Now!
REAL FOREIGN COINS
* * * * *
JUST MAIL COUPON!

Yes! We'll send you Genuine Foreign Coins absolutely free! Be a
coin collector! Trade with other kids! Also, we'll send WHITE
CLOVERINE Brand Salve and Big Catalog showing dozens of wonderful

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premiums you can have. Cameras, Watches, Radios, Rifles, Fishing Outfits, Dolls, etc. (Sent ppd.).
You simply offer WHITE CLOVERINE Brand SALVE—easily sold to friends, relatives and neighbors at 50c a package. Rush coupon to start. Mail Coupon for FREE FOREIGN COINS, BIG CATALOG and ORDER OF SALVE (CX 4A)

Another advertisement reads in part:

BOYS! GIRLS! LADIES! MEN!
WIN A BEAUTIFUL SIGNET RING
Engraved With Your Own Initial
IT'S FUN! IT'S EASY!
All You Do is NAME THESE FAMOUS U. S. PRESIDENTS
[Pictures]
Just Get All 4 Right — We'll Send Your
GENUINE NICKEL SILVER SIGNET RING ABSOLUTELY FREE!
(CX 8A)

17. The complaint charges that through the use of such advertisements respondents represent, contrary to fact, that the articles of merchandise offered (magnifier, coins, ring, etc.) are sent free and without any obligation on the part of the recipient, and that such merchandise is offered for some purpose other than the obtaining of sales agents.

18. In the examiner's opinion, these charges are well founded. While a careful and thoughtful reader of the entire advertisement, including the coupon, probably would understand that the advertisement is for the purpose of obtaining sales agents and that the "free" article is available only if the salve is ordered, this would not be true of the average reader. The words featured in the advertisements are "free", "given", "absolutely free", etc. Moreover, it must be remembered that the advertisements are directed primarily to persons of immature age. Unquestionably the advertisements have the tendency and capacity to mislead a substantial number of such persons.

19. Actually, of course, the sole purpose of the advertisements is to obtain sales agents and thereby promote the sale of the salve. The so-called free articles are never sent by respondents except along with a shipment of the salve; that is, the coupon ordering the salve must be sent to respondents before they will forward the "free" article.

20. The hearing examiner was favorably impressed with Mr. George C. Wilson, III, and does not believe that there was any element of willfulness or wrongful intent on his part in the use of the advertisements. It is elementary, however, that neither willfulness nor wrongful intent is an essential element in a violation of the Fed-

eral Trade Commission Act. The test is the effect or probable effect of the advertisements.

21. It is urged by respondents that the corporation has nothing whatever to do with the advertising and marketing of the salve, that these functions are performed by the partnership alone. The testimony on behalf of respondents is that the corporation purchases the raw ingredients which go into the salve (petrolatum, turpentine, wax, perfume, etc.) and the metal containers in which the salve is packaged and also the cartons in which the salve is mailed to purchasers, and that all of these materials are sold by the corporation to the partnership, which manufactures, advertises, and sells the salve.

22. In the examiner's opinion this position is untenable in the face of the circumstances disclosed by the record. In the first place, there is the fact of the relationship of the parties. The entire project is a family enterprise. The same persons who own the corporation are members of the partnership. Mr. George C. Wilson, III, is the active head of both. All of the land and buildings used in the enterprise are the property of the corporation, as is all of the machinery used in the manufacture of the salve. The land, buildings, and machinery are leased by the corporation to the partnership.

Thus a situation is presented in which in practical effect the parties are selling to themselves, buying from themselves, and leasing property to and from themselves.

The facts already mentioned probably would be sufficient to negate any concept that the corporation and partnership are separate and distinct entities in the purchase of materials and supplies, on the one hand, and the manufacture, advertising, and sale of the salve, on the other.

23. But there are other circumstances. The very containers in which the salve is packaged and sold to the public bear on both front and back the statement: "Manufactured by the Wilson Chemical Co., Inc." (Emphasis added) (CXs 17, 95). Frequently, orders for supplies and raw materials were placed by the partnership, as well as by the corporation. In numerous instances, communications ostensibly from the partnership were signed by Mr. George C. Wilson, III, as "President", just as he would sign for the corporation.

24. Viewing the record as a whole, it is impossible to escape the conclusion that actually the entire enterprise of obtaining the materials and supplies and the manufacturing, advertising, and selling of the salve was a single enterprise carried on by both the corporation and the partnership acting in cooperation each with the other.

25. Another defense interposed by respondents is that the present case is barred by a former proceeding instituted by the Commission; that is, that the former proceeding is *res judicata* of the present one.

26. The former proceeding, Docket 2874, 23 F.T.C. 301, was directed solely against the corporate respondent, Wilson Chemical Company, Inc. As the other respondents were not parties to the proceeding, it is obvious that the defense of *res judicata* is without merit as to them. As to the corporate respondent, comparison of the complaint, findings, and order in the former case with the complaint in the present case makes it reasonably clear that at least one of the prerequisites for the application of the doctrine of *res judicata*—identity of issues—is lacking here.

Whereas the former case dealt with misrepresentations regarding the amount of salve to be sold and the amount of money to be remitted in order to obtain various premiums, the present case is concerned largely with the offer of so-called “free” goods for the purpose of inducing the prospect to send in an order. Another practice charged here, which was not involved in the former case, is the alleged use of high-pressure collection methods. Moreover, the present complaint, unlike the former one, appears to attack respondents’ entire sales plan as inherently unlawful.

Finally, the former case was instituted and decided in 1936, prior to the enactment of the Wheeler-Lea amendments to the Federal Trade Commission Act. Thus the complaint charged only the use of unfair methods of competition in commerce. The complaint in the present case, on the other hand, charges that the practices challenged constitute not only unfair methods of competition in commerce, but unfair and deceptive acts and practices in commerce as well. This alone probably would be sufficient to distinguish the two cases and preclude application of the *res judicata* principle.

27. It is therefore concluded that the defense of *res judicata* has not been sustained.

28. As indicated above, a further charge in the present complaint is that respondents employ high-pressure collection methods; specifically, that they send threatening letters to persons who have ordered the salve and have not remitted the purchase price. Examples of the letters challenged, all of which are printed form letters, appear in the record as Commission Exhibits 28–35. Some of the letters are on stationery of respondents, while others are on the letterhead of respondent J. McClellan Davis, who is a practicing attorney at law in Tyrone, Pennsylvania. As to the letters which bear his name, Mr. Davis testified that he either prepared them or approved them. The actual printing and mailing of all of the letters is usually done by the other respondents.

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The hearing examiner sees nothing illegal in the use of the letters. They appear to follow the forms frequently used by creditors, collection agencies, and attorneys.

It is respondents' practice to accept return of the salve in settlement of the obligation, so long as the return is made within a reasonable time. In fact, one of the letters, Commission Exhibit 30, specifically refers to the option to return the salve. Where the salve is in fact ordered and received, respondents would appear to be within their legal rights in insisting that the salve be paid for or returned, even though the persons involved may be of immature years.

29. It is therefore concluded that this charge in the complaint has not been sustained. And this being the only charge which involves respondent Davis, it follows that the complaint should be dismissed as to him. Additional reasons for dismissing as to respondent Davis are that he has no financial interest whatever in the business; his relationship to the business is nothing more than that of attorney.

30. Finally, the complaint (Paragraph 8) appears to attack respondents' entire merchandising program as inherently unlawful. The hearing examiner is unable to concur in that view. If respondents will remove from their advertising the misleading features pointed out above no legal reason is seen why they may not continue with their sales program.

31. The use by respondents of the misleading advertisements discussed above has the tendency and capacity to cause a substantial portion of the public to purchase respondents' salve and to agree to act as sales agents for such salve, with the result that substantial trade is diverted unfairly to respondents from their competitors. The acts and practices of respondents are therefore to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. The proceeding is in the public interest.

ORDER

It is ordered, That respondent Wilson Chemical Company, Inc., a corporation, and its officers, and respondent George C. Wilson, III, individually and as an officer of said corporation, and respondents Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson as officers or directors of said corporation, and respondents George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson, individually and

as partners trading under the name Wilson Chemical Company, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product White Cloverine Brand Salve or any other merchandise, do forthwith cease and desist from:

1. Representing as free or without cost any article of merchandise the obtaining of which is contingent upon the purchase of other merchandise or the performance of some service, unless the terms and conditions upon which such article may be obtained are clearly and conspicuously set forth in immediate conjunction with such representation.

2. Representing directly or by implication that any merchandise offered for the purpose of obtaining sales agents is offered for any other purpose.

It is further ordered, That the complaint be dismissed as to the charges discussed in paragraphs 28, 29 and 30 of this decision.

It is further ordered, That the complaint be dismissed as to respondents Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson, and Michael B. Wilson in their individual capacities insofar as their relationship to the corporate respondent is concerned.

It is further ordered, That the complaint be dismissed in its entirety as to respondent J. McClellan Davis.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter alleges that the respondent salve manufacturers violated the Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 45 (1958), by the use of misleading and deceptive advertisements to recruit children and adults to sell "White Cloverine Brand Salve" and by the employment of a system of threatening and deceptive collection letters to coerce payment for the salve from children and adults to whom it had been sent as the result of contacts achieved through the deceptive advertising. One of the respondents, J. McClellan Davis, an attorney admitted to practice in the State of Pennsylvania, is charged with aiding the respondents in their scheme by allowing threatening and deceptive collection letters to be sent on his letterhead to recipients of respondents' salve.

The hearing examiner found that the advertisements had the tendency and capacity to mislead the public and issued an order

prohibiting their use without the addition of qualifying language. He found nothing illegal in the use of the collection letters, however, and dismissed the charge relating to this practice as to all respondents and dismissed the complaint as to respondent J. McClellan Davis. Counsel supporting the complaint has appealed the initial decision insofar as it concerns the dismissal as to the collection letters and J. McClellan Davis. Respondent's counsel, in his brief and argument before the Commission, contends that the collection letter of an attorney is not "commerce" as that term is used in the Federal Trade Commission Act and that, therefore, the Commission has no jurisdiction to consider whether the employment of the letters is unlawful. Respondents have taken no appeal from the examiner's findings as to the deceptive nature of the advertisements, and that matter is therefore settled by the initial decision.

The Wilson companies manufacture and sell a product called "White Cloverine Brand Salve." Although other means of distribution are used, the primary method is to send the product to children or adults who are induced to order the salve by advertisements in comic books. The majority of persons so responding are children. These advertisements offer "free" and "absolutely free" rings, magnifiers, and coins to those persons that send in the coupon which is attached to each advertisement. However, the ad does not clearly and adequately inform the reader that by sending in the coupon he is obligating himself to become a sales agent for the Wilson Chemical Company. This failure to disclose that the so-called "free" goods were given with an obligation was the basis of the hearing examiner's finding that the advertisements were misleading and deceptive.

When a coupon was received, the child or adult who mailed in the coupon would then be sent a package containing fourteen cans of salve, whose collective retail value was approximately seven dollars (\$7), the "free" goods, and a booklet. The booklet informed the addressee for the first time in conspicuous type that he was now a salesman, instructed him how to sell, and illustrated premiums that he could earn. If the recipient was dissatisfied with the manner in which he was made a salesman he was told to pay the postage and return the salve. However, if he did not do so within forty-five days, a follow-up notice was sent, informing the addressee that this means of terminating the obligation was foreclosed and that only the cash value of the shipment would be sufficient to close the account. If no reply was received from any person to whom the salve was sent within sixty days, the company began to use a series of letters in an attempt to induce payment in cash for the salve.

The letters that were sent always used the same language, without regard to whether the recipient was a child or an adult.

The first three letters of the series are written under the letterhead of the Wilson Chemical Company. Their tone changes from a friendly reminder to threats of legal action and consequent embarrassment and penalty if the recipient makes it necessary for the company to turn over the account to an attorney in the recipient's home town for collection by legal process.

If the first three letters do not accomplish their purpose of obtaining a cash settlement, the child or adult receives a series of letters under the letterhead of "J. McClellan Davis, Attorney At Law." In these letters the recipient is informed, among other things, that Davis has been retained by the Wilson Chemical Company to contact the addressee, that there is no question of the recipient's liability in this matter, that legal action would begin in ten days if cash was not remitted at once, that embarrassment and added cost could be saved by remitting now, and that if no payment was received promptly, legal action would be instituted by Mr. Davis' corresponding attorney in the recipient's home town.

If the Davis letters failed to produce the desired cash, Wilson Chemical Company took no further action. The company merely placed the name of the recipient on a bad debt list. Although suit was threatened as a means of ultimate collection, there is not a single case where suit was ever begun. The respondent, George C. Wilson, III, testified to the effect that he had no intention of instituting suit on the small claims involved. Furthermore, respondent Davis testified that he never had any corresponding attorneys nor would he insult one by referring such a small claim.

The Wilson Chemical Company has never referred, nor do they intend to refer, an individual account to respondent Davis. Mr. Davis has no records of his stated representation of the company as its collection attorney. In 1945, at the request of the Wilson Chemical Company, he prepared the wording of the letters which are purportedly sent by him. Then he delegated the authority to the Wilson Chemical Company to decide when the letters would be used, how they would be used, to whom they would be sent, and the number of letters that would be used in connection with any given child or adult. He receives compensation for the use of the letterhead and occasionally receives responses in the mailbox listed on the letterhead, which he then delivers directly to the company. He is familiar with the type of advertising used by the company. He also knew that some of the letter recipients were children and that no effort was made in the letters to distinguish between children and adults.

