

IN THE MATTER OF

VENT-AIR LENS LABORATORIES, INC., ET AL.

ORDER DISMISSING COMPLAINT IN REGARD TO THE ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION ACT*Docket 8715. Complaint, Oct. 3, 1966—Decision, December 16, 1968*

Order placing on Commission's docket for review an initial decision dismissing charges of deceptive sales practices against a manufacturer of contact lenses and dismissing the complaint.

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 Vent-Air Lens Laboratories, Inc., a corporation, and Lawrence Lewison, Marvin Shore and Shirley Lewison, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Vent-Air Lens Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 76 Madison Avenue, in the city of New York, State of New York.

Lawrence Lewison is president, Marvin Shore is controller and Shirley Lewison is treasurer of the corporate respondent. These individuals direct, formulate and control the acts, practices and policies of the corporate respondent, including those hereinafter referred to. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, sale and distribution of contact lenses under the name Vent-Air Contact Lenses. Respondents distribute said contact lenses through wholly owned outlets and through franchised outlets. Contact lenses are designed to correct errors and deficiencies in the vision of the wearer, and are, devices, as the term "device" is defined in the Federal Trade Commission Act.

* Published as amended by Hearing Examiner's order of June 7, 1967, which designated the corporate name of respondent as Vent-Air Lens Laboratories, Inc., instead of Vent-Air Contact Lens Laboratories, Inc.

PAR. 3. Respondents have caused and now cause the said devices, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained, a course of trade in said device in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and have disseminated, and caused the dissemination of, advertisements concerning said devices by various means, including but not limited to the aforesaid media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all inclusive, of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

A new contact lens!

* * * * *

VENT-AIR IS EVERYWHERE!

* * * For today you'll find Vent-Airs available—in authorized offices only—in more than 85 cities in the United States, Canada, Mexico and other foreign countries!

Every pair of Vent-Airs is registered at the laboratory for your lifetime protection. In case of loss, duplication or adjustment, this permanent prescription record permits the Vent-Air Laboratory to be of immediate service * * * dependable service that's available in offices the world over!

So whether you winter in Florida, summer in Canada or move to Honolulu, your Vent-Air Guarantee Card is your key to this exclusive lifetime, world-wide service * * * at no extra cost!

* * * * *

Now Vent-Air's No-Risk plan lets you wear your own prescription lenses before you're obligated to take them.

* * * * *

Professional Services Agreement

Vent-Air Grooved Contact Lenses are guaranteed to be optically perfect and precision ground. The fitting office below agrees to provide all services necessary to the accurate fitting of said lenses and their comfortable, satisfactory wear; and the fee fixed above [the cost of the lenses] will cover all additional fitting, adjustment, etc. which may become necessary to insure satisfaction to the patient mentioned herein. Prescription changes will be made to the original lenses at no charge.

* * * * *

You've asked:

"HOW OFTEN SHOULD MY
LENSES BE CHECKED?"

A very good question indeed, for often no matter how comfortable they may be or how well you may be seeing with your lenses, changes of which you are not aware may have taken place.

What kind of changes?

- Changes in your eye's curvature, for one thing, which appear not to affect your immediate comfort (because you're so adjusted to your lenses) yet which require that your lenses be reshaped. And what a difference when they're refitted properly, how much better they feel!
- Normal wear and tear on your lenses—due to handling, dropping, rubbing, residue accumulation and normal eye secretions. Lenses become scratched, marred, and their clarity is dimmed—you're so accustomed to it you completely overlook it, except perhaps for a vague feeling of eyestrain. But once they're repolished and cleared up, what a relief! * * * everything's so much brighter it's as though a curtain had lifted!

And of course changes in your optical prescription:

- An increased difficulty in reading, because your lens prescription may be a bit strong for you now

(your eyes sometimes improve with wearing lenses)—a simple reduction in strength will add a great deal to reading ease.

- A normal onset of astigmatism which can be remedied by a change in your lens prescription.
- A seeming increase of late in sensitivity to light, or extra discomfort in a confined, smoke-filled room. Tinting your lenses may be the answer.
- A heightened sense of strain and tiredness, or annoying sleepiness when doing concentrated or close viewing, sewing, knitting or even watching television—due to needing more lens help or better muscular coordination.
- Recurrent headaches, eye-aches or dizziness, otherwise unexplainable, and an inability to keep things in focus, definitely pointing to the need to verify your prescription.
- Unwarranted smarting or tearing which may be your eyes' reaction to excessive strain, or indicate hidden eye changes important to uncover.
- Some blurring or haziness in your distance viewing which can be cleared up by simply regrinding your lenses to a stronger prescription.
- And other eye changes, some normal and some abnormal, which may be related to your general health and require a change in lens correction.

(See important P.S. over)

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All these are changes your lenses may need which can add greatly to your enjoyment of them and which are *important for your better eye health.*

That's why the answer to your question is:

**"AT LEAST ONCE A YEAR and
PREFERABLY
EVERY SIX MONTHS."**

Most of these changes are covered by your Vent-Air Laboratory Guaranty, providing for no laboratory

charge for prescription changes to your lenses. But an important condition of this guaranty is that, for your own protection, you must have your eyes examined and your lenses checked at your Vent-Air office *at least once a year.* Otherwise the guaranty is cancelled.

So, for the sake of your eyes' better health and your greater lens comfort, if it is almost a year since your last eye and lens check-up, make your appointment now. Don't lose your Vent-Air Guaranty by putting it off!

© 1964 Vent-Air Laboratories

P.S.—As a special accommodation to those of you who may have been neglectful, we are permitting a grace period of the next thirty days for reinstatement of your Vent-Air Guaranty. If you come in for a check-up within this period all its privileges will be yours again—no charge for prescription changes, laboratory service through Vent-Air offices everywhere, etc. A word to the wise * * *!

VENT-AIR

Available In Principal Cities

VENT-AIR GUARANTY CARD

This card when presented at any office where Vent-Air lenses are dispensed entitles you to lifetime service on your Vent-Air lenses.

PAR. 6. Through the use of said statements and representations, and others similar thereto not specifically set out herein, respondents have represented and are now representing directly and by implication:

1. That Vent-Air contact lenses are a new or recent discovery or development in contact lenses.

2. That Vent-Air contact lenses and services are available to the consuming public in Vent-Air offices located in 85 cities throughout the United States and in offices in many foreign countries throughout the world.

3. That, without incurring any additional charges or fees, a purchaser of Vent-Air contact lenses is entitled to repair of, or services on, said lenses due to changes in eye curvature, normal wear and tear due to handling, dropping, rubbing, residue accumulation, marring, scratching, and changes in optical prescription.

4. That respondents' guarantee or Professional Service Agreement given to purchasers of their contact lenses and (a) issued prior to 1964 (hereinafter referred to as the "old" guarantee or agreement) is not subject to any conditions or limitations, or (b) issued from 1964 to the present (hereinafter referred to as the "new" guarantee) is subject only to the limitations or condition that purchasers of Vent-Air contact lenses have their eyes examined and their lenses checked once a year; further, that all offices where respondents' contact lenses are available honor either guarantee without any charges to purchasers of said lenses.

5. That prospective purchasers of contact lenses can wear or use Vent-Air contact lenses made to their own optical prescription for an unlimited period of time to determine their suitability and can do so without incurring any charge or obligation to take or pay for the lenses under respondents' "no-risk plan."

6. That their "no-risk plan" and other offered services provided by them are exclusive with respondents in that no other seller of contact lenses has such a plan or provides the same services.

PAR. 7. In truth and in fact:

1. Vent-Air contact lenses are not a new or recent discovery or development in contact lenses; they have been on the market for more than 10 years.

2. Vent-Air contact lens offices owned by respondents are located in less than 40 cities in the United States; franchised offices are located in less than 25 cities in the United States.

3. The owned and franchised offices do not all offer or adhere to the statement and representations made in respondents' advertisements concerning lens service and repairs; many offices impose varying fees and charges on the purchasers of Vent-Air contact lenses who return to have lenses serviced or repaired.

4. All of the offices where respondents' contact lenses are available do not honor either the "old" guarantee or agreement or the "new" guarantee. Many offices impose charges for any services or repairs rendered under the guarantee, as well as charging previously undisclosed fees for eye examinations necessary to avoid cancellation of the guarantee; further, any and all guarantees given to purchasers of Vent-Air contact lenses fail to clearly and conspicuously disclose (a) the full nature and extent of the guarantee, (b) all material conditions or limitations which respondents impose and (c) the manner in which respondents will perform thereunder.

5. There is a fee for examining the eyes of a prospective pur-

chaser of Vent-Air contact lenses and grinding lenses to the proper optical prescription; trial or use of the contact lenses is restricted to brief periods of time and only in respondents' offices during times when such offices are open.

6. The services performed by respondents for purchasers of Vent-Air contact lenses are not exclusive with respondents; they are services usually and customarily offered by other sellers to purchasers of contact lenses.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act; respondents failure to abide by the terms of certain of their guarantees constitutes unfair and deceptive acts and practices within the meaning of Section 5 of the Federal Trade Commission Act.

PAR. 8. The dissemination by the respondents of the false advertisements and their failure to abide by the terms of certain of their guarantees, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 12 and 5 of the Federal Trade Commission Act.

Mr. Howard Epstein and Mr. William J. Kelly, Jr., for the Commission.

Mr. Solomon H. Friend, Bass & Friend, of New York, N.Y., and Mr. Joel J. Weiner, of New York, N.Y., Attorneys for respondents, Vent-Air Lens Laboratories, Inc., Mr. Lawrence Lewison, and Mrs. Shirley Lewison.

Mr. Meyer Schwartz, of New York, N.Y., for respondent, Mr. Marvin Shore.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

OCTOBER 11, 1968

The complaint in this proceeding, issued on October 3, 1966, alleges that Vent-Air Contact Lens Laboratories, Inc.,¹ a corporation, Lawrence Lewison, Shirley Lewison, and Marvin Shore, individually and as officers of said corporation, violated the provisions of the Federal Trade Commission Act by misrepresenting the nature and extent of the services offered by its owned and operated and also its franchised retail sales stores to purchasers of its Vent-Air Contact Lenses, and other alleged false advertising claims.

¹ By order dated and filed June 7, 1967, the hearing examiner amended the complaint herein so as to designate the corporate respondent by its correct name, Vent-Air Lens Laboratories, Inc.

By amended answer, the respondents have denied the substantial allegations set forth in the complaint, and two of the individual respondents, Shirley Lewison and Marvin Shore, have filed motions, accompanied by their individual affidavits, requesting that the complaint be dismissed as to each of them.

On two occasions, hearings were delayed due to certifications by the hearing examiner to the Commission of two separate motions filed by counsel for withdrawal of the proceeding from adjudication and acceptance of a consent order. Both motions were denied by the Commission.

Hearings have now been completed, proposed findings and conclusions of law have been filed by counsel, and the proceeding is now before the hearing examiner for initial decision. All proposed findings of fact and conclusions of law not found nor concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The respondent, Vent-Air Lens Laboratories, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office located at 76 Madison Avenue, New York, New York (admitted in amended answer), and is a subsidiary of Klear Vision Contact Lens Specialists, Inc., a corporation also incorporated under the laws of the State of New York (Tr. 928-934).

2. The individual respondent, Lawrence Lewison, is an optometrist and president of the corporate respondent, Vent-Air Lens Laboratories, Inc., and Klear Vision Contact Lens Specialists, Inc. Mr. Lewison formulates, directs and controls the acts, practices and policies of the corporate respondent. His business address is the same as that of the corporate respondent. (Amended answer; Tr. 932-34.)

3. The individual respondent, Shirley Lewison, is the wife of Lawrence Lewison, holding the offices of secretary and director of the corporate respondent at the request of her husband. Mrs. Lewison has never received any salary or remuneration, nor attended any meetings of the board of directors of the corporate respondent. The only function performed by Mrs. Lewison as secretary has been to affix her signature to a resolution or other routine corporate document as a ministerial act when requested to do so by her husband, Lawrence Lewison. Mrs. Lewison is a housewife and has never formulated, directed or controlled the

acts, practices and policies of the corporate respondent. (Affidavit in support of Motion to Dismiss; Tr. 7, 1150.)

4. The individual respondent, Marvin Shore, was controller of the corporate respondent from approximately January or February 1958 until March 25, 1966, when he left the employ of corporate respondent and entered the employment of Roman Products Corporation, a manufacturer of frozen foods, located in South Hackensack, New Jersey. Mr. Shore is a certified public accountant, and was never a stockholder nor officer of corporate respondent. During his employment with corporate respondent, Mr. Shore did not formulate, direct, nor control the acts, practices and policies of the corporate respondent (Tr. 771-72, 1230). As controller, Mr. Shore carried out the instructions given him by Dr. Lewison, president of corporate respondent. Mr. Shore had left the employment of the corporate respondent more than six months prior to the issuance of the complaint herein. (Affidavit in support of Motion to Dismiss; Tr. 729, 762.)

5. The corporation respondent is and has been engaged in the manufacture, sale, and distribution of contact lenses under the trade name, Vent-Air Contact Lenses (admitted by amended answer). The corporate respondent sells and distributes said contact lenses through wholly owned retail and franchised stores located in various cities in the United States and foreign countries, including the District of Columbia. Contact lenses are designed to correct errors and deficiencies in the vision of the wearer, and are devices, as the term "device" is defined in the Federal Trade Commission Act.

6. The corporate respondent has caused and now causes the said devices, when sold, to be transported from its place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. Corporate respondent maintains a course of trade in said device in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of corporate respondent's business in such commerce is and has been substantial (admitted by amended answer; Tr. 1103-1104).

7. In the course and conduct of said business, corporate respondent has disseminated and caused the dissemination of certain advertisements concerning the said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements inserted in newspapers, magazines, and other advertising media for the purpose of inducing and which were

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likely to induce, directly or indirectly, the purchase of said devices; and have disseminated, and caused the dissemination of, advertisements concerning said devices by various means, including the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices, in commerce, as "commerce" is defined in the Federal Trade Commission Act (see amended answer; CX 1, 2, 23-29, 31-34).

8. The complaint alleges, among other things, that, typical of the statements and representations contained in said advertisements, are the following:

A new contact lens!

* * * * *

VENT-AIR IS EVERYWHERE!

* * * For today you'll find Vent-Airs available—in authorized offices only—in more than 85 cities in the United States, Canada, Mexico and other foreign countries!

Every pair of Vent-Airs is registered at the laboratory for your lifetime protection. In case of loss, duplication or adjustment, this permanent prescription record permits the Vent-Air Laboratory to be of immediate service * * * dependable service that's available in offices the world over!

So whether you winter in Florida, summer in Canada or move to Honolulu, your Vent-Air Guarantee Card is your key to this exclusive lifetime, world-wide service * * * at no extra cost!

* * * * *

Now Vent-Air's No-Risk plan lets you wear your own prescription lenses before you're obligated to take them.

* * * * *

Professional Services Agreement

Vent-Air Grooved Contact Lenses are guaranteed to be optically perfect and precision ground. The fitting office below agrees to provide all services necessary to the accurate fitting of said lenses and their comfortable, satisfactory wear; and the fee fixed above [the cost of the lenses] will cover all additional fitting, adjustment, etc. which may become necessary to insure satisfaction to the patient mentioned herein. Prescription changes will be made to the original lenses at no charge.

* * * * *

You've asked:

"HOW OFTEN SHOULD
MY LENSES BE CHECKED?"

A very good question indeed, for often no matter how comfortable they may be or how well you may be seeing with your lenses, changes

of which you are not aware may have taken place.

What kind of changes?

- Changes in your eye's curvature, for one thing, which appear not to affect your immediate comfort (because you're so adjusted to your

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lenses) yet which require that your lenses be reshaped. And what a difference when they're refitted properly, how much better they feel!

- Normal wear and tear on your lenses—due to handling, dropping, rubbing, residue accumulation and normal eye secretions. Lenses become scratched, marred, and their clarity is dimmed—you're so accustomed to it you completely overlook it, except perhaps for a vague feeling of eyestrain. But once they're repolished and cleared up, what a relief! * * * everything's so much brighter it's as though a curtain had lifted!

And of course changes in your optical prescription:

- An increased difficulty in reading, because your lens prescription may be a bit strong for you now (your eyes sometimes improve with wearing lenses)—a simple reduction in strength will add a great deal to reading ease.
- A normal onset of astigmatism which can be remedied by a change in your lens prescription.
- A seeming increase of late in sensitivity to light, or extra discomfort in a confined, smoke-filled room. Tinting your lenses may be the answer.
- A heightened sense of strain and tiredness, or annoying sleepiness when doing concentrated or close viewing, sewing, knitting or even watching television—due to needing more lens help or better muscular coordination.
- Recurrent headaches, eye-aches or dizziness, otherwise unexplainable, and an inability to keep things in focus, definitely pointing

to the need to verify your prescription.

- Unwarranted smarting or tearing which may be your eyes' reaction to excessive strain, or indicate hidden eye changes important to uncover.
- Some blurring or haziness in your distance viewing which can be cleared up by simply regrounding your lenses to a stronger prescription.
- And other eye changes, some normal and some abnormal, which may be related to your general health and require a change in lens correction.

All these are changes your lenses may need which can add greatly to your enjoyment of them and which are *important for your better eye health.*

That's why the answer to your question is:

**"AT LEAST ONCE A YEAR and
PREFERABLY
EVERY SIX MONTHS."**

Most of these changes are covered by your Vent-Air Laboratory Guaranty, providing for no laboratory charge for prescription changes to your lenses. But an important condition of this guaranty is that, for your own protection, you must have your eyes examined and your lenses checked at your Vent-Air office *at least once a year*. Otherwise the guaranty is cancelled.

So, for the sake of your eyes' better health and your greater lens comfort, if it is almost a year since your last eye and lens check-up, make your appointment now. Don't lose your Vent-Air Guaranty by putting it off!

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P.S.—As a special accommodation to those of you who may have been neglectful, we are permitting a grace period of the next thirty days for reinstatement of your Vent-Air Guaranty. If you come in for a check-up within this period all its privileges will be yours again—no charge for prescription changes, laboratory service through Vent-Air offices everywhere, etc. A word to the wise * * *!

VENT-AIR
Available In Principal Cities

VENT-AIR GUARANTY CARD

This card when presented at any office where Vent-Air lenses are dispensed entitles you to lifetime service on your Vent-Air lenses.

9. The complaint further alleges that, through the use of said statements and representations, respondents have represented that:

(a) Vent-Air contact lenses are a new or recent discovery or development in contact lenses; whereas, Vent-Air contact lenses are not a new or recent discovery or development in contact lenses, but have been on the market for more than 10 years.

(b) Vent-Air contact lenses and services are available to the consuming public in Vent-Air offices located in 85 cities throughout the United States and in offices in many foreign countries throughout the world; whereas, Vent-Air contact lens offices owned by corporate respondent are located in less than 40 cities in the United States, and franchised offices are located in less than 25 cities in the United States.

(c) Without incurring any additional charges or fees, a purchaser of Vent-Air contact lenses is entitled to repair of, or services on, said lenses due to changes in eye curvature, normal wear and tear due to handling, dropping, rubbing, residue accumulation, marring, scratching, and changes in optical prescription; whereas, owned and franchised offices do not all offer or adhere to the statement and representations made in corporate respondent's advertisements concerning lens service and repairs; many offices impose varying fees and charges on the purchasers of Vent-Air contact lenses who return to have lenses serviced or repaired.

