ness of the product to those persons whose symptoms are due to an established or existing deficiency of Vitamin B_1, Vitamin B_2, or Niacinamide, and further unless such advertisement clearly and conspicuously reveals the facts that in the great majority of persons, or of any age, sex or other class or group thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to treatment by the use of the product, and that in such persons the product will not be of benefit.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' preparations, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in or which fails to comply with any of the affirmative requirements of Paragraph 1 hereof.

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

IN THE MATTER OF

WESTERN RADIO CORPORATION ET AL.

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

Docket 7468. Complaint, Apr. 2, 1959—Decision, Sept. 25, 1963

Order requiring manufacturers of a "Walkie Talkie" portable radio transmitter in Kearney, Nebr., to cease representing falsely in newspaper and magazine advertising and otherwise that their said "Walkie Talkie" transmitter had a satisfactory operational range of up to one-half mile for a home receiver and up to 10 miles when transmitting from auto to auto; that the device carried a 1-year service guarantee; and that operation thereof required no license.

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 Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, 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 Western Radio Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Nebraska. Its office is located at Kearney, Nebraska. Individual respondents Paul S. Beshore and W. P. Beshore are officers of said corporation. They formulate, direct and control the policies of the corporate respondent. The address of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the manufacture, sale and distribution of various kinds of electronic devices, including portable radio transmitters sold under the names of "New Magic Walkie Talkie", "Radi-Vox" and "Radio Talkie".

PAR. 3. In the course and conduct of their business respondents ship their products from their place of business in Nebraska to purchasers thereof located in various other States, and maintain, and have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents in the conduct of their business were, and are, engaged in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of portable radio transmitters and related electronic products.

PAR. 5. Respondents in the course and conduct of their said business, and for the purpose of inducing the purchase of their portable radio transmitters, advertise the same by means of advertisements inserted in newspapers and magazines of general circulation and by circulars and other advertising material distributed through the mail and otherwise. Among and typical, but not all inclusive, of the statements and representations appearing in said advertisements are the following:

New Magic Walkie Talkie! Your own pocket size radio station! Broadcasts to any home or car radio without wires or hookups! * * * With this radio talkie you can talk to your friends up to a block or more away! Talk up to 1 mile or more between two automobiles. Instant operation. Just push button to talk. No license needed * * * Guaranteed to work. 1 year service guarantee.

* * * * * * *

A real transistor Powered Pocket Size Radio Talkie. Sends your voice to any house or car radio! No connections, wires or electric "plug in". Works every-

where—up to ½ mile or more! No license or permit required anywhere! * * * One year service. Money Back Guarantee!

* * * * * * *

Use Radio-Talkie Radi-Vox in a thousand ways.

* * * * * * *

Talk to any one radio or to all or any group of radios in nearby locations.

* * * * * * *

Talk from car to car up to 1–10 miles apart. Any number of cars can be used!

* * * * * * *

Between Hotel Rooms—upstairs or down. From car to trailer. To House. Between buildings up to ½ mile or more. Break in regular Radio Broadcasts.

* * * * * * *

PAR. 6. By the use of the statements appearing in the aforesaid advertisements, and others of the same import not herein set forth, respondents represented, directly or by implication:

1. That respondents' portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in the home or other buildings.

2. That respondents' said device, without the use of additional equipment, has a satisfactory operational range of up to 10 miles when transmitting from an automobile to any automobile radio receiver in another automobile.

3. That said device carries a 1-year service guarantee.

4. That no license is required to operate said device.

PAR. 7. The aforesaid statements, representations and implications arising therefrom, were and are, false, misleading and deceptive. In truth and in fact:

1. Respondents' portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of substantially less than up to one-half mile for home radio receivers located in the home or other buildings.

2. Respondents' said device, without the use of additional equipment, has a satisfactory operational range of substantially less than up to 10 miles when transmitting from one automobile to an automobile radio receiver located in another automobile.

3. The guarantee furnished by respondents in connection with said device is limited in certain respects and requires the payment of $1.50 for postage and handling charges, which facts are not disclosed in the advertising of the guarantee.

4. Respondents' said device when used to broadcast in a certain manner set out in the operating instructions, requires a license under the regulations of the Federal Communications Commission.

PAR. 8. The use by the respondents of the foregoing false and misleading statements, representations and implications has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that said statements, representations and implications were, and are, true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase their said product. As a result thereof, trade in commerce has been unfairly diverted to the respondents from their competitors and injury has thereby been done to competition in commerce.

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

Mr. Garland S. Ferguson and *Mr. John J. McNally* for the Commission.

Mr. Charles H. Rowan, Milwaukee, Wis., and *Mr. C. W. Collins*, Los Angeles, Calif., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

JULY 25, 1962

This is a proceeding under the Federal Trade Commission Act, charging violation of § 5 thereof in that respondents have falsely advertised, in interstate commerce, a pocket-size radio transmitter designated by them, and referred to usually in the record herein, as Radi-Vox. There are four distinct charges alleged in Paragraphs 5, 6, and 7 of the complaint, which in substance are that respondents have falsely claimed in advertisements inserted in newspapers and magazines of general circulation, as well as by circulars and other material distributed through the mail and otherwise, that their radio transmitting device in question:

1. Has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in buildings;
2. Has a satisfactory operational range of up to 10 miles when transmitting from an automobile to any automobile radio receiver in another auto;
3. Carries a 1-year service guarantee; and
4. Requires no license to operate.

Respondents, in substance, deny these charges in their answer. It is found herein that the material allegations of the complaint either have been admitted by respondents or have been sustained by preponderance of the evidence, and an appropriate order is hereinafter issued.

The complaint herein was issued April 2, 1959, and the respondents filed their answer on June 10, 1959. While the record is short, the subsequent history of the litigation is somewhat complicated, and must be stated in order to determine herein the real contentions of respondents. Prior to any hearings, counsel supporting the complaint, and respondents' counsel negotiated a consent agreement, which was submitted to the hearing examiner on October 27, 1959. It disposed of the first three charges, but reserved the right to litigate the fourth charge. Reference would not be made herein to any proceedings relating to this consent agreement, since they are not a part of the official record, except that respondents, in their proposed findings, insistently contend that the initial decision of the hearing examiner accepting said consent agreement and issuing an order in accordance therewith is final and binding upon the parties as to the first three charges, and limits the issues for trial and decision to the fourth charge. Respondents also, as a part of their proposals, tender the same order that was stipulated in said consent agreement.

The hearing examiner issued his initial decision accepting said consent agreement on October 28, 1959, and thereafter, upon review, the Commission, on December 2, 1959, issued its order vacating such initial decision as "not appropriate in all respects to dispose of this proceeding", and remanded the case to the hearing examiner for further proceedings. It is the respondents' contention (Proposed Findings, pp. 1–3, paragraphs 1 and 3) that, the agreement having been duly approved by respondents and by counsel supporting the complaint and the Bureau of Litigation of the Commission, and the initial decision accepting said agreement being in strict accord with the then Rules of Practice of the Commission, the said agreement became final and binding, and that the first three charges of the complaint are not litigable herein because:

1. Said initial decision was not served upon the parties until November 14, 1959, and the Commission's order vacating it was improper since it was issued on December 2, 1959, more than fifteen days thereafter;

2. No party had appealed from the initial decision; and

3. There was no sound factual basis for its disapproval by the Commission.

No such contention had previously been made by respondents throughout the course of this proceeding since the vacation of said initial decision.