As stated, Wilson Chemical Company, through respondent George C. Wilson, III, decides each month which letters will be sent and to whom they will be mailed by consulting accounting records which are kept at the company's office. All other aspects of the operation are under the control of the company. It prints the letters in its plant as the needs of business require, addresses the envelopes, and mails them at the local post office. Any responses to the communications are usually picked up by company employees from the post office box listed on Mr. Davis' letterhead, to which the company had access. All expenses of this scheme are paid by the company, including paper, printing, postage, and rental on the post office box.

I

The advertisements which are used by the Wilson Chemical Company to induce persons to send for the salve have the tendency and capacity to mislead a substantial segment of the public. The misrepresentation in the advertisements that "free" goods are sent without obligation is material, for it induced readers to send in the attached coupons, a course they may not have taken if they had realized that by doing so they were committing themselves to becoming a Cloverine salve salesman. This misleading enticement to become a sales agent is the foundation for the order in the initial decision to clearly disclose the conditions under which the "free" goods are being offered. It also forms the basis for counsel supporting the complaint's contention that the collection letters violate Section 5 because they use threats to institute legal proceedings in a context of deceptive practices.

Several of the letters which are sent by the respondents to dun the children and adults contain threats to institute legal proceedings. These statements are coercively phrased, stating that prompt legal action will be taken if there is no answer within a few days; that penalty will be imposed upon the child if he does not respond quickly; and that embarrassment will occur if the account is referred to an attorney in the addressee's home town. These statements, taken together in the series of letters sent over a period of time, are definitely calculated to induce the recipient to respond immediately. They are strong letters to send to adults. Their coercive nature is increased when it is considered that in the majority of cases the recipients of these letters are probably children.

The Commission and the courts have had prior occasions to consider cease and desist orders against threats to sue in a context of deceptive practices. However, none of these cases has involved situations which are on "all fours" with the present case. Thus, a review

of these decisions is necessary to delineate the scope of this form of unfair trade practice. In one case, a circuit court sustained a Commission order which required the interstate seller to cease and desist from using threats to sue in an attempt to force customers to accept goods in excess of the quantities ordered or to pay larger sums of money than that agreed to be paid or to pay damages for cancellation of quantities of goods in excess of amounts ordered. *Dorfman v. Federal Trade Commission*, 144 F. 2d 737 (8th Cir. 1944). The seller in *Dorfman* used deceptive and misleading statements to gain orders for his goods, which he then "padded" by unilaterally increasing the quantities ordered or the money required to be paid. The Commission held, among other things, that the practice of padding orders was in violation of Section 5 and accordingly ordered the respondent to cease order "padding" and the accompanying use of threats to sue. The court affirmed and with reference to the threats of legal proceedings, said:

* * * threats to sue for the purpose of extorting money from customers where no money is due may be forbidden by the Federal Trade Commission, * * *. (144 F. 2d at 740.)

In *Norman Co.*, 40 F.T.C. 296 (1945), after adversary proceedings, the Commission issued an order against a seller, requiring it to cease and desist from shipping unordered goods to department stores and from using threats of legal proceedings to induce payment for the unordered goods. *B. W. Cooke*, 9 F.T.C. 283 (1925), presents a situation where the seller respondent used grossly false statements to induce persons to sign contracts for correspondence courses. After obtaining their signatures, the seller used threats of legal suits to recover from the customers who were induced to sign through the false statements. The Commission, on stipulated facts, issued an order to cease and desist the false advertising in all events and the threats to sue, except when the respondents in good faith believed them necessary to collect amounts legally due the seller for services rendered. Several other proceedings which have involved fact situations similar to the above cases have resulted in stipulations and consent orders.

These decisions adequately demonstrate that Section 5 is violated where an interstate seller of goods uses threats of legal proceedings in an attempt to coerce his customers to pay for goods which have been placed into the recipient's hands through practices which are unfair and deceptive. In this context for the seller to assert through coercive means that he will commence legal proceedings is unlawful.

The foregoing conclusions are controlling in the present case. The company, by misleading advertisements, placed their products into

the hands of children. It then proceeded to dun them with threats of legal proceedings if they did not send the retail value of the salve. Whether each individual who dealt with the company was legally bound on the contract is beyond the nature of these proceedings. However, it can be said, after considering the misleading advertisements and the fact many of the persons who sent in the coupons from the comic books were children, that the company did not have an unassailable claim to the full retail value of the salve. To use threats to sue under these circumstances is a violation of Section 5. See *Dorfman v. Federal Trade Commission*, *supra*; *Norman Co.*, *supra*; *B. W. Cooke*, *supra*.

The collection practices of respondents contained another violation of Section 5 in the use of threats to sue when they had no intent of ever commencing legal proceedings. Several of the collection letters used threats to institute legal proceedings unless the account was settled quickly. However, they never resorted to such action nor did they intend to on the small claims which were involved. These practices have the tendency and capacity to mislead persons receiving the threats. Recently the Commission issued an order against such a practice, *Family Publications Service, Inc.*, No. C-604, 63 F.T.C. 971, September 27, 1963. The respondents in that case, among other things, were alleged to have threatened their debtors with legal proceedings unless the debtor paid the debt within a stated period. It was further alleged that respondents did not resort to legal action to collect accounts and had no intention of doing so. As to this practice, the Commission's order prohibits them from falsely representing that accounts have been referred to an attorney for collection. The respondents in the present case have used a similar practice. A practice unlawful when used to collect a valid debt is of course unlawful when it takes place in a merchandising program founded on deceptive advertising.

The letter writing campaign contained a third unlawful practice in that the source of the "attorney demand" letters was misrepresented. The final letters in the series sent to the recipients of the salve were on the stationery of J. McClellan Davis, Attorney At Law. These letters were phrased in terms of "we" and "I," thus representing to the receiver that the attorney was now writing them and that "I" intend to take certain legal actions if the account is not paid. In effect, a child or adult reading these letters would be led to believe, contrary to fact, that an attorney was now contacting him at the instigation of the company.

In many cases before the courts and the Commission, cease and desist orders have been issued which prohibit the seller from rep-

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resenting that a collection agency was an independent organization in an attempt to collect their accounts. *Wm. H. Wise Co., Inc.*, 53 F.T.C. 408 (1956), *aff'd per curiam*, *Wm. H. Wise Company, Inc. v. Federal Trade Commission*, 246 F. 2d 702 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 856 (1957); *International Art Company v. Federal Trade Commission*, 109 F. 2d 393, 396, 397 (7th Cir. 1940), *cert. denied*, 310 U.S. 632 (1940); *United States Pencil Co., Inc.*, 49 F.T.C. 734 (1953); *United States Stationery Co.*, 49 F.T.C. 745 (1953); *Norman Co.*, *supra*; *Perpetual Encyclopedia Corp.*, 16 F.T.C. 443 (1932); *B. W. Cooke*, *supra*; *National Remedy Company*, 8 F.T.C. 437 (1925).¹ The *Wm. H. Wise Co.*, *supra*, case presents an appropriate vehicle for an exploration of this concept because the only deceptive practice involved was the use of a purportedly independent collection agency. The respondent in that case sold various products throughout the country. When a customer did not pay he was sent several letters on the company's stationery. If these failed to produce payment, then the debtor received letters from a purportedly independent collection agency, which the Commission found to be part of the seller's enterprise and not independent from it. The Commission found that the representation that some organization other than the seller was contacting the debtor had the tendency and capacity to mislead and issued an appropriate order. The Commission believes that even delinquent debtors are entitled to know the source of letters which are sent to them. Sellers may not adopt a disguise to lead debtors to believe that someone other than the seller is dealing with the debtor's account. As said by the Commission in the *Wise* case in commenting on this type of violation:

It is true that all persons should pay their just debts. Within legal limits, creditors are entitled to pursue their collection methods energetically. That does not, however, justify methods that are deceptive under the law * * *. (53 F.T.C. at 426.)

II

The next issue before us is that raised by the respondent Davis. It is his contention that Section 5 does not apply to him because the collection letter of an attorney is not commerce within the Federal Trade Commission Act. Mr. Davis prepared the wording of the letter which was sent by the company in an attempt to collect cash for the salve. For this service he received, and continues to receive, compensation. Mr. Davis was aware that his letter would be used

¹ In *Perpetual Encyclopedia Corporation*, 16 F.T.C. 443, 525 (1932), the order as phrased seems to imply that if the seller in that case had obtained an attorney's consent, he would then be able to freely use letters on an attorney's stationery in an attempt to force customers to pay. However, we do not consider this position controlling because it ignores the long line of cases involving sellers who misrepresented that an independent collection agency was attempting to collect from the debtor.

to dun recipients of the salve. It was to this end that he delegated authority to the company to use the letters in any manner that they felt necessary. Having so participated in the preparation of the letters and their use in the collection scheme of the company, he must be equally as liable as the company for any violation of Section 5 which arises from the letters. Unquestionably, the company is engaged in interstate commerce in the salve business. The practices which they use to promote their sales in commerce are subject to the Act. Likewise, Mr. Davis, as a participant in these practices, is equally liable. It is true that no case has arisen under the Act which presents a fact situation similar to the present. However, it has been clearly established that a person who furnishes another with the means of violating Section 5 is also subject to a cease and desist order of the Commission. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273, 281 (3d Cir. 1952). This principle is controlling in the present case because Mr. Davis has furnished the company with the form letters and the authority to use them as the company deems fit as part of their method of selling salve.

III

Inasmuch as the Commission has found the collection letters used by the respondents to be in violation of Section 5, the hearing examiner's initial decision will be modified by striking Findings 9, 28 and 29 and that portion of the order relating to the collection letters and respondent J. McClellan Davis. The initial decision will be further modified by the insertion therein of the Commission's findings of fact and conclusions on the questions discussed in this opinion. An order adopting the initial decision as so modified will issue.

In the hearing examiner's view the sales program of the respondents would be made lawful by the removal of the deceptive advertising (*i.e.*, Finding 30). This statement is not accurate because it overlooks the unlawful collection letters used by the respondents. Therefore, it will be stricken.

Commissioner Elman did not participate in the consideration or decision of this case.

FINAL ORDER

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision, filed by counsel supporting the complaint, and on briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision ruling on said exceptions and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion and, as so modified, adopted as the decision of the Commission:

It is ordered, That paragraph 9 of the initial decision be set aside and that the following paragraph be inserted in lieu thereof:

9. Respondent J. McClellan Davis, an attorney admitted to practice in the Commonwealth of Pennsylvania, represents himself as the collection attorney for the other respondents. In this position he has aided the other respondents in the development and use of their collection methods, which are used to obtain payment for "White Cloverine Brand Salve."

It is further ordered, That paragraphs 28, 29, 30, and 31 be set aside and that the following paragraphs numbered 28 through 38 be inserted in lieu thereof:

28. The respondents refuse to accept returns of salve after a limited period of time. If a return is accepted, the person who was misled into ordering the salve is required to pay return postage.

29. The primary purpose of the respondents is to secure the retail value of salve which is sent to persons who, in the majority of instances, are children. To this end, a series of coercive and deceptive collection letters are sent to the salve recipients. No effort is made to differentiate between children or adult readers in the text of the letters.

30. The first series of letters are sent on the stationery of the Wilson Chemical Company; they contain threats to institute legal proceedings unless the reader pays the asserted obligation.

31. In fact, the respondents have never instituted legal proceedings nor do they intend to do so.

32. The respondents' use of threat of legal proceedings has the tendency and capacity to mislead a substantial portion of the public into believing that if the recipient fails to accede to the companies' demand for payment, he will be subjected to embarrassing and expensive litigation.

33. If the foregoing series of letters do not accomplish their purpose, then the recipient receives another series of letters on the stationery of "J. McClellan Davis, Attorney At Law." By these letters the respondents represent to addressees that an attorney now has their account and is personally writing them as an attorney to effect a cash settlement and if said cash set-

tlement is not made quickly, the reader will be subject to embarrassing and expensive litigation which will be instituted by respondent Davis' corresponding attorney in the recipient's home town.

34. In fact, the letters are sent pursuant to the complete direction and control of the Wilson companies, who pay for all expenses in connection with their use. In effect, the companies are merely writing the addressee under a disguise. Respondent Davis prepared the wording of the letters and delegated the authority to the Wilson companies to use them; beyond this Davis has not rendered, nor was it intended that he render, any legal services whatsoever in connection with the collection of outstanding accounts.

35. Respondent Davis has never referred, nor does he intend to refer, any individual account to corresponding attorneys.

36. The respondent's use of the Davis letters has the tendency and capacity to mislead a substantial portion of the public into believing that they are, upon receipt of these letters, being contacted by an attorney and that if they fail to send a cash settlement, then they will be the subject of embarrassing and expensive litigation brought by an attorney in their home town.

37. The use of the entire series of letters is unfairly coercive because its use has the tendency to force children and adults to remit payment without considering whether they are actually liable to pay the claim.

38. The acts and practices of respondents, as found herein, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act. The proceeding is in the public interest.

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision.

It is ordered, That respondent Wilson Chemical Company, Inc., a corporation, and its officers, and respondent George C. Wilson, III, individually and as an officer of said corporation, and respondents Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson as officers or directors of said corporation, and respondents George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson, individually and as partners trading under the name

of Wilson Chemical Company, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product, "White Cloverine Brand Salve," or any other merchandise, do forthwith cease and desist from:

1. Representing as free or without cost any article of merchandise, the obtaining of which is contingent upon the purchase of other merchandise or the performance of some service, unless the terms and conditions upon which such article may be obtained are clearly and conspicuously set forth in immediate conjunction with such representation.

2. Representing, directly or indirectly, or by implication, that any merchandise offered for the purpose of obtaining sales agents is offered for any other purpose.

