

the manner and form in which they have complied with the order set forth herein.

Commissioner Elman dissenting and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

PRODUCT TESTING COMPANY, INC., ET AL.

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

Docket 8534. Complaint, Oct. 10, 1962—Decision, Feb. 17, 1964

Order requiring Elizabeth, N.J., mail-order sellers of coffeemakers, dinnerware, luggage, toaster-broilers and other merchandise to cease making—in circulars, return mail pieces and other promotional material distributed to prospective customers—false claims concerning the character of their business operations and using deceptive prices, quality, guarantee, and performance claims to promote the sale of their merchandise.

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 Product Testing Company, Inc., a corporation, and Damar Products, Inc., a corporation, also trading as Mrs. Dorothy Damar, Damar's, Emma & Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau, and David W. Margulies, individually and as an officer of each of said corporations, 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 Product Testing Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 833 Newark Avenue, in the city of Elizabeth, State of New Jersey.

Respondent Damar Products, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey. In addition to doing business under its corporate name it also trades and does business under the several trade

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names of Mrs. Dorothy Damar, Damar's, Emma and Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau. Its office and principal place of business is located at the above stated address.

Respondent David W. Margulies is an individual. He formulates, directs and controls the acts and practices of the said corporate respondents, including the acts and practices herein set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution, by and through the United States mails, of coffeemakers, dinnerware, luggage, toaster-broilers, and other articles of merchandise to members of the purchasing public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the aforesaid articles of merchandise to be shipped from their aforesaid place of business in the State of New Jersey, and from the various places of business of their suppliers located in other States of the United States, to members of the purchasing public located in various States of the United States, and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The majority of the shares of stock of each of the said corporate respondents is owned by the said Margulies who, as aforesaid, formulates, controls and directs the affairs of each of the corporate respondents. The remainder of such shares of stock is owned in its virtual entirety by members of the said Margulies family and is under the control of the said Margulies. Through the device of the said Damar Products, Inc., the said Margulies falsely represents, among other things, that allegedly preferred customers are being afforded the opportunity to purchase merchandise through corporate respondent Damar Products, Inc., at substantial savings without the payment of commissions to wholesalers, middlemen, etc. Through the device of Product Testing Company, Inc., the said Margulies falsely represents, among other things, that tests, surveys, etc., of consumer preference for new products are being conducted prior to the time said products are offered for sale to the general public and that to induce consumer participation said goods are being offered at substantial savings to prospective purchasers. The two corporate respondents are, therefore, but the devices employed by

the said Margulies to effectuate his false and misleading plans to mislead and deceive members of the purchasing public.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the sale of the various articles of merchandise offered for sale and sold by them, respondents have made and are now making numerous statements and representations with respect to the character of their business operations and the price, quality, guarantee, performance and other characteristics of the articles of merchandise they sell. Said statements and representations have been made in circulars, return mail pieces and other kinds of promotional material distributed to prospective customers.

A. Typical and illustrative of said statements and representations made by and through said Product Testing Company, Inc., but not all inclusive thereof, are the following:

This is a Consumer Test * * * disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The articles described on the enclosed circulars can be yours at far less than retail prices. Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign.

To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.,
P.O. Box 51,
Hillside, New Jersey

I am enclosing \$----- for the test offers checked below, at the special bureau testing price shown.

- ☐ Test No. 1—Flavoramic Coffeemaker at \$9.59
- ☐ Test No. 2—52-pc. Dinnerware Set at \$10.20
- ☐ Test No. 3—15-pc. Cookware Set at \$11.65
- ☐ Test No. 4—3-pc. Luggage Set at \$14.89*

*Fed. Excise Tax included.

NOTE: Offer expires August 31, 1960 10-day return privilege permitted for any reason on this product test.

Accompanying said cards are circulars which read, in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only \$19.95.

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, \$29.95.

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15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware
 * * * suggested retail \$29.95.

* * *
 Mac Gregor Plaid 3-pc. Flite Light Luggage set * * * complete 3-pc. set
 \$29.95 * * *

* * *
 Special panel member Price Test * * * disregard price on circular!

Dear Panel Member:

A large national retailer wishes to determine the most popular price at which to offer the \$19.95 Toaster-Broiler featured on the enclosed circular. During this test you may order one for yourself at the price you select, even though it may be offered at a much higher price after the test. Simply detach the Test Form. Check your price and mail with your remittance to the address below.

Product Testing Co.
 P.O. Box 51, Hillside, N.J.

No. 1120P

PT-1Y

Special Price Test

What price should it sell for?

(Check only one)

☐ \$10.95	☐ \$11.59	☐ \$11.95	☐ \$12.49
☐ \$12.99	☐ \$13.79	☐ \$14.95	☐ \$15.79
☐ \$17.49	☐ \$19.95		

* * * * *

Fill-in and Mail Today

I enclose \$ _____ for _____ Broiler-Toaster #340 at the price I have checked above, plus 95¢ for each unit ordered to cover actual postal handling and shipping charges.

NOTE: Offer expires January 15, 1961. 10-day return privilege permitted for any reason on this product test.

Accompanying said cards are circulars which read in part:

Flavoramic Toaster Broiler * * * Retail \$19.95 * * *

* * * * *

This is a Consumer Test * * * disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The article described on the enclosed circulars can be yours at far less than retail price.

Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign. To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.,
 P.O. Box 51, Hillside, N.J.

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Would you like to become a regular Panel Member? See reverse side.

Product Testing Co., Consumer Test Form, P.O. Box 51, Hillside, N.J.
Test Acct. No. 1137.

I am enclosing \$ ----- for the test offers checked below at the special testing price shown.

- ☐ Test No. 1—Coffeemaker (No. 902) Deluxe at \$9.89
☐ Test No. 2—Coffeemaker (No. 901) Regular at \$8.89
☐ Test No. 3—52-pc. Dinnerware Set (No. 2) at \$10.54
☐ Test No. 4—15-pc. Cookware Set (No. 343) at \$11.93
☐ Test No. 5—3-pc. Luggage Set (No. 904) at \$15.95*
 *Federal Tax included.