Respondent's counsel have erroneously attempted in such contention to apply the present rules of the Commission, which are greatly misconstrued by counsel, to a proceeding which was conducted entirely under the Commission's then applicable May 1957 Rules of Practice for Adjudicative Proceedings. Under § 3.25 of those Rules, and in strict pursuance thereof, the initial decision accepting the consent agreement was issued and served within 30 days following the submission to the hearing examiner of said agreement, and while a joint appeal by the parties was provided for by such Rules in the event the hearing examiner did not approve the consent agreement, the Commission retained its authority and discretion, under § 3.25(e) thereof, without limitation as to time, either to approve or reject any consent agreement accepted by the hearing examiner and his initial decision thereon, and to remand the case to the hearing examiner for adjudication in regular course. Furthermore, the said initial decision under consideration here, in accord with such Rules, was in no sense final, expressly providing, "The agreement shall not become a part of the record unless and until it becomes a part of the decision of the Commission." Also, a consent-order adjudication, under the Commission's Rules, always has been and still is a matter of discretion to end litigation upon agreement, and is not a determination of any contested factual issues.

Under the Commission's present Rules, hearing examiners are no longer concerned with consent settlements, which are now delegated to the Office of Consent Orders under Part 3 of the Commission's Rules of Practice. Procedures and Organization effective June 1, 1962, which Part 3 became originally effective July 21, 1961. Counsel for respondents is evidently also confused by the current Rules of Practice for Adjudicative Proceedings, which is Part 4 of the Commission's present Rules of Practice, Procedures and Organization. Section 4.19 of the Rules of Practice for Adjudicative Proceedings provides that a petition for review of an initial decision must be filed within 15 days after service of the initial decision, but also provides that the Commission has an additional 15 days within which to place a case on its own docket for review. This rule has no application whatsoever either current consent-order procedures or to any consent-order proceeding coming under the former rules, such as the one under consideration here. Neither of these consent-order procedure rules limits the Commission's time for consideration and

disposition of a consent-order agreement. The several contentions of respondents in this respect are therefore wholly without merit, and the said abortive 1959 consent-order proceedings constitute no bar to adjudication in regular course of any issue in this case.

Following the remand of this case to the hearing examiner for further proceedings, hearings were held on January 7–8, 1960, in Washington, D.C., during which hearings evidence was presented only in support of the fourth charge of the complaint, which involved only the issue that respondents had falsely advertised their said Radi-Vox as requiring no license to operate. At these hearings, counsel supporting the complaint presented evidence in support of that charge only, and respondents likewise presented their defense only as to such charge. No rest was taken by either party on any charge of the complaint, the matter being left open for further proceedings by both parties.

On February 9, 1960, counsel supporting the complaint filed a "Motion To Reopen Hearing As To The Issue Covered By Paragraph Seven, Subparagraph 4 Of The Complaint", on the ground of surprise arising from the testimony of respondent Paul S. Beshore, who had testified for respondents on January 8, 1960, in essence that two units of said Radi-Vox which had been submitted to the Federal Communications Commission were not of the kind sold to the public, but were experimental units from the respondents' laboratory, which had substantially higher field strength than the regular production models advertised and sold by respondents, and that the same, in his absence from respondents' factory, were erroneously given to a representative of the Federal Communications Commission by some employee without Beshore's knowledge. Respondents strenuously objected to any further hearings on said fourth charge in their "Memorandum Opposing Motion To Reopen Hearing", filed on February 17, 1960.

Counsel supporting the complaint, according to said motion, desired to take the testimony of one Ablowich, a former employee of the Federal Communications Commission, who, such counsel claimed, was available to testify and, if called, would controvert the said testimony of respondent Paul S. Beshore.

On March 21, 1960, the hearing examiner issued his interlocutory order reopening the hearing as to said fourth charge as being in the public interest, in order that all available evidence pertaining thereto might be fully presented on the record. Following this, a number of hearings were held on all four charges of the complaint, on various dates on and between March 29, 1960, and April 3, 1961, in

Kansas City and St. Louis, Missouri, and Los Angeles, California. At the hearings in St. Louis and Kansas City, evidence was received in connection with the first three charges of the complaint, while the hearing at Los Angeles was devoted exclusively to the testimony of the said witness Ablowich relating solely to the controversial fourth charge of the complaint. After the completion of these hearings, respondents presented their evidence in defense at two hearings, one in Washington, D.C., on October 18, 1961, and one which was finally held in Omaha, Nebraska, on April 2, 1962, after unavoidable delays caused by the removal of one of respondents' expert witnesses and the accidental death of another just prior to the time set for their respective appearances to testify.

Respondents' defense having been concluded, counsel supporting the complaint was given until May 1, 1962, in which to elect to present rebuttal evidence. On that date, such election not having been made, and all evidence having been presented, the reception of evidence was terminated and June 15, 1962, fixed as the date for submission by the parties of their proposed findings, conclusions and order, which were duly filed.

On October 16, 1959, counsel for the parties had agreed upon a stipulation as to certain facts material to the fourth charge of the complaint and the denial thereof by respondents, relating to the necessity for a license for the device in question under the regulations of the Federal Communications Commission. At that time it was anticipated that the consent agreement would be accepted by the Commission, and that it would be unnecessary to try the other three issues which were covered thereby. Subsequently, as above stated, the Commission rejected the consent agreement and the case came on for trial on all issues. On the first day of hearing, January 7, 1960, by agreement of parties, the stipulation was received in evidence as Commission's Exhibit 1. In their proposed findings (Paragraph 4, page 3) the respondents for the first time contend that such stipulation, when received in evidence, limited all future hearings to consideration of the fourth issue alone. A careful study of the stipulation reveals that it contains no such limitation, and subsequent trial of the case, wherein all parties contested all issues, demonstrates beyond question that respondents did not consider such a limitation to exist. Respondents' contention that the stipulation limits the proceeding to consideration of the fourth charge only is therefore rejected as inconsistent with the facts and wholly untenable.

Respondents, in their proposed findings, raise only one other question with respect to the procedure followed by the hearing examiner.

They contend that there is error in the hearing examiner's refusal to permit examination of an investigation report made to the Commission by the witness Charles T. Snavely, an attorney-examiner for the Commission. This witness testified on March 29, 1960, in Kansas City, respecting his procurement of a Radi-Vox purchased by the witness John E. Mair by mail from respondents as a result of one of their published advertisements. Snavely testified, in substance, that he interviewed Mair on September 3, 1958, and that he, jointly with Mair, tested the device as to range and the transmission of any intelligible conversation, without satisfactory results; that Mair permitted him to take the device with him, and he then made personal tests on his portable radio at home, as well as on his car radio, all without satisfactory operation, although the instruction sheets which Mair had received with the radio were followed strictly in all tests. Snavely then obtained a loan of the device from Mair for further tests, and subsequently had it tested by experts.

In the course of his direct examination Snavely referred briefly to his final report to the Commission, and on his cross-examination respondents' counsel inquired further about such report, which was dated December 15, 1958, and finally asked to see the report, to which counsel supporting the complaint objected on the ground that it was confidential material. The hearing examiner sustained the objection because the Commission had never delegated any authority to its employees or to hearing examiners to disclose any such official reports, and stated in substance that the Commission itself, within its discretion, would be the only authority capable of ordering the production of said report (Tr. 110–113). In its order denying interlocutory appeal issued September 15, 1958, in *Sun Oil Company*, Docket 6834, the Commission granted discretion to its hearing examiners, where there is admittedly a prior statement of a witness referring to documents signed by him and contained in the Commission's confidential files, to screen such documents, and in the exercise of sound discretion, to permit their use in the cross-examination of such witness. In that decision, however, the Commission adhered strictly to its Rules relating to the release of confidential information insofar as such related to interview reports by its employees, and did not delegate the authority to require their production, under any circumstances, to its hearing examiners. Since counsel for respondents did not avail themselves of the patent remedy provided by the Commission's said Rules, of requesting the Commission itself to order the production of the requested document, and the hearing examiner had no authority to do so, there is no error in the hearing examiner's refusal to require the production thereof.