3. Using threats of legal action and other forms of coercion and intimidation to induce persons to accept and pay for merchandise which is sent to them as the result of advertisements in violation of paragraphs 1 and 2, above.

4. Using threats of legal proceedings in an attempt to gain payment of accounts, when in fact legal proceedings are not to be employed as a collection device.

5. Using correspondence which represents that some person or organization other than the aforementioned respondents is engaged in attempting to effect a cash settlement of an individual's asserted delinquent account.

It is further ordered, That individual respondent J. McClellan Davis, his representatives, agents, and employees, directly or indirectly, in connection with the offering for sale, sale or distribution of a preparation designated "White Cloverine Brand Salve" or any other products of the respondent Wilson Chemical Company, Inc., or the other individual respondents herein, do forthwith cease and desist from:

1. Using threats of legal action and other forms of coercion and intimidation to induce persons to accept and pay for merchandise which is sent to them as the result of advertisements which are in violation of paragraphs 1 and 2, above.

2. Using threats of legal proceedings in an attempt to gain payment of accounts, when in fact legal proceedings are not to be employed as a collection device.

3. Permitting, aiding, or abetting the other respondents herein in the violation of paragraph 5, above.

It is further ordered, That the hearing examiner's initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That 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.

By the Commission, Commissioner Elman did not participate in the consideration or decision of this case.

IN THE MATTER OF

JAMES M. DUDLEY TRADING AS
FIRE-PAK MANUFACTURING COMPANY

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

Docket 8542. Complaint, Nov. 5, 1962—Decision, Jan. 15, 1964

Order dismissing complaint charging a Jacksonville, Fla., seller of a shaker-type dry chemical fire extinguisher designated "Fire-Pak", with misrepresenting the effectiveness, purported tests, government approval, and superiority over competitive products.

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 James M. Dudley, an individual trading as Fire-Pak Manufacturing Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent James M. Dudley is an individual trading as Fire-Pak Manufacturing Company, with his principal office and place of business located at 2220 Southside Boulevard in the city of Jacksonville, State of Florida.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of a shaker-type dry chemical fire extinguisher designated "Fire-Pak" to the public.

It is further ordered, That the hearing examiner's initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That 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.

By the Commission, Commissioner Elman did not participate in the consideration or decision of this case.

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PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of a shaker-type dry chemical fire extinguisher designated "Fire-Pak" to the public.

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PAR. 3. In the course and conduct of his said business, respondent now causes, and for some time last past has caused, his said fire extinguisher, when sold, to be shipped from his place of business in the State of Florida to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business as aforesaid, and for the purpose of inducing the sale of his said fire extinguisher, respondent has made certain statements and representations in the advertising, packaging and labeling of his said fire extinguisher with respect to the safety, utility, and effectiveness thereof. Among and typical but not all-inclusive of the statements and representations so made are the following:

1. On the packaging:

Excellent fire protection in automobiles, boats, buses, electrical equipment, farms, garages, homes, house trailers, industrial plants, institutions, service stations, schools, trucks, tractors.

Safe * * * effective

An approved extinguishing agent

2. On the label:

Safe * * *

Approved extinguishing agent

3. In a promotional advertising brochure, the aforementioned representations appear in the form of a reproduction of the package and label. In addition thereto, the said brochure contains the following statements and representations:

Unequaled in * * * effectiveness

Your best protection in * * * boats * * * homes * * * house trailers
* * * automobiles * * * industry * * * farm equipment * * * heating systems
* * * trucks * * *

Safe * * *

An approved extinguishing agent

Instantly puts out flaming grease, fuel oil, electrical, or even a butane or propane fire.

Fire-Paks are very practical as protection around the home, industry, boats, auto, and farms, because they are effective on grease, gasoline, over-heated stoves, electrical fires, butane and propane fires.

Fire-Paks are more effective than most extinguishers costing up to six times as much.

Fire-Paks are in use with: U. S. Department of Agriculture (Forest Div.)
* * * U. S. Army Engineers * * *

Tests revealed that one Fire-Pak has more fire killing power than three one quart carbon tetrachloride extinguishers (at $\frac{1}{3}$ the cost of only one C.T.C.) or two 5 lb. CO₂ extinguishers (at $\frac{1}{7}$ the cost of one CO₂)

PAR. 5. Through the use of the aforesaid statements and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that the "Fire-Pak" fire extinguisher:

1. Is excellent fire protection for use in boats, buses, trucks, schools, service stations, institutions, and other types of vehicles and establishments.

2. Will extinguish fires of all sizes and types and is safe and effective for use on butane and propane fires.

3. Has been approved by a recognized testing laboratory or by recognized regulatory authorities for use on boats, trucks, buses, and in schools, service stations, institutions, and other types of vehicles and establishments.

4. Is in regular and continuing use with, and hence is approved for use by, the United States Department of Agriculture and the United States Army Corps of Engineers.

5. Is unequaled in effectiveness, has greater fire extinguishing capability than other types of fire extinguishers and is more effective than extinguishers costing up to six times as much.

PAR. 6. In truth and in fact, the "Fire-Pak" fire extinguisher:

1. Is not adequate protection for boats, buses, trucks, schools, service stations, institutions, or many other types of vehicles and establishments.

2. Is not effective in extinguishing any fires except certain small fires in their initial stages and is not of any value for nor safe for use on butane or propane fires.

3. Has not been tested nor approved by any testing laboratory nor approved by any regulatory authority for use on boats, trucks, buses, schools, institutions, or any other type of vehicles or establishments.

4. Is not approved by or in continuing or regular use with agencies of the United States Government as represented.

5. Is not unequaled in effectiveness and does not have greater fire extinguishing capability than other types of fire extinguishers nor is it more effective than other types of fire extinguishers.

The representations referred to in Paragraph 4 are therefore false, misleading, and deceptive.

PAR. 7. In the course and conduct of his business, at all times mentioned herein, respondent has been and is in substantial competition in commerce with corporations, firms and individuals in the sale of fire extinguishers.

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PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's product by reason thereof.

PAR. 9. The aforesaid acts and practices of respondent as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. Charles J. Connolly for the Commission.

Mr. James M. Dudley, pro se.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

ISSUED AUGUST 15, 1963

The complaint in this matter, issued November 5, 1962, charges respondent with violations of Section 5 of the Federal Trade Commission Act¹ through alleged misrepresentations "with respect to the safety, utility, and effectiveness" of a portable fire extinguisher sold and distributed by respondent under the trade name of "Fire-Pak."

Respondent's answer, filed December 17, 1962, generally takes issue with the charges of the complaint.

Pursuant to leave granted by the Commission to hold hearings herein at more than one place, hearings in this matter were held at Washington, D.C. and Jacksonville, Florida. The hearing at Washington took place on May 10, 1963, and that in Jacksonville on May 15 and 16, 1963. Respondent did not participate either in person or by counsel at the initial hearing of May 10, 1963, at Washington for reasons of alleged financial inability to come to Washington, hereinafter discussed. Complaint counsel presented his case-in-chief at the Washington hearing. Respondent, however, did appear and fully participate at the Jacksonville hearing where he presented his defense-in-chief and underwent cross-examination on much of the subject matter covered by the direct testimony offered by counsel supporting the complaint at the Washington hearing. The hearing set for rebuttal purposes on May 23, 1963, at Washington was waived by counsel supporting the complaint.

¹ Section 5(a)(1) of the Act, here pertinent, reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

Prior to the opening of the initial hearing herein at Washington, the undersigned received a long distance telephone call from respondent at Jacksonville advising, after some discussion, that he was prepared to settle the case by stipulating to accept the proposed cease and desist order set forth in the complaint, but by subsequent letter dated May 7, 1963, respondent notified the examiner that he was unable to go along with the proposed settlement because it called for a substitute answer admitting all the allegations of the complaint which he felt " * * * is not true." His May 7 letter reads as follows:

Dear Mr. Bush:

This will acknowledge receipt of the three separate documents requiring my signature from Mr. Charles J. Connolly, counsel in support of complaint Docket No. 8542.

I regret that I have troubled you so much in this matter but I am not in position to hire needed legal counsel; therefor, I have been very awkward in handling this matter.

One document entitled Substitute Answer requests that "He admits all material allegations of the complaint to be true."

I simply cannot sign this document knowing that it is not true.

I do not have the money to appear in Washington for my defense.

Your courtesies and kindnesses in the past are most appreciated.

Yours truly,

James M. Dudley. (Tr. 55-62, 165-174.)

Under letter dated May 8, 1963, the examiner acknowledged receipt of respondent's aforementioned letter and notified respondent of his right to appear at the opening hearing of May 10, 1963, at Washington, D.C., notwithstanding his then present intention not to appear, but advised him that if he did not appear the undersigned would " * * * endeavor to protect your interest at the hearing to the extent possible." The examiner also advised respondent in his said letter that: "On May 15, 1963, hearing will open in your case at Jacksonville, Florida, pursuant to official notice heretofore served upon you, to give you opportunity to appear and testify in your own behalf and to call such witnesses as you may desire in your behalf." (Tr. 166-174.)

Prior to the initial hearing herein of May 10, 1963, at Washington, D.C., respondent personally participated in a prehearing conference held in this matter in Washington on January 31, 1963. (Tr. 1-54.) The record also shows that respondent came to Washington on at least three different prior occasions for purposes of discussing possible settlement of the matter with Commission personnel. (Tr. 172.) At the aforesaid prehearing conference of January 31, 1963, respondent gave no indication to the examiner that he would be unable, for financial reasons, to attend the then orally announced initial hearing to be held at Washington to hear six proposed witnesses for the Com-

mission, all residents of the greater Washington, D.C., metropolitan area. At the same prehearing conference, the examiner also announced, subject to the approval of the Commission, that a hearing would also be held at a subsequent date at Jacksonville to take the testimony of numerous proposed witnesses for respondent who resided at Jacksonville. Respondent expressly acknowledged at the opening of the hearing in Jacksonville under questioning by the examiner that he had made no indication or claim at the prehearing conference that he would be unable for financial reasons to attend the initial hearing at Washington. (Tr. 171.)

The record as a whole, including respondent's financial statements (RX-3), establishes that respondent had the financial resources to come to Washington for the initial hearing. (Tr. 494.)

At the conclusion of the hearing at Jacksonville, respondent waived the filing of proposed findings of fact, preferring to leave the matter entirely in the hands of the examiner for decision. Although the examiner nevertheless established a common due date for the filing of proposed findings of fact, conclusions of law, and order together with reasons therefor and briefs in support thereof, these have been filed only by counsel supporting the complaint. Complaint counsel's submissions have been carefully reviewed and considered and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

After the formal opening of the hearing in Jacksonville on the morning of May 15, 1963, the examiner made available to respondent for overnight use his personal copy of the transcript of testimony taken in the case at Washington and offered to recess the hearing until the following morning in order to give respondent opportunity to peruse the transcript and prepare his defense. The offer was declined because some of respondent's witnesses were present and he did not want to put them to the inconvenience of coming back a second time. (Tr. 172-173.) But respondent did avail himself of the use of the transcript of the Washington hearing and used it for the preparation of his defense. (Tr. 406, 449.) Similarly, complaint counsel also made available to respondent all of the Commission exhibits received in evidence at the Washington hearing. (Tr. 173.)

GENERAL BACKGROUND

Respondent James M. Dudley is an individual trading as Fire-Pak Manufacturing Company, with his principal office and place of business located at 2220 Southside Boulevard in the city of Jacksonville, State of Florida.

He has been engaged since 1955 in advertising, offering for sale, sale and distribution of a portable "shaker-type" dry chemical fire extinguisher sold under the trade name or designation of "Fire-Pak." The Fire-Pak extinguisher bears some resemblance in size and shape to a quart size thermos bottle, but is considerably smaller and gives the impression of being quite diminutive. It is made up of an aluminum cylindrical container, an iron bracket or handle attached to the cap of the container, and a dry chemical powder within the container. The container is $8\frac{1}{2}$ inches in height and 3 inches in diameter. It holds two pounds of a dry chemical powder hereinafter described. The full weight of the loaded extinguisher, including its contents and the bracket attached to the outside of the container, is $2\frac{3}{4}$ pounds. (CX-2(a); Tr. 519.)

Each Fire-Pak is capped with a removable aluminum cap which functions very much like the metal pry caps used on glass jars of canned foods. (See CX-2B for physical exhibit.) A perforated disc, containing 45 evenly spaced quarter inch holes, is fitted into the top of the cylinder of each Fire-Pak directly beneath the extinguisher's removable cap. When the cap is removed from the extinguisher, it has the appearance of a huge salt shaker. Attached firmly to the center of each cap by means of a rivet is a $1\frac{1}{4}$ inch iron bracket or pry handle which extends down the side of the extinguisher and underneath its bottom. When attached to a wall, the bracket serves as a holder for the extinguisher but such use of the bracket is optional with the user. The primary purpose of the bracket is to serve as a lift or pry for the removal of the extinguisher's cap. The cap of the extinguisher is removed by a quick jerk of the bracket from the extinguisher or of the extinguisher away from the bracket. This exposes the dry chemical contents of the extinguisher for use through its perforated disc. Refilling of the extinguisher is accomplished by removing the perforated disc, pouring in the dry powder, and replacing the disc.

Respondent's recommended procedure for the use of the dry chemical in his Fire-Pak extinguisher is to grasp the extinguisher by its base and to cast its powder content at the base of flame with long repeated sideway motions of the arm, rather than to shake or pour the powder directly over a fire. The evidence shows that the casting method of applying the Fire-Pak extinguisher is the most effective way of using it. This method of application also enhances the safety of the user by permitting him to stand further back from the fire than if he were attempting to put out a fire by shaking or pouring the contents of the Fire-Pak directly over the fire which in many

instances would in any event be impossible due to the intensity of the flame. (CX-2B, Tr. 191.)