- ☐ I wish to become a panel member at \$1.00

Please add 50¢ for each article ordered on Test No. 1 and No. 2; add \$1.00 for each article on Test No. 3 and No. 4; and \$1.45 on Test No. 5—to cover actual postage, handling and shipping charges.

NOTE: Offer expires May 25, 1961. 10-day return privilege permitted for any reason on this product test.

PT-2E

Accompanying said card are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only \$19.95. See special discount offer! * * *

* * * * *
 Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, \$29.95.

* * * * *
 15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware * * * suggested retail \$29.95.

* * * * *
 Mac Gregor Plaid 3-pc. Flite Light Luggage set, complete 3-pc. set \$29.95 * * *

B. Typical and illustrative of said statements and representations made under the name of said Damar Products Inc., are the following:

DAMAR'S
 78 Damar Building,
 Elizabeth, New Jersey

Disregard the manufacturer's price on the enclosed circular * * *.

Dear Preferred Customer:

The enclosed certificate is for your use only! No one else can use it
 * * * It is sent only to our most valued customers in sincere appreciation of their loyalty and patronage * * *, in order to show our appreciation we have made arrangements with a leading manufacturer that will save you many dollars * * *.

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In order to save the high cost of many small shipments to ordinary wholesalers, salesmen's commissions and middlemen's profits, the factory has agreed to give us their production of the new 1961 model before it is offered nationally * * * and at a price that will save our preferred customers over \$11.00.

* * * Each of these jumbo sized coffeemakers is equipped with one of the best automatic thermostats made * * * produced and unconditionally guaranteed by world-famous Westinghouse * * *.

* * * It makes 15 cups of coffee at one time * * *.

You save over \$11.00 as a preferred customer! Our price to you is not \$22.95 nor even \$19.95, which you would expect to pay for any ordinary coffeemaker without the beautiful gold-tone base, but as a Preferred Customer you pay a very low \$8.89 when you use the enclosed certificate. Otherwise, you pay the regular customer's price.

* * * So use your special privilege certificate now while it saves you money, * * *.

Accompanying said letters are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only * * * see special discount offer * * *

DAMAR'S
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular * * *.

The enclosed certificate is for you alone! No one else can use it. * * * It is sent only to a few of our most valued customers—in sincere appreciation for their loyalty and patronage.

At a cost far below that offered by anyone * * * anywhere!

You'll save a fortune * * *.

The low, low special price to you as a preferred customer is the biggest surprise of all!

You save \$19.41 on this special one-time offer!

* * * It's all yours for only \$10.54!

How we can make this offer! * * * by eliminating salesmen's commissions, wholesalers, jobbers and middlemen, all the profits on-top-of profits that inflate prices have been eliminated. * * * just \$10.54 for the complete 52-pc. Edgebrook Set!

1. * * *

2. It is guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatever.

3. Lifetime Guarantee against defects in manufacture or workmanship, * * *.

Accompanying said letters are circulars which read in part:

Edgebrook * * * nationally advertised Break Resistant Dinnerware
* * * complete service for 8, \$29.95.

* * * * *

DAMAR's
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular * * *.

Dear Preferred Customer:

The enclosed certificate is for your use only—No one else can use it—
* * * It is sent only to our most valued customers in sincere appreciation
of their loyalty and patronage * * * we have made arrangements with a
leading manufacturer that will save you many dollars * * *.

* * * * *

* * * in order to save the high cost of many small shipments to ordinary
wholesalers, retailers, salesmen, commissions and middlemen's profits—
the factory has agreed to reserve at a price that will save you, our preferred
customers * * * over \$8.00!

* * * * *

You save over \$8.00 as a special preferred customer!

Our price to you is not \$22.95, nor even \$19.95, which you would expect
to pay for such a magnificent kitchen appliance with Automatic Westing-
house Thermostat, all bakelite sides and gleaming chrome. As a Preferred
Customer you pay a very low \$11.78 when you use the enclosed certificate.
Otherwise, you pay the regular customer's price.

* * * so use your special privilege certificate now while it saves you
money, * * *.

Accompanying said letter are circulars which read in part:

Flavoramic Toaster-Broiler * * * retail \$19.95 * * * see special price
offer.

PAR. 6. Through the use of the aforesaid corporate and trade
names, statements and representations, and others similar thereto,
but not specifically set forth, respondents have represented, directly
or indirectly,

(a) That Product Testing Company, Inc., The Consumer Re-
search Bureau and Product Testing Bureau are independent testing
companies which conduct tests, trial offerings or surveys to deter-
mine consumer reaction, preference or marketability of products.

(b) That the Damar Products, Inc., offer to sell said merchandise
is made only to a limited number of preferred customers;

(c) That the aforesaid higher price amounts whether accompanied
or unaccompanied by words or terms such as "Retail", "SUGGEST-
ED RETAIL", etc. are the prices at which the merchandise referred
to is usually and customarily sold at retail in all of the trade areas
in which it is offered for sale; and that purchasers of respondents'

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merchandise realize savings equal in amount to the differences between the said higher prices and the corresponding lower prices.

(d) That said coffeemaker when used as directed has the capacity to make or brew and will in fact so make or brew with one filling of the necessary ingredients and at one time sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc.

(e) That said Flavoramic Coffeemaker is unconditionally guaranteed in every respect by said Product Testing Company, Inc., and said Damar Products, Inc., for the lifetime of said coffeemaker.

That said coffeemaker thermostat is unconditionally guaranteed by the Westinghouse Electric Corporation, 3 Gateway Center, Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker.

That said dinnerware set is unconditionally guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatsoever by said Damar Products, Inc. and that said dinnerware set is unconditionally guaranteed against defects for the lifetime of the purchaser, the lifetime of said product or some other extended but unspecified period of time by Damar Products, Inc.