The hearing examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All procedural and evidentiary matters have been thoroughly reviewed, and all rulings made during the course of the proceeding are hereby confirmed. All arguments, proposals and briefs of counsel have been carefully studied and considered in the light of the entire record, and all such proposals not herein adopted either verbatim or in substance and effect are hereby rejected.

Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint have fully sustained the burden of proof incumbent upon them, and have established, by substantial, reliable and probative evidence, and the fair and reasonable inferences drawn therefrom, all the material allegations of the complaint. The hearing examiner therefore makes the following:

FINDINGS AS TO THE FACTS

The facts alleged in Paragraph 1 of the complaint are admitted by the answer, and also stipulated. Therefore it is found that respondent Western Radio Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska, with its office located at Kearney, Nebraska; that individual respondents Paul S. Beshore and W. P. Beshore are officers of said corporation; that they formulate, direct and control the policies of the corporate respondent; and that the address of the individual respondents is the same as that of the corporate respondent.

The facts alleged in Paragraph 2 of the complaint are likewise admitted by the answer and also stipulated. It is therefore found that respondents are now, and for more than 1 year last past have been, engaged in the manufacture, sale and distribution of various kinds of electronic devices, including portable radio transmitters sold under the names of "New Magic Walkie Talkie", "Radi-Vox" and "Radio Talkie".

The facts alleged in Paragraph 3 of the complaint are also admitted by the answer and stipulated. It is therefore found that in the course and conduct of their business respondents ship their products from their place of business in Nebraska to purchasers thereof located in various other States, and maintain, and have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The evidence, moreover, proves the substantial extent of respondents' business. Respondent Paul S. Beshore testified that they have a

plant occupying a square block of area in Kearney, Nebraska, of which approximately 40,000 square feet of space is used for manufacturing their various products. The testimony of the witness Ablowich went into considerable detail concerning the various parts of respondents' offices and factory, their machinery, their operations, their manufacturing of the Radi-Vox as well as of intercommunication sets, broadcast receivers, and other related electronic products not involved in this proceeding, and the large number of employees he saw engaged there in their work at the time of his visit in early February 1957.

While the fourth paragraph of the complaint, relating to respondents' competition in commerce, was denied by the answer, the facts therein set forth were later stipulated, and the testimony of respondent Paul S. Beshore further shows that as of January 8, 1960, respondents had manufactured approximately 20,000 of the Radi-Vox device here in question. It is therefore found that respondents in the conduct of their business were, and are, engaged in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of portable radio transmitters and related electronic products.

There were received in evidence, without objection, two advertisements of respondents relating to the Radi-Vox, Commission's Exhibits 11 and 12, which were advertisements published respectively in the January 1957, and July 1958, issues of the magazine Popular Science Monthly. There was also credible testimony that the same ad appeared in the magazine Mechanix Illustrated (Tr. 91). These two publications were then, and now are, magazines of general circulation throughout the United States. The respondents also used mail circulars and other advertising material offering such device to the public. Commission's Exhibit 13–A, –B is typical of these circulars. This proceeding is premised upon the representations contained in such advertisements.

The evidence relating to the third charge of the complaint, that respondents' device carries a 1-year service guarantee, will be first considered, since it is determinable solely upon the basis of respondents' said advertising and their instructional sheets (CXs 3–A, –B and 16–A, –B, and RX 11–A, –B). The respondents' said advertisements published in magazines stated in this respect:

GUARANTEED TO WORK. 1 YEAR SERVICE GUARANTEE.

In their circulars respondents stated in such respect:

Further—Radi-Vox is guaranteed free from defects in workmanship or material for one year from date of purchase.

Respondents' sales of Radi-Vox devices were made as a result of these advertisements, and delivery was made to the purchasers by the United States mails. In the shipping containers of said devices, respondents placed circulars setting forth operating instructions (CXs 3–A, –B and 16–A, –B, and RX 11–A, –B). The purchaser, upon reading such instructional sheets, learned for the first time that "During the period of one year after purchase, repairs will be made for a charge of $1.50 for postage and handling". In these instructions, also for the first time so far as the purchaser knew, respondents reserved the right to determine whether such devices "have failed due to improper battery installation, alteration or unusual abuse", and agreed, after such determination, to repair said devices "on an actual cost basis and return collect on delivery for the charges due in addition to the standard handling and postage charge of $1.50". This more specific follow-up guarantee contained in the instruction sheets sent to all purchasers who bought the device by mail during the years preceding the institution of this case was only changed in a few particulars in the guarantee used currently by respondents at the time of the hearings (RX 11–B). There was an increase in the postage and handling charge from $1.50 to $2.00, and a new statement that other actual repair charges "generally will be $3.00 for any reasonable repair".

Since the magazine advertisements which the public first saw induced the purchase, this first impression on the prospective purchaser is the determining factor upon the question of deception with reference to the guarantee. It is now well established "that a guarantee per se negatives the idea of a further consideration" (*Parker Pen Co.* v. *F.T.C.* (C.C.A. 7, 1946), 159 F. 2d 509, 511). This case and many cited therein, as well as numerous subsequent cases, have established beyond question the principle that the Commission's duty is to protect the uninformed, casual or negligent reader from deception by false advertising. Therefore information furnished subsequent to the tender of a guarantee, belatedly revealing the true facts to the purchaser concerning all conditions and limitations attached to such guarantee, does not alleviate the first deception, nor absolve the advertiser from responsibility for his original false representations. Since the original statement of guarantee was absolute and without any qualification, it is therefore necessarily found that respondents have falsely and deceptively represented that their Radi-Vox is unconditionally guaranteed for one year, in violation of § 5 of the Federal Trade Commission Act, as set forth in the third charge of the complaint.

The first and second charges of the complaint may be considered together because the evidence pertaining thereto is linked together in the testimony of the witnesses who referred to these matters; and likewise in respondents' advertisements containing these two types of misrepresentation, they are either expressly stated together, or closely mingled in their arrangement in the text.

Respondents' "Radi-Vox" is a small radio transmitter which is succinctly and well described by the Federal Communications Commission experts who testified. This description is:

> The device consists of a small transmitter unit designed to be held in the hand, 2½ X 4½ X 1¼ inches in size. The antenna extends 7½ inches out of the case, and an extension is provided to make the antenna extend 16½ inches out of the case. * * * The transmitter itself consists of a transistor supplied by a 6-volt battery. The unit is designed to operate in the lower part of the standard broadcast band and is tunable by a slug. A microphone is built into the face of the unit (CX 4, Report of John Knight, F.C.C. Project Engineer, F.C.C. Office of Chief Engineer, Laboratory Division, joined in by E. W. Chapin, Chief of said Division, and another executive official thereof; and CX 19, Report of H. W. Bourell, Engineer in Charge of the Kansas City, Missouri, Field Operating Division of F.C.C.).

Under the accompanying instructions, the Radi-Vox device is put into operation by pulling down a "Talk Switch" and manipulating a frequency setter button and the extension of the antenna as may be required.

The rather small magazine advertisements of Radi-Vox, pertinently to these two charges, emphasize the following statements, largely in capital letters:

> BROADCAST TO ANY HOME OR CAR RADIO WITHOUT WIRES OR HOOKUPS!
>
> With this Radio Talkie you now CAN TALK TO YOUR FRIENDS UP TO A BLOCK OR MORE AWAY! Talk up to 1 mile or more between 2 automobiles. INSTANT OPERATION! Just push button to talk!

In the circular enclosed with the device when mailed to the purchaser, in bold script type, appears the following:

> Talk to all house and car radios everywhere! * * * No wire connections required!

These words are followed by large capitalized letters, stating:

> Normal range up to ½ mile*,

followed by the word "Guaranteed". In the small-print footnote to which the star refers, the circular states:

> We guarantee RADIO TALKIE will transmit or send your voice without extra connectors or wires while you walk, to any ordinary radio anywhere in your local area or building and up to ½ mile or more when operated in accordance with simple instructions and precautions. We guarantee that Radi-Vox will

transmit or send your voice on wave bands from 550 to 800 Kilocycles AT WILL by a simple dial adjustment.