Respondent's portable shaker-type dry chemical extinguisher must be sharply distinguished from the portable pressure-type dry chemical fire extinguisher because, as hereinafter detailed, the pressure extinguisher is an "approved" extinguisher whereas the shaker-type is not. In "approved" extinguishers the dry chemical is expelled by gas kept under pressure in the extinguisher as released by the opening of a valve, whereas in the Fire-Pak the powder is expelled by means of the human energy used in casting the powder on a fire. The smallest pressure-type extinguisher holds $2\frac{1}{2}$ pounds of dry chemical as against the 2 pounds held by Fire-Pak but the pressure-type extinguisher is made in sizes holding up to a maximum of 30 pounds of powder. The discharge from a pressure extinguisher has an effective range of approximately 5 to 20 feet, depending upon the size and design of the extinguisher. (CX-5 at page 43.) The discharge range from a Fire-Pak depends upon the dexterity, vigor and experience of its user. From the record as a whole, including the examiner's observation of respondents' films (RX-10) showing the application of Fire-Pak to fire, it is found that the minimum effective discharge range of the Fire-Pak in the hands of an average inexperienced user using respondent's recommended arm casting application of the dry chemical would be between 3 and 5 feet but in the hands of one trained and experienced in the technique the effective range would be about 10 feet. (Tr. 435, 444.) A pressure-type extinguisher, like the shaker-type Fire-Pak, also "must be operated in accordance with instructions which are prominent on the extinguisher" for maximum effective use. (CX-5 at page 43.) From the record as a whole it is further concluded that skill and experience is an important factor in the use of any fire extinguisher whether it be of the shaker or pressure type or any other type. (Tr. 76.) The use of any type of fire extinguisher is more effective in the hands of a professional fire fighter than those of an amateur.

The total weight of the smallest of pressure-type fire extinguishers including its dry chemical content is between 9 and 11 pounds, as compared with the $2\frac{3}{4}$ pound weight of the Fire-Pak. The height of a pressure extinguisher is about 16 inches as against the Fire-Pak's $8\frac{1}{2}$ inch height. (Tr. 521-522.) The diameter of a pressure extinguisher is approximately 3 inches or about the same diameter as that of the Fire-Pak.

The retail list price on the Fire-Pak extinguisher is \$6. (Tr. 52.) The list price of the lowest price pressure extinguisher put out by one of the leading fire-fighting equipment manufacturers is \$19.50. (Tr. 287.)

The contents of any fire extinguisher, whether it be water, foam chemical, dry powder, or some other substance, is commonly referred to as the fire extinguishing agent. (Tr. 273.)

The fire extinguishing agent used in the Fire-Pak extinguisher is a specially treated sodium bicarbonate powder (about 91 percent) with components (about 9 percent) for producing free flow and repellantcy.

The same chemical agent is also used in "approved" dry chemical pressure-type fire extinguishers. (Tr. 254-255, CX-3 A and B, CX-4, CX-5 at p. 43, RX-1 A.) To remove any mystery about this chemical agent, it may be stated that in its pure form it is the sole ingredient in the well known and widely used Arm and Hammer Soda Bicarbonate and that the chemical is also an old stand-by for certain types of gastric distress.

It is found from the testimony of one of the complaint counsel's expert witnesses and from the record as a whole that the powdered sodium bicarbonate used by respondent as an extinguishing agent in his Fire-Pak extinguisher "* * * is * * * widely used in fire extinguishment." (Tr. 154; see also CX-5 at pp. 43, CX-9 at pp. 17.)

The fire extinguishing agent here under discussion when used on a fire produces a cloud of finely dispersed dust over the fire. The dust separates the flame from the combustible material and thereby has the effect of smothering the fire. (Tr. 154, CX-5 at pp. 45, par. 4321.)

For all practical purposes, there are three recognized general classes of fires denominated as Class "A", "B", and "C" fires. The sodium bicarbonate dry powder fire extinguisher agent is designed for use primarily on Class "B" fires which are defined as fires in flammable petroleum products or other flammable liquids or greases, where the "blanketing-smothering" effect of oxygen-excluding media is most effective. Dry powdered sodium bicarbonate is effective on Class "B" fires involving small quantities of flammable liquids and greases in open vessels or on floors, sand, gravel, and other ground surfaces. (CX-5, pp. 4, 43, and 45, Tr. 215, 250.)

The dry chemical powder here under consideration is also suitable for Class "C" fires. Class "C" fires are defined as fires involving electrical equipment where the electrical nonconductivity of the extinguishing media is of first importance. Sodium bicarbonate, a nonconducting extinguishing agent, is effective on Class "C" incipient fires in electrical equipment. (CX-5, pp. 4, 43, 45, Tr. 215, 250.)

Powderized sodium bicarbonate also has some limited effect on some Class "A" fires. Class "A" fires are defined as fires in ordinary combustible materials such as wood, cloth and paper where the

"quenching-cooling" effect of quantities of water or solutions containing large percentages of water is most effective in reducing the temperature and is, therefore of first importance. The involved dry chemical is not effective on deep-seated Class "A" fires in ordinary combustible material but may have some value on incipient surface fires in such materials. (CX-5, pp. 4, 43, 45; CX-9 at p. 17, Tr 215, 250.)

The fire extinguishing agent used in Fire-Pak is purchased by respondent from the Fyr-Fighter Company of Newark, New Jersey, a manufacturer and distributor of such well-known fire extinguishers as the trade-marked "Pyrene," "Fire-Fighter," and "C-O-Two." The company uses the same extinguishing agent in its own line of "Pyrene" dry chemical fire extinguishers. It designates the extinguishing agent as its "Patented Formula H" and describes it as consisting " * * * essentially of powdered sodium bicarbonate treated in inert, non-toxic dry additives and liquid synthetic resin." (Tr. 255-257, CX-3 A and B, CX-4, RX-1 A.)

The Fyr-Fighter Company manufactures and distributes only the *pressurized* type of dry chemical fire extinguishers. The company does not make or distribute any *shaker-type* fire extinguishers, such as the Fire-Pak. The firm manufactures and sells only "approved" fire extinguishers. (Tr. 269; CX-9, p. 6.)

An "approved" fire extinguisher is one which has been approved by one of two recognized laboratories for testing fire protection equipment. These are Underwriters' Laboratories, Inc., and Factory Mutual Laboratories. In at least one State and in some counties in another State there is legislation prohibiting the sale " * * * of any make, type or model or extinguisher * * * unless such make, type or model is approved and labeled by the Factory Mutual Laboratories, Underwriters' Laboratories, Inc., or other testing laboratory approved by the Fire Marshal as providing adequate and reliable tests and examination." (Tr. 121-125; CX-9, p. 2.)

Although the two mentioned fire protection testing laboratories recognize dry chemicals made from a base of sodium bicarbonate as a safe and effective fire extinguishing agent on Classes "A", "B", and "C" fires to the extent heretofore indicated, they have never approved the *shaker-type* fire extinguisher employing such extinguishing agent but do approve the *pressure-type* extinguisher using the same dry chemical. (Tr. 124.)

The National Auto Stock Racing Association of Daytona Beach, Florida, promoters of stock car races, selected some years ago the Fire-Pak as its exclusively approved fire extinguisher for use on each automobile engaged in racing at races it sponsors. No other fire extinguisher was thereafter allowed to be used at such car races.

This was done after extensive comparative tests were made with various types of fire extinguishers as to their relative merits for use on fuel fires in racing cars and on tire fires. Fire-Pak competed in such tests against pressurized extinguishers employing not only dry chemicals but also carbon dioxide and water with additives as extinguishing agents. (Tr. 338-442, 460.)

Respondent operates a one-man factory in the back of his home in Jacksonville where with the help of occasional day labor he manufactures the shells of the Fire-Pak extinguishers, fills them with the described dry chemical, and packages each loaded extinguisher in an individual carton. His wife assists him in the office work. (Tr. 189-190, 248, 416.)

Although respondent's sales of Fire-Paks and refills of dry chemicals have been increasing each year since he commenced operations in 1955, his business remains essentially a small operation. His total net sales for 1962 was \$38,318 and his net profits from operations for the year was \$10,080. His net worth as of December 31, 1962 was \$15,386. (RX-3.)

Respondent sells between 12,000 and 14,000 Fire-Paks annually. Approximately 80 to 85 percent of the sales are to customers within the State of Florida. The remaining sales are principally to customers in North Carolina and Mississippi. It is found that respondent has maintained a substantial course of trade in Fire-Paks in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Tr. 237-238, 241.)

Respondent operates principally through distributors and dealers. He has three such distributors, one in central Florida whose principal activity is commercial fishing, another in North Carolina who handles the Fire-Pak as part of his general line of fire appliances, and a third in Mississippi who sells insurance as well as Fire-Paks. Respondent has a total of perhaps 24 dealers who acquire their Fire-Paks almost entirely through respondent's distributors. The dealers for the most part are engaged in selling auto parts. (Tr. 237-238, 240-242; RX-3.)

Approximately 50 percent of respondent's total annual sales is repeat business. About 15 percent of the total sales are for refills of the extinguishing agent. (Tr. 241, 247.)

Respondent acknowledges that he is in competition with some 15 Jacksonville dealers of fire extinguishers who sell only the "approved" type of extinguisher but the evidence fails to show that the latter are engaged in the sale of fire extinguishers in "commerce." However, it can be inferred and is found from the record as a whole that respondent who sells annually somewhat more than 2,000 Fire-Paks to customers in States outside Florida out of total

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annual sales of up to 14,000 units per year is in " * * * substantial competition in commerce * * *," as alleged in the complaint, with numerous distributors of fire extinguishers engaged in interstate sales of such commodities. (Tr. 33, 178-182, 448.)

Ninety-nine percent of the sales of Fire-Pak are for commercial or industrial use. The remaining one percent is sold to individuals for use in their homes and boats and such individual buyers are persons who have had experience with the extinguisher in their occupations in industry or government. Respondent does not solicit orders on a house-to-house or boat-to-boat basis because he has found that this is not economically feasible. Respondent's sales are mainly in quantity case lots. (Tr. 52-53, 459, 557 A and B.)

In addition to sales to commercial or industrial users of his product, respondent has made substantial sales of his Fire-Pak to various Governmental agencies or subdivisions as hereinafter outlined. He has also sold thousands of his extinguishers to hundreds of fire departments. One of these is the Lakewood-San Jose Fire Department, near Jacksonville. (Tr. 205, 354, 362, 365, 367, 370, 388; RX-2 A and B; RX-4 A and B; RX-5 A and B.)

Over the years, respondent has sold his Fire-Pak extinguishers to various governmental departments or units, both at the federal, state, county, and municipal levels, including the following:

Government unit	Years of purchase	Total number of fire-paks sold or total amount of purchases.
Fla. State Road Comm. (Tr. 362-3).	April 1958-Nov. 1962..	2,120 Units
Va. State Road Dept. (Tr. 365).	1962-March 1963.....	187 Units
Fla. Forest Service (Tr. 367-8).	Nov. 1956-Feb. 1963..	Undetermined but for past 11 months, 72 Units.
U.S. Dept. of Ag., Forest Service (Tr. 370-5; RX 2A-C).	1956-1963.....	\$2,036.00
U.S. Dept. of Ag., Fish & Wildlife Service (RX 2A & C).	1957 & 1963.....	\$73.82
U.S. Army, Engineers Corps. (RX 5A-B; Tr. 389-90).	1959-1963.....	\$2,097.00
U.S. Dept. of Interior (RX 5A).	One purchase-1962---	\$75.49
City of Fort Lauderdale, Fla. (Tr. 353).	1956-1961.....	253 Units
U.S. Dept. of Ag., Research Service (RX 2B).	1961.....	\$20.05

Respondent has also sold Fire-Paks to the Mississippi Forest Service, the Texas Forest Service and the Georgia Forest Service. (Tr. 205, 244.)

The great bulk of respondent's sales, however, have been to private industrial users. The citrus industry is one of respondent's largest users of the Fire-Pak. His chief customers in this field are various citrus producing affiliates of the Minute Maid Corporation. Other of respondent's customers include various paper manufacturing companies, a brick firm, heavy construction companies, manufacturers of fertilizers, oil companies, truck lines, and liquefied petroleum (LP Gas) firms. (Tr. 242, 244, 245, 358-62, 383, 392, 393; RX-6C, RX-6-Z-21, RX-6-Z-32.)

Respondent's customers, both private and governmental, buy the Fire-Pak chiefly for use in extinguishing petroleum fires on mobile equipment, such as trucks, tractors, road machinery, and spraying equipment. In addition to gasoline, fuel used in a great deal of this equipment is butane and propane. It is inferred and found that the fire department purchasers of Fire-Pak use the extinguishers on petroleum fires. (Tr. 205, 245, 359, 360-62; RX-6A.)

The ultimate users of Fire-Pak extinguishers are employees of respondent's customers. They are employed almost entirely as operators of various types of mobile motorized equipment and as mechanics skilled in the care of such equipment. Such men are physically active and mechanically inclined individuals. It is found that men of these occupations would be far more adept and adroit in the effective use of respondent's shaker-type of fire extinguisher than office workers or housewives or the general public. Respondent caters almost exclusively to this type of ultimate user.

Respondent and his agents, all experts in the use of fire extinguishers, generally give demonstrations, instructions, and training in the use of the Fire-Pak extinguisher prior to sale. (Tr. 201-204, 334, 346, 355-356; RX-6B, RX-6T, RX-6X, RX-6Z11, RX-6Z24, RX-6Z41, RX-6Z45.)