(f) That said Sun-Craft Cookware Set consists of 15 pieces of heavy aluminum cookware.

(g) That said Damar Products, Inc. purchases its said merchandise directly from the manufacturer and thereby avoids the payment of a middleman's profit and that said savings are passed on to the purchasers.

PAR. 7. In truth and in fact:

(a) Products Testing Company, Inc., The Consumer Research Bureau and Product Testing Bureau are not independent testing companies and do not conduct consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products.

(b) Damar Products, Inc., offers to sell said merchandise are not made only to a limited number of preferred customers;

(c) The aforesaid higher price amounts whether accompanied or unaccompanied by words or terms such as "Retail", "SUGGESTED RETAIL", etc. are not the prices at which the merchandise referred to is usually and customarily sold at retail in all of the trade areas in which it is offered for sale; and purchasers of respondents' merchandise did not realize savings equivalent in amount to the differences between the said higher prices and the corresponding lower prices. Said higher price amounts are in excess of the price or prices at which said merchandise was generally offered for sale and sold in said trade areas.

(d) Said coffeemaker when used as directed does not have the capacity to make or brew and will not in fact make or brew with one filling of the necessary ingredients and at one time sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc. The cups of coffee above referred to by respondents are of a 4 oz. net content. The usual and customary cups of coffee served in homes, lodges, clubs, churches, schools, offices, restaurants, etc., contain substantially more than 4 ozs. net.

(e) Said Flavoramic coffeemaker is not unconditionally guaranteed by said Product Testing Company, Inc. or Damar Products, Inc. for the lifetime of said coffeemaker. Such guarantee as may be provided is subject to numerous restrictions, limitations and conditions as to its nature, extent and duration and is given by a wholly different guarantor. Said coffeemaker thermostat is not unconditionally guaranteed by the Westinghouse Electric Corporation, 3 Gateway Center, Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker. Such guarantee as may be provided is subject to numerous restrictions, limitations and conditions as to its nature, extent and duration. Said dinnerware set is not unconditionally guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatever by said Damar Products, Inc., and said dinnerware set is not unconditionally guaranteed against defects for the lifetime of the purchaser, the lifetime of said product or some other extended but unspecified period of time by Damar Products, Inc. Such guarantee as may be provided is subject to numerous restrictions, limitations and conditions as to its nature, extent and duration and is given by a wholly different guarantor.

(f) Said Sun-Craft Cookware Set does not consist of 15 pieces of heavy aluminum cookware. Two of said co-called pieces are a scouring pad and cookbook and respondents' count of "15 pieces" is made up by separately tallying each component part such as pot-lids, dividers, etc.

(g) Said Damar Products, Inc. does not purchase all of its said merchandise directly from the manufacturer and thereby avoid the payment of a middleman's profit and said savings are not passed on to the purchaser.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 8. 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 engaged

in the sale of articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 9. 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' articles of merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the 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. Terral A. Jordan and Mr. George J. Lubberda for the Commission.

Blum Jolles, Haimoff, Szabad & Gersen; Mr. Seymour Kehlmann, of counsel; New York, N.Y., for respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

JUNE 18, 1963

By complaint issued October 10, 1962, the above-named respondents were charged with the use of false, misleading, and deceptive acts and practices in connection with the sale and offering for sale of certain products in commerce as "commerce" is defined in the Federal Trade Commission Act, in violation of Section 5 of the Act.

After answer was made by the respondents, prehearing conferences were held by order of the hearing examiner. In that order the parties were advised to prepare, if desired, requests for the admission of the genuineness of documents pursuant to Section 4.11 of the Rules of Practice. After several postponements a prehearing conference was held on February 11, 1963, at which considerable progress was made by way of stipulations with respect to certain issues in the case. When it appeared that extended discussions between counsel might be necessary for further stipulation and agreement, the possible use of Section 4.11 of the Rules of Admissions was suggested for greater expedition. Pursuant thereto, complaint counsel by letter dated March 6, 1963, requested respondents to admit the genuineness of certain documents as well as both the genuineness and truthfulness of certain other documents. A similar letter was also sent by

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complaint counsel on the following day, March 7, 1963. These letters were served upon respondents' counsel on March 7 and March 8, 1963, respectively.

The respondents served neither sworn statements denying the relevant matters of which the admissions were requested or setting forth in detail the reasons why they could neither truthfully admit or deny them, nor written objections on the ground that the matters involved were irrelevant, privileged, or improper. As a consequence, the requested admissions were deemed made pursuant to Section 4.11 of the Rules.

On February 28, 1963, a receiver was appointed by respondent Damar Products, Inc. The receiver, however, has not been brought into these proceedings, nor has he appeared in any way. Counsel for the respondents, at the hearing on this matter held March 27, 1963, indicated that their appearance was general and unconditional for respondent David W. Margulies. As to the other respondents, their appearance was conditional because of their belief that they had no authority to act for a corporate respondent in receivership. For the record, however, counsel stated:

* * * we will continue to represent the defendants to the extent that we have the authority to do so.

The hearing examiner invited counsel to make a formal motion to withdraw. Counsel, however, declined to do so.

At the conclusion of the hearing both parties filed proposed findings and briefs, which have been carefully considered. To the extent the proposed findings are inconsistent with those made, they are deemed rejected.

FINDINGS OF FACT

The Respondents

1. Respondent Product Testing Company, Inc., is a corporation organized on June 29, 1960, and which presently exists under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 833 Newark Avenue, in the city of Elizabeth, State of New Jersey.

2. Damar Products was started in 1948 by respondent David W. Margulies, trading as Damar Distributing Company. Respondent Damar Products, Inc., was incorporated on January 11, 1952, and has been and is now existing and doing business under and by virtue of the laws of the State of New Jersey. In addition to doing business under its corporate name it also trades and does business under the several trade names of Mrs. Dorothy Damar, Damar's,

Emma and Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau. Its office and principal place of business is located at the above-stated address.