This circular further states:

BROADCAST TO ANY HOME OR CAR RADIO WITHOUT WIRES OR HOOKUPS OF ANY KIND! * * * HAS SENSITIVE VOICE MICROVOLT AND FREQUENCY SETTER. PUSH TO TALK SWITCH—INSTANT OPERATION.

The circular further emphatically sets out more specific representations:

TALK TO ANY ONE RADIO OR TO ALL OR ANY GROUP OF RADIOS IN NEARBY LOCATIONS.

TALK FROM CAR TO CAR UP TO 1-10 MILES APART. ANY NUMBER OF CARS CAN BE USED!

BETWEEN HOTEL ROOMS—UPSTAIRS OR DOWN.

FROM CAR TO TRAILER—TO HOUSE.

BETWEEN BUILDINGS UP TO ½ MILE OR MORE.

BREAK IN REGULAR RADIO BROADCASTS!

While elsewhere in this circular reference is made to instructions which will come with the device "for operation in cars, homes, between buildings—over miles of phone lines", such language does not alter the definite statements made elsewhere therein. Furthermore, in the magazine advertisements there is additional language,

COMPLETE READY TO OPERATE with instructions and hundreds of ways and tricks for broadcast through any radio you desire.

This language also does not alter the positive representations previously made.

Two consumer witnesses credibly testified in support of the case-in-chief. It does not appear that either one of them had complained to the Commission before being interviewed by its representative Snavely. John E. Mair of Kansas City, an assembler at General Motors, bought his Radi-Vox through an ad in the Popular Science magazine, which ad he had seen in that and several other magazines, including Mechanix Illustrated, for a considerable period of time before he actually bought the device. He received his Radi-Vox in August 1958, and attempted to operate it. He read the accompanying instructions, but certain information contained therein, which indicated conditions and areas where trouble in operating the device would occur had not appeared in the ad through which he became interested and purchased the device. He found that the device did not seem to work, even after he bought new batteries for it. He tried it on several different radios, and could only get a squeak when he touched antennas. It was during the period of his tests that the

Commission's attorney-examiner Snavely, who had obtained from respondents a list of Radi-Vox buyers' names in the area, came to his home and inquired about his Radi-Vox; and the two of them made several tests together in Mair's home. Mair made no attempt to communicate with respondents, and heard nothing further from them after receiving the device. There was an attempt on cross-examination of this witness to develop that he lived in an electrically noisy neighborhood, and also that he took the Radi-Vox apart, but the witness, while admitting there was electrical equipment in the neighborhood, stated he was unable at any time to get the device to work, even when all electric lighting and other possible interference was turned off, and also stated he did nothing but install new batteries in the Radi-Vox. Snavely, after fruitless tests in company with Mair, as already stated, later borrowed the device and then unsuccessfully tested it himself, both in his own apartment within an area free from business noise and in his auto, and it worked neither place. He then gave it to the witness Robert W. Hester, who owns and operates a television and radio service company. With Snavely, Hester ran some preliminary checks on the device, according to its instruction sheet, and they found it would not work except with an additional carrier wire. Hester detailed the indoor checks, and then testified that they took it outdoors, beyond the range of any radiated noise, and after various tests with different receivers, were unable to get any reception from the Radi-Vox other than just some noise.

Hester then referred Snavely to the Television Service Engineers, a trade association of which Hester was a member, for a more thorough testing of the device. The said Radi-Vox was finally referred to this oganization's Technical Committee, of which one Donald Day was chairman. Day, a radio and electronics technician with considerable experience, including teaching in that field, made further tests with the instrument, using recognized standard testing equipment. His tests, on the Hammurland HQ–129 Receiver in a light commercial business zone, gave intelligible voice reception for only about 40 feet. An automobile radio check in the same area resulted in reception at approximately only 20 feet. He then took the Radi-Vox and the testing equipment 20 miles outside of Kansas City, into a sparsely-populated area with no obstructions, and in that rural territory set up the Hammurland and attached approximately 100 feet of aerial to the receiver. There a barely intelligible reading of the Radi-Vox without attachments was obtained at about 350 feet distance, under excellent testing conditions. A test was also made

with the automobile radio at the same rural location, with a perceptible radiation of only about 75 feet from the Radi-Vox. Use of the Hammurland Receiver approximately doubled the distance of reception in the several tests, but, as Day reported it, a Hammurland Receiver is "normally not in the hands of the average radio listener" (R. 122, CX 12–B). After other similar tests, he made a report of his findings in writing, which he gave to Snavely (CX 12–A, –B). His conclusions in the report were that communication between cars up to a mile or more, or between houses a block or more apart, would be possible only under special conditions, if at all.

The second consumer witness called by the Commission was Dr. Paul B. Vatterott, who also purchased a Radi-Vox from the respondents through a magazine ad in Popular Science. His attempts to make it work failed, and he thereupon opened it and found a connection was corroded by a leaking battery, so that he had to replace the battery. He made several attempts to transmit messages from his automobile to another driven by his brother-in-law on a trip they and their families made to Colorado. The Radi-Vox worked when the cars were about 50 feet apart, but when they were one or two blocks apart the Doctor's voice was not audible in the other car. He also tested the device in his private office by attempting to call his nurse out in the reception room, where there was a radio; this attempt worked out so poorly it was finally given up, although the distance between the transmitter and the receiving radio was only about 25 feet. He also tried the Radi-Vox out at home, but it would not work in excess of 50 feet from the receiving radio.

The Commission's representative, Snavely, called upon him, as he had upon Mair earlier, and was permitted to take the Doctor's Radi-Vox for testing and checking in the summer of 1960. The Doctor was quite objective in his testimony, and volunteered that he did not expect too much for the small amount he had paid for the Radi-Vox, and on cross-examination conceded that he had not followed all of the instructions that came with the device. Repeated inquiries as to whether he had used any additional equipment or bought a coupler to connect the transmitter to the automobile antenna, as set forth in the instruction sheet, were answered by him in the negative. This, of course, was of little importance, since the advertisement itself promised practically universal use without reference to additional hookups.

Snavely, in June 1960, delivered this Radi-Vox to the witness Harold W. Bourell, engineer in charge of the Kansas City Federal Communications Office, an experienced radio engineer. Upon re-

ceiving authority from the Washington office of that Commission, Bourell, using several standard field intensity meters, checked and rechecked the Radi-Vox for its field-intensity measurements or radiation. He made a complete, detailed report thereof (CX 19), dated August 29, 1960. From his tests he found, among other things, that 6 feet from the Radi-Vox with its antenna fully extended, voice modulation was fairly clear and could be understood, but at 10 feet it was too weak and distorted to be understood, and could not be heard at all beyond 15 feet. His tests were made on several days in August 1960, at his home and in an open residential area free from industrial radio noises, and as a result of his test, wherein he used a 70-foot antenna, the signal strength of 200 microvolts per meter at a distance of 100 feet was far in excess of that authorized without a license from the Federal Communications Commission under Part 15 of its Rules and Regulations. His further conclusions as to respondents' device violating such rules are subsequently referred to in connection with the evidence relating to the fourth charge of the complaint.