Through the use of such demonstrations, instructions, and training, the effectiveness and personal safety of the users of respondent's Fire-Pak are enhanced.

The advertisement claims here under consideration consist of a brochure (CX-1), the printed matter on the carton (CX-2A) in which each Fire-Pak is packed, and the printed matter on the cylinder of the Fire-Pak extinguisher (CX-2B).

FULL TEXT OF ABBREVIATED ADS CHARGED TO RESPONDENT

The complaint sets out a number of respondent's advertisements in abbreviated form and in some instances does not set forth additional statements in the advertisements which bear a relationship to the alleged advertisement claims. This has resulted in the opinion of the examiner in the omission of certain words, phrases and sentences which are necessary for a full understanding of the representations made by respondent in his advertisements.

The complaint alleges that respondent has made certain representations on the "packaging" of the Fire-Pak extinguisher. The "packaging" is the carton (CX-2A) in which extinguisher is packed. The carton is printed with reading matter in both black and red ink. One of the panels of the carton contains the following representations, as alleged in the complaint:

Excellent fire protection in automobile, boats, buses, electrical equipment, farms, garages, homes, house trailers, industrial plants, institutions, service stations, schools, trucks, tractors.

The above is arranged in the panel in vertical fashion and the first three words "Excellent fire protection" are in more prominent type than the words that follow.

Respondent in his answer admits that the above representation is made on the packaging of his product but the evidence also shows that there is printed conspicuously at the bottom of the panel the following statement:

ALL FIRES START SMALL

The above is printed in larger, blacker and more attention-arresting type than are the listings of the properties on the panel (*i.e.* automobiles, boats, buses, etc.) for which the Fire-Pak is recommended as the fire extinguisher in the event of fire.

The complaint charges a further representation on the "packaging" of the Fire-Pak extinguisher. This representation appears on a second panel of the Fire-Pak's carton and reads as follows:

Safe * * * effective

Respondent in his answer admits that the above representation is made on the packaging of his product but the evidence also shows that there is printed directly beneath each of the aforesaid words certain matter which are pertinent to the context in which the said words "Safe" and "effective" are used in the panel. The full pertinent text of the panel is printed vertically thereon as follows:

SAFE
Non Toxic

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Non Corrosive
 Non Abrasive
 Non Conductor
 of Electricity
 EFFECTIVE
 on
 Flammable Liquids
 Electrical Fires and
 will control flame in
 ordinary combustibles
 (Smothers fire instantly)

* * * * *

Finally, with respect to the "packaging" of the Fire-Pak extinguisher, the complaint alleges that there is printed thereon a representation reading as follows:

An approved extinguishing agent

Respondent's answer admits that the foregoing representation is made on the packaging of his product but the evidence also shows that the full related text of the printed panel which contains the said representation reads as follows:

HOW TO USE

Grasp at base and cast contents at base of flame
 (Drawing depicting a Fire-Pak in use by recommended casting method.)

After Use

Remove perforated disc and refill with Fire-Pak
 dry chemical (No annual recharge necessary).
 SAFE—CLEAN—Odorless
 An Approved Extinguishing Agent
 Non Toxic—Non Corrosive
 Non Abrasive—Non Conductor of Electricity
 Will not Freeze Deteriorate or Evaporate

The complaint also charges respondent with making certain representations "on the label" of the Fire-Pak extinguisher. (For physical exhibit of Fire-Pak, see CX-2B). Such "label" representations refer to reading matter affixed to the cylinder of the extinguisher. (Tr. 248.)

The complaint alleges that the label on the Fire-Pak extinguisher carries the following representations:

(a) Safe * * *

(b) Approved extinguishing agent

Respondent in his answer admits that the above representation appears "on the label" of the extinguisher but the evidence also shows that the full related text of the label which contains the said

representation reads the same as the text shown on the top of this page.

The complaint further charges respondent with making certain representations about the Fire-Pak extinguisher in a "promotional advertising brochure" (CX-1). The complaint alleges and respondent admits that he made the following statement in the brochure:

Safe * * *

An approved extinguishing agent.

But the evidence also shows that the full text of the above advertising is as follows:

SAFE—CLEAN—ODORLESS An Approved Extinguishing Agent

SAFE

Because it is

Non-Toxic

Non-Corrosive

Non-Abrasive

Non-Conductor of Electricity

Will Not Deteriorate, Freeze, or Evaporate

The complaint also alleges and respondent admits that representation is made in the brochure that the Fire-Pak extinguisher is:

UNEQUALED IN . . . EFFECTIVENESS

But the evidence also shows that the full text of the above representation is as follows:

UNEQUALED in SPEED
SIMPLICITY
EFFECTIVENESS

(The above is set up as nearly as possible as it appears in the brochure; the word "Unequaled" in the brochure is some two or three times the height of the words—speed, simplicity and effectiveness.)

Respondent contends that the above statement does not represent that the Fire-Pak is unequalled in effectiveness by any other extinguisher but represents only that in the combination of the factors of speed, simplicity, and effectiveness the Fire-Pak is unequalled and that he sincerely believes this to be true. Consideration will be given later to the appropriate interpretation to be given to the full text of the representation.

DECEPTIVE REPRESENTATIONS CHARGED TO RESPONDENT AND CONCLUSIONS REACHED THEREON

The complaint charges that respondent through the advertisements in question made five separate representations with respect to the Fire-Pak extinguisher which it alleges are false, misleading and deceptive. For evidence that these representations were in fact made,

complaint counsel relies on the advertisements shown in the complaint and requests the examiner "* * *" to use his expertise in interpreting the meaning of the advertisements which are supported by the ads themselves," asserting that "there is no need of consumer testimony to interpret the meanings of the advertisements."

In *Zenith Radio Corp. v. Federal Trade Commission*, 143 F. 2d 29 (7th Cir. 1944), it was held that the Commission "* * *" has a right to look at the advertisements in question, consider the relevant evidence in the record that would aid "* * *" in interpreting the advertisements, and then decide "* * *" whether the practices engaged in by petitioner were unfair or deceptive, as charged in the complaint."

Consideration must necessarily be first given to the question of whether the advertisements in question do in fact constitute the representations charged in the complaint. Obviously, if the conclusion is drawn that the advertisements do not in fact spell out the charged representations, then the evidence presented to show whether these representations are true or not is no longer relevant because a cease and desist order can be issued only with respect to representations *actually made by a respondent* which are also found to be false, misleading, and deceptive. Attention is again directed to the fact that the record is barren of any consumer testimony as to the meanings of the involved advertisements and that their interpretation must therefore be based on the advertisements and *other* "* * *" relevant evidence in the record that would aid "* * *" in interpreting the advertisements "* * *." *Zenith Radio Corp. v. Federal Trade Commission, supra.*

Taking up the five representations charged by the complaint in the order in which they are presented therein, the first charge is that respondent through the above-described advertisements has represented, directly and by implication, that the Fire-Pak extinguisher "is excellent fire protection for use in boats, buses, trucks, schools, service stations, institutions, and other types of vehicles and establishments."

The record shows that respondent did in fact make substantially the above statement on one of the panels of the carton (CX-2A) of the Fire-Pak extinguisher and that the brochure (CX-1) on the Fire-Pak makes a similar statement under the heading "Your Best Protection For."

But the record also shows that the very panel of the carton on which the statement in question is made also carries a conspicuous warning that "All Fires Start Small." The same conspicuous warning is also repeated on two of the other panels of the carton and is likewise conspicuously painted on the label of the Fire-Pak extin-

guisher itself preceded by the exhortation "Remember." Similarly the aforementioned brochure statement under the caption "Your Best Protection For" is preceded by another heading conspicuously warning that "To Wait Can Be Too Late" and this warning, by way of illustration, shows at its side a picture of a house aflame, presumably because a fire extinguisher was not used on the fire when it was in its incipient stage. Another page of the brochure carries pictures of the Fire-Pak extinguisher and its carton with their respective markings "Remember All Fires Start Small" and "All Fires Start Small." Even in the illustrations, these warnings stand out prominently and conspicuously.

The diminutive size of the Fire-Pak extinguisher must also be taken in consideration in construing the meaning conveyed by the advertisement in question. It is difficult to imagine that anyone, even a child of twelve, would be deceived by the wording in question into believing that the Fire-Pak, not much larger than a quart size carton of milk, was being recommended for use on anything other than *small incipient fires* on the properties mentioned in the advertisements.

It is found that the statement in the involved advertisement that the Fire-Pak extinguisher "Is Excellent Fire Protection in Automobiles, Boats, Buses, Electrical Equipment, Farms, Garages, Homes," etc., when *considered in conjunction with* (a) the conspicuous warnings on the advertisement that "All Fires Start Small" and (b) the tiny size and appearance of the Fire-Pak extinguisher, constitutes an advertisement only to the fact that the Fire-Pak is effective on *small incipient fires* in such properties. Conversely, it is found that the advertisement in question is not a representation that the Fire-Pak fire extinguisher is "* * * adequate protection for boats, buses, trucks, schools, service stations, institutions, or many other types of vehicles and establishments." (See Par. SIX of complaint.) The proposed cease and desist order set forth in the complaint does not seek to prohibit respondent from advertising that the Fire-Pak extinguisher will be of value in extinguishing small fires in their initial stages. The charge here under consideration will be dismissed for failure to show that respondent made the *unqualified* representation with which he is charged.

Secondly, the complaint alleges that respondent through various advertisements has represented, directly and by implication, that the Fire-Pak extinguisher "Will extinguish fires of all sizes and types and is safe and effective for use on butane and propane fires." Since there is more than one representation involved in this allegation, the representations therein will be dealt with separately.

Respondent in his answer vigorously denies that he has anywhere in his advertisements claimed that the Fire-Pak extinguisher will extinguish "fires of all sizes".

The examiner has carefully examined all of the involved advertisements and finds no evidence therein of a claim that the Fire-Pak extinguisher will extinguish fires of all sizes. While as shown in the preceding issue the advertisements do state that the extinguisher is "excellent fire protection in automobiles, boats, buses" and so forth, such advertisement when considered in conjunction with the many warnings in the advertisements that "All Fires Start Small" and the diminutive size of the extinguisher makes it clear that respondent has not represented his extinguisher as effective on "fires of all sizes" but only on fires in their initial stages. The charge here under consideration will be dismissed because of failure to show that respondent made the representation with which he is charged.

The complaint as seen also alleges that respondent through the above-described advertisement represented that his Fire-Pak extinguisher will extinguish fires "of all types".

Respondent in his answer alleges that the only representation he has made in this connection is that the Fire-Pak extinguisher will be "effective on flammable liquids, electric fires and controls flame in ordinary combustibles." The examiner finds that this statement is the only direct representation made by respondent in any of the involved advertisements as to the types of fires on which the Fire-Pak would be effective. The statement appears on both the brochure and the carton of the extinguisher. As heretofore shown, fires are generally classified into Class "A", Class "B", and Class "C" fires and that a Class "A" fire involves ordinary combustibles (wood, paper, cloth), Class "B" involves flammable liquids, and a Class "C" fire involves electrical fires. The examiner has carefully examined all of the involved advertisements and finds that respondent has not represented therein, directly or by implication, that the Fire-Pak will extinguish all types of fires but only a representation that it will extinguish the described fires which fall into Classes "B" and "C". With respect to Class "A" fires, the ads represent only that the extinguisher will "control", not extinguish, such fires by smothering. Since there has been a failure to show that respondent has represented that his fire extinguisher will extinguish all types of fires, the charge that respondent made such representations will be dismissed.

The remaining portion of the alleged representation here under consideration charges respondent with representing that the Fire-Pak extinguisher is "safe and effective for use on butane and propane

fires." The reference here is to a single non-conspicuous statement on the last page of the four page brochure which reads: "Fire-Paks are practical as protection around the home, industry, boats, auto, and farms, because they are effective on grease, gasoline, overheated stoves, electrical fires, *butane and propane pressure fires.*" (The underscoring has been supplied; it is not present in the brochure.) It should be noted that there is no claim in the above statement that the Fire-Pak extinguisher is "safe" for use on butane and propane pressure fires but only that it is "practical" for such purpose. The above statement is the only reference in all the involved advertisements with respect to the use of the Fire-Pak extinguisher on butane and propane pressure fires.

The examiner has carefully examined the advertisements in question and finds that the word "safe" has been used therein only in the sense claimed by respondent. As heretofore found, the advertisements in question represent that the Fire-Pak's extinguishing agent is "safe" in the sense of being "Non Toxic Non Corrosive Non Conductor of Electricity. Will Not Deteriorate or Evaporate." The record establishes that the treated sodium bicarbonate used as an extinguishing agent in the Fire-Pak extinguisher is "safe" to human beings in the sense that word is used in the advertisements in that it is non-toxic and a non-conductor of electricity and is "safe" with respect to machinery and other properties in that it will not cause corrosion or abrasion and is "safe" in the further sense that the dry chemical will not freeze, deteriorate or evaporate. (See Tr. 84-86 for testimony of one of the Commission's expert witnesses which has been adopted by all other Commission expert witnesses; Tr. 183-185.) It is found that in the sense the word "safe" has been used in the advertisements in question there has been no misrepresentations or false, misleading or deceptive statements. But it should be again noted that in the particular representation here under consideration (see above) the word "safe" is not used at all.