3. Respondent David W. Margulies is the President of Damar Products, Inc. The majority of the shares of stock of said Damar Products, Inc., is owned by the said Margulies and the balance is owned by a member of his family. The stock of said Product Testing Company, Inc., is wholly owned by respondent Damar Products, Inc. The said Margulies formulated, directed and controlled the acts and practices of the said corporate respondents hereinafter set forth and participated directly in such acts and practices. His office and principal place of business is located at the above-stated address.

4. Corporate respondent Product Testing Company, Inc., has been located at the same address as Damar Products, Inc., has had no active corporate officers or directors, paid no corporate franchise taxes to the State of New Jersey, has always been wholly owned by respondent Damar Products, Inc., and during its active life, which covered the period June 29, 1960, to around the middle of 1961, was operated by the same persons that operated respondent Damar Products, Inc. The corporate independence of Product Testing Company, Inc., was and is a mere fiction. Said Product Testing Company, Inc., and Damar Products, Inc., have been and are now one company. Product Testing Company, Inc., has been and is now in reality just another trading name of Damar Products, Inc.

5. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution, by and through the United States mails, of coffeemakers, dinnerware, luggage, toaster-broilers, and other articles of merchandise in substantial quantities to members of the purchasing public. However, offers to sell the Flavoramic Toaster-Broiler, Flavoramic Coffee-maker, Edgebrook Dinnerware Set, Sun-Craft Cookware Set and MacGregor Luggage Set, specifically mentioned in the complaint, ceased around the middle of 1961.

6. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the aforesaid articles of merchandise to be shipped from their place of business in the State of New Jersey, and from the various places of business of their suppliers located in other states of the United States, to members of the purchasing public located in various states of the United States and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The Advertisements

7. In the course and conduct of their business, and for the purpose of inducing the sale of the various articles of merchandise offered for sale and sold by them, respondents have made statements and representations with respect to the character of their business operations and the price, quality, guarantee, performance and other characteristics of the articles of merchandise they sell. Said statements and representations have been made in circulars, return mail pieces and other kinds of promotional material distributed to prospective customers.

A. Typical and illustrative of said statements and representations made by and through said Product Testing Company, Inc., but not all inclusive thereof, are the following:

THIS is a Consumer Test * * * Disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The articles described on the enclosed circulars can be yours at far less than retail prices. Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign.

To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.,
P.O. Box 51,
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I am enclosing \$----- for the test offers checked below, at the special bureau testing price shown.

- ☐ Test No. 1—Flavoramic Coffeemaker at \$9.59
- ☐ Test No. 2—52-pc. Dinnerware Set at \$10.20
- ☐ Test No. 3—15-pc. Cookware Set at \$11.65
- ☐ Test No. 4—3-pc. Luggage Set at \$14.89*

*Fed. Excise Tax included.

NOTE: Offer expires August 31, 1960. 10-day return privilege permitted for any reason on this product test.

PT-1M

Accompanying the above card are circulars which read, in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 Cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully guaranteed! Now only \$19.95.

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, \$29.95.

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15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware * * * suggested retail \$29.95.

* * * * *

MacGregor Plaid 3- pc. Flite Light Luggage Set * * * complete 3-pc. set, \$29.95.

* * * * *

Special Panel Member Price Test * * * disregard price on circular!

Dear Panel Member:

A large national retailer wishes to determine the most popular price at which to offer the \$19.95 Toaster-Broiler featured on the enclosed circular. During this test you may order one for yourself at the price you select, even though it may be offered at a much higher price after the test. Simply detach the Test Form. Check your price and mail with your remittance to the address below.

Product Testing Co.
P.O. Box 51, Hillside, N.J.

PT-1Y

Special Price Test

#1120P

What price should it sell for?

(Check only one)

☐ \$10.95	☐ \$11.59	☐ \$11.95	☐ \$12.49
☐ \$12.99	☐ \$13.79	☐ \$14.95	☐ \$15.79
☐ \$17.49	☐ \$19.95		

* * * * *

Fill-in and Mail Today

I enclose \$----- for ---- Broiler-Toaster #340 at the price I have checked above, plus 95¢ for each unit ordered to cover actual postal, handling and shipping charges.

NOTE: Offer expires January 15, 1961. 10-day return privilege permitted for any reason on this product test.

Accompanying this card are circulars which read in part:

Flavoramic Toaster-Broiler * * * Retail \$19.95 * * *

This is a Consumer Test * * * Disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The article described on the enclosed circulars can be yours at far less than retail price. Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign. To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.
P.O. Box 51, Hillside, N.J.

Would you like to become a regular panel member? See reverse side.
Product Testing Co., Consumer Test Form, P.O. Box 51, Hillside, N.J.
Test Acct. No. 1137.

I am enclosing \$----- for the test offers checked below at the special testing price shown.

- ☐ Test No. 1—Coffeemaker (No. 902) Deluxe at \$9.89
☐ Test No. 2—Coffeemaker (No. 901) Regular at \$8.89
☐ Test No. 3—52-pc. Dinnerware Set (No. 2) at \$10.54
☐ Test No. 4—15-pc. Cookware Set (No. 343) at \$11.93
☐ Test No. 5—3-pc. Luggage Set (No. 904) at \$15.95*
 *Federal Tax included.
☐ I Wish to become a Panel Member at \$1.00

Please add 50¢ for each article ordered on Test No. 1 and No. 2; add \$1.00 for each article on Test No. 3 and No. 4; and \$1.45 on Test No. 5—to cover actual postage, handling and shipping charges.

NOTE: Offer expires May 25, 1961. 10-day return privilege permitted for any reason on this product test.

PT-2E

Accompanying this card are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only \$19.95—see special discount offer!

* * * * *
 Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, \$29.95.

* * * * *
 15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware * * * suggested retail \$29.95.

* * * * *
 Mac Gregor Plaid 3-pc. Flite Light Luggage Set complete 3-pc. set, \$29.95 * * *

B. Typical and illustrative of said statements and representations made under the name of Damar Products, Inc., are the following:

DAMAR'S,
 78 Damar Building,
 Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular * * *.