(d) Corporate respondent's guarantee or Professional Services Agreement given to purchasers of their contact lenses and (1) issued prior to 1964 (hereinafter referred to as the "old" guarantee or agreement) is not subject to any conditions or limitations, or (2) issued from 1964 to the present (hereinafter referred to as the "new" guarantee) is subject only to the limitations or condition that purchasers of Vent-Air contact lenses

have their eyes examined and their lenses checked once a year; further, that all offices where corporate respondent's contact lenses are available honor either guarantee without any charges to purchasers of said lenses; whereas, all of the offices where corporate respondent's contact lenses are available do not honor either the "old" guarantee or agreement or the "new" guarantee. Many offices impose charges for any services or repairs rendered under the guarantee, as well as charging previously undisclosed fees for eye examinations necessary to avoid cancellation of the guarantee; further, any and all guarantees given to purchasers of Vent-Air contact lenses fail to clearly and conspicuously disclose (1) the full nature and extent of the guarantee, (2) all material conditions or limitations which corporate respondent imposes, and (3) the manner in which corporate respondent will perform thereunder.

(e) Prospective purchasers of contact lenses can wear or use Vent-Air contact lenses made to their own optical prescription for an unlimited period of time to determine their suitability and can do so without incurring any charge or obligation to take or pay for the lenses under corporate respondent's "no-risk plan"; whereas, there is a fee for examining the eyes of a prospective purchaser of Vent-Air contact lenses and grinding lenses to the proper optical prescription; trial or use of the contact lenses is restricted to brief periods of time and only in corporate respondent's offices during times when such offices are open.

(f) Corporate respondent's "no-risk plan" and other offered services provided by it are exclusive with corporate respondent in that no other seller of contact lenses has such a plan or provides the same services; whereas, the services performed by corporate respondent for purchasers of Vent-Air contact lenses are not exclusive with corporate respondent; they are services usually and customarily offered by other sellers to purchasers of contact lenses.

10. Therefore, the complaint alleges, the advertisements referred to in paragraph 8 above were and are misleading in material respects and constitute false advertisements as that term is defined in the Federal Trade Commission Act; and the failure of corporate respondent to abide by the terms of its guarantees constitutes unfair and deceptive acts and practices within the meaning of Section 5 of the Federal Trade Commission Act.

11. Complaint counsel offered the testimony of 13 witnesses, including two of the individual respondents, Dr. Lawrence Lewison and Marvin Shore. Of the remaining 11 witnesses, two were

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optometrists formerly employed by Vent-Air in its Washington, D.C., offices, and the remaining nine witnesses were purchasers of Vent-Air contact lenses and offered by complaint counsel to substantiate the allegations that corporate respondent did not honor its service guarantees. One of these so-called consumer witnesses was not permitted to testify concerning the guarantee because the testimony of the witness disclosed that her son was the wearer of the contact lenses purchased from Vent-Air and the proper person to testify concerning the transaction. Additional consumer witnesses were subpoenaed by complaint counsel, but did not testify. One witness, who was subpoenaed, did not respond to the subpoena. Another witness, who appeared in response to the subpoena, was excused after being interviewed by complaint counsel upon the stated reason that her testimony would not support the allegations of the complaint (Tr. 849). In sum, eight purchasers of Vent-Air contact lenses under the "old" guarantee (that is, under Vent-Air's guarantee or Professional Services Agreement issued prior to 1964, see Paragraphs Six and Seven, subparagraphs 4, of Complaint) testified at the hearing. Significantly, complaint counsel did not offer any witness or any evidence that any purchaser of Vent-Air contact lenses after 1964 (referred to in Paragraphs Six and Seven, subparagraphs 4, of the Complaint as the "new" guarantee) did not receive all of the benefits under the guarantee. The testimony of each of the witnesses offered by complaint counsel will now be discussed.

12. The first witness offered by counsel supporting the complaint was Miss Gloria Eleanor Chodos, of Alexandria, Virginia. Miss Chodos testified as follows: Miss Chodos purchased a set of Vent-Air contact lenses in 1960. She originally went to the Vent-Air office in Washington, D.C., by reason of having seen a newspaper advertisement (Tr. 227) similar to CX 1 (Tr. 233). The Vent-Air office was in the Colorado Building, Washington, D.C. The name of the optometrist who waited on Miss Chodos was Dr. Miller. Miss Chodos contracted to purchase a set of contact lenses on her first visit (Tr. 235). About one week intervened after she contracted to purchase the lenses until she went back for a second visit and received the lenses (Tr. 236). The optometrist gave her instructions on the use and wearing of the lenses. She wore the lenses in the Vent-Air office (Tr. 236). She took the lenses, wore them at home and at her office, but could not see clearly with the lenses. She went back to the Vent-Air office to try and get some kind of an adjustment or to find out whether it was partly her fault that she could not see

clearly with the contact lenses (Tr. 237). She was told that it would take some time and adjustment to get used to wearing the lenses. She decided to try a "little further" at wearing the lenses. She continued attempting to wear them, but could not see clearly while wearing the contact lenses (Tr. 238). Miss Chodos continued going back to the Vent-Air office and explained to the optometrist, Dr. Miller, that everything was becoming blurred. He then decided to try a new type of contact lens on Miss Chodos. Instead of the round lens, he gave her a cylindrical lens. She took these lenses home and attempted to wear them, but she still could not see with them (Tr. 238). She continued going back to the Vent-Air office and was told that she needed more trial with the lenses. She continued her visits to the Vent-Air office and they gave her another eye examination (Tr. 239). After this examination, the optometrist told her that she had a "stigmatism problem" and could not wear contact lenses and wear them properly. Miss Chodos "tried to get a refund or get some kind of money back for the time" that she had "spent in going down there all the time," and she "got absolutely nowhere" (Tr. 239). During the time that Miss Chodos was making the visits to the Vent-Air offices, the company made no charges for its services (Tr. 242).

13. On cross-examination, Miss Chodos was questioned concerning the dates of each of her visits to the office of Vent-Air in the Colorado Building, Washintgon, D.C., beginning with the date of her first visit and continuing to the last visit, when each set of contact lenses was delivered to her, and what service was performed for Miss Chodos on each visit. The hearing examiner observed Miss Chodos, as well as each of the other witnesses and their demeanor while testifying in this proceeding. Upon the basis of the testimony of Miss Chodos, the hearing examiner finds as follows: On December 19, 1960, Miss Chodos first visited the Vent-Air Contact Lens Specialists' office in the Colorado Building, in Washington, D.C. (Tr. 243, 247). She next visited the Vent-Air office on December 30, 1960 (Tr. 247). She again visited the Vent-Air office on January 9, 1961 (Tr. 247, 252). She next visited the office on January 16 and again on January 28, 1961. She next visited the office on February 17, 1961, and paid \$5 on account toward the purchase price of the lenses. She next visited the office on February 24, 1961, when she picked up her contact lenses, paid \$80 on her account, and obtained a three-year insurance policy on her lenses (Tr. 247, 248, 251-53). On March 13, 1961, she visited the office and advised that she

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was wearing her contact lenses 8 hours each day (Tr. 253). On this visit, she was given an eye examination (Tr. 254). On March 24, 1961, Miss Chodos visited the office, received an eye examination and an exchange of contact lenses, for which no charge was made. On March 30, 1961, she again visited the office for an eye examination and for another on April 14, 1961 (Tr. 254). On April 17 and April 24, 1961, she again visited the office and received eye examinations. On May 27, 1961, Miss Chodos visited the office and was given a set of cylindrical contact lenses to replace the lenses she had been wearing, which she surrendered to the office (Tr. 256). From the time on May 27, 1961, when Miss Chodos was given the cylindrical lenses, she has not visited or communicated with the office of Vent-Air Lens Laboratories (Tr. 256). In all, Miss Chodos made approximately 18 visits to the office of Vent-Air Lens Laboratories and received service on her contact lenses for which Vent-Air did not make any charge (Tr. 257). This testimony affirmatively shows that corporate respondent honored the service guarantee, if any, given to Miss Chodos at the time she purchased her contact lenses in 1960 by giving her service on 18 occasions. It is not shown that corporate respondent ever refused service to Miss Chodos. Accordingly, it is found that the testimony of Miss Chodos does not establish the allegations set out in Paragraphs Six and Seven of the complaint.

14. Mrs. August Hoenack, Bethesda, Maryland, was the next witness offered by complaint counsel. Mrs. Hoenack has worn glasses since she was 16 years old. She is a music teacher who teaches teachers (Tr. 300). Mrs. Hoenack testified as follows: She first became aware of the existence of Vent-Air Lens Laboratories, Inc., from an advertisement in the Sunday weekly television program supplement of The Washington Star in the Fall of 1957 (Tr. 269). After observing the advertisement, Mrs. Hoenack "thought" she first visited the office of Vent-Air Lens Laboratories, Inc. (actually, the name of corporate respondent's Washington, D.C., office was Contact Lens Specialists, Inc.), in the Colorado Building, Washington, D.C., in late November 1957 (Tr. 269). On her first visit to the office, her eyes were examined and "Some lenses were put on my eyes" (Tr. 269). Mrs. Hoenack did not remember the name of the person or persons to whom she talked at the office or any exact conversation about the purchase of contact lenses (Tr. 270-71). She decided that day to purchase the contact lenses. On her second visit one or two weeks later, the contact lenses, ground to her prescription, were placed over her

eyes. She was told to wear the contact lenses on a regular schedule, such as one hour the first day, two hours the second day, etc. The contact lenses were removed and she carried them with her in a container from the office (Tr. 272-73). Mrs. Hoenack did not recall if there were any representations made to her about her ability to wear contact lenses or that the contact lenses could be tried by her at no risk or under a no-risk plan (Tr. 273). She stated that, "I believe it was the initial ad that gave me that impression" (Tr. 274). Mrs. Hoenack "thought" she paid for the lenses at the time of her second visit to the office. She testified that she made many more visits to the office (Tr. 277), because the lenses were uncomfortable and her eyes were red and blood-shot. She had been given a guarantee card which she stated indicated that she "could go back at any time for as long as I wanted to with no charge," and she kept going back for a period of three and one-half years, but the people in the Vent-Air office told her that the lenses were "all right; that there wasn't any great problem" (Tr. 280-81). Mrs. Hoenack further testified that one of the reasons she went back to the office was that the lenses were uncomfortable and she would remove them while driving the car or on a street corner and drop and lose a lens while removing it. Under her guarantee, Vent-Air would replace the lens, and it might be more uncomfortable than the lens she had lost. She would then go back to the Vent-Air office and "they would modify and improve it somewhat, but they didn't bother to see that it was correct before they mailed it out to me" (Tr. 281). Mrs. Hoenack testified that it "happened at least six times that I lost a lens under those circumstances" (Tr. 282). She also testified that she had an insurance policy which covered the loss of the lens, for which she paid an annual premium of \$15.

15. Mrs. Hoenack further testified as follows: Her daughter purchased contact lenses from Vent-Air in 1960, and the daughter was unable to wear her lenses. At that time, according to Mrs. Hoenack, Vent-Air had a policy of a refund within a year. Mrs. Hoenack wrote a letter to Vent-Air requesting a refund for both herself and her daughter, and Vent-Air replied by letter, refusing to make a refund, but suggested that her daughter visit the Vent-Air office and "have her lenses adjusted" (Tr. 283). Mrs. Hoenack believed that she "would not get a refund on mine since it had been three and a half years, but since hers was under the year that they at the time were quoting as a refund time limit that they would refund the money for hers. * * * Dr. Ginsberg,

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at one time, told me the guarantee time" (Tr. 283). Later, Mrs. Hoenack corrected her previous testimony to the effect that, in her letter to Vent-Air Lens Laboratories, Inc., she had requested a refund for both herself and daughter, and testified that she only requested that a refund be made to her daughter (Tr. 287). In 1961, Mrs. Hoenack again visited the Vent-Air offices and was told there was no reason why she couldn't wear contact lenses. She then stopped going to the offices because she could not wear the contact lenses she had purchased from Vent-Air (Tr. 292-93).

16. On cross-examination, Mrs. Hoenack admitted that she first visited the Vent-Air office on November 29, 1957, and bought her contact lenses; then, on July 9, 1960, almost three years later, Mrs. Hoenack took her daughter to the Vent-Air office to purchase contact lenses for the daughter. Mrs. Hoenack further admitted that Vent-Air Lens Laboratories, Inc., replaced free of charge to Mrs. Hoenack nine pairs of contact lenses which she either lost or broke during the period 1957 to August 15, 1962, the date of her last visit to the Vent-Air office, not 1961 as Mrs. Hoenack had previously testified (Tr. 302). Mrs. Hoenack finally stated that her complaint against Vent-Air was that she could not wear the contact lenses which were sold to her by Vent-Air (Tr. 299). She further stated (Tr. 305) :

* * * My complaint is I don't think they made the kind of effort that should have been made to fit them. When I went in for my repeated checkups, usually nothing was done.

Counsel for respondents, referring to Vent-Air's office records, began to question Mrs. Hoenack about what was done for her at each of her visits to the Vent-Air office during the period beginning on November 29, 1957, when she first visited the Vent-Air office, until her last visit in 1962 (Tr. 310). Among some of the questions and answers were the following :

Q. * * * Do you remember what Vent-Air tried to do over the years to help you?

A. Yes, I do remember.

Q. * * * Do you remember how many visits you made to Vent-Air and how many examinations you had, and what they did to try to help you?

A. I think I could say there must have been as many as 20, and I think I can say that at most of them they did nothing other than to say they made some adjustment and that I just needed to stick to a wearing schedule.

Q. How about examinations? Did they examine your eyes? (Tr. 317.)

A. Yes, I think they spent a great deal of time. I think this is a complete—the sad thing about it, to spend all that time and not accomplish anything.

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Q. Didn't you bring a prescription from some other doctor to them and have them fill it for nothing?

A. I don't recall.

Q. You don't remember that?

A. I think I—if you will tell me more about it, I probably will.

Q. Sure. Vent-Air went so far as even to allow you to go to another doctor to be examined and to fill your prescription that you brought free—didn't they do that for you?

A. I don't recall, but I think perhaps they did. I do have a record here of the things that the doctor said—

Q. Just answer the question. You don't recall, but now you do recall they did; correct?

A. I believe so. I have a faint recollection of it.

Q. And since it's coming back to you now, didn't they do this for you five—or, excuse me, four years—maybe I was right the first time—five years after you bought the first set of lens?

A. I don't know the time.

Q. Well, when did you visit Dr. Katz, telephone number FE 7-8567? When did you visit Dr. Katz and get a prescription and have him examine you? (Tr. 318.)

A. I assume it was after the three and a half years because I had—

Q. Right.

A. Made a number of complaints. They knew I was unhappy by that time.

Q. Just tell me when. Do you understand when I ask you a question Mrs. Hoenack, if the question is when, that you should answer yes?

A. I am sorry. After the three and a half years.

Q. And to be a little more specific, wasn't it in 1962 that you went to Dr. Katz, whose telephone number is FE 6-8567, have your eyes completely re-examined and rechecked and get a prescription from him and bring it to Vent-Air, and Vent-Air filled it for nothing, free, in 1962—is that true?

A. Under my insurance, I believe.

Q. Well, your insurance didn't cover—excuse me. Your insurance covered loss or broken lenses, isn't that true?

A. I guess so.

Q. You guess so. So they didn't fill it under your insurance policy. They did it as a customer service, correct?

A. I guess so.

Q. And after you got the new lens in 1962, you came back to the company on August 8, 1962, for a check-up and pattern found to be okay, and you were advised to return two weeks later; no charge for that visit, correct? (Tr. 319.)

A. I don't know.

Q. You mean you don't remember.

A. No.

Q. It could have happened, could have happened, couldn't it?

A. Yes.

Q. And then you came back on August 15, 1962, two weeks later, and you reported your wearing time was five hours with the lens, right?

A. I don't know.

Q. And after 1962 you never came back again; right?

A. I don't know. I guess not. (Tr. 320.)

17. Counsel finally stipulated that: (1) the witness recalled having a guarantee which entitled her to lifetime service, that she could visit the office without additional charges; (2) that she, in fact, did visit the Vent-Air offices on approximately 52 occasions between 1957 and 1962 at no charge to her; (3) under her insurance policy or service arrangement, Mrs. Hoenack received nine pairs of contact lenses to replace lenses which were lost or broken; (4) in 1962, Vent-Air Lens Laboratories, Inc., furnished to Mrs. Hoenack free of charge a new pair of contact lenses from a prescription written by another doctor who examined Mrs. Hoenack. It is found that the testimony of Mrs. Hoenack does not establish the allegations of the complaint.

18. Mrs. Marilyn Henretty, a housewife, of Annandale, Virginia, was the next witness offered by counsel supporting the complaint. Mrs. Henretty testified as follows: Mrs. Henretty purchased a pair of contact lenses from Vent-Air in June, 1960, largely by reason of a close friend and roommate who was working as a secretary in the Washington, D.C., office of Vent-Air at that time. Before purchasing the contact lenses at the Vent-Air office, Mrs. Henretty was allowed to try on a pair which had not been ground to her prescription to see how they would feel in her eyes (Tr. 333-35). The day she received her prescription contact lenses, she received instruction in the office of Vent-Air on how to insert the lenses under her eyelids and continued to wear the lenses while she remained seated in a room in the office for a period of time. For exactly how long she remained in this room she did not remember. She was handed something to read, but stated she could not read because she was "tearing too bad" (Tr. 336). She received a little more training in the use and care of the lenses and was given a time schedule for the wearing of the contact lenses, wearing the lenses for two hours, then two hours with the lenses removed, and so on. She could not keep the contact lenses in her eyes for two hours (Tr. 336). She further testified: Her eyes burned and were uncomfortable when she wore the lenses; she was told by Dr. Ginsberg, in the Vent-Air office, that there was a "money-back guarantee. If you could not wear them within the year, the money would be returned, would be refunded. I was also told that for my lifetime I would have the service of Vent-Air throughout the country. Wherever their office was throughout the country, if I should have a problem, I could just go in and they would take care of it" (Tr. 337). Mrs. Henretty was in and out of the Vent-Air office, but could not remember the dates (Tr. 337). In June

1961, she visited the office and stated she would like to return the lenses, and "they" refused, and said "there was nothing obviously wrong as far as they could see. And I told them that I had been to a doctor to examine my eyes to change the lenses in a regular pair of glasses, and he told me that my lids were too sensitive; I could not wear them. I went to Dr. Bockoven here in Washington" (Tr. 338). She originally made her request for a refund to Dr. Ginsberg at the Vent-Air office in the Bender Building, and then later to the Vent-Air office in the Colorado Building, but did not remember the name of the person to whom she talked. She later wrote a letter to Mr. Marvin Shore, in the New York office of Vent-Air, at the suggestion of Dr. Ginsberg. In her letter to Mr. Shore, Mrs. Henretty stated that she could not wear the lenses and would like to return the lenses and "have my money refunded," but Mr. Shore "denied that there was ever such a guarantee and that I should report back to the office for any further adjustments that might be necessary." She stated that she followed Mr. Shore's suggestion and went back to the Vent-Air office. "That was the last visit I made to the office. * * * And that was at G Street. And I got no response." She then called the Optometric Board on the telephone and later wrote to the Better Business Bureau (Tr. 339-341).