The respondent has not anywhere in his advertisements represented that the use of his extinguisher is the safest way to extinguish a fire of butane or propane origin. The record shows that the safest way to extinguish such a fire is to turn off the valve to the tank which holds the gas. When this is done and the surroundings "* * * are kept cool below their point of combustion * * *," the fire will burn itself out of its own accord. On the other hand, if the fire is extinguished by means of an extinguishing agent without shutting off the valve, this may cause an explosion from accumulated vapors which could be more of a hazard than the fire itself. For this reason the standard instructions for extinguishing a butane or propane fire

is to turn off the valve. This is well known to all industrial users of the gases in question. (Tr. 87-88, 323-325.) However, there are occasions when it is impossible to get to the valve because of surrounding fire or to turn off the valve because it has been broken or damaged. In such event, an extinguisher must be used and presumably other measures are taken, if possible, to prevent an explosion. (Tr. 324-325.) Required by law, it is standard practice for bulk transport trucks and storage plants of the liquefied gas under consideration to be equipped with fire extinguishers. (Tr. 283, 288.)

In view of the fact that respondent has not made any representations in the advertisements in question that the Fire-Pak extinguisher " * * * is safe * * * for use on butane or propane fires" in the sense that an extinguisher is the best way to put out such fires, the charge here under consideration will be dismissed. There is an indication in the record that respondent would be quite willing to revise his advertisements to include a warning that the safest way to extinguish a butane or propane pressure fire is to turn off the outlet valve. (Tr. 470.) Respondent is advised to make this change in all future advertisements in which the Fire-Pak is recommended for use on butane or propane pressure fires in the interest of placing the fullest possible information before his purchasing public about recommended procedures for dealing with butane and propane fires.

As to the alleged representation that the Fire-Pak extinguisher is "effective" on butane and propane pressure fires, respondent admits in his answer, as the above quoted excerpt from his brochure shows, that he made this claim but respondent vigorously alleges that such claim is true. The record is clear that the extinguishing agent in the Fire-Pak will readily put out a pressure fire of butane or propane gas origin. This is admitted by the Commission's key expert witness, Roger C. Hale, who stated on direct examination that the extinguishing agent used in the Fire-Pak " * * * has been used successfully under high pressure in dense, large clouds to put out some spectacular butane or propane fires." (Tr. 88; Mr. Hale is a "key" witness in the sense that all of complaint counsel's expert witnesses adopted or concurred in the expert testimony given by Mr. Hale.) A film introduced by respondent with verbal descriptions in the record of its fire extinguishing scenes demonstrates the spectacular extinguishment of a large combination gasoline and butane fire through the use of the Fire-Pak extinguisher in some six or seven seconds. (Tr. 543.)

Since there has been a failure to show that respondent's representation that the Fire-Pak extinguisher is not effective on butane or propane fires, the charge that such representation is false, misleading, and deceptive will be dismissed.

Thirdly, the complaint alleges that respondent through his advertisements has represented, directly and by implication, that the Fire-Pak extinguisher: "Has been approved by a recognized testing laboratory or by recognized regulatory authorities for use on boats, trucks, buses, and in schools, service stations, institutions, and other types of vehicles and establishments." The complaint further charges that said representation is false, misleading, and deceptive.

It will be recalled that complaint counsel has not adduced and does not rely on any consumer testimony on the interpretation or meaning to be given to any of respondent's advertisements but requests the examiner to make such determination from the advertisements themselves.

The examiner has carefully examined all of the involved advertisements and finds that the only statement therein that uses the word "approved" is the following: "An Approved Extinguishing Agent." This appears on the label of the Fire-Pak extinguisher and on the full size illustration thereof on the brochure and is also repeated on one of the panels of the extinguisher's carton. The statement is a part of other surrounding statements on the label and carton panel which refer only to the dry chemical content of the extinguisher and not to the extinguisher as a unit. (See CX-1 and 2A.)

As heretofore shown, one of the panels of the carton does state that the Fire-Pak affords fire protection in schools, service stations, institutions, and other types of vehicles and establishments, but there is nowhere in this statement or elsewhere in respondent's advertisement any claim that the Fire-Pak extinguisher as a unit "has been approved by a recognized testing laboratory or by recognized regulatory authorities for use" on such properties, as charged in the complaint.

It should be noted that the issue in question under the pleadings is not whether the respondent has represented that his extinguisher employs "an approved extinguishing agent" but whether respondent has represented, directly and by implication, that his Fire-Pak extinguisher as a unit (*i.e.*, the metal container with its appendages and its dry chemical content) has been approved by a recognized testing laboratory or by recognized regulatory authorities for use on the aforementioned properties. On the latter the examiner finds after careful study of all the involved advertisements that respondent has not made such a representation either directly or by implication. Since respondent did not make the representation, the charges in the complaint involving such alleged misrepresentation must necessarily be dismissed.

Although the question of whether or not respondent's extinguishing agent is "an approved extinguishing agent" has not been placed in issue by the pleadings in this proceeding, it may be noted in passing that the dry chemical that respondent uses in his Fire-Pak extinguishers is approved by the National Board of Fire Underwriters and also, as noted earlier, is in wide use. (CX-5, p. 43; CX-9, p. 17.)

Fourthly, the complaint alleges that respondent through his advertisements has represented, directly and by implication, that the Fire-Pak extinguisher "Is in regular and continuing use with, and hence is approved for use by, the United States Department of Agriculture and the United States Army Corps of Engineers." The complaint further alleges that such representations are false.

The brochure is the only advertisement of those here involved in which respondent makes a claim that the Fire-Pak is in use by the United States Department of Agriculture and the United States Corps of Engineers. The claim appears in a small space in the last page of the brochure and reads in part as follows:

FIRE-PAKS
are in use with:
U.S. Department of Agriculture
(Forest Division)
U.S. Army Engineers
State Forestry Services
State Highway Departments
County Law Enforcement Agencies
City Fire Departments
* * *

It will be noted that respondent has not anywhere stated or claimed in the above advertisement that the Fire-Pak extinguisher is "in regular and continuing use with, and hence is approved for use" by the United States Department, Forest Division, and by the United States Army Engineers.

The evidence presented by respondent shows that the two agencies have been in fact fairly regular and substantial purchasers of the Fire-Pak extinguishers over a period of years extending into the current year. (See page 202 *supra*.) Thus, the Department of Agriculture has purchased more than \$2,000 in Fire-Paks in the years 1956 to 1963 which if computed on the basis of the regular list price of \$6 per Fire-Pak would constitute purchases in excess of 700 Fire-Paks. (Actually respondent gives substantial discounts on the list price on quantity orders.) Similarly the United States Corps of Engineers purchased about \$2,100 in Fire-Paks in the years 1959 to 1963. One invoice to the Corps totaled \$736. (RX-5 A and B.)

It is found that respondent has not represented, directly and by implication, as charged in the complaint, that the Fire-Pak extinguisher is approved for use by the United States Department of Agriculture and the United States Army Corps of Engineers.

It is further found that respondent has not directly represented, as charged in the complaint, that the Fire-Pak extinguisher "is in regular and continuing use" by the United States Department of Agriculture and the United States Corps of Engineers but insofar as such representation can be implied from the advertisement in question, complaint counsel has failed to establish that the implied representation is not true in view of respondent's substantial sales to the said agencies over the years. Accordingly the charges here under consideration will be dismissed.

The fifth and final charge of the complaint is that respondent has falsely represented in his advertisements that the Fire-Pak extinguisher "Is unequaled in effectiveness, has greater fire extinguishing capability than other types of fire extinguishers and is more effective than extinguishers costing up to six times as much."

It will be noted that the quoted paragraph charges three separate representations. The first of these alleged representations is that the Fire-Pak extinguisher "is unequaled in effectiveness." Respondent in his answer expressly denies that he has made this representation, "* * *" but states affirmatively that his advertising material represents that the Fire-Pak Extinguisher is unequaled in the combination of three factors, those of speed, simplicity and effectiveness, and the impression conveyed regarding this point in Respondent's advertising material is that for those fire extinguishers on the market today that are fast and speedily used of the category the speedy and simple fire extinguishers, the Fire-Pak is in this group the most effective and is therefore unequaled."

The complaint in this connection alleges, as heretofore shown, that respondent in his brochure has represented that the Fire-Pak extinguisher is "Unequaled in * * * effectiveness." The stars shown in the quotation are part of the quotation as set forth in the complaint; they represent word omissions from the full text of the representation under consideration. The full text thereof in respondent's brochure (CX-1) reads as follows:

Speed
UNEQUALED in Simplicity
Effectiveness
(In the advertisement the height of the
word "Unequaled" is the same as the com-
bined height of the three words, Speed,
Simplicity, Effectiveness.)

As heretofore indicated no consumer testimony on the meaning of this advertisement (or any other) was adduced by complaint counsel; he requests the examiner to find from the advertisement itself that the alleged representation was in fact made. Complaint counsel contends that the abbreviated advertisement set forth in the complaint "Unequaled in * * * effectiveness" stands alone as an independent representation without reference to the claims of "speed" and "simplicity" for the extinguisher. (Tr. 225-227.)

Respondent, on the other hand, as seen in his answer and in his testimony contends that he intended to convey the thought in the complete non-abbreviated statement, and that the reasonable interpretation of the non-abbreviated statement is, that the Fire-Pak extinguisher is unequalled *in the combination* of the factors of speed, simplicity and effectiveness. The complaint does not challenge the representation that the Fire-Pak extinguisher has "speed" and "simplicity" and counsel supporting the complaint does not appear to challenge the truthfulness of respondent's contention that the Fire-Pak extinguisher is "unequaled *in the combination* of the factors of speed, simplicity and effectiveness." (Emphasis supplied.) In his testimony under cross examination, respondent readily conceded, with the candor that is characteristic of all of his testimony, that an unqualified representation that the Fire-Pak is "unequaled in effectiveness" would be absolutely false. (Tr. 227.)

The ultimate question is thus whether the full unabbreviated statement should be interpreted as a claim that the Fire-Pak was being unqualifiedly represented as being unequalled in effectiveness to all other extinguishers or only as a claim that *in the combination of the three factors* of speed, simplicity and effectiveness the Fire-Pak is unequalled by any other extinguisher.

As stated in *Zenith Radio Corp. v. Federal Trade Commission, supra*, the Commission not only has a right to look at the advertisements in question but *also* to " * * * consider the relevant evidence of record that would aid * * * in interpreting the advertisements * * * " in making its decision as to whether the practices engaged in by a respondent are unfair or deceptive as charged in a complaint.

The interpretation to be given to the unabbreviated representation in question is best approached in steps. As the first step, the examiner finds that the consuming public would regard and interpret the words

Speed
UNEQUALED in Simplicity
Effectiveness

as a single, unified statement reading "Unequaled in speed, simplicity, and effectiveness" and not as three separate, isolated sentences reading

"Unequaled in speed," "Unequaled in simplicity" and "Unequaled in effectiveness."

It is our further finding that the buying public would relate the unified statement "Unequaled in speed, simplicity, and effectiveness" to the diminutive size of the Fire-Pak as illustrated in life-size in the very brochure which carries the unified statement and on the basis of these two factors would conclude that the unified statement was simply a representation that the Fire-Pak fire extinguisher was unequalled *in the combination* of the three factors of speed, simplicity and effectiveness.

The examiner further finds that the unified statement would not in any event be suggestive to respondent's current and prospective customers, consisting almost entirely of industrial and commercial firms and Government agencies experienced in the purchase of fire protection equipment, of a representation that the Fire-Pak was "unequaled in effectiveness" because on the basis of their experience with fire extinguishers they would know even without thinking about it consciously that such was not the thought intended to be conveyed by the unified statement. In this connection one of the other statements in respondent's brochure (not a subject of the present litigation) is here pertinent. It reads:

Fire-Paks were developed over four years ago to meet the need of commercial and industrial people, who have widely dispersed operations, such as vehicles, shops, and thousands of other installations that create a potential fire hazard. An operation of any type is always under-protected because of the high cost of larger fire equipment as well as the service and maintenance problem such equipment creates. (CX-1.)

The examiner finds and concludes that there has been a failure of proof to show that the full advertisement (unified statement) here under consideration is false, misleading and deceptive and accordingly the charge based on this advertisement will be dismissed.

The next portion of the charge under consideration is the alleged representation in the respondent's advertisements that the Fire-Pak "* * * has greater fire extinguishing capability than other types of fire extinguishers * * *."

In his answer respondent specifically denies that he has made in any of his advertising material the claim "* * * that the Fire-Pak Fire Extinguisher is more effective than 'other types of fire extinguishers'" but he contends that he has merely represented that the Fire-Pak has greater fire extinguishing capabilities *than certain other specified types of fire extinguishers of specified size or capacity.*

The examiner finds that the only advertising claim in the advertisements in question which relates to the above alleged representation is the representation in respondent's brochure that "Tests Re-

vealed That One Fire-Pak Has More Fire Killing Power than Three One Quart Carbon Tetrachloride Extinguishers * * * or Two 5 LB CO₂ Extinguishers * * *."

It is concluded and found that respondent has not represented in his advertisements that the Fire-Pak has "greater fire extinguishing capability than other types of fire extinguishers" as he is charged with in the complaint but that he has represented only that the Fire-Pak has greater fire extinguishing capability than *certain other specifically identified types of fire extinguishers of specified size or capacity*, namely, three one quart carbon tetrachloride extinguishers or two five pound CO₂ extinguishers.

There has thus been a failure of proof that respondent has made the alleged representation but even if the alleged representation is construed to mean that respondent has represented, as he admits, that the Fire-Pak has greater fire extinguishing capability than three one quart carbon tetrachloride extinguishers or two five pound CO₂ extinguishers, there has also been a failure of proof that this representation is not true. In fact complaint counsel has not introduced any evidence to show that the latter statement or representation is not true. On the other hand, respondent did present testimony in support of his actual representation although the burden of proof did not require him to do so. (Tr. 228, 344, 427.)