Respondent Paul S. Beshore manifestly is greatly interested in the outcome of this proceeding. While he has had extensive experience in radio, in attempting to explain away the results of the several tests made by the foregoing witnesses his testimony must be rejected as purely his professional opinion, based on the hypotheses of what the record showed had occurred during such tests. The results of the various tests made by Beshore also must be rejected, in view of his general lack of credibility, as hereinafter discussed. Certain tests were made for respondents by the only other witness called by them, one Peter D. Young. He is also of Kearney, Nebraska, a young electrical engineer student who holds television and radio-telephone licenses from the Federal Communications Commission and is the chief engineer of a television station in Kearney. He admitted that all his tests were made by him operating the receiver, while Richard Beshore, the son of respondent Paul S. Beshore, operated the transmitter. These tests were made on March 28 and 29, 1962, with two transmitters which Paul S. Beshore testified were production models. The tests for transmission distance or operational range were made both in and between buildings in Kearney, and also between automobiles in rural areas nearby. The tests in Kearney were made in locations having overhead electric or telephone wires. The automobile tests, as made, required additional hookups and equipment, such as a coupler and a hookup of the transmitter with the car radio antenna. In the auto road tests, it is also noted, Young always operated the radio receiver, which he, as an expert, had specially tuned in for the reception of the transmitter signals from the other car. These tests,

as well as tests made by him to determine field strength, have but little value.

Therefore, upon the weight and credibility of all the evidence, it is found that respondents' portable radio transmitter, the Radi-Vox in question, without the use of additional equipment thereon, or special local conditions such as electric wiring in houses or wires along the highway, has a satisfactory operational range, for use with radio receivers located in the home or other building, of not more than 50 feet in city, town, or commercial areas, or 75 feet in rural areas; and such device, without additional equipment, has a satisfactory operational range of no more than two city blocks when transmitting from one automobile to a radio receiver located in another auto. It is accordingly found that the first and second charges of the complaint have been sustained, and that, by the use of the statements contained in their advertisements, respondents have falsely and deceptively represented, directly or by implication, that their said portable radio transmitter, the Radi-Vox device, without the use of additional equipment, has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in the home or other buildings, and that their said device, without the use of additional equipment, has a satisfactory operational range of up to 10 miles when transmitting from an automobile to any automobile radio receiver in another automobile.

At the time counsel supporting the complaint filed their proposed findings, they also submitted an extensive brief on the law and evidence relating thereto, in which, among other things, they pointed out with great particularity the numerous inaccuracies and weaknesses of respondents' evidence on the contested issues involving the first, second and fourth charges. Especially, they detailed the testimony of the witness David Ablowich, and ably analyzed it in contrast to the testimony of respondent Paul S. Beshore relating to the fourth charge, to which it was diametrically opposed. As already stated, when Beshore testified in Washington, D.C., on January 8, 1960, he stated (Tr. 54–55) that:

A. My understanding of the situation was that a Mr. Ablovitch (sic) who is an employee at the FCC Monitoring Station at Grand Island, came in to the plant, and I was not there, one of the employees gave Mr. Ablovitch (sic) two units. But he made the statement that he didn't know what he wanted to use them for. * * * They apparently were experimental units that were in our laboratory at the time Mr. Ablovitch (sic) from the FCC came in. * * * The way it was explained to me, was that there were no production units available to give to him.

Q. You have stated that these production models had a 10,000 micro forad (sic) antenna coupler; whereas, your regular sets have a 2500 micro forad? (sic)

A. That's right; it's micro micro forad. (sic)

Q. Antenna coupler?

A. That's right.

Q. What difference in field strengths would result from a transmitter having 10,000 micro farad antenna coupler?

A. It would be substantially higher. * * *

He also testified that the units respondents received back from the Federal Communications Commission after tests made by its experts Knight and Chapin, at Laurel, Maryland, "had 10,000 micro farad couplers" and that his field tests, made in January 1957, of the Radi-Vox that has been advertised and sold by respondents, still obtain, since there has been no change in the device itself since that time, although occasionally a field test is made of a model from the production line, the results of which do not vary from those of the tests made in January 1957.

This particular part of Beshore's testimony was basically the reason for counsel supporting the complaint insisting upon taking the testimony of Mr. Ablowich, because if the Radi-Vox models tested by the Federal Communications Commission's experts were not regular production models, but were experimental models with four times the field strength of such regular production models, the results of those tests, as testified to by such experts, would be inapplicable herein, and would not tend to establish the fourth charge of the complaint, that respondents' device was powerful enough to require a license from that Commission. Respondents' emphatic opposition to the taking of Ablowich's testimony strongly indicates that respondent Paul S. Beshore knew that Ablowich would positively contradict him, as he later did, and reveal the fact that Beshore himself had been present at the factory when Ablowich visited it on February 6, 1957, and had delivered to Ablowich two regular production models of Radi-Vox taken from a regular shipping case (Tr. 239–241) for testing by the Federal Communications Commission. This is exactly what was shown by the testimony of Ablowich when it was finally taken. Ablowich further testified that Beshore sketched for him a rough circuit diagram of the device in question (CX 22). This diagram was referred to by Beshore in his letter (CX 23) hereinafter discussed. In Beshore's testimony he attempts to explain this diagram, stating it is not exact, but is "basically" correct.

Ablowich, an experienced electronics engineer, now with the Meteorology Department of the United States Navy, on February 7, 1957, was assistant engineer in charge of the Federal Communications Commission Monitoring Station at Grand Island, Nebraska, not far from respondents' place of business at Kearney. Over many years he had frequently met and associated with respondent Paul S.

Beshore in "ham" radio and various professional group activities. Commission's Exhibits 5 and 6 are photographs taken at such a meeting, which show both Ablowitch and Beshore standing near or next to each other. They were on more than friendly terms, and it is not "a" Mr. Ablowich, as stated by Beshore, but the Mr. Ablowich whom he knew intimately, and only reluctantly admitted knowing when recalled to the witness-stand in the course of the defense, after Ablowich had testified. This clearly demonstrates that respondent Beshore's claim or inference that he did not know Mr. Ablowich, or knew him only slightly, is completely false. Furthermore, Beshore's sworn statement that he was not present when Ablowich obtained the two devices alleged to be special experimental models was utterly incorrect, because a few days after Ablowich had visited respondents' plant, Beshore wrote a letter to Arthur A. Johnson, engineer in charge of the Federal Communications Commission Monitoring Station at Grand Island (CX 23), dated February 15, 1957, stating that he was transmitting three

> additional sets of instruction sheets that we furnish with the Radi-Vox Radio-Talkie Device. We furnished two of these units to Mr. Dave Ablowich when he called on us February 6th, and also discussed the technical information with him. We also furnished a circuit diagram of the device for your information. * * * As I outlined to Mr. Ablowich, we use a Ferris instrument. * * * Mr. Ablowich left a copy of Document 9288, which we did not have * * *.

A true copy of this letter of Beshore's was received into the record by stipulation (CX 23) upon the hearing examiner's order of July 26, 1961, and, as already stated, Commission's Exhibit 22 is the "circuit diagram of the device" which Beshore mentioned in said letter, and which was produced at the hearing in Los Angeles by witness Ablowich. Beshore, in his testimony given subsequently on October 18, 1961, while conceding that he had always been on friendly terms with Ablowich, denied the transaction of early February 1957, as testified to by Ablowich. But he was hesitant and was not clear as to whether or, if so, when, he gave Ablowich the schematic diagram of the Radi-Vox (CX 22). And Beshore never did explain away, in his said testimony of October 18, 1961, and his later testimony of April 2, 1962, this letter of February 15, 1957 (CX 23), wherein he referred beyond question to his own personal dealing with Ablowich on February 6, 1957. Beshore testified that the two instruments which had been delivered to the Federal Communications Commission were returned, and claimed that when he received them they contained interior couplers, which were "10,000 micro micro forad" (sic) couplers. This is certainly inconsistent with his said letter, which stated he had furnished "a circuit dia-

gram of the device". Certainly Beshore would not transmit special units to the Federal Communications Commission for testing, and at the same time give Ablowich his own hand-drafted rough circuit diagram of a regular production model of the device.

Counsel supporting the complaint, in their said brief, have pointed out numerous other contradictions and weaknesses in respondent Beshore's testimony, which are unnecessary to detail here. Beshore's testimony is unreliable insofar as contradicted by the credible evidence of witnesses testifying in support of the complaint, and the reasonable and fair inferences drawn therefrom, as well as from his own letter (CX 23), and must certainly be rejected.