19. On cross-examination, Mrs. Henretty testified: Dr. Ginsberg told her orally on her first visit to the Vent-Air office that she could obtain a refund within one year if she could not wear the contact lenses (Tr. 342-44). On June 4, 1960, Mrs. Henretty made a \$10 deposit on the purchase of the contact lenses, and, on June 15, 1961, wrote to Mr. Marvin Shore requesting a refund (Tr. 345). Mrs. Henretty did not remember the exact date she requested a refund (Tr. 347). Based upon the testimony of the witness, it is found that, on June 4, 1960, Mrs. Henretty visited the Vent-Air office for an eye examination at the invitation of her friend and roommate, Miss E. Mozier, who was then employed by Vent-Air as a secretary. Mrs. Henretty's eyes were examined, and Mrs. Henretty was quoted a reduced fee of \$85 for the purchase of Vent-Air contact lenses. She left a \$10 deposit. Measurements of her eyes were taken and a pair of contact lenses was ordered for Mrs. Henretty. A pair of non-prescription lenses was placed over her eyes to try (Tr. 347-48; 334-35). Mrs. Henretty did not remember a visit to the Vent-Air office on June 11, 1960, but did remember returning to the office on June 18, 1960, for additional fittings and measurements and sitting for a lengthy, all day wearing test before she paid

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for the lenses (Tr. 349-350). After the wearing test, Mrs. Henretty paid the balance of \$75 to Dr. Ginsberg (Tr. 350). She returned to the Vent-Air office on June 28, 1960, ten days after the lenses had been delivered to her, and advised Dr. Ginsberg that she had pain and tears in the left eye after wearing the lenses for one hour (Tr. 350). Dr. Ginsberg tested her eyes and requested that she keep trying to wear the lenses. No charge was made for the visit. On September 20, 1960, Mrs. Henretty returned to the office for a checkup and told Dr. Ginsberg she could only wear the lenses one to two hours each day (Tr. 351). Dr. Ginsberg took her lenses into a back room and did something to them, brought them back to Mrs. Henretty, placed them over her eyes and asked her to try them again (Tr. 352). On December 28, 1960, Mrs. Henretty again visited the office and complained that she could not get more than two hours of wearing, and told Dr. Ginsberg she had not worn the lenses since October 1, 1960. No charge was made for this visit. On December 30, 1960, Mrs. Henretty returned to the office and Dr. Ginsberg examined her eyes again and ordered a new pair of lenses for Mrs. Henretty and she returned the old lenses to him. No charge was made for this (Tr. 353-54). On January 6, 1961, Mrs. Henretty returned to the office, at which time the new set of contact lenses was delivered to her without charge, and she was afforded an opportunity to and did remain in the office while wearing the new lenses and adjusting to them (Tr. 354). On March 2, 1961, Mrs. Henretty returned to the office with the new set of lenses for a checkup (Tr. 359-360). She next returned to the office on June 15, 1961, and requested a refund. Mrs. Henretty testified that, when she requested the refund from Dr. Ginsberg, she had previously visited Dr. Bockoven who had told her that her eyelids were too sensitive to wear contact lenses (Tr. 364). Dr. Ginsberg denied to Mrs. Henretty that he had promised to her a one year refund; that he could not have done so since she originally was given such a large reduction from the regular purchase price of her contact lenses (\$85) (RX 1), the regular price being about \$150 (Tr. 368-69). Following receipt of Mr. Marvin Shore's letter of June 23, 1961, (RX 1), replying to Mrs. Henretty's letter dated June 15, 1961, Mrs. Henretty followed Mr. Shore's suggestion and again visited the Vent-Air office to see if there were any adjustments necessary to her lenses (Tr. 372). Subsequent to June 27, 1961, Mrs. Henretty again visited the Vent-Air office and an attendant tried to make another adjustment on her lenses. He took the lenses into a "back room

again and did something, ground them or whatever it is they did. I don't know" (Tr. 373). It is found that the testimony of Mrs. Henretty does not establish the allegations of the complaint. As was the case with the first two witnesses, Mrs. Henretty's complaint was directed toward an alleged guarantee made orally to Mrs. Henretty by Dr. Ginsberg as to the suitability of the contact lenses. The complaint in the present proceeding does not raise such an issue. Mrs. Henretty testified that Vent-Air never, at any time, refused to give her service on her lenses. Therefore, it is found that the testimony of Mrs. Henretty does not establish the allegations of the complaint to the effect that corporate respondent failed and refused to carry out the terms of its guarantee.

20. The next witness who testified in support of the complaint was Stephen G. Wade, of Springfield, Virginia, an employee of the U.S. Department of Agriculture. At the time of the hearing, Mr. Wade was wearing corrective lenses and had been wearing them for 16 or 17 years (Tr. 405-406). Mr. Wade testified as follows: Early in 1957, Mr. Wade, while in the United States Army stationed at Fort Ord, California, noticed an advertisement of Vent-Air contact lenses in the San Francisco Chronicle, San Francisco, California. Mr. Wade was attracted to the advertisement because the ad stated it was easy to wear contact lenses, and there was a guarantee on the lenses whereby the purchaser could get free lifetime service on the lenses. Mr. Wade visited the Vent-Air office in San Francisco, inquired about contact lenses, a pair of lenses was placed over his eyes for a short period of time, and he was quoted a price of \$200 (Tr. 407). Mr. Wade purchased a pair of Vent-Air contact lenses and also a policy of insurance against loss or breakage to the lenses for a period of three years. Mr. Wade continued to wear the lenses over a period of approximately seven years, as hereinafter found. Mr. Wade further testified that he was told by the San Francisco office of Vent-Air that (Tr. 408)

* * * [T]here was a lifetime service warranty on the lens, that if corrections had to be made in the prescription, the corrections and the service—there would not—there would be—let me go back.

There would be either no, neither service charge nor charge for prescription changes during lifetime. They subsequently mailed to me a guarantee card. As I recall, this came from New York, * * *.

The guarantee card issued to Mr. Wade was received in evidence as CX 4, and reads as follows:

VENT-AIR GUARANTY CARD

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Extend Service Privileges to
 PFC Stephen G. Wade 81057
 US 56 262 776
 Fort Ord, Calif.
 Fitted at San Francisco

This card when presented at any office where Vent-Air Lenses are dispensed entitles you to lifetime service on your Vent-Air lenses.

Your Signature (Signed) Stephen G. Wade

VENT-AIR CONTACT LENS LABORATORIES

21. Mr. Wade further testified, on direct examination, as follows: In September 1958, he was discharged from the Army and moved to Spokane, Washington, where he went into television broadcasting. He stated that "basically the reason why I wanted to wear contact lenses, was for the cosmetic approach" (Tr. 409). He further stated (Tr. 410-11):

Anyway, when I went in to the Vent-Air establishment in Spokane and confronted them with the guarantee card, they told me they didn't know of any such thing; that they would let me have the first visit or two free, on the house, but they said after that that I would have to pay for subsequent service on the lens.

The service he "anticipated" on his guarantee card was occasional trouble:

* * * I would get, I guess, what they would call burrs on them. I would get uncomfortable. I would assume that what they would have to do would be grind them down, I believe. I don't know the technical terms. I don't know, grind an edge off of them or some such thing. This would happen occasionally, sometimes frequently, throughout the period of time that I wore contact lenses.

I did have to pay, then, for subsequent visits for service at the Spokane office. And if it will help the Court any, I do have some cancelled checks that were part of my—I should say the bulk of these were given for service over the period that I was in Spokane (Tr. 411).

* * * I paid for subsequent visits to the Spokane office. I then joined the U.S. Government with the Department of Agriculture in 19— the second of March, 1964, moved to Washington, D.C., where I subsequently needed service on my lens, and I confronted the Vent-Air office here in Washington, D.C., with my guarantee card and the fact that I expected to get service on them under the provisions of the guarantee.

They refused. I had to have service on them, so I went ahead and paid for it. I forget exactly how many visits I had, two or three at least, as I can recall. My method of payment there was by a charge account that I had at that time, Central Charge. I was not able to reproduce any, or able to find any of the charge tickets on it because I didn't keep the individual charge tickets over a period of time.

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Well, what I mean by that is that when I finally got to a point that I figured that it would be neither economical or advisable for me to continue to wear contact lenses was when I confronted them with the pair, the first pair of lens that I bought in San Francisco. I believe they said they were warped and that I would have to buy and pay for a new pair (Tr. 412-13).

This was at the Vent-Air office in Washington, D.C., in 1964. Mr. Wade further stated:

Over most of the period of my wearing contact lenses I had their insurance which is for breakage or loss of lens. I don't know whether it would help the Court here or not, but I do have a couple of those documents, the first one, and then one in Spokane (Tr. 414).

* * * * *

Well, anyway, I carried this insurance against breakage or loss, disappearance, and there was a couple of occasions during when I did carry the insurance that I did lose single lenses, and they were replaced with no problem. But when I—getting back to where, the need for replacing of my original lens here in Washington, D.C.—

HEARING EXAMINER POINDEXTER: You had bought another set in the meanwhile?

THE WITNESS: I had bought another set in the meantime, yes. Actually, it wasn't a—cash didn't change hands. It was a tradeout deal. A friend, he got them for nothing, Judge (Tr. 415).

* * * * *

Anyway, I had let this type of insurance lapse [insurance against loss or breakage of the contact lens], and the first question that the people here in Washington, D.C., asked me—

* * * * *

The first question that they asked me when it was ascertained that the set was no longer serviceable was, do you have insurance on them? I said, no, I don't. Well, then, you will have to pay for another set.

I said, well, my understanding of this insurance from the very beginning was that under normal usage you did or you would make the lens good, that is, if the correction became incorrect—in this case, I assumed because they were warped under normal usage that they were incorrect—that I would get—

HEARING EXAMINER POINDEXTER: Wait a minute. Incorrect? If the correction became incorrect, what do you mean by that?

THE WITNESS: Well, that the lens did not properly fit, give me proper vision, proper feel—

HEARING EXAMINER POINDEXTER: You mean comfort or what?

THE WITNESS: Comfort and vision, a combination of the two, which was needed to wear the lens.

Anyway, they flatly refused since I did not have this guarantee. The loss or breakage guarantee had lapsed. They flatly refused to do anything about it. I protested, to no avail (Tr. 415-17).

HEARING EXAMINER POINDEXTER: Protested. They didn't do anything about what, now, Mr. Wade?

THE WITNESS: About replacing my lens.

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* * * * *

Well, they were unsatisfactory, yes. They were uncomfortable. I couldn't see properly (Tr. 417).

Mr. Wade had not lost nor broken the lenses. In reply to a question by the hearing examiner as to the nature of his complaint to the Vent-Air office in Washington, D.C., in 1964, Mr. Wade stated:

Well, I protested, first of all, protested all along that I should be getting my service free whenever I went into a Vent-Air office for an examination or service on the lens, number one.

Number two, I claimed that when these lens come to a point that they were not comfortable and I couldn't see correctly out of them, that I should have been afforded a new pair under my original guarantee. I got no satisfaction out of the Washington, D.C. office.

I subsequently wrote two letters, one to San Francisco, one to the Vent-Air organization in New York, explaining my plight,² and I got no satisfaction out of them (Tr. 419).

I subsequently wrote to the Federal Trade Commission asking whether or not I had any protection of my rights as a citizen (Tr. 420).

22. With respect to the second set of Vent-Air contact lenses, Mr. Wade obtained this pair of lenses in a sort of barter arrangement with the Vent-Air dealer in Spokane, whereby Mr. Wade made public announcements about Vent-Air contact lenses on behalf of the Spokane Vent-Air dealer over the public address system at high school basketball games, and, in return, the Vent-Air dealer in Spokane gave and fitted to Mr. Wade a new set of Vent-Air contact lenses. This was early in 1960. Mr. Wade retained possession of the first pair of contact lenses which he had purchased in San Francisco in 1957 (Tr. 427). Mr. Wade testified that, when he moved to Washington, D.C., in March 1964, he had two pairs of Vent-Air contact lenses, but there had been "two replacements" under his three-year insurance policy for loss or damage to the original set of lenses which he had purchased in San Francisco in 1957 (Tr. 428, 432). Mr. Wade further testified: It was the original pair of lenses about which he complains, although he wore the two sets of lenses interchangeably (Tr. 429). When he came to Washington, D.C., in March, 1964, and went to

² Mr. Wade did not write two letters, but wrote a letter addressed to Vent-Air Contact Lens Specialists, corporate respondent's New York office, dated June 8, 1964 (CX 5), complaining that, on June 8, 1964, corporate respondent's Washington, D.C., office had told him that the contact lenses which he had purchased at its San Francisco office in 1957 were worn out and the Washington, D.C., office refused to replace the "worn out" lenses with a new pair of contact lenses under his "lifetime service" card (CX 4), and Mr. Wade sent a copy of this letter addressed to M. Lon Kasow, O.D., who was employed in the San Francisco office of corporate respondent in 1957 when Mr. Wade originally purchased the first set of contact lenses.

the Vent-Air office, he demanded service on his original set of lenses and showed them his "lifetime service" card (CX 4); they refused to "honor it" (Tr. 433-34). He then wrote to the Vent-Air office in New York (CX 5) and mailed a copy thereof to M. Lon Kasow, O.D., formerly employed in the Vent-Air office in San Francisco (Tr. 434-35). Mr. Wade testified that he did not visit the Vent-Air office in Washington, D.C., again, and, after receiving the replies (CX 6 and CX 7) to his letter to the Vent-Air offices in New York and San Francisco, he wrote a letter to the Federal Trade Commission. He then resumed wearing regular eyeglasses (Tr. 435).

23. On cross-examination, Mr. Wade testified as follows: He purchased a set of Vent-Air contact lenses in San Francisco in July 1957, and received the lifetime service guaranty card (CX 4; Tr. 602). Mr. Wade moved to Spokane, Washington, in September or early October, 1958. He received all the service which he requested on the lenses while he lived in the San Francisco area, and was relatively satisfied with the contact lenses (Tr. 603-604). After moving to Spokane, Mr. Wade became an announcer on the public address system at basketball games and read commercial announcements about Vent-Air contact lenses on behalf of the Vent-Air office in Spokane (Tr. 604-605). In repayment for these announcements on the public address system, Mr. Wade received a spare set of contact lenses from the Vent-Air dealer in Spokane (Tr. 606). This was in the early 1960's (Tr. 607). At the time of these commercial announcements on behalf of the Vent-Air dealer in Spokane, Mr. Wade was wearing the contact lenses he had purchased in San Francisco in 1957. The second or spare set of Vent-Air contact lenses which Mr. Wade obtained in Spokane some time in the early 1960's was clear in color, and similar to the lenses which he had purchased in San Francisco in 1957. By looking at the two sets of lenses, they could not be told apart; they were indistinguishable (Tr. 609). As a part of the "deal," the Vent-Air dealer in Spokane fitted Mr. Wade with the second or spare set of Vent-Air contact lenses which he received in return for the commercial announcements (Tr. 612). While Mr. Wade lived in Spokane before moving to Washington, D.C., "basically," he wore the first set of lenses. However, from time to time he wore the second set to keep it from drying out and becoming unserviceable (Tr. 612). Mr. Wade had been told that plastic contact lenses should be worn at reasonably periodic intervals. By "basically," Mr. Wade testified that he meant that he wore the first set of contact

lenses "almost all of the time" (Tr. 613). While he was wearing the first set of lenses, he left the second set on a shelf in his bathroom in a solution in a soaker kit. He moved to Washington, D.C., during the latter part of February 1964, and the second set of lenses remained in the solution during the trip to Washington, D.C. (Tr. 614-15). Mr. Wade had an insurance policy covering loss or breakage on the original set of contact lenses which he purchased in San Francisco in 1957 (Tr. 615). When Mr. Wade moved to Washington, D.C., in late February 1964, and later asked for service on the original set of lenses, his insurance policy for loss or damage to the original set of lenses had expired (Tr. 616). Mr. Wade did not recall having both lenses replaced without charge by the Spokane Vent-Air office on February 8, 1964, because of a prescription change (Tr. 616). Except for his first two visits to the Vent-Air office in Spokane for service on his original set of contact lenses purchased in San Francisco in 1957, Mr. Wade testified that he paid a fee (Tr. 617, 619). Upon being asked if he had any records to substantiate his claim that he had been required to pay a fee for services to the Spokane Vent-Air office, Mr. Wade testified that he had "almost \$80 worth of canceled checks" (Tr. 619). The checks produced by Mr. Wade were made out to Ernest Burnett, O.D., the optometrist in charge of the Vent-Air office in Spokane, who was the man with whom Mr. Wade made the deal for the second set of Vent-Air contact lenses (Tr. 620). Mr. Wade testified that, after obtaining the second set of lenses from Dr. Burnett, he went back to Dr. Burnett's office on two occasions for further fittings (Tr. 623), and, during the period 1960-1964, he paid Dr. Burnett various sums for contact lens fluid and a total of \$15 or \$30 for insurance policies, which were included in the \$80 odd dollars in checks that Mr. Wade testified he paid Dr. Burnett for service on his Vent-Air contact lenses (Tr. 624). In reply to questions of respondents' counsel, Mr. Wade testified that he made further payments by check to Dr. Burnett as follows: On February 11, 1961, a check for \$18.12, which included \$15 for renewal of insurance policy warranty and \$3.12 for two bottles of lens fluid solution; and in July of 1960, a check for \$3.12 for fluid solution. Mr. Wade further averred that the payments by check which he made to Dr. Burnett in Spokane, and which Mr. Wade claimed were for service, were for service on the first set of lenses which he had purchased in San Francisco in 1957, and not on the set obtained in the deal with Dr. Burnett in Spokane (Tr. 626). Mr. Wade further testified

that, on two different occasions while living in Spokane, he lost a single lens from the first set of lenses which he had purchased in San Francisco in 1957, and that the actual original contact lenses had been replaced with new Vent-Air contact lenses under his insurance policy which was in effect at the time (Tr. 629); so that, when Mr. Wade moved to Washington, D.C., in late February 1964, he had a set of Vent-Air contact lenses which had replaced the original set of contact lenses which he had purchased in San Francisco in 1957, and also the set of Vent-Air contact lenses which he had obtained from Dr. Burnett in Spokane, Washintgon (Tr. 628-29). Mr. Wade testified that, on his first visit to the Vent-Air office in Washington, D.C., on or around March 9, 1964, after moving from Spokane, Washington, in late February 1964, he requested service on his original set of Vent-Air lenses (the lenses purchased in San Francisco in 1957), and was told by the Vent-Air representative in the Washington, D.C., office that the set of lenses was worn out and warped, and that he would have to buy a new pair (Tr. 631-34; CX 5). At that time, Mr. Wade was aware that the insurance policy on the lenses had lapsed and was not in effect (Tr. 632). Mr. Wade testified that he expected the Vent-Air office in Washington, D.C., to replace the worn-out and warped lenses with a new set of lenses under the lifetime service guarantee (CX 4), which had been issued to him in San Francisco in 1957 when he purchased the original set of Vent-Air lenses (Tr. 639). Instead, Mr. Wade testified, the Vent-Air representative in the Washington, D.C., office told him that, if his insurance policy had been continued in effect, the worn-out and warped lenses would have been replaced for him under the insurance policy (Tr. 642). Subsequently, on April 13, 1964, Mr. Wade visited the Vent-Air office in Washington, D.C., and requested that they check his Vent-Air contact lenses since he was having trouble with the lenses at that time. On April 16, 1964, Mr. Wade again called at the Vent-Air office in Washington, D.C., while wearing the original set of contact lenses with which he was having trouble (Tr. 651). On further cross-examination, Mr. Wade testified that, although he had visited the Vent-Air Lens office in Washington, D.C., for service on his contact lenses on several occasions after moving to Washington, D.C., from Spokane in late February 1964, no one in that office told him that a pair of lenses which he presented for service was worn-out or warped until he visited the office on June 8, 1964 (Tr. 653; CX 5). Upon being reminded of his previous testimony that he had visited

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the Vent-Air office in Washington, D.C., for service on his lenses on several occasions after moving from Spokane, Washington, the latter part of February 1964, including a visit on April 13, and a few days later on April 16, 1964, Mr. Wade was asked if, on any of these previous visits, anyone in the Vent-Air office in Washington, D.C., told Mr. Wade that his lenses were worn-out and warped, and, upon being pressed by the hearing examiner for an answer, he replied: "Okay. I don't recall whether they did or not. They could have or they could not have. I don't recall" (Tr. 653-54). Further, Mr. Wade admitted that he could have visited the Washington, D.C., Vent-Air office on June 5, 1964, and brought with him a second set of contact lenses which were scratched, in addition to the pair of contact lenses which he was wearing (Tr. 656-57).