The examiner finds and concludes that respondent has not made the representation (*i.e.* that the Fire-Pak has greater fire extinguishing capabilities than other types of fire extinguishers) alleged in the complaint and accordingly the charge of false advertising in connection therewith will be dismissed as the premise therefor is missing.

The final portion of the charge here under consideration is the alleged false representation in respondent's advertisements that the Fire-Pak "* * *" is more effective than extinguishers costing up to six times as much."

The alleged representation is based on a sentence on the last page of respondent's brochure reading: "Fire-Paks are more effective than most extinguishers costing up to six times as much."

It should be observed that there is some disparity between the representation as alleged in the complaint and the actual text of the statement made in the brochure. The statement in the brochure limits the application of the claim made therein to "most" extinguishers costing up to six times as much, as the Fire-Pak. On the other hand, the alleged representation appears to make the claim applicable to *any and all* extinguishers costing up to six times as much as the Fire-Pak.

It should also be noted that the above-quoted statement in the brochure is followed immediately by another sentence or statement which respondent contends relates to and has the effect of specifically identifying the types of fire extinguishers which respondent has reference to in his claim that the Fire-Pak is more effective "than most extinguishers costing up to six times as much" as the Fire-Pak. (Emphasis supplied.) (Tr. 222-224.) The sentence in the brochure which immediately follows the quoted claim reads: "Particular attention is invited to the effective rating chart on this brochure." The examiner agrees with respondent's contention that the two sentences are related and that the effect of the second sentence is to qualify the first sentence by specifically identifying the types of extinguishers the advertiser, respondent) is referring to in the expression "most extinguishers costing up to six times as much." The examiner further finds that the normal reaction of prospective purchasers would be to refer to the mentioned chart in the brochure if they desire a specific identification of the competing fire extinguishers the advertiser is referring to in the phrase "most extinguishers costing up to six times as much."

The verbal text of the chart referred to has heretofore been alluded to and quoted in another connection but with an omission of the cost data therein which is here pertinent. The full text of the chart reads: "Tests revealed that one Fire-Pak has more fire killing power than three one quart carbon tetrachloride extinguishers (at $\frac{1}{3}$ the cost of only one C.T.C.) or two 5 lb. CO₂ extinguishers (at $\frac{1}{4}$ the cost of one CO₂)."

The cost data is, of course, that shown between the parentheses.

No proof was offered by counsel supporting the complaint that the Fire-Pak did not have as claimed "more fire killing power" than three one quart carbon tetrachloride extinguishers or two five pound CO₂ extinguishers and similarly complaint counsel did not submit any evidence to disprove respondent's claim in the involved statement that a Fire-Pak sells at a fraction of the cost of the two mentioned competing types of fire extinguishers. The only evidence the examiner has been able to find in the record on the charge here under consideration is the following colloquy between complaint counsel and one of his expert witnesses, a deputy fire chief of Washington, D.C.:

Q. Is Commission's Exhibit 2-B [i.e., a Fire-Pak in evidence as a physical exhibit] more effective than extinguishers costing up to six times as much?

A. Are more effective?

Q. Yes, sir, more effective?

A. I wouldn't think so, no, sir. (Tr. 147.)

and a statement by another of complaint counsel's expert witnesses, an employee of the Department of Agriculture, Division of Fire Control, the Bureau of Forest Services, who being handed respondent's brochure and given carte blanche by complaint counsel to go through it and to pick out therefrom statements he thought were false, stated:

A. * * * And it [the brochure, CX-1] says, "Fire-Paks are more effective than most extinguishers costing up to six times as much" and I would say that is a false statement. (Tr. 152.)

Thus the issues raised by the two related sentences in the brochure (*i.e.*, "Fire-Paks are more effective than most extinguishers costing up to six times as much. Particular attention is invited to the effective chart on this brochure.") as qualified by the reading matter on the "effective chart" (*i.e.*, "Tests revealed that one Fire-Pak has more fire killing power than three one quart carbon tetrachloride extinguishers (at $\frac{1}{3}$ the cost of only one C.T.C.) or two 5 lb. CO₂ extinguishers (at $\frac{1}{4}$ the cost of one CO₂)" is whether it is true that one Fire-Pak sells at one-third the cost of a one quart carbon tetrachloride extinguisher or at one-seventh the cost of a one five pound CO₂ extinguisher *and* whether one Fire-Pak has "more killing power" than the described carbon tetrachloride or CO₂ extinguishers.

Needless to say the above opinion testimony is hardly germane to the precise issues here involved as shown above. But even if such expert opinion is considered germane, its value is questionable because it is mere opinion without the backing of tests or experiments and cost data to support it.

Accordingly the mentioned expert opinion testimony cannot be deemed reliable, probative and substantial evidence of the alleged untruthfulness of respondent's claim that the Fire-Pak at lesser cost "has more fire fighting power" than the described competing types of fire extinguishers. On the other hand, evidence was introduced by respondent tending to support the advertised claim although he did not have the initial burden of proof thereon. (Tr. 222-224, 300-302, 322, 344.) The examiner, however, does not deem it necessary to pass on such evidence and specifically refrains from making any findings based on such evidence relative to the truthfulness of the advertisement in question.

It is found and concluded that there has been a failure of proof to show that respondent's representation that the Fire-Pak is more effective than most extinguishers costing up to six times as much as the Fire-Pak is false. Accordingly the charge of false advertisement based on such representation will be dismissed.

Although the above disposes of the issues in this proceeding, a summary of complaint counsel's case-in-chief and the examiner's evaluation thereof may be of assistance to the Commission on review. Complaint counsel, who took over from previous counsel what would be a very difficult case to present in any circumstances, adduced the testimony of eight expert witnesses in the field of fire protection. Through them he sought to show that the Fire-Pak fire extinguisher was not "safe" and "effective" contrary to the complaint's *abridged* version of respondent's advertisement that the Fire-Pak extinguisher was "Safe—effective." As heretofore shown, the word "Safe" in the *unabridged* advertisement (CX-2A) is followed by the words "Non Toxic," "Non Corrosive," "Non Abrasive" and "Non Conductor of Electricity" which the examiner has found were the only meanings in which the word "Safe" is used in the advertisement. Through his witnesses complaint counsel sought to import to the word "Safe" a new connotation not suggested by the advertisement, namely, that the Fire-Pak fire extinguisher by virtue of the fact that it requires manual manipulation to discharge its dry chemical contents requires the user to get so close to a fire as to endanger his person. (Tr 85.)

This attempt failed as may be seen from the following colloquy between complaint counsel and his key witnesses, Roger C. Hale, whose testimony was adopted by all other Commission witnesses:

Q. Keeping your mind away from the toxic value [meaning the Fire-Pak's non-toxic quality] of it but the fact that you have to go to the fire and shake this ingredient on the fire, do you think there is any possible chance of hazard, or danger?

A. There could be from the heat absorption and possibly catching your own clothing on fire by getting too close. The general problem is that most inexperienced people will not get that close * * *. (Tr 85.)

From the testimony of the same expert witness it is also found that the word "Safe", when used in connection with a fire extinguisher, is normally used to convey the thought that the chemical content of the extinguisher is non-toxic and a non-conductor of electricity. (Tr. 85-86.)

Through his expert witnesses, complaint counsel also sought to show that the Fire-Pak extinguisher was not "Effective" in a sense other than that used in the *unabridged* advertisement in question (CX-2A) in which it will be recalled that the full text of the advertisement reads:

EFFECTIVE
on
Flammable Liquids
Electrical Fires and
will control flame in
ordinary combustibles
(Smothers fire instantly)

In his direct examination of his expert witnesses, complaint counsel sought to show through testimony adduced from such witnesses that the "shaker-type" Fire-Pak extinguisher is not an "effective" fire extinguisher in the sense that its hand method of application severely limits its speed, continuity and range of application as compared to a "pressure-type" of extinguisher and is therefore of value only in small incipient fires. (Tr. 72-74, 76, 145, 154.) This evidence is irrelevant because our findings show that respondent in his advertisements represents only that the Fire-Pak is effective on small incipient fires and because the complaint does not seek to enjoin respondent from advertising that his product is effective on "* * * small fires in their initial stages."

Complaint counsel introduced in evidence ten pictures of fires. (CX-6 A-J.) For the most part these represent fires of either flammable liquids or a combination of flammable liquids and wood gratings. There is no clear cut evidence from which it can be determined whether the fires shown in the pictures are small incipient fires or larger fires but all are serious fires. (Tr. 111.) The record does not contain a definition of a "small fire" and it is probable that a universally acceptable definition of a "small fire" does not exist. The Commission witnesses testified that it was their expert opinion that the Fire-Pak was incapable of putting out any of the fires shown in the pictures except one or two. There is no showing of record that any of the Commission expert witnesses have ever had any actual experience in trying to put out fires like those shown in the pictures *with a shaker-type fire extinguisher* similar to the Fire-Pak.

On the other hand, respondent testified categorically that he has actually extinguished with the Fire-Pak extinguisher fires identical with those shown on eight of the pictures and fires similar to those shown on the remaining two pictures. (Tr. 549-556.) The examiner has carefully observed the demeanor of respondent during his participation in this proceeding both as a witness and as counsel *pro se*. He has noted respondent's sincerity, candor and endeavor to answer all questions with care and exactitude and saw no evidence of evasion or attempt to distort facts. The examiner finds respondent's testimony throughout the hearing to be probative and reliable and not subject to discount for reasons of self-interest.

S. J. King, Jr., an Assistant Fire Chief of the Jacksonville (Fla.) Fire Department, testifying in behalf of respondent, also testified that a Fire-Pak extinguisher would put out any of the fires shown in the ten pictures noted above. (Tr. 305-315.) Similar testimony is of the record by respondent's brother, Jarrell Lamar Dudley, who for a number of years sold and demonstrated Fire-Pak extinguishers.

The record also contains a film made in behalf of respondent showing the extinguishment of ten different fires by means of Fire-Pak extinguishers, some of which are similar to the fires in the ten pictures introduced into evidence by complaint counsel and some are even more spectacular. (RX-10.) The film is also described verbally in the record. (Tr. 496-546.) As heretofore shown, respondent has had *repeat* orders over the years for Fire-Pak extinguishers from many Fire Departments, from the Forest Division of the United States Department of Agriculture, from the United States Army Engineers Corps, and from innumerable commercial and industrial concerns.

In so far as the Commission's ten pictures of fire scenes (CX-6 A-J) are here relevant, from the entire record it is found that the Fire-Pak extinguisher in the hands of an experienced handler would extinguish the fires therein shown.

Complaint counsel recognizes that the problem in this case has been not whether respondent's product possesses merit but rather the determination of its limitations which he candidly admits is a difficult matter to appraise with definitiveness. (Tr. 316, 318.) But whatever these limitations are, the examiner is satisfied from the record that respondent has not made any false representations about his product in the advertisements in question.

To some extent this proceeding has been brought about by imprecisions in respondent's advertisements. At the hearing respondent expressed a willingness and even an eagerness to remove these imprecisions from his advertisements. (Tr. 469-480; 494-495.) It is suggested to respondent that he take immediate steps to eliminate from his advertisements the imprecisions which are sufficiently identified in the body of this initial decision.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

FINAL ORDER

The Commission, on September 23, 1963, having issued an order staying the effective date of the decision herein, and the Commission now having determined that the proceeding should not be placed on its own docket for review, but that the initial decision of the hearing examiner should be modified in certain particulars:

It is ordered, That the below-quoted paragraph from page 213 of the initial decision of the hearing examiner, filed August 19, 1963, be, and it hereby is, stricken.

"Although the question of whether or not respondent's extinguishing agent is 'an approved extinguishing agent' has not been placed in issue by the pleadings in this proceeding, it may be noted in passing that the dry chemical that respondent used in his Fire-Pak extinguishers is approved by the National Board of Fire Underwriters and also, as noted earlier, is in wide use. (CX-5, p. 43; CX-9, p. 17)"

It is further ordered, That the following paragraph be, and it hereby is, substituted in place of the paragraph heretofore stricken:

"Although the question of whether or not respondent's extinguishing agent is 'an approved extinguishing agent' has not been placed in issue by the pleading in this proceeding, respondent is cautioned in his use of the word 'approved.' A representative of the company which produces respondent's extinguishing agent testified that it was approved only when used in one of their extinguishers (Tr. 271, 273). The National Board of Fire Underwriters does not approve chemical extinguishing agents separately, but grants approval only to fire extinguishers or systems as a whole (CX-5, CX-9). An accurate statement concerning respondent's extinguishing agent, therefore, would be that it is utilized in certain extinguishers which have been approved by the National Board of Fire Underwriters, but that no express approval has been accorded the agent itself. It is suggested that respondent either precisely qualify his use of the word 'approved' or that he eliminate it from his advertisements until such time as he obtains express approval of his device from a recognized testing laboratory."

It is further ordered, That the initial decision of the hearing examiner, filed August 19, 1963, as herein modified, be, and it hereby is, adopted as the decision of the Commission.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

Complaint

64 F.T.C.

IN THE MATTER OF

SAMUEL SCHEFF ET AL. DOING BUSINESS AS
BURMAX SALES COMPANYORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8553. Complaint, Jan. 11, 1963—Decision, Jan. 15, 1964*

Order requiring a New York City distributor of nonrubber combs to retailers. to cease misrepresenting the composition of its nonrubber combs by using the terms "Rubber," "Rubber-Resin," and "Hard Rubber" in stamping and advertising.