It is therefore clear, upon the weight and credibility of all the evidence, that the tests made at Laurel, Maryland, by the Federal Communications Commission's experts John E. Knight and Edward W. Chapin were made on regular production models of the Radi-Vox device which Beshore himself had delivered to Ablowich at respondents' own plant, and not upon any "experimental" models much higher in field strength. Without extensively detailing the technical aspects of the tests made, it is sufficient to quote from the summary of these experts' official report, as follows:

> Laboratory tests indicate that the unit is in compliance with Part 15 if operated with the small antenna provided with the unit, but that it is not in compliance when used with large antennae as outlined in the operating instructions furnished with the unit.

In this connection, unquestionably a regular stock model of Radi-Vox sold to Dr. Vatterott, when tested by the witness Bourell, engineer in charge of the Kansas City Federal Communications Commission Monitoring Station in August 1960, was also found to be in violation of that Commission's rules. Bourell testified that he found that its radiation limit

> is far in excess of that permitted in Part 15 of the Commission's rules, while the instructions furnished with the Radi-Vox unit state that coverage up to several blocks may be obtained by connecting the antenna of the Radi-Vox to a wire antenna of 50 to 100 feet; and on the reverse side of the instruction sheet, in the last paragraph, it is stated, in spite of all these suggested hookups, the power radiated does not exceed legal requirements (CX 19).

In all of his tests Bourell used a frequency of 650 kilocycles, and found that when a 70-foot antenna was used, the device showed a signal strength measurement of 200 microvolts at a distance of 100 feet.

Respondents' advertising contains only the bald statements, "NO LICENSE OR PERMIT REQUIRED ANYWHERE" or "No license needed" (CXs 6 and 7). Part 15 of the Federal Communications Commission's cur-

rent Rules, July 1958, is in evidence (RX 7–C). Section 15.208 thereof clearly requires a station license from that Commission for the operation of any low-power communication device which was manufactured after December 31, 1957, if such device exceeds the authorized radiation limit set forth in said Rules. The evidence shows that said Commission's Rules provide the following radiation limits: for 650 kilocycles of 36.9 microvolts per meter at 100 feet; 15 microvolts per meter at 190 feet; and for 950 kilocycles, 15 microvolts per meter at 165 feet. The evidence further shows that such limits were greatly exceeded by respondents' two devices when they were tested by the said two Federal Communications Commission experts during April 1957, and by respondents' device tested by another such expert in August 1960. There is substantial identity, insofar as the minimum field intensity requirement is concerned, between § 15.211 of said July 1958 rules and the pertinent section of Part 15 of the Rules of that Commission which were in force when the tests of 1957 at Laurel, Maryland, were made by that Commission's experts Knight and Chapin. Respondents' device, when an extended wire antenna is used therewith, exceeds this minimum field intensity, and therefore requires a station license issued by the Federal Communications Commission in order to be operated legally.

From the great preponderance of the evidence, it must therefore be found that the fourth charge of the complaint has been amply sustained, and that respondents have falsely represented that their Radi-Vox device may be operated, under all conditions and circumstances, without a license.

Respondents' instruction sheet for the Radi-Vox (RX 11–A, –B), which sheet is entitled "Radio Talkie Broadcaster", had been used for about two or two and one-half years before April 2, 1962: that is, at most, since late 1959. It has been changed from the one used by respondents before that time, according to Beshore's testimony wherein he stated, "[There are] very little [differences in the wording of the text]. * * * It is basically the same as it has always been. We have had to change it somewhat because of the change in rules of the Federal Communications Commission since the beginning * * *. (Tr. 365.) While the product is the same, the name of the device is changed to only "Radio Talkie", which had been used somewhat in respondents' advertising as well as the name "Radi-Vox" to describe the instrument. In this later instruction sheet emphasis is laid on the device's operation "IN CONFORMANCE WITH PART 15 of the FCC rules", etc., to support the preceding statement, "NO LICENSE OF ANY KIND IS REQUIRED FOR THE OPERATION OF THE RADIO

TALKIE." There follow other statements that the Federal Communications Commission's rules specifically permit a small transmitter of the types of respondents' device to "be operated with an antenna, including lead-in, not to exceed 10 feet in length", and that their device has a shorter antenna "even when used in a car", and, after emphatically warning the buyer to disregard information from anyone contrary to the foregoing statements, specifically tells the buyer:

Extra wires or extra antennas MUST NOT be connected to the Radio Talkie antenna. ANY ATTEMPT TO CONNECT EXTRA WIRES TO THE RADIO TALKIE ANTENNA WILL RESULT IN THE DEVICE BEING COMPLETELY INOPERATIVE OR RESULT IN INEFFECTIVE SHORT RANGE OPERATION.

These statements are not slight differences in the text from that of the earlier instruction sheet, as claimed by Beshore, but differ basically therefrom. As counsel supporting the complaint urge, this change unquestionably demonstrates that respondents knew that their former recommended use of long antennas and extra hookups did violate the Federal Communications Commission's rules requiring a license for the device, when so operated. Respondents have tacitly admitted such violation by this abrupt and radical change from their earlier instruction sheet, which was full of illegal "tricks", to use the word with which respondents beguiled the innocent public in their magazine advertisements. While respondents do not clearly or specifically contend that they have entirely abandoned all the practices complained of by so changing their instruction sheet, since it was adopted not earlier than the latter part of 1959, long after the complaint herein issued, and for other good reasons, the respondents have in no manner established a valid defense of abandonment of any of the practices charged and found herein to violate the Federal Trade Commission Act.

Upon the foregoing evidence the hearing examiner therefore makes the following

CONCLUSIONS OF LAW

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

2. This proceeding is in the public interest.

3. The aforesaid practices of respondents, as herein found, were, and now are, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

Respondents have tendered a proposed order covering the first three charges of the complaint, which is identical to that contained

in the previous vacated initial decision based on a consent agreement which was rejected by the Commission. Since this proposed order, insofar as it relates to the first three charges, is based upon respondents' untenable theory that these three charges were not properly in litigation herein, it must be rejected, as must also that portion thereof dismissing the complaint as to the fourth charge. The proposed order submitted by counsel supporting the complaint is somewhat vague and repetitious, and therefore the hearing examiner, while accepting the basic principles thereof, has adopted it only in part and in substance. Accordingly,

ORDER

It is ordered, That respondents Western Radio Corporation, a corporation, and its officers, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their portable radio transmitter designated as "New Magic Walkie Talkie", "Radi-Vox" and "Radio Talkie", or any other portable radio transmitter with the same or substantially the same transmitting power, or any other similar product, whether designated under said name or names, or any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That said portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of up to one-half mile for reception by home radio receivers, or that said device without additional equipment has an operational range of any specified distance in excess of fifty feet in city, town or commercial areas or seventy-five feet in country or rural areas;

2. That said portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of from one to ten miles when transmitting from an automobile or other moving vehicle to a radio receiver in another vehicle, or representing directly or by implication that said device, so used, has a range of any distance in excess of two city blocks;

3. That any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth, including the amount of any service or other charge which is imposed;

4. That no license or permit is required for any operational use of said device, unless the specific conditions under which such license or permit would be required are clearly and conspicuously set forth in immediate conjunction therewith.

OPINION OF THE COMMISSION

JUNE 12, 1963

By MACINTYRE, *Commissioner:*

This case is before us on respondents' exceptions to the initial decision and order to cease and desist entered by the hearing examiner. The complaint charges that respondents violated Section 5 of the Federal Trade Commission Act by misrepresenting the effective range, without additional equipment, of their pocket-sized portable radio transmitter and the guarantee attaching to the product, and by falsely claiming that no Federal Communications Commission license was required to operate the device.