24. By agreement of counsel, Dr. Abraham Miller, an optometrist formerly employed in the Vent-Air office in Washington, D.C., from about 1957 to 1965, and employed at the time of the hearing by the Sterling Optical Company, Washington, D.C., as an optometrist, was called, out of turn, as a witness for respondents. Since Dr. Miller's testimony relates largely to the testimony given by Mr. Wade, Dr. Miller's testimony will now be discussed. Dr. Miller is a graduate of the University of Maryland, with a Ph.D. degree, and has a degree of Doctor of Optometry from the Northern Illinois College of Optometry, now called the Illinois College of Optometry, obtained in 1950 (Tr. 666-67). Dr. Miller identified RX 3-A, 3-B, and 3-C as a temporary patient record card opened for Mr. Stephen Wade by the Washington, D.C., Vent-Air office (Tr. 673-75), and also RX 4, a memorandum from the Vent-Air office in Washington, D.C., to Dr. Burnett, of the Vent-Air office in Spokane, Washington, handwritten in red ink, requesting that Dr. Burnett forward to the Washington, D.C., office the patient record card and extra pair of contact lenses for Mr. Stephen G. Wade, and advising that Mr. Wade was then residing in the Washington, D.C., area and wished a checkup on the new lenses. On a blank page, the memorandum bears the handwritten notation in blue ink: "Mailed lenses & records March 9/64." The handwriting in blue is different from the handwriting in red ink. These exhibits were received in evidence over complaint counsel's objection (Tr. 674, 677, 685). RX 3-A, RX 3-B, and RX 3-C, Mr. Wade's temporary record card, was made and kept as a part of the routine of the Washington, D.C., Vent-Air office and in the regular course of business (Tr. 676), and the entries thereon were made by one of

the clerks employed in the Vent-Air office or by one of the optometrists who waited on the patient (Tr. 689). In general, these record cards show, among other things, the date of the patient's visit to the Vent-Air office and what service was performed, such as an eye examination, correcting the fitting of the contact lenses, changing the prescription, etc. From an examination of the patient record card of Mr. Wade, and also of RX 4, the memorandum from the Vent-Air Washington office to the office in Spokane, Washington, requesting that the Spokane office send the records and extra pair of lenses for Mr. Wade to the Washington office, which was then doing business under the name of Contact Lens Specialists, located in the Colorado Building at 14th and G Streets, NW., Dr. Miller testified as follows: The records do not show the date Mr. Wade first visited the Vent-Air office in Washington, D.C. The first entry on the temporary patient record card made by the Washington Vent-Air office for Mr. Wade (RX 3-A) is dated April 13, 1964, but Mr. Wade must have visited the office earlier than that date, because RX 3-A shows that he was wearing on that date (April 13, 1964), a pair of contact lenses which had been delivered to him by the Washington office (Tr. 679). (RX 3-A, among other things, bears the notation: " * * * Picked up lenses sent from Spokane—Leaving 2d pr. for RX change—no complaint NA 2 weeks.") By examining RX 3-A, 3-B, 3-C, and RX 4, Dr. Miller stated that, on or about March 9, 1964, was the closest date that Dr. Miller was able to give as to when Mr. Wade first visited the Vent-Air office in Washington, D.C. (Tr. 685). Mr. Wade then revisited the office on April 13, 1964, and received service on a pair of Vent-Air contact lenses and left a second pair of contact lenses for prescription changes (Tr. 686; RX 3-A). On April 16, 1964, Mr. Wade visited the Vent-Air office and complained about a new set of Vent-Air contact lenses, and the fitter attempted to adjust the lenses properly (Tr. 687; RX 3-A). An entry on RX 3-A, dated April 29, 1964, shows that Mr. Wade again visited the Vent-Air office in Washington, D.C., and Dr. Miller waited on Mr. Wade. Dr. Miller examined the contact lenses that Mr. Wade was wearing, and could not find anything wrong with them (Tr. 688). The lenses were not scratched nor warped, and there was nothing wrong with the lenses (Tr. 689). RX 3-B shows that, on June 5, 1964, Mr. Wade next visited the Vent-Air office with two sets of lenses. The set of contact lenses which he was wearing was in good condition. One lens of the set he was not wearing was badly scratched, and the other lens was warped.

Mr. Wade's eyes were examined during this visit (RX 3-B; Tr. 693-94). Dr. Martin Lievrant, a junior optometrist in the Vent-Air Washington office, attended Mr. Wade during his visit on June 5, 1964 (Tr. 695). RX 3-C shows that, on June 8, 1964, three days later, Mr. Wade again visited the Vent-Air Washington office, wearing Vent-Air contact lenses which, he stated, he had been wearing for six hours. Dr. Miller attended Mr. Wade during this visit. Dr. Miller examined Mr. Wade's eyes and did a "fluorescein" as a routine to determine the condition of the cornea in Mr. Wade's eyes. Dr. Miller found their condition to be good (Tr. 690). During this same visit, Mr. Wade then presented a second pair of lenses, and complained that the left lens of this pair was badly scratched and the right lens was warped. Mr. Wade demanded that Dr. Miller replace the second set of lenses, even though Mr. Wade did not have a policy of insurance on these lenses in effect at that time (Tr. 691). Dr. Miller informed Mr. Wade that he would have to buy another set of lenses if he (Mr. Wade) did not have a policy of insurance on this pair of lenses (Tr. 692). Mr. Wade told Dr. Miller that his insurance had expired and, when Dr. Miller told Mr. Wade that he (Dr. Miller) could not do anything for him, and that he (Mr. Wade) would have to buy a new set of lenses, Mr. Wade was amicable and did not argue with Dr. Miller (Tr. 695). Dr. Miller further testified that the set of contact lenses which Mr. Wade was wearing and had brought to the Vent-Air office for service on April 13 and 16, 1964, and which Dr. Miller had observed on April 29, 1964, was a new set of prescription lenses which Mr. Wade had ordered from the Vent-Air office in Spokane, Washington, on or about February 8, 1964, prior to Mr. Wade's moving to Washington, D.C., in late February 1964 (RX 5, RX 6; Tr. 702), and was not the same set of lenses which was scratched and warped.

25. On further redirect examination, Dr. Miller identified RX 5, which is an order, dated February 8, 1964, for Vent-Air contact lenses, originating in Spokane, Washington, for Mr. Stephen Wade, and also RX 6, the patient record card for Mr. Stephen G. Wade, dated July 31, 1957, which was issued by the Vent-Air office in San Francisco, California, at the time Mr. Wade purchased his original set of Vent-Air contact lenses (Tr. 704). Dr. Miller testified that it was easy to determine that the contact lenses which Mr. Wade was wearing when he visited the Vent-Air office in Washington, D.C., on April 13, 16, and 29, 1964, above referred to, and on which he received service, were new lenses

(Tr. 706). This was accomplished by comparing the prescription for the original contact lenses which Mr. Wade purchased in San Francisco in 1957 (RX 6), with the prescription for the contact lenses which the Vent-Air office in Spokane, Washington, ordered for Mr. Wade on February 8, 1964 (RX 5), shortly before he moved to Washington, D.C., later that month. The respective prescriptions for the two sets of contact lenses have different optics: "The optics in the San Francisco pair is minus 250, the optics in the pair from Spokane for the right eye, minus 300, and for the left eye, minus 375" (Tr. 706; RX 5 and RX 6). Dr. Miller explained that RX 5, the order for the new set of contact lenses which the Vent-Air office in Spokane, Washington, ordered for Mr. Wade on February 8, 1964, shows that Mr. Wade was given a new set of contact lenses in exchange for a pair which he surrendered, necessitated by a change in his prescription (Tr. 707). Dr. Miller testified that the notation on the order card for the new set of contact lenses, dated February 8, 1964 (RX 5), "N/C Exch," is the code used by Vent-Air meaning, "no charge, exchange" (Tr. 708).

26. Upon the basis of the evidence and testimony, it is found that the contact lenses which Mr. Wade was wearing when he visited the Vent-Air office in Washington, D.C., on April 13, 16, and 29, 1964, and which Dr. Miller testified were new lenses, were in fact the new lenses with the prescription changes which the Vent-Air office in Spokane, Washington, ordered for Mr. Wade from the New York office on February 8, 1964 (RX 5), in exchange for and in substitution of his original pair of Vent-Air contact lenses which he had purchased in San Francisco in 1957, and which he surrendered to the Spokane office. After the new contact lenses with the prescription changes called for in RX 5 had been received by the Vent-Air office in Spokane, Washington, from the Vent-Air office in New York, the Spokane office then forwarded the new lenses to the Vent-Air office in Washington, D.C., as requested by that office in the memorandum, RX 4. After their receipt by the Vent-Air office in Washington, D.C., that office delivered the new lenses to Mr. Wade after his arrival in Washington, D.C., from Spokane, Washington, in late February 1964. This was the only pair of Vent-Air lenses owned by Mr. Wade which was covered by respondent's guarantee. The Vent-Air office in Washington, D.C., fitted and serviced these lenses for Mr. Wade. When the testimony of Dr. Miller is considered, along with the exhibits which he identified and explained, particularly RX 3-A, 3-B, and 3-C, RX 4, 5, and 6, together with

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the testimony of Dr. Lewison, hereinafter discussed in Paragraph 55 herein, also RX 27, 28, and 29, it is found that the testimony of Mr. Wade does not establish the allegations of the complaint that corporate respondent did not abide by the terms of its guarantee to Mr. Wade.

27. Mr. Paul Joseph Canavan, of New Carrollton, Maryland, an insurance underwriter, was the next witness who testified in support of the allegations of the complaint. In July 1961, Mr. Canavan visited the Vent-Air office in Boston, Massachusetts, then located at 480 Boylston Street in that city, after having noticed a Vent-Air advertisement in a Boston newspaper. On this visit, Mr. Canavan purchased a pair of Vent-Air contact lenses at a price of \$175, plus a one-year insurance policy on the lenses for loss or damage (Tr. 440-41) and paid a \$10 fee for an eye examination (Tr. 459, 461A). Mr. Canavan did not remember the wording in the advertisement. The representations made to Mr. Canavan in the Vent-Air Boston office when he purchased the contact lenses are similar to the statements contained in paragraphs 21 and 22 of CX 10 (Tr. 457-58), which are as follows:

21. Vent-Air maintains a program of continuous care for their contact lens wearers. This means that any prescription changes, admittedly rare, which may be needed are made to the patient's lenses without charge for his lifetime. (Of course this does not include changing single-vision to double-vision lenses.) Nor is there any charge for any services in Vent-Air offices for the first year. After this the only charge is for professional services.

22. Vent-Air services and Vent-Air unique self-ventilating lenses are exclusively available in authorized offices throughout the United States, Canada and Mexico. Any Vent-Air office is ready to be of service to the Vent-Air wearer, with rapid access to prescription records and direct contact with the laboratory in the event change or replacement is needed.

28. In October 1961, Mr. Canavan was called to active duty in the United States Army, and he discontinued wearing the contact lenses and resumed wearing regular eyeglasses. Mr. Canavan was discharged from the Army in August 1962, and in February 1963 he began work for an insurance company in Washington, D.C. Mr. Canavan decided to resume wearing his contact lenses and went to the Vent-Air office in Washington, D.C., and advised the person who waited on him that he (Mr. Canavan) had purchased a pair of Vent-Air contact lenses from the Vent-Air office in Boston in 1961, but had been in the Army and had not worn his contact lenses, but wished to resume wearing them. The Washington office suggested that he write to the Boston office and request that his patient records be forwarded to the Vent-Air

office in Washington, D.C. (Tr. 442). Subsequently, by letter dated March 22, 1963, the Boston office advised Mr. Canavan that his records had been forwarded to the Vent-Air office in Washington, D.C., and that he should call that office for an appointment (CX 8; Tr. 443). On April 13, 1963, almost two years after he had purchased the contact lenses in Boston, Mr. Canavan returned to the Vent-Air office in Washington, D.C., and requested that his contact lenses be checked (Tr. 464). Mr. Canavan was given an eye examination and the contact lenses were checked and refitted for his eyes. Mr. Canavan was charged \$10 for the eye examination, to which he did not object, but was not charged for the refitting and service on the contact lenses, although Mr. Canavan knew that these services were not to be provided free after the first year following date of purchase of the lenses (CX 10; Tr. 459, 468). The Vent-Air office in Washington, D.C., instructed Mr. Canavan in the use and care of his lenses, and he began his re-education in the wearing of contact lenses. This required that he revisit the Vent-Air office a number of times, initially wearing the lenses for three hours daily, and gradually increasing the wearing time each week (Tr. 447). On May 4, 1963, Mr. Canavan visited the office for a checkup, at which time a fluorescein test was again made, and he was advised that the fluorescein pattern was satisfactory (Tr. 474). At that time, an appointment was made for Mr. Canavan to return on a date during the month of June 1963. Mr. Canavan visited the office in June and advised the attendant that he had built up his wearing time of the lenses to ten hours per day. On this visit, another fluorescein test was made. No charge was made to Mr. Canavan for the services rendered by Vent-Air at the time of this visit. On July 13, 1963, Mr. Canavan again visited the Vent-Air office for a checkup, and on that visit he advised the office that he had built up his wearing time to twelve hours per day. Another fluorescein test was made during this visit. Again, no charge was made by Vent-Air for these services (Tr. 475). At the time of this visit, Mr. Canavan was advised by the Vent-Air attendant that he was doing fine and had no problems. Mr. Canavan was requested to try to build up his wearing time from twelve to thirteen hours per day, and an appointment was made for him to visit the office the following month. Mr. Canavan did not go to the Vent-Air office for the appointment in August, but did visit the office on September 28, 1963, for another checkup, at which time Mr. Canavan reported that he was wearing his contact lenses for twelve hours per day. A fluorescein test was again made and found satis-

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factory. Mr. Canavan was not charged for services performed during this visit. An appointment was made for Mr. Canavan to visit the office three months later, but he did not return (Tr. 476).

29. Mr. Canavan's complaint was that, at some time during the periods of his visits to the Vent-Air office in Washington, D.C., between March and September, 1963, he became confused and uncertain as to which contact lens belonged in which eye; that he went to the Vent-Air office to get it straightened out; and that a receptionist or secretary told him there would be a "\$5 service charge to have this accomplished" (Tr. 447).

30. The services rendered by the Vent-Air office in Washington, D.C., to Mr. Canavan at the time of his visits in April, May, June, July, and September 1963 were performed without charge, even though, under the terms of its guarantee to Mr. Canavan (CX 10), the company was not obligated to perform these services without charge after one year from date of purchase. (The service guarantee in CX 10 was valid for only one year from date of purchase, as follows: "* * * Nor is there any charge for any services in Vent-Air offices for the first year"; see paragraph 27 hereof.) Accordingly, it is found that the testimony of Mr. Canavan does not establish any of the allegations set forth in the complaint.

31. Mr. John D. Leigh, an advertising clerk employed by a local newspaper in Washington, D.C., was the next witness called by complaint counsel. On direct examination, Mr. Leigh testified as follows: In the summer of 1962, he noticed an "ad in the paper" by the respondent corporation, advertising two pairs of contact lenses "for \$99, to come in for a fitting, and if they could not fit you, there would be no cost." In August 1962, Mr. Leigh visited the Vent-Air office in Washington, D.C. (Tr. 494-95). Mr. Leigh was given "an examination and fitted" and then went back to the office in a week or two for the lenses. When he went back on the second visit, he was given another eye examination and shown how to insert the lenses in his eyes and how to care for them. On this visit, Mr. Leigh also paid for the lenses and took them home with him, but made many subsequent visits for adjustments and fittings. His vision close up and at a distance was fine, but, at a point in between, his vision through the contact lenses was blurred. Mr. Leigh was not required to pay any fee to corporate respondent for services performed during any of these visits because, according to Mr. Leigh, "That was included in a year's service, or whatever it is, in the \$99" (Tr. 496-97). Mr. Leigh's last visit to the Vent-Air office

was in September 1963, when he was told by Dr. Maxwell or Dr. Miller, of the Vent-Air office, that "I could not be fitted because one of my eyes was deformed" (Tr. 498). In conclusion, Mr. Leigh testified that "I was never able to wear them and be comfortable or to have the correct vision during the year I tried them" (Tr. 499).

32. On cross-examination, Mr. Leigh testified as follows: On his first visit to the Vent-Air office on August 16, 1962, his eyes were examined and he was measured for a prescription for contact lenses. He made a \$10 or \$25 deposit toward the \$99 purchase price for the two pairs of lenses. On August 18, 1962, two days later, Mr. Leigh returned to the office and measurements of his eyes were taken again and contact lenses were fitted to him. On this visit, Mr. Leigh took out a one-year insurance policy for loss or damage to the lenses at a premium of \$15 per annum. He requested that the second pair of contact lenses be in a brown color (Tr. 500-501). Mr. Leigh did not remember the date on which his contact lenses were delivered to him, but he believed it was on Saturday and he sat in the room with a lot of people, wearing his lenses (Tr. 502). Mr. Leigh did not remember exactly how long he wore the contact lenses in the office before leaving and taking them home with him (Tr. 503). Before leaving the office with the lenses, Mr. Leigh was instructed in the handling and care of the lenses, and was requested to return to the office in one week for a checkup. Within a few days, Mr. Leigh returned for a checkup (Tr. 504). On this visit, he reported that the right lens was satisfactory, but that the left was a "little irritating" (Tr. 504-505). Mr. Leigh advised the office attendant that he was following the schedule of wearing the lenses that had been given him. He was given another examination and instructed to return to the office the following month. Mr. Leigh testified that "Everytime I went, they gave me another examination, yes, and a new set of lenses most of the time" (Tr. 505). On his fourth visit to the office on September 10, 1962, Mr. Leigh picked up the brown pair of contact lenses, which was subsequent to the date on which he picked up the other pair of contact lenses (Tr. 505). Between August 16, 1962, and October 1, 1963, the date of Mr. Leigh's last visit to the Vent-Air office, Mr. Leigh made 29 visits to the Vent-Air office for examinations, fittings, and adjustments to his contact lenses, and was given five or six replacements of the contact lenses at no additional cost above the \$99 which Mr. Leigh paid for the two pairs of contact lenses (Tr. 506-507). Mr. Leigh

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testified that "I do not recall what was in the contract" (Tr. 508), but that the original agreement with corporate respondent was that it should give him free service for a year (Tr. 507). Mr. Leigh's complaint was that

they were going to fit me with contact lenses, or they would tell me when I went in for the original examination I could not wear them. This was not done until after the year was up and they told me one of my eyes was deformed. That is when I asked for a refund, and they referred me to the New York office. I wrote to them asking for a refund (Tr. 508-509).

In all, Mr. Leigh received 11 sets of replacement contact lenses from the corporate respondent during the period intervening between his purchase of the two sets of contact lenses in August 1962 and October 1, 1963, a period of more than one year (Tr. 518). During the year following the date of purchase of his contact lenses, Mr. Leigh did not ever request a refund. Upon consideration of the testimony of Mr. Leigh, it is found that the allegations of the complaint have not been established.