Dear Preferred Customer:

The certificate enclosed is for your use only! No one else can use it * * * It is sent only to our most valued customers in sincere appreciation of their loyalty and patronage * * * in order to show our appreciation we have made arrangements with a leading manufacturer that will save you many dollars * * *.

* * * In order to save high cost of many small shipments to ordinary wholesalers, salesmen's commissions and middlemen's profits, the factory has agreed to give us their production of the new 1961 model before it is offered nationally * * * and at a price that will save our preferred customers over \$11.00.

* * * * *

Initial Decision

64 F.T.C.

* * * Each of these jumbo sized coffeemakers is equipped with one of the best automatic thermostats made * * * produced and unconditionally guaranteed by world-famous Westinghouse * * *.

* * * It makes 15 cups of coffee at one time * * *

You save over \$11.00 as a Preferred Customer! Our price to you is not \$22.95 nor even \$19.95, which you would expect to pay for any ordinary coffeemaker without the beautiful gold-tone base, but as a Preferred Customer you pay a very low \$8.89 when you use the enclosed certificate. Otherwise, you pay the regular customer's price.

* * * So use your special privilege certificate now while it saves you money * * *.

Accompanying this letter are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only \$19.95. See special discount offer!

DAMAR'S,
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular.

The enclosed certificate is for you alone! No one else can use it * * *. It is sent only to a few of our most valued customers—in sincere appreciation for their loyalty and patronage.

At a cost far below that offered by anyone * * * anywhere! You'll save a fortune * * *

The Low, Low Special Price to you as a preferred customer is the biggest surprise of all! You save \$19.41 on this special one-time offer! * * * It's all yours for only \$10.54!

How we can make this offer! * * * by eliminating salesmen's commissions, wholesalers, jobbers and middlemen, all the profits on-top-of profits that inflate prices have been eliminated * * *. Just \$10.54 for the complete 52-pc. Edgebrook set!

1. * * *

2. It is guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatever.

3. Lifetime guarantee against defects in manufacture or workmanship, * * *.

Accompanying this letter are circulars which read in part:

Edgebrook * * * nationally advertised Break Resistant Dinnerware
* * * complete service for 8, \$29.95

DAMAR'S,
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular.

* * * * *

Dear Preferred Customer:

The enclosed certificate is for your use only—No one else can use it
* * *. It is sent only to our most valued customers in sincere appreciation
of their loyalty and patronage * * * we have made arrangements with a
leading manufacturer that will save you many dollars * * *.

* * * * *

* * * in order to save the high cost of many small shipments to ordinary
wholesalers, retailers, salesmen, commissions and middlemen's profits—
the factory has agreed to reserve at a price that will save you, our pre-
ferred customers * * * over \$8.00!

* * * * *

You save over \$8.00 as a special preferred customer! Our price to you
is not \$22.95, nor even \$19.95, which you would expect to pay for such a
magnificent kitchen appliance with Automatic Westinghouse Thermostat,
all bakelite sides and gleaming chrome. As a preferred customer you pay
a very low \$11.78 when you use the enclosed certificate. Otherwise, you
pay the regular customer's price. * * * So use your special privilege
certificate now while it saves you money * * *.

Accompanying said letter are circulars which read in part:

Flavoramic Toaster-Broiler * * * retail \$19.95 * * * see special price
offer.

8. Through the use of the aforesaid corporate and trade names,
as well as the aforesaid statements and representations and others
similar thereto, but not specifically set forth, respondents have rep-
resented, directly or indirectly:

(a) That Product Testing Company, Inc., The Consumer Re-
search Bureau and Product Testing Bureau are independent testing
companies which conduct tests, trial offers or surveys to determine
consumer reaction, preference or marketability of products.

(b) That the Damar Products, Inc., offer to sell said merchandise
is made only to a limited number of preferred customers.

(c) That the aforesaid higher price amounts, whether accom-
panied or unaccompanied by words or terms such as "Retail," "Sug-
gested Retail," were the prices at which the merchandise referred to
was usually and customarily sold at retail in all of the trade areas
in which it was offered for sale; and that purchasers of respondents'

merchandise realize savings equal in amount to the differences between the said higher prices and the corresponding lower prices.

(d) That said coffeemaker when used as directed has the capacity to make or brew and in fact will so make or brew, with one filling of the necessary ingredients and at one time, sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc.

(e) That said Flavoramic Coffeemaker is unconditionally guaranteed in very respect by said Product Testing Company, Inc., and said Damar Products, Inc., for the lifetime of said coffeemaker.

That said coffeemaker thermostat is unconditionally guaranteed by the Westinghouse Electric Corporation, 3 Gateway Center, Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker.

(f) That said dinnerware set is unconditionally guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatever by said Damar Products, Inc., and that said dinnerware set is unconditionally guaranteed against defects for the lifetime of the purchaser, the lifetime of said product, or some other extended but unspecified period of time by Damar Products, Inc.

(g) That said Sun-Craft Cookware Set consists of 15 pieces of heavy aluminum cookware.

(h) That said Damar Products, Inc., purchases its said merchandise directly from the manufacturer and thereby avoids the payment of a middleman's profit and that said savings are passed on to the purchasers.

Falsity of Representations

9. In truth and in fact:

(a) Products Testing Company, Inc., The Consumer Research Bureau and Product Testing Bureau are not independent testing companies and do not conduct consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products. Indeed, some of the so-called "test mailings" were made subsequent to many of the large mailings offering the same product by the respondents without any mention of tests. Thus the Product Testing offer, mailing 1137, made in April 1961, was preceded by mailings 1088A, 1106B, 1107C, 1121R, 1123T, and 1132.