Respondent Western Radio Corporation of Kearney, Neb., and the individual respondents are engaged in the manufacture and distribution of various electronic devices, including intercommunications sets and broadcast receivers, as well as the portable radio transmitter which is the subject of this proceeding. The respondents advertise in magazines of national circulation and maintain a substantial course of trade between Nebraska and other states.

Respondents' transmitter, which has been sold under the names of "Radi-Vox," "New Magic Walkie Talkie" and "Radio Talkie," was sold for twelve to thirteen dollars in the period 1957–1958. The Radi-Vox, which operates in the lower part of the standard broadcast band, is a small unit designed to be held in the hand. It consists of a transistor supplied by a six-volt battery. An antenna provided with the transmitter has a length of sixteen and one-half inches when fully extended.

Respondents take exception to the examiner's disposition of the proceeding on the ground that certain crucial findings are not supported by substantial evidence and that consequently the provisions of the order based thereon cannot be justified. Respondents also contend they were denied a fair hearing by the examiner's refusal to permit them to inspect and possibly use in cross-examination the Final Report, dated September 15, 1958, of Charles T. Snavely, a Commission attorney examiner who testified in this proceeding.

Before examining the contentions of the parties and the findings of the examiner in detail it is worth noting that respondents' counsel

does not except to the order entered below in its entirety. On oral argument respondents' attorney stated that respondents objected to the requirement that they refrain from representing that their device, without additional equipment, has an operational range in excess of fifty feet in cities, towns and commercial areas, and seventy-five feet in country or rural areas, or that the operational range of the device from one moving vehicle to another is a distance in excess of two city blocks without the use of additional equipment. Respondents' counsel conceded on oral argument that he did not quarrel with the order's prohibitions against the representation that the portable radio transmitter in question had a satisfactory operational range of up to one-half mile without additional equipment and the claim that the device without additional equipment had a satisfactory operational range from one to ten miles when transmitting from a moving vehicle to a radio receiver in another vehicle.

Respondents' counsel concedes forthrightly that paragraph 3 of the examiner's order, which prohibits representations that a product is guaranteed, unless the provisions of the guarantee, including service or other charges, are clearly set forth in conjunction therewith, represents a reasonable exercise of the Commission's powers and he does not except to this provision.

Respondents object to paragraph 4 of the order *in toto* on the ground that it is not supported by the evidence. That prohibition requires respondents to cease and desist from representing that no license or permit is required for any operational use of the device unless the specific conditions under which such license or permit would be required are clearly set forth in conjunction with such a claim.

The issues we must resolve on respondents' exceptions are, therefore, narrowed to three primary questions: (1) Does the record sustain an order prohibiting representations that the effective range of the transmitter without additional equipment is in excess of fifty feet in cities or seventy-five feet in rural areas and two city blocks when transmitting from one automobile to another; (2) whether respondents should be required to cease and desist from representing that no license or permit is required for any operational uses of the device unless the specific conditions under which such license would be required is clearly set forth in conjunction with such claim; and (3) the procedural question of whether respondents should have been given access to the Final Report of the Commission's attorney examiner testifying in this proceeding.

We first turn to the examiner's findings on the effective operational range of respondents' device without the use of additional equipment and the record evidence relating to those findings. To support that aspect of the case, counsel supporting the complaint adduced testimony on the operational capabilities of transmitters secured from two of respondents' customers, namely, John E. Mair of Kansas City, Mo., and Dr. Paul Vatterot of Creve Couer, Mo.

Mr. Mair testified that he followed the instructions included with respondents' transmitter and that he was unable to make the device work. There was also testimony from Robert W. Hester, engaged in the television repair business in Kansas City, that he and Charles Snavely, the Commission's attorney examiner, ran some preliminary tests on Mr. Mair's set. In the tests made by Hester, respondents' device did not work except when an additional carrier wire was added to the transmitter.

The Mair transmitter was then tested by a Mr. Donald Day, also of Kansas City and vice-president of Television Service Engineers in Kansas City, a trade association. This expert had been recommended by Hester as more qualified to thoroughly test the equipment on the basis of his experience with transmission and receiving equipment.

Day, apparently contrary to Mair and Hester, was able to get a readable transmission from the Radi-Vox, although nowhere near the maximum distances claimed in respondent's advertisements and circulars.[1] A meaningful finding on the capabilities of the transmitter, purchased by Mr. Mair, must therefore be made solely on the basis of Day's testimony, and we do not rely in any respect on the testimony of Messrs. Mair, Hester and Snavely in resolving the substantive issue, namely, the effective operational range of respondents' transmitter. Day tested respondents' device in both an urban and a rural area using both a standard automobile receiver and a special communications receiver, the Hammurland HQ–129, which, according to the witness, is not normally in the hands of the average radio listener. In the city, under normal operating conditions of noise, the maximum range of transmission without alteration of the transmitter as received by the special receiver was forty feet. Under

[1] "Broadcasts To Any Home or Car Radio Without Wires or Hook-Ups! * * * "Talk to Your Friends Up To A Block Or More Away! Talk up to 1 mile or more between two automobiles * * *." (CX 6 and CX 7.) "Talk to all houses and car radios everywhere! * * * No wire connections required! * * * Normal Range Up To ½ Mile * * * Talk From Car To Car Up To 1–10 Miles Apart * * *. Between Buildings Up To ½ Mile Or More * * *." (CX 13–A.) "Sends Your Voice To Any House Or Car Radio! No connections, Wires Or Electric 'Plug In' Works everywhere—Up To ½ Mile Or More! * * *." (CX 13–B.)

quiet conditions in a suburban location the maximum range of the transmitter without attachments, for a barely intelligible reading by the Hammurland equipped with one hundred feet of aerial, was 350 feet. When the witness used the ordinary auto radio under normal noise conditions, he was able to receive a satisfactory signal at a distance of only twenty feet. In a quiet zone the automobile receiver, to which a one-hundred-foot aerial was attached, received a signal from the transmitter at a distance of seventy-five feet.[2] The witness concluded, on the basis of the tests he had made, that communications between cars up to a mile or more or between houses a block or more away would be possible only under special conditions, if at all.

Respondents attack the findings made by the hearing examiner in reliance on Day's tests on the ground that the set used was obviously defective.[3] The argument is without merit for it has no support except respondent Paul Beshore's speculation on the failure of Messrs. Mair, Hester and Snavely to operate the device successfully. The fact is, however, that respondents' instructions specify the transmitter with its built-in antenna will operate over a distance of twenty-five to 300 feet, depending upon the sensitivity of the receiving radio and location. The test results achieved by Day, which have already been noted, were within or very close to those limits. In fact, the reading at 350 feet, which may be ascribed to the above-average sensitivity of the Hammurland radio with the extra one-hundred-foot aerial attached exceeded the performance standard envisaged by respondents' instructions, although not equally the challenged claims in their advertisements. In view of these facts, Beshore's testimony that the set was damaged is conjectural and entitled to little weight, and Day's testimony, therefore, constitutes a valid foundation for findings by the examiner or the Commission.

The hearing examiner also relied on testimony relating to the operational range of a transmitter secured from Dr. Paul Vatterot. Dr. Vatterot testified that several attempts were made to transmit messages from his automobile to another driven by his brother-in-

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[2] In his testimony Day gives a figure of "approximately 40 feet." (Tr. 123-24.) For the purpose of this decision we will accept the longer distance of 75 feet given in his written report. (CX 12.)