33. Dr. Julius Ginsberg, of Silver Spring, Maryland, an optometrist with an office located at 732 17th Street, NW., Washington, D.C., was the next witness offered by complaint counsel. Dr. Ginsberg graduated from the Chicago College of Optometry in 1951 and, following his graduation, was employed for approximately five years in the refracting and fitting of eyeglasses. In approximately March 1957, Dr. Ginsberg went to work in the Vent-Air Washington, D.C., office as an optometrist, and remained in the employ of corporate respondent until approximately May of 1961. Since that time, Dr. Ginsberg has been in the private practice of optometry in his own office at 732 17th Street, NW., Washington, D.C. (Tr. 524-25). On direct examination, Dr. Ginsberg testified substantially as follows: During the time he was employed at Vent-Air, any person who presented a guaranty card, regardless of whether the patient purchased the contact lenses from the Vent-Air office in Washington, D.C., or in some other city, the Washington office provided full service to the patient, at no additional charge (Tr. 528). During his employment at Vent-Air, the so-called "no-risk" plan was represented to the customer as an arrangement whereby the customer could try the contact lenses on in the office, before paying for them, and, if the patient was not satisfied, he was under no obligation to pay for, nor purchase, the contact lenses (Tr. 529-530). Usually, the patient would wear the lenses in the Vent-Air office anywhere from two to four hours before deciding to purchase the contact lenses (Tr. 534). Vent-Air also had a policy of making

a refund of one-half the purchase price of the contact lenses within six months from the date of the purchase of the lenses in the event the fitting was unsuccessful (Tr. 532-33, 541-42). A minimum of one to three months is required in order to know whether a patient has a good chance of success to wear contact lenses, and Dr. Ginsberg, in many cases, has worked for as long as one year in attempting to fit a patient with contact lenses (Tr. 538-39). The Vent-Air lens is different from other contact lenses on the market in that the part of the Vent-Air lens which fits against the eye has four hollow grooves spaced around the lens so as to enable the lens to breathe better or allow tear circulation. An ordinary lens does not have these hollows in it (Tr. 548-49). The patient record cards were completed and filled in by the optometrist at the time the patient was in the Vent-Air office (Tr. 560).

34. On cross-examination, Dr. Ginsberg testified, among other things, as follows: He made the eye examination on Mrs. Marilyn Henretty (RX 2; Tr. 572). Dr. Ginsberg denied that he made any money back guarantee to Mrs. Henretty, as she had testified, and the price of the contact lenses made to her was reduced to such an extent that it would have been ridiculous for Dr. Ginsberg to have done so (Tr. 579).

35. Mr. Marvin Michael Shore, of Jericho, New York, was the next witness called by counsel supporting the complaint. At the time of the issuance of the complaint herein and at the time of the hearing, Mr. Shore was employed by Roman Products Corporation of South Hackensack, New Jersey, as comptroller. Roman Products Corporation is a manufacturer of frozen foods. Mr. Shore entered its employ shortly after March 25, 1966, when he terminated his employment by the corporate respondent as comptroller (Tr. 724-25; Affidavit of Marvin Shore, dated August 3, 1967, filed on August 7, 1967, in support of his motion to dismiss the complaint herein). On direct examination, Mr. Shore testified, among other things, as follows: As comptroller of Roman Products Corporation, he supervises the financial records of the company, including internal controls and cost accounting work, prepares tax returns for the company, and co-ordinates the activities of various departments (Tr. 726). Mr. Shore has been a comptroller for approximately eleven years. Prior to becoming comptroller in private industry, Mr. Shore worked as an accountant in a public accounting firm. Mr. Shore is a graduate of Long Island University, and is a Certified Public Accountant, being registered under the laws of the State of New

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York (Tr. 725). Mr. Shore was employed by the corporate respondent, Vent-Air Lens Laboratories, Inc., in its New York office as comptroller from early 1958 through March 25, 1966 (Tr. 729, 762), when he went to work for his present employer. The guaranty card (CX 4), which had been issued to the witness Wade in 1957 (see paragraph 20 herein) was not being issued by Vent-Air during the time he was employed by Vent-Air. It was first issued by Vent-Air prior to the time he entered its employ (Tr. 731, 765-66). However, there were guaranty cards issued while he was employed at Vent-Air, but CX 4 was not one of them (Tr. 770).

36. On cross-examination, Mr. Shore testified as follows: He is not presently engaged nor financially interested in any company engaged in the optical business nor has he any intention of returning to the optical business. During his employment by Vent-Air, Mr. Shore did not have any part in setting company policies (Tr. 771-72). In answering correspondence for Vent-Air, he followed the directions and instructions given him by Dr. Lewison, president of corporate respondent (Tr. 773). The last three paragraphs of the letter written by Mr. Shore, dated April 27, 1965 (CX 17), do not refer to the type of guarantee issued to the witness Wade in 1957 (CX 4). Mr. Shore explained the types of guarantees which he was referring to (Tr. 773-74), which were different from CX 4. It was the Vent-Air policy to honor all guarantees previously issued by it prior to the time Mr. Shore was employed by Vent-Air in January or February 1958 (Tr. 765), and all guarantees issued subsequent thereto, in accordance with the letter and spirit of the guarantee (Tr. 774-75).

37. Dr. Harry Hollander, of Valley Stream, New York, engaged in the private practice of optometry in New York, N.Y., was the next witness offered by counsel supporting the complaint. Dr. Hollander testified substantially as follows: Dr. Hollander graduated from Northern Illinois College of Optometry in 1949, then began the practice of optometry in New Jersey (Tr. 782). In February 1955, Dr. Hollander entered the employ of Vent-Air in New York City, as an optometrist, specializing in contact lens work (Tr. 782-83). Dr. Hollander left the employ of Vent-Air in September 1961, and, since that time, has engaged in the private practice of optometry (Tr. 783). The lifetime guarantee card (CX 4) was given to all patients who purchased contact lenses from Vent-Air during the time he was employed there (Tr. 784). A person who had purchased Vent-Air contact lenses and

presented CX 4 at the office was examined to see if he or she needed a change of prescription without additional cost. Additional services, such as cleaning and polishing of lenses, determining whether a patient had switched his lenses, or had mistakenly inserted a contact lens in the wrong eye, were performed and rendered to the customer at no additional cost (Tr. 785-86). Dr. Hollander identified CX 14, denominated as a Professional Services Agreement, which is another lifetime guarantee card similar to that issued to the witness Faber (see paragraph 43 hereof), which was usually signed by the customer at the time of the purchase of Vent-Air contact lenses, and also signed by the optometrist on behalf of Vent-Air. This guarantee agreement (CX 14) set out the amount of the full purchase price of the contact lenses, which included payment for all professional services relating to the fitting, changes, corrections or adjustments which might be necessary to said lenses, and containing the following guarantee:

Vent-Air Grooved Contact Lenses are guaranteed to be optically perfect and precision-ground. The fitting office below agrees to provide all services necessary to the accurate fitting of said lenses and their comfortable, satisfactory wear; and the fee fixed above will cover all additional fitting, adjustment, etc. which may become necessary to insure satisfaction to the patient mentioned herein. Prescription changes will be made to the original lenses at no charge.

Below the provisions of the guarantee quoted above were lines for the signature of the optometrist, the name and address of the Vent-Air office and also blank lines for the signature and address of the purchaser of the contact lenses (Tr. 786-89).

38. Dr. Hollander further testified as follows: The guaranty card (CX 4) was issued by the Vent-Air headquarters office in New York, and was mailed to the patient by the New York headquarters office (Tr. 793-794). Any patient who walked into the Vent-Air office in New York and represented a guaranty card (CX 4) for Vent-Air contact lenses which he had purchased from a Vent-Air office in another city received the same treatment that persons received who had purchased Vent-Air lenses from the New York office (Tr. 796), and these services were rendered without additional charge to the customer (Tr. 797). Although the procedure varied slightly in some instances, the basic procedure when a prospective patient-purchaser of Vent-Air contact lenses came into the office and expressed a desire to purchase contact lenses, was as follows: The girl at the desk prepared a card for the patient, giving the name, address, etc. The prospec-

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tive purchaser was escorted into a room and was interviewed. The wearing of contact lenses was explained to the patient and a fee was quoted as to what the total cost of the contact lenses would be. If the patient stated that he wished to purchase the contact lenses, he and the optometrist signed a copy of the Professional Services Agreement (CX 14), a deposit toward the purchase price of the lenses was made by the patient and he was given a receipt. The patient was then escorted into an examination room, where his eyes were examined, measurements were taken, a future appointment was made for the patient and he was then dismissed for that day. At the next appointment, test contact lenses were applied to the patient's eyes, so that a fitter could ascertain the exact size, curvature, prescription, and other facets of the lens which this patient would require. A request was usually made for an additional payment toward the total purchase price, which was optional with the patient, and final prescription lenses were ordered for the patient and an appointment was made with the patient for a future date. Usually, on the third visit the patient's prescription contact lenses were applied to the eyes and checked to see that they fitted properly and that the prescription was the correct one. Any necessary changes or alterations in the lenses were made and, at one time, the patient sat in a special room, wearing the contact lenses, and they were checked periodically by a fitter. The patient was instructed as to the care and handling of the contact lenses, the proper way to insert and remove the lenses, and, if the patient was reasonably comfortable, another appointment was made for the patient to return for a check to see if he was wearing the lenses correctly or to make any necessary changes or adjustments in the lenses. The patient was then excused. Additional visits to the Vent-Air office by the patient depended on how well the patient adapted to the wearing of the contact lenses. If the patient did well, there were few visits. Patients who had problems in wearing the lenses were requested to return for further appointments. Generally, the patient took his prescription contact lenses home with him on the third visit, at which time he generally paid the balance due on the lenses (Tr. 797-800). Vent-Air contact lenses had not been on the market for sale prior to the time Dr. Hollander was employed at Vent-Air in 1955.

39. On cross-examination, Dr. Hollander testified as follows: Prescription changes for contact lenses for a 21-year-old patient are required infrequently, perhaps one change over a ten-year period (Tr. 810). It is possible to make several prescription

changes on a pair of contact lenses (Tr. 811). During the time Dr. Hollander was employed by Vent-Air, all necessary prescription changes on contact lenses for its patients were made without charge (Tr. 811-12).

40. Mrs. Barbara Adler, of New York City, N.Y., a photo researcher for an art book publisher, was the next witness offered by counsel supporting the complaint (Tr. 817). Mrs. Adler testified as follows: In September 1964, Mrs. Adler visited the Vent-Air office located at number 7 West 44th Street, New York City, as a result of a Vent-Air contact lens advertisement in a New York newspaper (Tr. 818). She decided to purchase a pair of Vent-Air contact lenses, and her eyes were examined and measurements were taken. An appointment was made for Mrs. Adler to revisit the office. Subsequently Mrs. Adler visited the office and her prescription contact lenses were fitted to her eyes. Some adjustments were necessary and the contact lenses were again applied to her eyes and she was requested to sit in a waiting room wearing the contact lenses. After wearing the lenses for less than one hour, Mrs. Adler paid the balance of the purchase price, another appointment was made for her, and she left the office with the lenses. Mrs. Adler purchased two pairs of lenses, the first pair delivered were clear lenses. On her third visit to the office, when she came in for a checkup, the second pair, which were tinted lenses, were delivered to her. Mrs. Adler visited the office on five or six occasions because the lenses were uncomfortable and her eyes burned (Tr. 820). In the spring of 1965 (Tr. 821), Mrs. Adler made her last visit to the Vent-Air office. During her visits to the office, various adjustments were made to the lenses in an effort to make them more comfortable. Mrs. Adler inquired at the desk in the Vent-Air office with regard to whom she could make a complaint concerning the unsatisfactory lenses and was referred to Mr. Marvin Shore. Mrs. Adler wrote two letters to Mr. Shore and received a letter from his office saying that he would look into the matter, but she heard nothing further.

41. On cross-examination, in reply to questions asked by counsel for corporate respondent, Mrs. Adler testified as follows: She first visited the Vent-Air office on September 28, 1964, with contact lenses which she had purchased from a Dr. Pollack in Jersey City, New Jersey, which were giving her trouble. (Dr. Pollack was engaged in the private practice of optometry in Jersey City.) She had been wearing these contact lenses for about two years at the time she first visited Vent-Air's office on

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September 28, 1964 (Tr. 824). The lenses which she had purchased from Dr. Pollack were not Vent-Air contact lenses. Dr. Pollack examined and fitted Mrs. Adler for the contact lenses which she purchased from him, and, although they were not uncomfortable to her eyes, they were very large and they "pushed the eyelid sort of out of shape. They were cosmetically unpleasant. * * * They were bigger lenses and they would change the shape of your eye. You looked as though you were staring" (Tr. 825). She called this to Dr. Pollack's attention, but he told her these were the only type of contact lens available at that time (Tr. 825). She made three visits to Dr. Pollack's office altogether (Tr. 826). Mrs. Adler stated (Tr. 828) :

The lenses were larger and they would do this, so that you had a squared-off line. You looked like you were staring. They were glittery and they looked very peculiar, and for women this is unpleasant.

Mrs. Adler built the wearing time of the contact lenses which she purchased from Dr. Pollack up to eight hours per day. On her visit to the Vent-Air office, Mrs. Adler told the attendant she did not like the way the contact lenses which she was then wearing looked, and that the Vent-Air contact lenses were smaller (Tr. 830). Mrs. Adler first visited the Vent-Air office on September 28, 1964, and took delivery of her Vent-Air contact lenses on October 3, 1964, the date of her third visit to the office, and paid the balance of \$105 owing on the purchase price of the lenses (Tr. 833). In 1965, Mrs. Adler purchased an insurance policy from Vent-Air for loss or breakage to the lenses (Tr. 836).

42. Mrs. Jennie Rooney, of Freehold, New Jersey, a social correspondent for a newspaper, was the next witness offered by complaint counsel (Tr. 838). Mrs. Rooney testified as follows: In the early part of 1960, on the recommendation from a friend whose daughter had purchased Vent-Air contact lenses, Mrs. Rooney and her son visited the Vent-Air office for the purpose of purchasing contact lenses for her son, at that time 17 years of age. The lenses were purchased for the son (Tr. 839). Although the son was still living at the time of the hearing, and was available to testify, being approximately 25 years of age, the son did not make any complaint about the contact lenses purchased from corporate respondent in 1960. Counsel for corporate respondent objected to any testimony by Mrs. Rooney concerning the purchase of the contact lenses for the son on the grounds that her son was the proper person to testify, he being available as a witness and more than 21 years of age at the time of

the hearing (Tr. 839). Counsel supporting the complaint stated that the guaranty card was made out in the name of the son (Tr. 842). At the request of complaint counsel, the hearing examiner permitted Mrs. Rooney to make an off-the-record explanation of her proposed testimony (Tr. 843). At the conclusion of her explanation as to the nature of her proposed testimony, the hearing examiner concluded that the son was the proper person to testify as to whether corporate respondent complied with its guarantee issued to the son, and sustained the objections made by counsel for respondents (Tr. 843).

43. Mrs. Ephraim Faber, of Queens Village, New York, was the next witness who testified in support of the allegations of the complaint. Mrs. Faber testified substantially as follows: Upon the recommendation of a friend, Mrs. Faber went to the Vent-Air office in New York in 1956 and purchased a pair of Vent-Air contact lenses. She executed corporate respondent's Professional Services Agreement, along with Dr. Harry Hollander, one of corporate respondent's optometrists. A copy of this Agreement is in evidence as CX 14 and its provisions are set out in paragraph 37 herein (Tr. 852-53). Dr. Hollander stated that she would never have to worry about fittings or any charges in connection with the lenses, that any problems she might have would be taken care of by a visit to the office and she would never have to pay any additional charges of any kind. She made several visits to the Vent-Air office where changes were made in her lenses, including prescription changes, for which no charges were ever made. In the year 1963, seven years after she had purchased the lenses, Mrs. Faber went to the Vent-Air office for a routine checkup and the Vent-Air office gave her a bill for \$5. Mrs. Faber refused to pay the charge (Tr. 855-856). About one year later she made an appointment and called at the Vent-Air office for another routine checkup and was told that the lenses had to be polished or some change was necessary, and she left the contact lenses at the Vent-Air office. When she returned to pick up the lenses, she was told there would be a \$10 fee for the doctor's examination. She protested, but to no avail. In order to get her lenses, she paid the \$10, plus the \$5 charge which she had not paid the year before, making a total of \$15 which she paid (Tr. 857). Mrs. Faber produced a receipt dated November 11, 1964, which was marked and received in evidence as CX 19 (Tr. 858). After this visit of November 11, 1964, Mrs. Faber did not again visit the Vent-Air office or have any further conversations with any employee of that office. Mrs. Faber wrote

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Vent-Air concerning the payment of these charges (Tr. 859). Mrs. Faber produced three letters, one being a letter from her husband, Mr. Ephraim J. Faber, to corporate respondent, dated December 10, 1964, received in evidence as CX 20; a letter from Mr. Marvin Shore on behalf of Vent-Air, acknowledging receipt of Mr. Faber's letter of December 10, 1964 (CX 20), and stating that Vent-Air was making an investigation of the matter and would get in touch with Mr. Faber later; and a further letter from Mr. Marvin Shore to Mr. Faber, dated January 20, 1965, in reply to Mr. Faber's letter dated December 10, 1964 (CX 21). Mr. Ephraim J. Faber is an attorney, and the husband of the witness, Mrs. Faber, and wrote the letter, dated December 10, 1964, to corporate respondent (CX 20) at Mrs. Faber's request. In this letter, Mr. Faber complained of the \$15 charge which corporate respondent required from Mrs. Faber and quoted certain provisions from the Professional Services Agreement (CX 14), which Mrs. Faber had executed at the time she purchased the contact lenses, as follows:

* * * "to provide all services necessary to the accurate fitting of said lenses and their comfortable, satisfactory wear";

and the fee of \$150.00 which Mrs. Faber paid for the lenses

"will cover all additional fitting, adjustment, etc. which may become necessary to insure satisfaction to the patient" and further that "Prescription changes will be made to the original lenses at no charge."

At the time Mrs. Faber paid the \$15 to the corporate respondent, Dr. Hollander was no longer in its employ, and she was then being attended by other optometrists in the Vent-Air office (Tr. 866). At the time of the hearing, Mrs. Faber was still wearing the Vent-Air contact lenses for approximately six hours each day (Tr. 868), especially for social purposes and weekends if she "goes out."

44. On cross-examination, Mrs. Faber affirmed, as was stated in the letter from Mr. Faber to corporate respondent, dated December 10, 1964 (CX 20), that, from the time she purchased the Vent-Air contact lenses in 1956 until shortly before December 10, 1964, the date of Mr. Faber's letter to Vent-Air (CX 20), the corporate respondent had made every effort to and did carry out the terms of its guarantee which was embodied in the Professional Services Agreement (CX 14; Tr. 870). Mrs. Faber admitted that, prior to the incident of the \$15 payment requirement in November, 1964, Mrs. Faber had made at least 24 or 25 visits to the Vent-Air office and received various services,

including checkups, polishing of lenses, grinding of lenses, new pairs of lenses, for which no charge was made to her (Tr. 872). Vent-Air's records showed that Mrs. Faber made three visits in 1956, seven visits in 1957, three visits in 1958, five visits in 1959, one visit in 1960, one visit in 1961, and three visits in 1962 (Tr. 872-73), which do not include 1963 and 1964. No charge was made for any of these visits. Dr. Hollander fitted Mrs. Faber for contact lenses at the time of her original purchase in 1956, and continued to wait on her most of the time when she visited the Vent-Air office for service up until 1961 when Dr. Hollander left the employ of Vent-Air (Tr. 874).