(b) The offers of Damar Products, Inc., to sell said merchandise are not made to a limited number of preferred customers only, but were, in fact, made during the regular course of respondents' business for over a year and a half to members of the purchasing public generally. Thus, mailings to more than a million customers were

made in each of the months of August 1960, December 1960, July 1961, and August 1961. In between these dates, there were a score or more of mailings, some of which ran into the hundreds of thousands. Such extensive mailings, despite the fact that respondents claimed to have three million customers, are hardly indicative of a limited number of preferred customers.

(c) The aforesaid higher price amounts, whether accompanied or unaccompanied by words or terms such as "Retail," "Suggested Retail," etc., were not the prices at which the merchandise referred to was usually and customarily sold at retail in all of the trade areas in which it was offered for sale; and purchasers of respondents' merchandise did not realize savings equivalent in amount to the differences between the said higher prices and the corresponding lower prices. Said higher price amounts were in excess of the price or prices at which said merchandise was generally offered for sale and sold in said trade areas. Although the actual price at which this merchandise was usually and customarily sold at retail is not shown in the record, it is uncontroverted that the usual and customary retail price was substantially below the advertised price in the respondents' mailings.

(d) Said coffeemaker when used as directed does not have the capacity to make or brew, and will not in fact make or brew, with one filling of the necessary ingredients and at one time sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc. The cups of coffee above referred to by respondents are of less than 4 ounce net content. The usual and customary cups of coffee served in homes, lodges, clubs, churches, schools, offices, restaurants, and similar places contain 5 ounces or more of coffee.

(e) Said Flavoramic coffeemaker is not unconditionally guaranteed by Product Testing Company, Inc., or Damar Products, Inc., for the lifetime of said coffeemaker. Instead, a one-year guarantee against electrical or mechanical defects is provided by the supplier-manufacturer. The coffeemaker thermostat is not unconditionally guaranteed by the Westinghouse Electric Corporation of Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker. Since the Spring of 1958, the thermostats have been made by a subsidiary of the Westinghouse Electric Corporation and sold to the percolator supplier-manufacturer without any guarantee. Since April 1962, however, the percolator manufacturer has been allowed to make returns to the thermostat manufacturer.

(f) The dinnerware set is not unconditionally guaranteed for two years against breaking, chipping, cracking, or crazing for any cause whatever by Damar Products, Inc., and is not unconditionally guaranteed against defects for the lifetime of the purchaser, the product, or some other unspecified period of time by Damar Products, Inc. Instead a one-year guarantee, involving a service charge of 15¢ per unit, is provided by the supplier-manufacturer.

(g) Said Sun-Craft Cookware Set does not consist of 15 pieces of heavy aluminum cookware. Two of said so-called pieces are a scouring pad and cookbook, and respondents' count of "15 pieces" is made up by separately tallying each component part such as pot-lids, dividers, etc.

(h) Said Damar Products, Inc., does not purchase all of its merchandise directly from the manufacturer and thereby avoid the payment of a middleman's profit, and said savings are not passed on to the purchaser.

Competitive Effects

10. 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 engaged in the sale of articles of merchandise of the same general kind and nature as those sold by respondents.

11. 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' articles of merchandise by reason of said erroneous and mistaken belief.

Respondents' Contentions

Respondents oppose the issuance of a cease and desist order on several grounds which will be discussed below.

First, respondents argue that the Commission has failed to sustain its burden of proof. They argue that since no witnesses were called by the Commission to testify on any of the allegations of the complaint, there has been incomplete foundation for the issuance of an order. This argument, however, ignores completely the purpose and effect of Section 4.11 of the Rules of Practice. The Federal Trade Commission Act gives the Commission express authority to make rules and regulations for the purpose of carrying out the provisions of the Act. These rules have the force and effect of law.

Commission counsel have used these rules correctly and with more than adequate notice to counsel for the respondents. It would be nonsensical to require live testimony to prove what has already been admitted by respondents pursuant to the Rules of Practice. It is fundamental that judicial admissions are proof possessing the highest possible probative value and no testimony is required to be taken in a case where all of the material allegations of the complaint can be established by such admissions. *Joe B. Hill, et al., v. Federal Trade Commission*, 124 F. 2d 104 (5th Cir. 1941) 3 S.&D. 436.

Second, respondents contend the complaint should be dismissed because the respondents have discontinued the practice complained of. They concede the principle which prohibits a dismissal for abandonment where it appears that the unlawful practices may be resumed. However, they cite the testimony of respondent Margulies to the effect that the discontinued practices will not be resumed.

The assurance of the respondents that they will not resume these practices is not in itself sufficient to warrant the dismissal of the complaint. The record must show the unlikelihood of the resumption of the practice. This is an affirmative defense that must be undertaken and proven by the respondents. It is not for the Commission to disprove the unlikelihood of resumption. The respondents have not supplied the necessary proof in this instance. The fact that Damar Products, Inc., is presently bankrupt is not sufficient, as will be shown below. There is no allegation or inference that business conditions have changed making the resumption of the practices unlikely. For example, see *Sheffield Merchandise, Inc.*, Docket No. 6627, 56 F.T.C. 991 (1960), *Firestone Tire & Rubber Co.*, Docket No. 7020, 55 F.T.C. 1909 (1959), *Bell & Howell Co.*, Docket No. 6729, 54 F.T.C. 108 (1957), *N. Erlanger, Blumgart & Co., Inc.*, Docket No. 5243, 46 F.T.C. 1139 (1950) *National Retail Furniture Association*, Docket No. 5324, 48 F.T.C. 1540 (1951), and *National Coat and Suit Industry Recovery Board*, Docket No. 4596, 47 F.T.C. 1552 (1950), as well as other cases cited by this hearing examiner in his initial decision in *Tung-Sol Electric Inc., et al.*, Docket No. 8514, May 13, 1963.