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 Samuel Scheff and Burton H. Scheff, individually and as copartners doing business as Burmax Sales 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 Samuel Scheff and Burton H. Scheff, are individuals and copartners doing business as Burmax Sales Company, with their office and principal place of business located at 156 Fifth Avenue, New York 10, New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of combs designed for use on human hair to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of New York and otherwise, to purchasers thereof located in the various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said combs in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of combs designed for use on human hair.

PAR. 5. Respondents, in the course and conduct of their aforesaid business, and for the purpose of describing, and to induce the purchase of, their combs, have stamped and branded said combs as "Rubber" and "Rubber-Resin", thereby representing, directly or by implication, that said combs are made or composed of rubber or hard rubber. Respondents have also designated, referred to and represented said combs as "Rubber", "Rubber-Resin" and "Hard Rubber" on boxes, packages, circulars, invoices and in various forms of advertising material circulated by them.

PAR. 6. The said representations were and are false, misleading and deceptive. In truth and in fact, respondents' said combs so stamped, branded and referred to are not made or composed of rubber or hard rubber, but are made or composed of material other than rubber or hard rubber.

PAR. 7. There are among the purchasing public substantial numbers of persons who prefer combs made of rubber or hard rubber, as distinguished from combs made or composed of the materials used in respondents' said combs.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Charles S. Cox supporting the complaint.

Mr. Donald E. Van Koughnet, Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

SEPTEMBER 10, 1963

The complaint which was issued herein charged respondents Samuel Scheff and Burton H. Scheff as individuals and copartners doing business as Burmax Sales Company with violating Section 5 of the Federal Trade Commission Act by offering for sale, selling and distributing in interstate commerce combs designed for use on human hair, which combs were sold to retailers for resale to the public

Findings

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and were deceptively branded and designated as "Rubber" and "Rubber-Resin" and "Hard Rubber" when in truth and in fact the combs so stamped, branded and designated were not made or composed of rubber or hard rubber, but were made or composed of material other than rubber or hard rubber. Respondents were duly served with the complaint, and filed their answer thereto. A series of prehearing conferences were convened at which it developed, among other things, that Samuel Scheff, one of the respondents named in the original complaint and a partner of Burmax Sales Company, had died on February 9, 1963, leaving Burton H. Scheff, the other respondent, as the sole surviving partner of Burmax Sales Company. At a prehearing conference convened on July 30, 1963, counsel for respondents moved to withdraw the answer which had theretofore been filed on behalf of respondents and to file, in substitution therefor, an admission answer under the Commission's Rules of Practice for Adjudicative Proceedings. Such admission answer, filed on July 31, 1963, and, by order of August 9, 1963, substituted for the original answer, *inter alia*, recites:

In answer to the complaint filed in the above entitled proceeding, respondents admit, deny and aver as hereinafter set forth.

1. Respondents admit all of the material allegations of the complaint except the allegations in respect of respondent Samuel Scheff concerning any acts subsequent to February 9, 1963, the said Samuel Scheff being deceased as of February 9, 1963 as established by Respondents' Exhibit No. 1, which was received in evidence at a prehearing conference on July 30, 1963.

2. Respondents waive their right under the Commission's Rules of Practice to submit proposed findings and conclusions herein.

3. Respondents specifically reserve their right to petition for review under Section 4.20 of the Commission's Rules of Practice.

Counsel supporting the complaint has likewise waived his right to submit proposed findings and conclusions, and has reserved his right to appeal from this Initial Decision. On the basis of the allegations in the complaint, the admissions in the amended answer filed July 31, 1963, on behalf of respondents, and the death certificate of Samuel Scheff (RX 1), the undersigned makes the following:

FINDINGS OF FACT

1. Respondents, Samuel Scheff and Burton H. Scheff, named in the complaint filed herein, were until February 9, 1963, individuals and copartners doing business as Burmax Sales Company with their office and principal place of business located at 156 Fifth Avenue, New York 10, New York. Samuel Scheff, named respondent in the complaint filed herein individually and as a copartner of Burmax Sales Company, died on February 9, 1963, leaving as the sole sur-

viving partner of Burmax Sales Company the respondent Burton H. Scheff.

2. At the time of the issuance of the complaint herein and for some time prior thereto respondents had been engaged in advertising, offering for sale, selling and distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, combs which were designed for use on human hair. Said combs were offered for sale, sold and distributed to retailers for resale to the public.

3. In the course and conduct of their business, respondents had caused, and for some time prior to the issuance of the complaint herein, had caused their products, when sold, to be shipped from their place of business in the State of New York, and otherwise, to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents had maintained, and at all times relevant to this proceeding, had maintained a substantial course of trade in said combs in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, and at all times relevant to these proceedings, respondents had been in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of combs designed for use on human hair.

5. In the course and conduct of their business, and for the purpose of describing, and in order to induce the purchase of their combs, respondents have stamped, branded and designated their said combs as "Rubber", "Rubber-Resin" and "Hard Rubber" and thereby represented, directly or by implication, that said combs were made or composed of rubber or hard rubber. Respondents have also designated, referred to, and represented their said combs as "Rubber", "Rubber-Resin" and "Hard Rubber" on boxes, containers, packages, circulars, invoices and in various forms of advertising material circulated by respondents.

6. The aforesaid representations by respondents were and are in fact false, misleading and deceptive. Respondents' said combs, which had been stamped, branded and designated by them as hereinabove set forth were not composed of rubber or hard rubber, but were made or composed of material other than rubber or hard rubber.

7. Substantial numbers of persons among the purchasing public who purchase combs, prefer combs made of rubber or hard rubber, as distinguished from combs made or composed of materials used in respondents' said combs.

8. Respondents' use of the above-mentioned false, misleading and deceptive statements, representations and designations has had, and

Conclusion

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now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and have had the effect of inducing the purchase of substantial quantities of respondents' products by reason of the aforesaid false, misleading and deceptive designation of the combs as rubber, rubber-resin and hard rubber when in truth and in fact said combs were and are made or composed of material other than rubber or hard rubber.

9. The aforesaid acts and practices of respondents as herein found were and are to the prejudice and injury of the public and of respondents' competitors. They constituted and now constitute unfair methods of competition in commerce. They were and are unfair and deceptive acts and practices in commerce and violate Section 5 of the Federal Trade Commission Act.

The undersigned makes the following:

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of and over the respondents and the subject matter of this proceeding.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The acts and practices of respondents in using the false, misleading and deceptive statements and representations herein described were, and are, all to the prejudice of the public and respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices, and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

4. The aforementioned false, misleading and deceptive acts and practices of respondents are proscribed by the Federal Trade Commission Act and should be enjoined.

Now, therefore,

It is ordered, That respondent Burton H. Scheff, individually, and as a surviving partner of Burmax Sales Company, and under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of combs designed for use on human hair, do forthwith cease and desist from:

1. Using the word "rubber" or any other word of similar import or meaning, alone, or in combination with any other word or words, to designate, describe or refer to such combs which are not in fact made entirely of vulcanized hard rubber;

Final Order

2. Representing in any manner that said combs are rubber or hard rubber or are made of rubber or hard rubber unless they are in fact made of vulcanized hard rubber.

It is further ordered, That this complaint be and it hereby is dismissed as to Samuel Scheff, deceased.

FINAL ORDER

The Commission, on October 23, 1963, having issued an order staying the effective date of the decision herein and the Commission now having determined that the case should not be placed on its own docket for review:

It is ordered, That the initial decision of the hearing examiner, filed September 11, 1963, be, and it hereby is, adopted as the decision of the Commission.

ORDER

It is ordered, That respondent Burton H. Scheff, individually, and as a surviving partner of Burmax Sales Company, and under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of combs designed for use on human hair, do forthwith cease and desist from:

1. Using the word "rubber" or any other word of similar import or meaning, alone, or in combination with any other word or words, to designate, describe or refer to such combs which are not in fact made entirely of vulcanized hard rubber;

2. Representing in any manner that said combs are rubber or hard rubber or are made of rubber or hard rubber unless they are in fact made of vulcanized hard rubber.

It is further ordered, That this complaint be, and it hereby is, dismissed as to Samuel Scheff, deceased.

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

Complaint

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IN THE MATTER OF

ABRAHAM RABEN ET AL. TRADING AS
FURS BY RABEN OF CLAYTONCONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket C-680. Complaint, Jan. 15, 1964—Decision, Jan. 15, 1964*

Consent order requiring a manufacturer and retailer of furs in Clayton, Mo., to cease violating the Fur Products Labeling Act by misbranding, deceptively invoicing and advertising its fur products, and substituting labels which do not conform to the requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Abraham Raben also known as Al Raben, an individual trading as Furs by Raben of Clayton, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Abraham Raben also known as Al Raben is an individual trading as Furs by Raben of Clayton.

Respondent is a manufacturer and retailer of fur products with his office and principal place of business located at 920 South Brentwood, Clayton, Missouri.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name of the country of origin of furs contained in such fur products, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled to show the country of origin of furs used in such fur products as the United States when in fact the furs used in such fur products were imported.

PAR. 4. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 5. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were certain fur products without labels and certain fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
3. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.
4. To show the country of origin of the imported furs contained in the fur product.

Complaint

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PAR. 6. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth on labels in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

(c) The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(d) The term "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(e) The disclosure that fur products were composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur where required was not set forth on labels in violation of Rule 20 of said Rules and Regulations.

(f) Labels affixed to fur products did not comply with the minimum size requirements of one and three-quarter inches by two and three-quarter inches, in violation of Rule 27 of said Rules and Regulations.

(g) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(h) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(i) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

(j) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required

by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.
3. To show the country of origin of imported furs used in fur products.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in that respondent set forth on invoices pertaining to fur products the name of an animal other than the name of the animal that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs used in such fur products, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products invoiced to show the name of the country of origin of furs contained in such fur products as the United States when in fact the furs used in such fur products were imported.

PAR. 10. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

(c) The term "Dyed Mouton Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 9 of said Rules and Regulations.

(d) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(e) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(f) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 11. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondent which appeared in issues of the St. Louis County Observer, a newspaper published in the State of Missouri.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

1. To show the true animal name of the fur used in the fur product.
2. To show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in that certain of said advertisements contained the name or names of an animal or animals other than those producing the fur contained in the fur product, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 13. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

- (a) The term "Persian Lamb" was not set forth in the manner required, in violation of Rule 8 of the said Rules and Regulations.

(b) The term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 14. In advertising fur products for sale, as aforesaid, respondent made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 15. Respondent in introducing, selling, advertising, and offering for sale, in commerce, and processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, has misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of said Act, in violation of Section 3(e) of said Act.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

Order

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The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Abraham Raben also known as Al Raben is an individual trading as Furs by Raben of Clayton, with his office and principal place of business located at 920 South Brentwood, Clayton, Missouri.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Abraham Raben, otherwise known as Al Raben, an individual, trading as Furs by Raben of Clayton, or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying any such fur product as to the country of origin of furs contained in such fur product.

2. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

3. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

4. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form on labels affixed to fur products.

5. Failing to set forth the term "Persian Lamb" on labels in the manner required where an election is made to use that term instead of the word "Lamb".

6. Failing to set forth the term "Dyed Broadtail-processed Lamb" on labels in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb".

7. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

8. Failing to disclose on labels that fur products are composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

9. Affixing to fur products labels that do not comply with the minimum size requirements of one and three-quarters inches by two and three-quarters inches.

10. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.

11. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

12. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal fur the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

13. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Misrepresenting in any manner, directly or by implication, the country of origin of the fur contained in fur products.

4. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

5. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

6. Failing to set forth the term "Dyed Mouton Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

7. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

8. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

9. Failing to set forth on invoices the item number or mark assigned to fur products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur product, and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Sets forth the name or names of any animal or animals other than the name of the animal producing the furs contained in the fur product as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

3. Fails to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

4. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That Abraham Raben, also known as Al Raben, an individual trading as Furs by Raben of Clayton, or under any other trade name and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the label affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

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

Opinion

64 F.T.C.

IN THE MATTER OF

OXWALL TOOL COMPANY, LTD., ET AL.

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

Docket 7491. Complaint, May 15, 1959—Decision, Jan. 16, 1964

Order denying motion for further modification of amended order, dated September 9, 1963, 63 F.T.C. 566, and restating the provisions of the cease and desist order—requiring conspicuous affirmative disclosure of the country of origin on imported handtools themselves and on the containers thereof.

OPINION OF THE COMMISSION

JANUARY 16, 1964

This proceeding is concerned with respondents' obligation to disclose the foreign origin of tools they import for domestic sale and distribution. We have already considered this matter on two other occasions, and it has now come up on respondents' motion and affidavit requesting clarification and modification of the Commission's final order entered September 9, 1963 whose pertinent provisions are set forth in the margin.¹ At respondents' request the effective date of that order has been stayed pending our decision on their latest motion.

Respondents contend that the modification of the original order to cease and desist, incorporated in the order of September 9, 1963, does not go far enough to meet the exigencies of their business and, in fact, has made uncertain the measures they must undertake to assure compliance with the Commission's order.

Our original order prohibited respondents from selling imported tools without conspicuously disclosing thereon the country of origin

¹ "IT IS ORDERED that respondents * * * do forthwith cease and desist from:

"1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing in a conspicuous place on the products themselves the country of origin thereof.

"2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment. Provided, however, that in those instances where (a) two or more products imported from two or more foreign countries or places are packaged together in the same container, where (b) the imported articles themselves are clearly and conspicuously marked with the country of origin, and where (c) the container is unsealed and the articles may be readily removed therefrom for examination by a prospective purchaser prior to purchase, the disclosure, in a conspicuous place on the container, that all or a portion of the contents of such package are imported and that the country or place of origin of foreign made products is set forth on each product, shall constitute compliance with the terms of this order."