45. When Mrs. Faber originally purchased her Vent-Air contact lenses in 1956, she did not take out what corporate respondent describes as a Certificate of Warranty of Replacement, and which Mrs. Faber referred to as an insurance policy against loss or damage to her contact lenses (Tr. 877). Mrs. Faber had her own insurance coverage on said lenses with a private insurance company. On February 11, 1960, Mrs. Faber purchased a Warranty Certificate of Replacement covering her against loss or damage to her lenses for a three-year period from February 11, 1960, to February 11, 1963 (Tr. 878; RX 9A and 9B). Although Mrs. Faber did not make specific claim against Vent-Air under this so-called Warranty Certificate of Replacement (Tr. 877), and which Mrs. Faber referred to as an insurance policy, on September 4, 1962, on one of her visits to the Vent-Air office, a pair of new, smoked replacement lenses was ordered for Mrs. Faber at the suggestion of the Vent-Air optometrist, in the belief that Mrs. Faber's eyes might have better tolerance for the smoked lenses (Tr. 879).³ When the first three-year Warranty Certificate of Replacement expired on February 11, 1963, Mrs. Faber purchased another one for the three-year period beginning February 11, 1963, to February 11, 1966. On or about November 11, 1964, Mrs. Faber received another set of contact lenses under the second Warranty Certificate of Replacement which she purchased on February 11, 1963. The replacement for this set of lenses is represented by RX 8, which was received in evidence (Tr. 886-87). RX 8 (the Warranty Certificate of

³ RX 30, which was subsequently received in evidence, shows that on September 4, 1962 a pair of smoked lenses was ordered for Mrs. Faber by the Vent-Air office and the order bore the notation "W/R," indicating that the lenses were being replaced under the three-year Certificate of Warranty. A girl in the Vent-Air office requested that Mrs. Faber pay a \$5.00 handling charge for the replacement of the lenses even though the Warranty Certificate for replacement did not provide for any handling charge. It is probable that this request for \$5 was due to the inexperience or ignorance of the girl in the Vent-Air office because certificates which were issued in 1961 and 1962 provided for a \$5 handling charge.

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Replacement), which Mrs. Faber purchased on February 11, 1963, and which extended for a three-year period to February 11, 1966, provides, among other things, that, when a replacement of lenses is made during the period the Certificate is in effect, a payment of \$7.50 is required. RX 9A, received in evidence, is a Temporary Certificate of Replacement issued to Mrs. Faber for the period, February 11, 1960, to February 11, 1963; and RX 9B is a receipt from Vent-Air for the payment by Mrs. Faber of \$30 on the premium thereof. During a visit to the Vent-Air office on November 11, 1964, Mrs. Faber was presented with a bill showing \$10 due, and \$5 owed from a previous visit, or a total balance due of \$15 (RX 10; Tr. 900-901). Mrs. Faber did not remember whether she paid the \$15 by cash or check (Tr. 900-902). Thereafter, on December 10, 1964, Mrs. Faber's husband wrote a letter to corporate respondent (CX 20) requesting, among other things, a credit of \$15 toward the renewal of the Certificate of Warranty from the date of the letter, December 10, 1964, for a period of one and one-half years, namely, to February 11, 1966, because Mr. Faber believed that the Professional Services Agreement (CX 14) exempted Mrs. Faber from any payment for services. Rather than request a refund of the \$15, Mrs. Faber and her husband decided to ask that the \$15 which she had paid to Vent-Air be applied for a one and one-half year renewal of the Certificate of Warranty, or insurance policy, as she termed it (Tr. 903).

46. In Mr. Faber's letter dated December 10, 1964 (CX 20), among other things, Mr. Faber complained that Vent-Air allowed Mrs. Faber's insurance coverage to expire without notifying her in advance of its expiration, so that she could pay for a renewal thereof. As a matter of fact, the Warranty Certificate of Replacement, or insurance as Mrs. Faber termed it, had not expired but remained in effect from February 11, 1963, to February 11, 1966 (Tr. 903-904). When Mrs. Faber received notice from Vent-Air that her Warranty Certificate of Replacement, or insurance, was ready for renewal on February 11, 1966, she made out a check for the sum of \$30 (RX 35) and mailed it to Vent-Air for a renewal of the insurance policy for the period, February 11, 1966, to February 11, 1969. After mailing the check, Mrs. Faber discussed it with her husband and decided not to renew the insurance for another three-year period and stopped payment on the check (Tr. 906-907). Mrs. Faber's complaint was against the charges for reinstatement of the Certificate of Warranty Replacement, such as the charge of \$7.50 when a

pair of lenses was replaced under RX 8. Mrs. Faber considered the Certificate of Warranty as an insurance policy against loss or breakage of the lenses, and objected to having been required to pay \$7.50 (for replacing her lenses) unless she made a specific claim under the Warranty Certificate of Replacement ("insurance policy" in her language) for actual loss or damage to her lenses (Tr. 914-15). Although Mrs. Faber received three or four pairs of contact lenses during her approximately 25 visits to the Vent-Air office during the period 1956 to 1964, she stated that: "I was never under the impression that I had purchased additional lenses, or were given additional lenses. I always considered these my original lenses" (Tr. 917). Mrs. Faber did not ever show the Certificate of Warranty for Replacement, or the insurance policy as she termed it, to her husband (Tr. 918).

47. It will be appropriate at this point to discuss the testimony of Dr. Lewison given in rebuttal to the testimony of Mrs. Faber. Dr. Lewison testified, with the assistance of Vent-Air records, as follows: He identified RX 9A and 9B as receipts for payments of \$30 on a replacement certificate of contact lenses issued to Mrs. Faber for the period, February 11, 1960, to February 11, 1963, and which warranty certificate did not provide for the payment by Mrs. Faber of any handling charge (Tr. 1190). Beginning with warranty certificates issued by Vent-Air in 1961, a provision requiring the payment of a handling charge was included therein. On September 4, 1962, a laboratory order (RX 30A and B) for replacement of lenses was issued by the Vent-Air office on behalf of Mrs. Faber under the warranty certificate which had been issued to Mrs. Faber for the period, February 11, 1960, to February 11, 1963, as represented by RX 9A and 9B, above referred to (Tr. 1191). However, Mrs. Faber was not satisfied with this replacement set of contact smoked lenses and, on September 11, 1962, another set of smoked contact lenses was ordered for Mrs. Faber, with no vents and a change in the prescription. On September 25, 1962, this new set of smoked contact lenses was mailed to Mrs. Faber as a replacement for the replaced pair and an attempt by Vent-Air to make sure that the replacement pair was comfortable for her. Dr. Hollander, who had usually attended Mrs. Faber at her visits to the Vent-Air office up to about September, 1961, had left the employ of Vent-Air at the time of the replacement of Mrs. Faber's lenses in 1962. Also, in 1961, Vent-Air had begun requiring a handling charge when lenses were replaced, and a girl in the office requested Mrs. Faber to pay a \$5 handling charge at the

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time of her visit to the Vent-Air office in 1962. At that time, Mrs. Faber refused to pay the \$5 and no bills were sent to Mrs. Faber for the \$5. As a matter of fact, Mrs. Faber was not actually obligated to pay any handling charge under the terms of the warranty replacement certificate which had been issued to Mrs. Faber for the period, February 11, 1960, to February 11, 1963 (RX 9A-B). Dr. Lewison explained that the only reason he could imagine for Mrs. Faber's being asked to pay the \$5 was that, in 1962, there was a great turnover in office personnel, and the girl who asked Mrs. Faber for the \$5 was not familiar with the required procedure, and Dr. Hollander, who had always waited on Mrs. Faber, was no longer in the Vent-Air office (Tr. 1195-1200). To the knowledge of Dr. Lewison, no one on an executive level in the Vent-Air office was aware that a \$5 charge had been asked of Mrs. Faber under an insurance warranty which she had taken out in 1960 and which did not provide for any handling charge (Tr. 1201). Mrs. Faber's first insurance warranty expired on February 11, 1963, and a three-year renewal was issued for the period, February 11, 1963, to February 11, 1966 (RX 32). Dr. Lewison identified RX 8 as a notice, dated November 11, 1964, to the warranty holder, Mrs. Faber, that her lenses had been replaced and a service charge of \$7.50 was required in order for the warranty of insurance to be reinstated for its original period (February 11, 1963, to February 11, 1966; Tr. 1203). Dr. Lewison identified RX 31 as a laboratory order for a set of contact lenses pursuant to the terms of replacement warranty certificate number 6Y34908, and also dated November 11, 1964, which directly ties it in to RX 8, above referred to (Tr. 1204-1205). Two other references on RX 31, which show that an order for contact lenses was made up for Mrs. Faber under the so-called insurance certificate, were the handwritten letters in blue ink, "W/R," which mean warranty replacement, and the handwritten notation in red ink in the lower right-hand corner: "N/C Cert Repl." (Tr. 1206). This meant that the lenses were being replaced at no charge under the Certificate of Warranty (Tr. 1206). The date, November 11, 1964, on RX 31 refers to the day on which the order for the lenses was entered into the laboratory, and the notation on RX 31 shows that the lenses were made up for Mrs. Faber on November 13, 1964, and delivered to her shortly after that date (Tr. 1206). When Mrs. Faber took delivery on these lenses, she paid the \$7.50 service charge set forth in the notice (RX 8) so as to reinstate the original term of three years (February 11, 1963, to February

11, 1966) in the warranty certificate replacement or insurance policy (Tr. 1207). Otherwise, the period during which the warranty certificate replacement or insurance policy would be in effect would have been shortened by one year, because, under the warranty, replacement was limited to one pair of lenses per year (Tr. 1210). When Dr. Lewison received notice of Mr. Faber's letter (CX 20) addressed to Vent-Air, "Attention Dr. Lewis" (Tr. 1215-18), Dr. Lewison added a notation on the bottom of the Vent-Air office copy (RX 33) of the letter from Mr. Marvin Shore to Mr. Faber, dated December 22, 1964 (CX 22), requesting that he (Dr. Lewison) be informed of the details of the transactions complained about by Mr. Faber in his letter to Vent-Air, dated December 10, 1964 (CX 20; Tr. 1219). In January 1965, details of the matters complained about by Mr. Faber in his letter (CX 20) were brought to Dr. Lewison's attention, and Dr. Lewison learned that the original five-dollar charge in 1962 should never have been imposed. He learned that, instead of collecting a charge of \$7.50, a charge of \$10 had been imposed against Mrs. Faber in 1964, a month prior to Mr. Faber's letter. This represented an overcharge to Mrs. Faber of \$7.50 (\$5 from 1962, and \$2.50 from 1964). Therefore, she was entitled to a refund of \$7.50. Instead of refunding the \$7.50 to Mrs. Faber, Vent-Air credited the \$7.50 toward reinstatement of the warranty replacement certificate or insurance policy for the original warranty period as Mr. Faber had requested in his letter (CX 20), and he was so advised (Tr. 1220-22). A notice (RX 32) was sent to Mrs. Faber on January 20, 1966, notifying her that the original period of her warranty was due to expire on February 11, 1966, and Mrs. Faber instructed Vent-Air to renew the warranty replacement certificate or insurance policy for another three-year period, February 11, 1966, to February 11, 1969 (RX 34A, B, and C; Tr. 1222-23). RX 34A, 34B, and 34C are carbon copies of the warranty replacement certificate or insurance policy for the period, February 11, 1966, to February 11, 1969, the original having been mailed to Mrs. Faber. This warranty certificate provides for a handling charge of \$7.50 for each pair of contact lenses replaced under the warranty (Tr. 1223-26). Mrs. Faber then mailed to Vent-Air her check dated January 18, 1966, for the sum of \$30 in full payment for the renewal of the warranty replacement certificate or insurance policy for the new three-year period, February 11, 1966, to February 11, 1969 (Tr. 1226-28). Subsequently, Vent-Air received notice from its bank in which it had deposited the check for collection that Mrs. Faber had stopped payment on the

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check on January 27, 1966 (Tr. 1228). Vent-Air then cancelled the warranty replacement certificate by writing the word "Void" on the face of the warranty certificate (RX 34A).

48. Dr. Lawrence Lewison, of Long Island, New York, an optometrist for almost thirty years, and president of the corporate respondent, Vent-Air Lens Laboratories, Inc., was the next witness offered by complaint counsel. Dr. Lewison testified as follows: Vent-Air Lens Laboratories, Inc., was organized in the year 1955 or thereabout, and is a subsidiary of Klear Vision Contact Lens Specialists, Inc. There are various corporations geographically located throughout the United States, which sell Vent-Air contact lenses. The names of these corporations are: Contact Lens Specialists of New York, Inc.; Contact Lens Specialists of Washington, D.C., Inc.; Contact Lens Specialists of Baltimore, Inc.; Contact Lens Specialists of Kansas City, Inc.; of St. Louis, Inc.; of Milwaukee, Inc.; of Chicago, Inc.; of Minneapolis, Inc.; of Indianapolis, Inc.; of California, Inc.; of Florida, Inc.; and maybe one or two others, depending upon the name of the city or state where located. Dr. Lewison owns the majority of the stock in these different corporations (Tr. 928-29), and is the president of each. There is also a Canadian corporation, which operates three offices, one each in Montreal, Toronto, and Vancouver, for the fitting and dispensing of Vent-Air contact lenses throughout Canada (Tr. 930). Dr. Lewison makes all of the policy decisions for the above-named corporations (Tr. 932), and has been in continuous supervision of all of the Vent-Air operations since 1955 (Tr. 933). The original Vent-Air contact lens was introduced in 1955 by the Vent-Air office in New York, N.Y. In 1955, there were two offices, one in New York City, and one in Chicago (Tr. 935). In addition to the corporate offices above referred to in which Vent-Air lenses are sold and distributed, there are also "franchise" offices (Tr. 937) in various cities of the United States and foreign countries, where Vent-Air lenses are sold and service rendered to all Vent-Air customers who may apply to these offices, regardless of where the lenses may have been fitted and sold (Tr. 939). Dr. Lewison identified CX 23A, B, C, and D, which was a brochure prepared and distributed during part of the year 1959, all of 1960, and a short period during 1961 (Tr. 958), by corporate respondent to persons interested in Vent-Air contact lenses (Tr. 945-46). Subsequently, CX 23 was revised, and each Vent-Air office was instructed to destroy and not distribute any further copies of CX 23 (Tr. 957). CX 24A and B is a brochure distributed by Vent-Air in 1964 and 1965

(Tr. 958). The offices listed on CX 24 for Winnipeg, Canada, London, Paris, Rome, and other foreign countries were franchised offices (Tr. 958-59). During the period of time that CX 23 was available at the various Vent-Air offices for distribution, there were more than 85 owned or franchised Vent-Air offices where contact lenses were available for sale and service (Tr. 961). During the period of time that CX 24 was available for distribution, the Vent-Air offices listed thereon, whether owned or franchised, had Vent-Air contact lenses available for sale or service (Tr. 962). CX 4, the so-called lifetime service guaranty card similar to the one issued to Mr. Stephen Wade, was first issued in 1957 and was continued until 1960 (Tr. 979, 981). Vent-Air's lifetime Professional Services Agreement (CX 14) was first issued in the fall of 1956, and was used until approximately November 1960 (Tr. 982; RX 7). Following each purchase of Vent-Air contact lenses from a Vent-Air office, the Vent-Air Contact Lens Laboratories in New York City was advised of the purchase, including the name and address of the purchaser, and the guaranty card, such as CX 4, was mailed by the New York headquarters Vent-Air office to each purchaser during the period, 1956 to 1960. The lifetime guarantee referred to the lifetime of the lenses involved (Tr. 983-84). A prescription change in Vent-Air contact lenses under the Vent-Air guarantee, such as CX 4 and CX 14, called for a change in prescription to the same lenses and not replacement of the lenses (Tr. 984). Vent-Air contact lenses were first introduced to the consuming public in 1955, with an original design consisting of four grooves around the edge of the lens which permitted greater access of tears and air beneath the lens to the corneal surface (Tr. 986-987). Changes and improvements have been made in that design from time to time. In 1961, a lens was introduced with a new design. Instead of having only the four grooves around the edge of the lens, this lens had a surrounding ring connecting each of the grooves. This lens was available for a period of one to two years, when the lens was modified to a much smaller design, a much thinner lens, with a new type of plastic (Tr. 988). This lens is still being used today (Tr. 989). These changes in the lens, including the thickness, size, and finish of the lens, width of the bevel, and the relationship of the outside curvature of the lens to the inside curvature, have all occurred since 1961 (Tr. 990-91). Vent-Air bears the risk under the so-called no-risk plan. Vent-Air prepares lenses that cost it many times the deposit which the customer leaves. Often the customer does not take the lenses after the lenses have been prepared to

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the customer's prescription (Tr. 994). In many instances, Vent-Air makes several pairs of contact lenses for the same customer in an effort to satisfy the customer. In some instances, contact lenses are prepared for a customer to his prescription, and the doctor finds that some adjustments are needed and will reorder a second pair of lenses prepared for the same customer. If the doctor finds additional changes are necessary, and, if the changes cannot be made to the same set of lenses, a third pair of lenses is prepared for the same customer under the original no-risk plan (Tr. 995).

49. On cross-examination, Dr. Lewison testified as follows: At the time CX 23 was distributed during the period 1959 to 1961, Vent-Air had more than 85 offices as represented in said brochure, and Vent-Air had offices in each of the cities and countries listed on CX 24 (Tr. 1001-1002). In addition, Vent-Air had offices in London, Liverpool, Birmingham, Bristol, Glasgow, Leicester, Middleborough, Sheffield, Sunderland, York, Hull, Cardiff, Bradford, Newcastle on Tyne, England. Vent-Air also had offices in Athens, Greece; Mexico City; Haifa and Tel Aviv in Israel; Bologna and Rome in Italy; The Hague in Holland; Johannesburg, South Africa; Frankfurt, West Germany; Panama City, Panama; Melbourne, Australia; Vienna, Feldkirch, Innesbruck, Graz, Judenberg, Kapfenberg, Kitzbuhel-Tirol, Ledben, Linz, Neusidel-See, Sealfelden, St. Veit, Salzburg, Villach, in Austria; Montreal, Toronto, Vancouver, Winnipeg, Medicine Hat, Saskatoon, in Canada; Hato Rey, Puerto Rico; and Halifax, Nova Scotia (Tr. 1003-1004). Dr. Lewison described the lens referred to as the "Smooth-round lens, something new, a remarkable advance in contact lens science" in CX 27 as being a lens developed about the time the ad was run in the Arizona Republic in 1965, which included several advances in the fabrication of lenses. Before that time, the lenses had edges which were sort of squared off, or in some instances reached almost a pointed sharpness. Some lenses which were then on the market had irregularly-shaped edges. The smooth-round lens described in CX 27 embodied a principle of an extremely well-rounded edge, mathematically exact, applied by an automatic process (Tr. 1005). Vent-Air had special machines which applied this roundness to the edge of the lens. These machines were developed strictly for the purpose of finishing this smooth-round lens. Therefore, all lenses had been finished by hand, which necessarily caused an unevenness to the edge and prevented obtaining a uniformly rounded and smoothed edge. The advantage in this lens over

the lens used and sold immediately before was that the thickness, the degree of roundness, and the smoothness of the edge was not only predictable, but could be duplicated time and again (Tr. 1006). Vent-Air attempted for several years to develop a machine for this purpose. It engaged engineers to design the machine, to build prototypes, and expended in the neighborhood of \$30,000 to \$40,000 in perfecting the machine. After this machine was placed in actual operation, Vent-Air began distributing the advertising brochure, CX 27 (Tr. 1007). In 1960, Vent-Air had devised a contact lens to assist the circulation of tears under the lens, with grooves around the perimeter of the lens which permitted entrance and exit of tears and air to the central part of the cornea, with a grooved ring connecting each of the vents, permitting greater freedom of movement of tears and air. Vent-Air's brochure (CX 28) referred to this improvement as a "New", "Miracle Lens by Vent-Air" (Tr. 1008). CX 28 was distributed in July of 1961. An enlarged model of the contact lens being sold by Vent-Air prior to July, 1961 was received in evidence as RX 11, and an enlarged model of the so-called "New" and improved "Miracle Lens by Vent-Air" advertised in CX 28 was received in evidence as RX 12 for the purpose of showing the difference between the so-called "Miracle Lens" of July, 1961 and the lens that Vent-Air was selling prior to July, 1961 (Tr. 1009-1010). The enlarged lens without the ring was marked RX 11, and the enlarged lens with the ring was marked RX 12. The contact lens without the ring was sold prior to July, 1961 (Tr. 1011). The UF-8 lens, described in CX 31 as "NOW IN ADVANCED UF-8 FORM WITH ULTRA-VIOLET PROTECTION" and "HERE IS THE DIFFERENCE!", was produced by Vent-Air in 1963. It represented the use of a different type of plastic. It was different in color and filtration qualities. It had the capacity to filter out ultraviolet rays, as verified by an independent testing laboratory which Vent-Air engaged to do research on the lens (Tr. 1012). Dr. Lewison estimated that Vent-Air had spent approximately \$10,000 in testing for the development of the "UF-8" lens. Dr. Lewison identified RX 13 and RX 14A, B, and C as being reports from Electrical Testing Laboratories, Inc., of New York City, testing the spectrophotometric properties of various types of plastic (Tr. 1013). On RX 13, in addition to the report of Electrical Testing Laboratories, Inc., there is stapled to the report a plastic container which held a clear Vent-Air lens. The plastic container is similar to those given to Vent-Air contact lens wearers in which to carry their contact lenses. On RX 14A, B, and C, in addition to the