Third, counsel for the respondents argues that in any event a dismissal as to the individual respondent David W. Margulies is appropriate. Although that respondent admittedly had direction and control of the corporate respondents, it is contended that he had little or nothing to do with the false representations, being primarily concerned with the finances of the corporations. This contention must be dismissed. It is elementary that the lack of knowledge or intent is no defense in actions of this type. See *Federal Trade Com-*

mission v. Algoma Lumber Co., 291 U.S. 67 (1934); *Koch v. Federal Trade Commission*, 206 F. 2d 311 (6th Cir. 1953); *Gimbel Bros., Inc., v. Federal Trade Commission*, 116 F. 2d 578 (2d Cir. 1941); *L & C Mayers Co., Inc., v. Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938). Moreover, this argument belies the important role Mr. Margulies played. He was not only the principal stockholder of the corporate respondent Damar but its president as well. Although the advertising was in charge of a vice president, the employment and discharge of that employee was fixed in Mr. Margulies who also had the power to alter or even cancel any proposed advertisements planned by the corporation. Considering the ease with which this individual respondent creates and operates corporations and does business under various trading names, the order must include him if it is to have any prophylactic effect at all.

Finally, respondents' argument with respect to the bankruptcy issue must be rejected. Communications from the counsel for the receiver of Damar Products, Inc., indicate the possibility of the debtor, Damar Products, Inc., perfecting a plan of arrangement under the bankruptcy proceeding which will enable it to resume its business operations later. Even an adjudication of bankruptcy would not necessarily terminate the existence of the corporation. A bankrupt corporation "continues to exist as a bankrupt individual continues to live and after it has been discharged from its liabilities it is free to do business again * * * under the corporate name." Harry D. Nims, *Unfair Competition and Trade Marks*, Baker, Voorhes & Co., Inc., 1947, at pg. 134, citing *Theobald-Jansen Electric Co. v. Harry I. Wood Electric Co.*, 285 F. 2d 29 (6th Cir. 1922); *In re Connolly & Wallace Co., Inc.*, 32 F. Supp. 827 MD. Pa., 1940); *Nicholson v. Thomas*, 277 Ky. 760, 127 SW (2d) 155 (1939); *Armington v. Palmer*, 21 RI 109, 42 A.308, 43 LRA 95 (1898). The New York rule seems to limit the use of the corporate name, see *Mutual Life Ins. Co., v. Manin*, 115 F. 2d 975 (2nd Cir. 1940).

As long, therefore, as the possibility exists that Damar Products, Inc., will again be selling and advertising merchandise, this order must apply to it because of its past history of illegal practices.

ORDER

It is ordered, That respondents Product Testing Company, Inc., a corporation, and its officers, Damar Products, Inc., a corporation, and its officers, also doing business as Mrs. Dorothy Damar, Damar's, Emma and Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau, and David W. Margulies, individually,

and as an officer of each of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of coffeemakers, dinnerware, luggage, toaster-broilers, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Testing" or the words "Consumer Research Bureau" or "Research Bureau" or any other word or words of similar import or meaning as a part of their respective corporate names or trade names unless such business is actually engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products.

2. Representing, directly or by implication, through the use of the words "This is a Consumer Test" or "Product Testing Service," or any other word or words of similar import or meaning that respondents are engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products; or misrepresenting, in any manner, the purpose or reason merchandise is offered for sale.

3. Representing, directly or by implication, that any offer to sell said merchandise is made to a limited number of preferred customers; or misrepresenting, in any manner, the class, group or number of persons to whom offers to sell merchandise are made.

4. Representing, directly or by implication, that any amount is the usual and customary price of merchandise in the trade area or areas where the representations are made when it is in excess of the generally prevailing price or prices at which said merchandise is sold in said trade area or areas.

5. Using the expressions "Retail," "Suggested Retail," or any other words or terms of similar import or meaning in connection with the retail prices of merchandise unless the prices so designated are the generally prevailing price or prices at which said merchandise is sold in the trade area or areas where the representations are made.

6. Representing, directly or by implication, that any saving from a trade area price is afforded in the purchase of merchandise unless the price at which it is offered is lower than the generally prevailing price or prices at which said merchandise

is sold in the trade area or areas in which the representations are made.

7. Misrepresenting, in any manner, the savings available to purchasers of respondents' merchandise or the amount by which the price of merchandise has been reduced from the price at which it is customarily sold by respondents or their competitors in the usual course of business, in the trade area or areas where the representations are made.

8. Representing, directly or indirectly, that said coffeemaker has the capacity to make or brew any specified number of cups of coffee unless it will in fact brew the specified number of cups of coffee so that each cup may contain five ounces or more; or that any of said products has a capacity, content or size different from what it has in fact.

9. Representing, directly or by implication, that said products are guaranteed unless the nature, extent and duration of the guarantee, the manner in which the guarantor will perform thereunder and the name and address of the guarantor are clearly and conspicuously disclosed and respondents do in fact fulfil all of their requirements under the terms of said guarantee.

10. Using the expression "15 piece * * * heavy * * * aluminum * * * cookware" or any other words or terms of similar import or meaning to describe a cookware set which does not in fact contain the specified number of separate cooking utensils; or misrepresenting in any manner or by any means the number of pieces or constituent parts making up or comprising any of the aforesaid items or sets of merchandise.

11. Representing, directly or by implication, that said merchandise is purchased directly from the manufacturer or without the payment of profits to middlemen unless such is the fact.

OPINION OF THE COMMISSION

FEBRUARY 17, 1964

This is an appeal by respondents from an initial decision finding that they had engaged in certain false, misleading and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C.A. 45(a)(1). The hearing examiner found that respondents conduct a mail-order business selling items such as luggage, coffeemakers, cooking and dinnerware to buyers located throughout the United States. Orders are solicited by means of letters, brochures and catalogs sent through the United States mails.

There is substantial evidence that the advertising or solicitory materials mailed by respondents contained false, deceptive and misleading representations of various kinds constituting violations of law as alleged in the complaint.

On appeal, respondents have raised only two principal issues. They contend that the cease and desist order is improperly issued against David W. Margulies in his individual capacity. Their other exceptions are to the terms and scope of the order to cease and desist.