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plastic containers stapled to each report, which contained finished contact lenses tested by the laboratory, there were attached to each report samples from the original sheets of plastic, which are used in the fabrication of Vent-Air contact lenses. In each container stapled to RX 14A, B, and C, there is a colored Vent-Air contact lens of different intensity (Tr. 1014), fabricated from the type of sample plastic attached to RX 14A, B, and C (Tr. 1015). The tests reported on each of these exhibits resulted in the development of what ultimately became known as the UF-8 lens (Tr. 1016). The UF-8 lens, as finally developed, was a colored lens which Vent-Air had been preparing for production during the summer of 1963, pending the results of the tests made by Electrical Testing Laboratories, Inc., and reported to Vent-Air in its report dated September 17, 1963 (RX 15; Tr. 1019-1022). CX 31 was one of the first pieces of advertising material that Vent-Air issued announcing the UF-8 lens (Tr. 1022). The "NEWLY-PERFECTED" contact lenses referred to in CX 9 were an improved form of the lenses which had been in use prior to the original Vent-Air vented lenses, particularly with reference to the size and thickness of the lenses, the size of the grooves, and the relationship of the curvature of the inside radius of the lenses to the corneal curvature of the eyes, which relationship varied from what it had been in previous years. CX 9 represents, among other things, that the newly-perfected Vent-Air contact lens is "26% thinner and lighter" than most other contact lenses previously on the market, including Vent-Air lenses (Tr. 1024-25). Vent-Air maintains a continuous program of research for the improvement and development of its contact lenses, including the shape, size, thickness, dimensions, finish, color, and all other attributes of lenses in order to develop an improved lens, as well as improving and developing tools and machines for their manufacture (Tr. 1026-27). Dr. Lewison estimated that Vent-Air expended \$5,000 to \$10,000 producing the lens advertised in CX 9 (Tr. 1027). Paragraph 21 of CX 10 correctly sets out the Vent-Air guarantee which was in effect in 1963. In 1961, Vent-Air had a one-year guarantee (Tr. 1027). The memorandum, dated November 22, 1960, set out on the lower part of RX 7, which reads, "From Dr. Lewison to all offices: If you are still using the form 'Professional Services Agreement,' please discontinue same at once and advise," refers to CX 14, Vent-Air's "Professional Services Agreement" (Tr. 1029-1030). Dr. Lewison identified RX 16 as a new form of Vent-Air's Professional Services Agreement, which replaced the form shown on CX 14, in December of 1960.

He also identified RX 17 as being a memorandum, dated December 15, 1960, from Dr. Lewison to all Vent-Air offices, which accompanied RX 16, directing that every new patient must sign the new Professional Services Agreement set out in RX 16 before delivery of the lenses to the patient (Tr. 1031-32). Each Vent-Air office reported to the New York office that it had read and understood the memorandum, as directed in RX 17 (Tr. 1034). The statement by Dr. R. R. Puorro, an optometrist and a Vent-Air franchisee in San Francisco, California, in his letter, dated June 13, 1964, to Mr. Stephen Wade (CX 6), does not correctly set forth Vent-Air's policy concerning the so-called lifetime guarantee and the rendering of service thereunder (Tr. 1034-36).

50. CX 25 and CX 26, Vent-Air advertisements which were distributed in the fall of 1962, accurately describe Vent-Air's no-risk plan. Dr. Lewison then described the procedure when a Vent-Air customer visits a Vent-Air office in response to a Vent-Air no-risk plan advertisement (Tr. 1041-42), as follows: needed for the fitting of the lenses, the lack of any guarantee as to

The interested party is invited into a private consultation room. He is given a description of contact lenses.

He is then asked to propound any questions he has regarding contact lenses. These questions are answered to the best of the interviewer's ability. The interviewer further goes on to explain the advantages and the disadvantages of contact lenses.

Then the interested party is told he will have an opportunity to wear lenses which have been made to his prescription and to his measurements, provided his eyes are healthy and he seems to be psychologically suitable for lenses. He will have such an opportunity to wear these lenses in our office for as long a period as he likes and for as many periods as he likes. His only obligation will be to pay for the eye examination involved in the preparation of these lenses.

Should he decide he wants the lenses after he has worn them, he will then pay the stated fee, or, rather, the difference between the examination fee and the stated fee.

If he should decide, as a result of these wearings, that he prefers not to take the lenses, he may leave without any obligation, except, as I mentioned, for the examination fee. Moreover, if he decides not to take the lenses, his new eye prescription which has been determined is either given to him or, at his option, prepared as regular glasses in a new frame which he might select from a special line of frames which we have in our office.

51. Vent-Air's no-risk plan described in CX 25 and CX 26 went into effect in 1962, and no other contact lens company, to Dr. Lewison's knowledge, has such a plan available. Prior to 1962, the procedure of the Vent-Air office was to explain to the prospective wearer the advantages and disadvantages of contact lenses, the approximate number of visits which would be

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needed for the fitting of the lenses, the lack of any guarantee as to the wearing ability of contact lenses, insofar as time was concerned, and the quotation of a fee which would include the lenses plus the services included in the then existing guarantee (Tr. 1042). At that time, a lens was not made up to the customer's prescription which he could try on before he was under any obligation to take or pay for the contact lenses. In some instances prior to 1962, optometrists in Vent-Air offices inserted non-prescription contact lenses into patients' eyes so as to give the examiner and prospective wearer some indication as to the prospective wearer's possible reaction to the contact lenses (Tr. 1043). Under Vent-Air's no-risk plan, the contact lenses were made to the wearer's prescription and then fitted to the prospective wearer's eyes according to the prescription and measurements of the patient, giving the customer a more accurate measure of what he would experience in actually wearing the lenses, rather than giving him a lens taken from a drawer of stock lenses and placed in the patient's eyes for test purposes (Tr. 1043-44).

52. Dr. Lewison identified RX 19, a printed pamphlet containing four pages, entitled "CONTACT LENS INSTRUCTIONS AND SYMPTOMS," which is given to each prospective purchaser of Vent-Air lenses for reading before the would-be purchaser finally decides he wishes to take the lenses under the so-called no-risk plan, and pay the balance, if any, due for the purchase price of the lenses (Tr. 1044-45, 1068). This exhibit, as its title or heading implies, gives instructions for a wearing schedule for the lenses, stresses the importance of a regular wearing schedule, but expressly states that Vent-Air makes no guarantee as to the number of hours per day the purchaser may be able to wear the contact lenses, since patients vary in their adaptability to contact lenses (RX 19). In addition to giving each prospective wearer of Vent-Air lenses a copy of RX 19 for reading and examination, Vent-Air offices use a tape recording in the form of an audio aid, which explains to the customer the facts concerning Vent-Air's no-risk plan. This tape recording is played and replayed in the office lounge where the customers are seated, and a fitter is available in the lounge to answer questions (Tr. 1069, 1085). Each Vent-Air office prepared its own tape recording, but each office conformed to a set of instructions issued by the New York office. At the hearing, the tape recording, which was prepared and was first begun to be played in the Vent-Air office in Washington, D.C., in late 1962 or early 1963, was played in the hearing room (Tr. 1078-1084). Much of the audio dialogue contained in this recording and transcribed on pages 1078 to 1083 of the transcript of this proceeding is taken from or at least

repeats many of the statements of instructions and symptoms contained in RX 19. The Vent-Air office in New York City purchased tape recorders for practically every Vent-Air office, and instructed these offices to play their recordings during the presence of each customer (Tr. 1085).

53. In addition to CX 1, 25, 26, 27, 31, and RX 2, which are advertising pieces referring to Vent-Air's no-risk plan, Dr. Lewison identified RX 20, 21, 22, and 23 as being a series of letters and literature sent out by Vent-Air to persons who inquired about the no-risk plan (Tr. 1088). RX 20 was sent out in August, 1962, and RX 21 and 22 were sent out in October, 1962. RX 23 was sent out in November, 1965. The gist of RX 20, 22, and 23 is that, under the no-risk plan, the customer is examined by a Doctor of Optometry or a Specialist, at a \$15 examination charge, and, if found suitable, lenses are made and fitted to the customer's prescription. The customer wears the lenses in the Vent-Air office, and only pays for them if he decides to take them. If the customer decides not to take the contact lenses, but prefers to continue wearing regular glasses, he gets a prescription for regular glasses at no additional cost other than the cost of frames. Dr. Lewison explained the reason why CX 1, an advertising mat, and RX 24, a tear sheet and the original ad taped to the tear sheet, and which was a Vent-Air advertisement of its no-risk plan published in The New York Daily News on only one date, July 14, 1963, did not contain any reference to a "Modest Examination Charge," whereas all of the other exhibits, which referred to Vent-Air's no-risk plan, contained a statement that there was a \$15 examination charge or a modest examination charge. The reason was that the State Commissioner of Education of the State of New York had ruled, in 1963, that the mention of a charge or a no charge in optical newspaper advertising was a violation of the optometry laws of the State of New York, and, for this reason, Vent-Air omitted any reference to a "charge" for an examination in this particular newspaper advertisement in New York City. However, in advertising brochures, such as CX 20 or 21, and the other material advertising Vent-Air's no-risk plan, reference to the examination charge was made for the reason that these advertising pieces were given and distributed to individuals who inquired about the no-risk plan. In other words, the Commissioner's ruling applied to newspaper advertising to the general public, and did not apply to advertising brochures distributed on an individual basis in response to specific inquiries (Tr. 1091-93). In all Vent-Air ad-

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vertising material distributed to customers or prospective customers subsequent to July 14, 1963, the date of the advertisement in The New York Daily News, there was included a statement of a charge for eye examination, and that the customer could wear the lenses in the office (Tr. 1100). Dr. Lewison also explained why the Vent-Air advertisement, which appeared in The Arizona Republic, Phoenix, Arizona, on May 30, 1965 (CX 27), did not contain a reference to the eye examination charge and that the contact lenses would be worn in the office, in referring to the no-risk plan, but simply stated: "Come in for your no-obligation demonstration today * * * learn all the advantages of our unique 'No-Risk' wearing plan." Dr. Lewison explained that the emphasis in the advertisement (CX 27) was directed toward the "Smooth-Round" feature of the Vent-Air lenses, and there was only a passing reference to the "'No-Risk' wearing plan," for the reason that readers in the Phoenix area, in particular, had been apprised of the plan for more than two years. Vent-Air believed that a reminder that such a plan was available and a suggestion that they come in to the office and get details of the plan were sufficient. Dr. Lewison explained that, as a general rule, before coming to the Vent-Air office, a prospective customer usually telephoned or wrote to the office for information. In response to such calls or written requests, the Vent-Air office would mail to the inquirer whatever literature the office had on the no-risk wearing plan, to the extent that there was a modest examination charge, no obligation to take the lenses, and the customer was welcome to wear the lenses, prepared and fitted to his prescription, in the office before finally deciding to take the lenses (Tr. 1100-1102).

54. On redirect examination, Dr. Lewison identified CX 34, a Vent-Air advertisement of the smooth-round lens, which appeared in the January 16, 1966, issue of The Detroit News and referred to the "No-Risk" plan as permitting the customer to wear his own custom-made lenses in the Vent-Air office before he decides to purchase the lenses, but did not mention that there was an eye examination charge (Tr. 1121-23). On cross-examination, Dr. Lewison explained that any person answering the advertisement in CX 34 would have been given the details of the no-risk plan as outlined in RX 20, 21, 22, and 23, in addition to an audio tape recording played in the Vent-Air office explaining the provisions of the no-risk plan (Tr. 1125). Dr. Lewison reiterated that all brochures issued by Vent-Air after 1963, which referred to the no-risk plan, contained statements that

there was a charge for eye examination (Tr. 1127-28). Complaint counsel then rested their direct case-in-chief.

55. Dr. Lawrence Lewison, president of the corporate respondent, and an individual respondent, was then called as a witness for respondents (Tr. 1160). (Dr. Miller had previously been called as a witness for respondents, out of turn, by agreement of counsel, at a session of the hearing previously held in Washington, D.C. His testimony has already been discussed in paragraphs 24 and 25 herein.) Dr. Lewison, on direct examination, testified as follows: The letter from Dr. R. R. Puorro, the Vent-Air franchisee in San Francisco, California, to Mr. Stephen Wade, dated June 13, 1964 (CX 6), did not correctly state the Vent-Air policy with respect to service under the so-called lifetime guarantee (CX 4), which had been issued to Mr. Wade (See paragraphs 20-23 herein). Dr. Lewison identified RX 18 as being a copy of the contract entered into between Vent-Air Contact Lens Laboratories, as franchisor, and Dr. Puorro, as franchisee, dated August 25, 1961 (Tr. 1161-64). Dr. Lewison pointed out that, under the franchise agreement (RX 18), Dr. Puorro agreed "to service all Vent-Air patients during the lifetime of this agreement" (Tr. 1165). The franchise agreement with Dr. Puorro was not renewed (Tr. 1166). In all cases where a customer purchases contact lenses from a Vent-Air office, a duplicate of the original record card is sent to the New York office and thereafter all records of service and charges are entered on the card as they are received. One of the purposes in keeping duplicate records is to make sure just what guarantee Vent-Air had given to the particular customer, whether a lifetime or a one-year guarantee, and to insure that the customer would receive the service to which he was entitled under the guarantee (Tr. 1167). This duplicate record system relieves some of the problems incurred when a Vent-Air customer purchases contact lenses in one Vent-Air office and later visits another Vent-Air office for service on the lenses (Tr. 1167). Dr. Lewison examined the Vent-Air records for its customer, Mr. Stephen Wade, and found that Vent-Air has a record of only one pair of contact lenses purchased by Mr. Wade, subject to any kind of a guarantee (Tr. 1169). Dr. Lewison identified RX 27 as being a copy of the Vent-Air record of all transactions involving contact lenses between Mr. Wade and the Vent-Air office in Spokane, Washington. This copy of Mr. Wade's record (RX 27), maintained in the Vent-Air New York office, showed three payments by Mr. Wade, as follows: One on February 13, 1961, of \$3.12 for solution; also, on Feb-

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ruary 13, 1961, a payment of \$15 for a warranty certificate which would entitle Mr. Wade to have his lenses replaced without charge if they became damaged, scratched, marred, lost, or in any way abused during that first year (Tr. 1176); and a payment on September 20, 1961, when Mr. Wade paid a \$10 handling charge on a claim he had made under the warranty certificate above referred to (Tr. 1177). Dr. Lewison identified RX 28 as being a record card for Mr. Wade, dated July 26, 1961. RX 28 shows that, on July 26, 1961, Mr. Wade made a claim for replacement under the insurance warranty certificate for which he had made the payment of \$15 on February 13, 1961, shown on RX 27. Dr. Lewison was certain that RX 28 related to Mr. Wade's claim under the warranty certificate, which he had purchased on February 13, 1961, because the record (RX 28) clearly states, in one place, "Insurance Replacement," and in another place, "Certificate Replacement." RX 28 was a blue carbon, and the original is ordinarily kept in the office from which the order originates, which, in this instance, was the Vent-Air office in Spokane, Washington (Tr. 1180-81). So far, the Vent-Air records showed that Mr. Wade had made only three payments, one for solution, one for the warranty certificate, and one for a \$10 handling charge under the warranty certificate. Dr. Lewison identified RX 29 as an order, dated March 20, 1963, for a new right lens, which was furnished to Mr. Wade in exchange for his old right lens, at no charge (Tr. 1184-85). According to the Vent-Air records, only one pair of contact lenses was ever purchased by Mr. Wade, and that was the pair of lenses which Mr. Wade had purchased in San Francisco in 1957. RX 29 represented an exchange lens for the original right lens which Mr. Wade had purchased in San Francisco in 1957. However, there was a prescription change in the right lens in the exchange from the old, original right lens purchased in 1957. RX 29 shows on its face that it was a prescription change, rather than a replacement under an insurance warranty certificate, because it states "N/C Exch," meaning no charge—exchange, and the statement, "Credit enclosed lens," which means that the old, right lens was returned at the same time the order for the prescription change was sent (Tr. 1185-1186). (Mr. Wade surrendered the old, right lens to the Spokane office, which sent it to the New York office with the order for the replacement.) No charge was made by Vent-Air for this prescription change in the original, right lens which Mr. Wade had purchased in San Francisco seven years previously (Tr. 1185). RX 5 is a copy of an order sent

in by the Spokane office to the Vent-Air office in New York City on February 8, 1964, for another prescription change in both lenses for Mr. Wade, and for which no charge was made by Vent-Air. A new pair of contact lenses, with a prescription change in both lenses was made up for Mr. Wade in exchange for his original contact lenses under this order, RX 5, at no charge to Mr. Wade (Tr. 1186-87). This prescription change in his original contact lenses was ordered for Mr. Wade less than one month prior to his move from Spokane, Washington, to Washington, D.C., and the new pair of contact lenses embodying this prescription change was forwarded from the Spokane, Washington Vent-Air office to the Washington, D.C., Vent-Air office and by that office delivered and fitted to Mr. Wade at no additional charge. (See the testimony of Dr. Miller previously discussed in paragraphs 24 and 25 herein.)

56. The charging allegations of the complaint are set out in subparagraphs (a) through (e) of paragraph 9 herein. The evidence and testimony in support of, and in opposition to, each allegation will now be further discussed.

(a) *The allegation that respondents represented that "Vent-Air contact lenses are a new or recent discovery or development in contact lenses," whereas, "Vent-Air contact lenses are not a new or recent discovery or development," but "have been on the market for more than 10 years."*—Complaint counsel sought to establish this allegation by several of corporate respondent's advertisements, and the testimony of Dr. Lewison, an individual respondent and president of the corporate respondent herein. Respondents admit that the Vent-Air lens was introduced on the market in 1955 (Tr. 986). The original lens had four grooves around the edge, which permitted greater access of tears and air beneath the lens to the corneal surface (RX 11; Tr. 987). Changes and improvements have been made in that design from time to time. In 1961, corporate respondent introduced a lens with a new design. Instead of having only the four grooves around the edge of the lens, this lens had a surrounding ring connecting each of the grooves. This lens was available for a period of one to two years, when the lens was modified to a much smaller design, a much thinner lens, with a new type of plastic (Tr. 988). These changes in the lens, including the thickness, size, and finish of the lens, width of the bevel, and the relationship of the outside curvature of the lens to the inside curvature, have all occurred since 1961 (Tr. 990-91). CX 27, a newspaper advertisement, uses the term "new," and states: "SOME-

THING NEW A REMARKABLE ADVANCE IN CONTACT LENS SCIENCE". This advertisement refers to a "Smooth-Round" Vent-Air lens, developed in 1965, which embodied the principle of a well-rounded edge, mathematically exact, applied by a special machine which rounded the edge of the lens. This machine was developed for the purpose of finishing this smooth-round lens. Theretofore, all lenses had been finished by hand, which necessarily caused an unevenness to the edge and prevented the attainment of a uniformly rounded and smoothed edge. Before the development of this machine, the lenses had edges which were sort of squared off and, in some instances, reached a pointed sharpness. Some lenses which were then on the market had irregularly-shaped edges. The advantage in this new lens over the lens used and sold immediately before was that the thickness, the degree of roundness, and the smoothness of the edge was not only predictable, but could be duplicated time and again with the use of this machine. Vent-Air attempted for several years to develop a machine for this purpose. It engaged engineers to design the machine and to build prototypes, and expended in the neighborhood of \$30,000 to \$40,000 in perfecting the machine (Tr. 1005-1007).

57. CX 28, a Vent-Air brochure distributed in July, 1961, refers to the "NEW MIRACLE-LENS by Vent-Air." This lens had been devised by Vent-Air in 1960 to assist the circulation of tears under the lens, with grooves around the perimeter of the lens which permitted entrance and exit of tears and air to the central part of the cornea, with a grooved ring connecting each of the vents, permitting greater freedom of movement of tears and air (RX 12). An enlarged model of the contact lens being sold by Vent-Air prior to July 1961 was received in evidence as RX 11, and an enlarged model of the "NEW MIRACLE-LENS by Vent-Air," as advertised in CX 28, was received in evidence as RX 12. The difference between the so-called "NEW MIRACLE-LENS" of July 1961 and the lens that Vent-Air was selling prior to July 1961 (Tr. 1008-1011) is evident by examining these two exhibits.

58. CX 31 is a Vent-Air brochure utilized to announce the introduction of the UF-8 lens, produced by Vent-Air in 1963. The brochure does not use the word "new" in describing the lens, but merely refers to the UF-8 lens as follows: "NOW IN ADVANCED UF-8 FORM WITH ULTRA-VIOLET PROTECTION". This lens represented the use of a different type of plastic. It was different in color and filtration qualities. It had the capacity to filter out

ultraviolet rays, as verified by an independent testing laboratory which Vent-Air engaged to do research on the lens (Tr. 1012). Vent-Air spent approximately \$10,000 in research and tests for the development of the UF-8 lens (RX 13, 14A-C, 15; Tr. 1012-1022).

59. CX 9 refers to a "NEWLY-PERFECTED" lens, which was an improvement over the lenses which had been in use prior to the original Vent-Air vented lenses, particularly with reference to the size and thickness of the lenses, the size of the grooves, and the relationship of the curvature of the inside radius of the lenses to the corneal curvature of the eyes, which relationship varied from what it had been in previous years. Among other things, CX 9 represents that the "NEWLY-PERFECTED" Vent-Air contact lens is "26% thinner and lighter" than most other contact lenses previously on the market, including Vent-Air lenses (Tr. 1024-25). The "NEWLY-PERFECTED" Vent-Air lens was produced after extensive research and development by Vent-Air at a cost of \$5,000 to \$10,000 (Tr. 1024-27). The testimony and evidence show that corporate respondent was constantly engaged in research and making improvements in its contact lenses from time to time. Accordingly, it is found that the allegation that corporate respondent had falsely advertised its contact lenses as a "new or recent discovery or development in contact lenses" has not been established by a preponderance of the evidence.

60. (b) *The allegation that respondents represented that Vent-Air contact lenses and services are available to the consuming public in Vent-Air offices located in 85 cities throughout the United States and in offices in many foreign countries throughout the world,* whereas "Vent-Air contact lens offices owned by respondents are located in less than 40 cities in the United States; franchised offices are located in less than 25 cities in the United States."—Complaint counsel have apparently abandoned this allegation made in the complaint. It is not discussed in complaint counsel's proposed findings. CX 23A, an advertising brochure, states, among other things, the following:

* * * For today you'll find Vent-Airs available—in authorized offices only—in more than 85 cities in the United States, Canada, Mexico and other foreign countries.

CX 23 was distributed in 1959, all of 1960, and for a short period in 1961 (Tr. 958). CX 23D states that there are "MORE THAN 85 AUTHORIZED OFFICES" at the " * * * addresses listed below" and "OTHER PRINCIPAL CITIES THROUGHOUT THE WORLD."

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CX 24A, another Vent-Air brochure, is headed, "VENT-AIR is everywhere!", and contains a list of offices with addresses and telephone numbers, and with the following statement:

AND OTHER PRINCIPAL CITIES THROUGHOUT THE WORLD INCLUDING LONDON—PARIS—ROME—MADRID—ANTWERP—THE HAGUE—LISBON—LEEDS—BARCELONA—HELSINKI—HALIFAX—LA PAS—BOGOTA—SAN JUAN—LIMA—HONG KONG.

CX 24A was distributed through 1964 and 1965 (Tr. 958).

61. The testimony of Dr. Lewison shows that, during the period from 1959 to 1961 when CX 23 was distributed, Vent-Air had more than 85 offices, as represented in said brochure, and also had offices in each of the cities and countries listed on CX 24 (Tr. 1001-1002). In addition, Vent-Air had offices in London, Liverpool, Birmingham, Bristol, Glasgow, Leicester, Middleborough, Sheffield, Sunderland, York, Hull, Cardiff, Bradford, Newcastle on Tyne, England. Vent-Air also had offices in Athens, Greece; Mexico City; Haifa and Tel Aviv in Israel; Bologna and Rome in Italy; The Hague in Holland; Johannesburg, South Africa; Frankfurt, West Germany; Panama City, Panama; Melbourne, Australia; Vienna, Feldkirch, Innesbruck, Graz, Judenberg, Kapfenberg, Kitzbuhel-Tirol, Ledben, Linz, Neusidel-See, Sealfelden, St. Veit, Salzburg, Villach, in Austria; Montreal, Toronto, Vancouver, Winnipeg, Medicine Hat, Saskatoon, in Canada; Hato Rey, Puerto Rico; and Halifax, Nova Scotia (Tr. 1003-1004). Upon the basis of the evidence and testimony, it is found that the allegations of subparagraphs 2 of Paragraphs Six and Seven of the complaint have not been established.

62. (c) and (d) *Vent-Air's alleged failure to abide by its guarantees.*—Subparagraphs 3 and 4 of Paragraphs Six and Seven of the complaint allege, among other things, that corporate respondent did not adhere to or honor the guarantees given to purchasers of contact lenses issued prior to 1964 (therein referred to as the "old" guarantee) and those issued after 1964 (referred to in the complaint as the "new" guarantee); and that Vent-Air's owned and franchised offices do not adhere to corporate respondent's representations concerning service and repairs on lenses, and impose varying fees and charges for such service, as well as charges for eye examinations. Subparagraph 4 of Paragraph Seven of the complaint further alleges that said guarantees fail to clearly and conspicuously disclose (a) the full nature and extent of the guarantee, (b) all material conditions or limitations imposed in the guarantee, and (c) the manner in which corporate respondent will perform thereunder.

63. The evidence shows that corporate respondent issued three service guarantees prior to 1964. The first was the so-called "lifetime" service guarantee card (CX 4), similar to the one which was issued to the witness, Stephen Wade, in 1957. CX 4 was first issued in 1957 and was continued until about November 1960 (Tr. 979, 981). Another so-called "lifetime" service guarantee, referred to as a "Professional Services Agreement" (CX 14), such as was issued to Mrs. Faber, was first issued in late 1956, and was continued until November 1960 (RX 7; Tr. 928). A "new" Professional Services Agreement (RX 16) replaced CX 14 in December 1960 (Tr. 1031). RX 16 is a one-year guarantee. A memorandum (RX 17), dated December 5, 1960, from Dr. Lewison, and addressed to the Vent-Air offices, accompanied RX 16 and was sent to all Vent-Air offices, notifying them to discontinue the lifetime Professional Services Agreement (CX 14), and to replace it with the one-year service agreement (RX 16; Tr. 1032). This memorandum (RX 17) stated that each member of the staff of each Vent-Air office should read the memorandum and the provisions of the guarantee under the new Professional Services Agreement (RX 16).

64. CX 10 is a Vent-Air booklet which bears a copyright dated 1963. Paragraph 21 thereof sets out the terms of the one-year service guarantee which the witness Canavan testified he picked up in the Vent-Air office in Washington, D.C., in 1963, and which, he testified, was similar to the guarantee which he received when he purchased his contact lenses in the Vent-Air office in Boston, Massachusetts, in 1961 (Tr. 457, 1027). The terms of the guarantee contained in CX 10 have been set out in Paragraph 27 hereof.

65. (d) *Vent-Air's alleged failure to clearly and conspicuously disclose the nature, extent, all material conditions or limitations of its guarantees, and the manner of performance thereunder.*—Vent-Air's original lifetime guarantee (CX 4), which was mailed to the purchaser by the New York office after the contact lenses had been purchased, reads, in substantial part, as follows:

This card when presented at any office where Vent-Air lenses are dispensed entitles you to lifetime service on your Vent-Air lenses.

CX 4 is reproduced on pages 1496-97 hereof. The original "Professional Services Agreement," which is also a lifetime guarantee (CX 14), is set out in paragraph 37 hereof.

66. RX 16 is a one-year guarantee and replaced CX 14. RX 16

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reads as follows:

(VENT-AIR) CONTACT LENSES

Dated..... 19....

At
(City) (State)

I hereby agree to pay for pair(s) of Vent-Air Contact Lenses and for services related to the fitting and delivery of same, the sum of \$; and I agree to pay \$ herewith and the balance as may be decided upon, with full payment due on or before delivery of my lenses. This amount paid is not refundable after delivery of said lenses.

In consideration of the fee above, the Fitting Office agrees to furnish pairs(s) of Vent-Air Contact Lenses which are optically-perfect and precision-ground, and the services related thereto. It also agrees to provide any additional services necessary to the fitting of said lenses without charge for a period of one year after delivery. Prescription changes will be made to the original lenses at no charge for the lifetime of the wearer except changing single-vision to bifocal lenses in which case only the difference will be charged.

67. CX 10, a Vent-Air booklet entitled *Facts You Should Know About Seeing Without Glasses*, sets out in paragraph 21 thereof Vent-Air's one-year guarantee which the witness Canavan testified was similar to the guarantee which had been issued to him in 1961. The guarantee provision set out in paragraph 21 of CX 10 is reproduced in paragraph 27 hereof.

68. CX 29, a Vent-Air pamphlet which was distributed in October 1964, and reprinted in full on pages 4 and 4a of the complaint herein, explains the guarantee which was in effect at that time. The basic provision of Vent-Air's original lifetime guarantee (CX 4) has been set out in paragraph 65 above. It merely states that the guaranty card (CX 4) "entitles you to lifetime service on your Vent-Air lenses." It will be noted that the guarantee does not describe the nature of the lifetime service referred to in the guarantee and the manner in which corporate respondent will perform thereunder. However, the evidence shows that CX 4 was discontinued in November 1960, and has not been used since that time. There is no evidence to show there is any likelihood that the issuance of CX 4 will be resumed in the future.

69. CX 14 (discontinued in November 1960, and replaced by RX 16), CX 10, and CX 29 adequately set out the nature, extent, material conditions or limitations of the guarantee, and the manner of performance thereunder.

70. (e) *The alleged representation that purchasers can wear*

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or use Vent-Air contact lenses made to their own optical prescription for an unlimited period of time to determine their suitability without incurring any charge or obligation to take or pay for the lenses under corporate respondent's "No-Risk" plan.—Complaint counsel rely on seven advertising pieces to establish the allegations that corporate respondent falsely represented its so-called no-risk plan. These are CX 1, 2, 25, 26, 27, 31, 32, and 34. CX 1 refers to Vent-Air's no-risk plan as follows:

* * * And Vent-Air's exclusive No-Risk plan assures that, if suitable, you'll wear your own custom-made contact lenses before you take them or pay for them.

CX 2 refers to the no-risk plan as follows:

Now Vent-Air's No-Risk plan lets you wear your own prescription lenses *before* you're obligated to take them. Your eyes are examined by our Doctor of Optometry and your new prescription used in making up lenses specifically for you. There is only a modest examination charge if you choose not to take them.

CX 25 refers to the no-risk plan as follows:

* * * And Vent-Air's NO-RISK plan breaks the barrier that has kept so many from enjoying the advantages of these modern invisible lenses. Here's how the plan works: Your eyes are examined and if you're suitable, lenses prescribed and fitted * * * you wear them in our office. A modest examination charge is what you pay. Then only after you've worn your lenses and decided you want them are you required to pay for them. If you decide not to take them you get a new prescription for regular glasses.

CX 26 refers to the no-risk plan as follows:

Now Vent-Air's renowned No-Risk plan is expanded to include thorough eye examinations and changing either to contact lenses or conventional eyeglasses:

Your eyes are carefully examined by a Doctor of Optometry. (Modest examination charge.)

If you're suitable, Vent-Air invisible lenses are custom-fitted to your new prescription * * * you wear them in our office and only if you decide you want them do you pay for them.

If you prefer regular glasses your new prescription is filled in ultra-modern frames of your choice.

CX 27 refers to the no-risk plan as follows:

Come in for your no-obligation demonstration today * * * learn all the advantages of our unique "No-Risk" wearing plan. You may see without glasses tomorrow!

CX 31 refers to the no-risk plan as follows:

Vent-Air now breaks the barrier that has kept so many from enjoying the advantages of invisible lenses.

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Here's how it works: if you're suitable for contact lenses, Vent-Air custom-made invisible lenses are made to your eye prescription * * * you wear them in our office. Only a modest examination or fitting charge is what you pay.

Then only after you've worn your lenses and you've decided you want them are you required to pay for them. There is only the examination or fitting charge if you decide not to take them.*

Full details on this "No-Risk" plan at your local authorized Vent-Air Office.

*May be applied on purchase of regular glasses.

CX 32 refers to the no-risk plan as follows:

USE VENT-AIR'S UNIQUE NO-RISK PLAN

If suitable, you'll wear your own custom-made lenses before you take them.

Full details at your Vent-Air office.

CX 34 refers to the no-risk plan as follows:

Vent-Air's unique "No-Risk" plan permits you to wear your own custom-made lenses in our office before you decide. You really have nothing to lose except your eyeglasses!

To find out more about Vent-Air Contact Lenses, Call or come in at your convenience for a private no obligation demonstration * * * no charge, of course. We'll be delighted to answer any question!

71. Par. 5 of the complaint purports to set out and quote a representation made by Vent-Air in its advertising with respect to its no-risk plan, and which is alleged to be false and deceptive. This quoted portion is as follows:

Now Vent-Air's No-Risk plan lets you wear your own prescription lenses before you're obligated to take them.

This quotation is lifted from CX 2, but does not quote all of the pertinent language in the advertisement which refers to the no-risk plan. However, Paragraph Six of the complaint, subsection 5, alleges that, through the use of the said statement and representation, corporate respondent has represented:

That prospective purchasers of contact lenses can wear or use Vent-Air contact lenses made to their own optical prescription for an unlimited period of time to determine their suitability and can do so without incurring any charge or obligation to take or pay for the lenses under respondents' "no-risk plan";

whereas, there is a fee for examining the eyes of a prospective purchaser and grinding lenses to the proper optical prescription; trial or use of the contact lenses is restricted to brief periods of time and only in corporate respondent's offices during times

when such offices are open.

72. An examination of the advertisements quoted in paragraphs 70 and 71 above demonstrates that each advertisement sets out the provisions and terms of corporate respondent's no-risk plan and specifically states that a charge is made for the eye examination, except CX 27 and CX 32. These two advertisements state that full details of the no-risk plan can be obtained at the Vent-Air office. Dr. Lewison described the procedure when a prospective purchaser visits a Vent-Air office in response to a no-risk plan advertisement (paragraph 50 hereof). It is found, therefore, that the allegations contained in subsection 5 of Paragraphs Six and Seven of the complaint have not been established.

73. With reference to the allegation that respondents have advertised that the lenses could be worn for an unlimited period of time to determine their suitability, it is found that there has been no such representation. All of the advertising under the no-risk plan states that the lenses will be worn in the Vent-Air office. There is no representation in any advertisement that the contact lenses can be taken home by the purchaser and worn for an unlimited period of time without charge or obligation. Indeed, the advertisements state that the lenses can be worn "in our office," and, only after the customer has decided to purchase the lenses is he obligated to pay for them. Further, there is no limitation in the advertisements of the no-risk plan as to the length of time a prospective purchaser may wear the lenses in the Vent-Air office before he decides to take them and becomes obligated to pay for them. Also, if the prospective purchaser decides not to purchase the contact lenses, he may use the prescription for the purchase of a regular set of eyeglasses. Complaint counsel conceded that the complaint does not raise any issue as to the suitability or wearability of Vent-Air contact lenses (Tr. 1054-55).

74. (f) *The exclusivity of services performed by Vent-Air for purchasers of its contact lenses.*—The complaint alleges that the Vent-Air "no-risk plan" and other services provided are exclusive with corporate respondent in that no other seller of contact lenses has such a plan or provides the same services, whereas, the services performed by respondents for purchasers of Vent-Air contact lenses are not exclusive with respondents and are services usually and customarily offered by other sellers to purchasers of contact lenses. The proposed findings of complaint counsel make no reference to this allegation. At the hearing, complaint counsel offered no evidence to substantiate the al-

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Order

legation that other sellers of contact lenses offered to their customers the same services offered by Vent-Air. The only sellers of contact lenses who testified at the hearing, in addition to the respondent, Dr. Lewison, were Doctors Ginsberg and Hollander, former employees of Vent-Air, but now in the private practice of optometry. Dr. Ginsberg testified that his service plan differs from Vent-Air's (Tr. 589), and Dr. Hollander testified that he does not provide free cleaning and adjusting of contact lenses to his purchaser customers (Tr. 805). Accordingly, it is found that this allegation of the complaint has not been established.

75. The hearing examiner heard the testimony of each of the witnesses who testified at the hearing and observed their demeanor while testifying. He has carefully re-examined the testimony of each witness as reported in the transcript of the hearings, and has set out the substantial and pertinent portions of their testimony in the findings herein made. An examination of the evidence and testimony offered by complaint counsel to establish the violations of Sections 5 and 12 of the Act alleged in the complaint, instead of establishing the alleged violations, on the whole, shows a good faith effort by corporate respondent and its president, Lawrence Lewison, to honor and carry out the terms of its guarantees and representations made in advertising material. When all of the evidence and testimony of record is considered, including that offered by respondents, it is found that the allegations contained in Paragraphs Six, Seven and Eight of the complaint have not been established by a preponderance of the evidence.

CONCLUSION

The burden of proof herein rests upon counsel supporting the complaint to establish the allegations therein made by a preponderance of the evidence. Since this burden has not been sustained, it is concluded that the complaint herein should be dismissed.

ORDER

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

ORDER PLACING CASE ON COMMISSION'S DOCKET FOR REVIEW AND DISMISSING COMPLAINT

The Commission, on November 20, 1968, having stayed the effective date of the initial decision dismissing the complaint

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until further order of the Commission and having hereby placed such decision on its own docket for review and determined that the Commission does not accept all of the findings and conclusions of the hearing examiner but that the complaint should be dismissed:

It is ordered, That the proceeding herein be, and it hereby is, placed on the Commission's docket for review.

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