The only evidence pointed to by respondents to exculpate Mr. Margulies is his own testimony to the effect that he had direction and control of the corporate respondents only in the sense that the president of any corporation has such direction and control. He further testified that he did not exercise specific control in the sphere of corporate advertising and that this responsibility was delegated to his subordinates. While self-compurgating testimony is not completely devoid of probative value, when standing alone without corroboration, it is readily outweighed by documentary or other evidence not weakened by a partisan disability.¹

In this record there is much evidence to establish that the respondent Margulies actually exercises complete power and control over the activities of the two corporate respondents. While the corporations are not mere fictions, the evidence shows that in actual fact Margulies is the real party in interest behind their operations. Margulies owns a majority of the shares of stock of respondent Damar Products, Inc., with the balance being held by his father, Isaac G. Margulies. All of the stock of the respondent, Product Testing Company, Inc., is owned by Damar Products, Inc. Moreover, while not necessarily controlling to our decision here, we have previously found in earlier litigation naming Margulies as an individual respondent that he was responsible for the therein-found unlawful activities of Damar Products, Inc. *Damar Products, Inc., et al.*, Docket No. 7769, 59 F.T.C. 1263, December 6, 1961. This finding was affirmed on appeal. *Damar Products, Inc., et al. v. Federal Trade Commission*, 309 F. 2d 323 (3d Cir. 1962). And, further, in a decision issued this day, we have found the respondent Margulies responsible for the operations of still another corporation. *Around-the-World Shoppers Club*, Docket No. 8460 [p. 845 herein]. All of the respondent Margulies' corporations are headquartered at the same location.

Documentary evidence in this record indicates that Margulies at first admitted his responsibility for the unlawful activities of the corporate respondents. In response to a specification of a subpoena

¹ See *United States v. Gypsum Co.*, 333 U.S. 364, 396 (1948).

duces tecum asking for the names of persons responsible for the sales and promotional activities of the corporate respondents, Margulies submitted a signed statement averring that the:

"Persons responsible for the advertising, offering for sale, etc., were Joseph Vine and David W. Margulies".

Margulies' own testimony indicates that he exercises powers not ordinarily accorded to the president of a corporation. He testified that he had the responsibility for hiring the other officers, including the vice president in charge of advertising, the vice president in charge of operations and the controller. When asked whether he had authority to fire these officers, he responded "Sure".

The witness testified that he did review advertising material before mailing or distribution and that he "certainly" had the power to veto or "kill" anything that came to him for final review.

On the basis of the foregoing evidence the hearing examiner found that the order to cease and desist must run against respondent Margulies in his individual capacity " * * * if it is to have any prophylactic effect at all." We most heartily agree. An excerpt from the opinion of Judge John Paul in a recently decided and quite similar case accurately and succinctly sums up our conclusion on this issue:

To the foregoing we might add the comment that it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices. *Pati-Port, Inc., et al v. Federal Trade Commission*, 313 F. 2d 103, 105 (4th Cir. 1963).

We turn now to respondents' exceptions to the terms of the order to cease and desist entered by the hearing examiner. Respondent first objects to the provisions of paragraphs 2 and 3 of the order on the ground that they prohibit certain representations even if truthful. Respondents' interpretation of these provisions of the order is correct, for they flatly prohibit the respondents from representing that their merchandise is offered in connection with a product test or survey or that it is offered to a limited number of preferred customers. Respondents would have us add a qualifying phrase such as "except when such is the fact", arguing that unqualified prohibitions of this type are beyond the power of the Commission.

The described prohibitions conform to the Commission's policy of forbidding without qualification any representations which are unlikely to ever be true. This is not a case where respondents are forever barred from making representations which the normal course of their business requires them to make and which could be more often than not truthful, as would be the case, for example, were we to flatly prohibit a clothing manufacturer from representing that

his garments were all wool on the basis of a record showing that one or two garments so advertised were in fact not composed solely of wool. Respondents here are not engaged in testing or consumer surveys or limited offerings to preferred customers but are hucksters, pure and simple. They are engaged solely in the sale of merchandise for profit, and their advertising, giving a contrary representation, is completely false. Thus, the order must comprehensively enjoin such misleading representations without qualification.

In this connection we note that the first paragraph of the order to cease and desist does contain a qualification in that, pursuant to its terms, the respondents are forbidden use of the words "Testing," "Consumer Research Bureau," or "Research Bureau" or words of similar meaning as a part of a corporate name or trade name "unless such business is actually engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products." While this paragraph of the order was promulgated by the hearing examiner exactly as it was contained in the complaint, the record discloses that respondents conducted no tests, surveys or research and had no facilities for doing so. Under these circumstances, paragraph 1 of the orders should prohibit the use of the words testing, consumer research bureau, research bureau or words of similar import as a part of a trade name without qualification, and the hearing examiner's proposed order will be modified by striking therefrom the qualifying language beginning with the word "unless".

The Commission's authority to enter orders which unqualifiedly prohibit a course of conduct is clear. *Caroline R. Macher, et al. v. Federal Trade Commission*, 126 F. 2d 420 (2d Cir. 1942). It is highly unlikely that these respondents will change their method of operation and become a bona fide research or testing organization. However, should this occur, the Commission will be available to entertain an application for an appropriate modification of this order. See *Federal Trade Commission v. National Lead Company, et al.*, 352 U.S. 419 (1957); *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52 (4th Cir. 1950).

The remainder of respondents' objections to the terms of the order to cease and desist are not sufficiently meritorious to warrant detailed discussion and are denied.

The initial decision of the hearing examiner will be modified to conform to the views of the Commission as expressed herein and, as so modified, will be adopted as the decision of the Commission.

Commissioner Elman concurred in the result, and Commissioner Reilly did not participate.

Complaint

64 F.T.C.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision and upon briefs in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the appeal should be denied and that the initial decision should be modified, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner be modified by striking the following words from paragraph 1 of the proposed order to cease and desist:

"unless such business is actually engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products."

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

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

Commissioner Elman concurring in the result, and Commissioner Reilly not participating.