[3] Respondents rely on Mair's testimony that the only sound he could get from the transmitter was a squeak when he touched the antenna of the device with that of a radio (Tr. 84); Hester's testimony that he could get no intelligible sound from the device (Tr. 115); Snavely's testimony that he could get no sound from the transmitter; Day's answer during cross-examination that the transmitter may have been damaged (Tr. 128); and the testimony of respondent Paul S. Beshore that the foregoing testimony shows that the Mair transmitter was obviously defective and may have been damaged in the mails. (Tr. 295-299.)

law on a trip. The Radi-Vox on that occasion, according to this witness, worked when the cars were fifty feet apart but not when they were one or two blocks apart. The same witness testified that he was unable to make the device work satisfactorily in his office, although the distance between transmitter and receiver was only twenty-five feet in that experiment. At home Dr. Vatterot found that the transmitter would not work in excess of fifty feet from the receiving radio. The same set was subsequently tested by Harold W. Bourell, the engineer in charge of the Kansas City Federal Communications Office, for compliance with that agency's licensing rules. Incidental to that test he found that with its antenna fully extended the voice modulation of the Radi-Vox was fairly clear and could be understood when the transmitter was six feet from the receiving radio, but that at ten feet it was too weak and distorted to be understood and could not be heard at all beyond fifteen feet.[4]

Respondents evidently do not dispute that the Vatterot transmitter was operational but argue that Vatterot's experience should be discounted on the ground that he had not followed the instructions accompanying respondents' device which specify hooking a coupling device to the transmitter. The coupling device, described in the instructions, is an adaptor which will connect the Radi-Vox to the automobile antenna; it is not furnished with the transmitter, but may be purchased for $3.95 from respondents or made by the purchaser from standard parts.[5] But respondents' contention is without merit because they initially advertised that the promised operational range could be obtained without additional wires and hookups and therefore the fact that Vatterot did not hook up the coupling device suggested by the instructions in his transmission attemtps from one vehicle to another does not invalidate his testimony. Respondents further argue that Dr. Vatterot had not used the transmitter in accordance with instructions furnished with the set because he had not turned up the radio in his office to its maximum volume. Vatterot, during cross-examination, admitted that he had not turned the radio up to its maximum volume because he did not want the radio blaring in his office. Vatterot's failure to turn up the volume of his radio was immaterial; respondents' circular claims that its device would "Break In Regular Radio Broadcasts!" It should be unnecessary to point out that the public does not receive "regular radio broadcasts" with their receivers turned to maximum volume. Respondents' instructions after the sale therefore qualify

[4] CX 19.
[5] CX 16.

in a material respect one of the initial representations inducing purchase of the product.

Respondents presented rebuttal evidence on the operational range of their transmitter, namely, the testimony of a Mr. Peter Young, who ran certain tests on their device. Respondents charge that the hearing examiner erroneously rejected this evidence. The contention is without merit. The tests made by Young on the transmission capabilities of the device from one vehicle to another are irrelevant, as the examiner found, since they were made with an additional hook-up to respondents' transmitter. The issue here involved is the operational capability of the unit without additional equipment. In the case of the test relating to the device's transmission to home receivers, Young admitted that the home receiver used in the test was connected to an extension antenna as recommended in the instructions. We note again, in this connection, that respondents represented without qualification that the device would broadcast to any home or car radio without wires or hook-ups. This all-embracing claim necessarily represented also that no additional wires or hook-ups are required with respect to the receiving set. Young's test on the transmitting range of the Radi-Vox to home receivers clearly is not relevant to the issues presented by the complaint, namely, the operational capabilities of the unit without the installation of additional equipment. In fact, Young's tests are not pertinent to the issues presented except insofar as they show that even with additional equipment the Radi-Vox's operation does not equal the maximum claims made for the device in the advertisements under consideration here.[6]

On reviewing the evidence, we are convinced that the record supports the finding that respondents have misrepresented the effective operational range of their transmitter. Even respondents do not in their exceptions argue that their transmitter without additional equipment could transmit to home receivers up to one-half mile away or from a moving vehicle to another at distances of up to ten miles as represented in their advertising claims. The remaining question on this issue, therefore, concerns the proper remedial measures which should be adopted to preclude further deceptions of this nature. On this record, we are forced to conclude that the maximum operational capability of the device is extremely low. Under urban conditions without the use of additional equipment the record

[6] Young testified that his test results included reception by a home receiver at a distance of 2½ blocks, and transmissions of ½ block to 3 or 4 blocks in the city of Kearney, and 3 to 5 miles in the country in the case of the automobile tests. (Respondents' brief, p. 16.) Compare with the advertising claims set forth in note 1, *supra*.

evidences reception by radios at distances ranging from six, twenty, forty, and up to a maximum of fifty feet from the transmitter. Day, in a rural area, recorded transmissions at distances of 350 feet to the Hammurland receiver and seventy-five feet to an ordinary car radio when an aerial of one hundred feet was attached to these receivers. Day's results in the rural area, it may be concluded, in fact exceeded the effective operational range of the device without the use of additional equipment.

The order submitted by the hearing examiner in effect gives respondents the license to claim distances in excess of their transmitter's operational capacity by the prohibition of representations that the unit, without additional equipment, has an operational range of any specified distance in excess of seventy-five feet in country or rural areas. The provision in the hearing examiner's order requiring respondents to cease from representing that the device, without additional equipment, when transmitting from an automobile or other moving vehicle to a receiver in another vehicle, has a range of any distance in excess of two city blocks is not supported by the evidence. The relevant evidence does not show that the Radi-Vox without additional equipment will in fact satisfactorily communicate to a vehicle two blocks away. The only pertinent testimony on this point is that of Dr. Paul Vatterot, who testified, as the hearing examiner found, that the Radi-Vox worked when the cars were fifty feet apart but that the transmission was inaudible when the distance between the vehicles increased to one or two blocks.

We conclude that the order entered below should be modified by deleting therefrom paragraphs 1 and 2, which require respondents to refrain from representing that their transmitters without additional equipment have operational ranges in excess of the distances specified therein, e.g., fifty feet, seventy-five feet or two city blocks, etc. The record here warrants a broader prohibition precluding assertions in any manner misrepresenting the effective operational range of Western Radio's transmitters. Respondents will therefore be prohibited from representing that their transmitters have any specified operational range unless they are able to establish that their device can effectively operate over the distance claimed. Requiring respondents to ensure the accuracy of their advertising claims in this manner is necessary to preclude further misrepresentation and exaggeration about the merits of their product of the nature documented by the record. This prohibition has the further advantage of flexibility permitting respondents to adapt their advertising claims to changes in the product provided that they establish the veracity of

their claims. The requirement that respondents establish the validity of their representations on the operational range of their transmitter clearly delineates Western Radio's obligations under the order. The task of respondents of complying with the order and the duty of the Commission to enforce compliance will therefore be facilitated.

Furthermore, the order should not be limited merely to misrepresentations of the effectiveness of the transmitter made in conjunction with the representation that no additional equipment is required. The order will be amended to cover any possible misrepresentation respondents might make as to the effective range of the Radi-Vox whether or not such claims are made in conjunction with a recommendation for the use of additional equipment. The order should not be limited merely to the precise misrepresentations brought to light in this proceeding but should be broad enough to encompass any deceptive statement reasonably related to the false advertising claims evidenced by this record.

We turn now to respondents' exception to the examiner's finding they falsely represented their Radi-Vox device may be operated under all conditions and circumstances without a license. The Federal Communications Commission regulations pertinent to a consideration of this issue are contained in Part 15 of that agency's rules entitled "Incidental and Restricted Radiation Devices Subpart E Low Power Communication Devices." [7] These regulations, which require a license for operation if the device's radiation exceeds the permissible limits stated therein, are designed to prevent interference with authorized radio services.[8] The record evidence relating to respondents' representations on the licensing requirement pertains to the period 1957–1958. In this connection we note that although the rules in effect in 1957 underwent certain revisions in the following year, these changes are not relevant to the questions presented by this proceeding, since the minimum field intensity requirement remained substantially unchanged.

The testimony of Messrs. Knight and Bourell is ample to demonstrate the falsity of respondents' unqualified representation, "No license needed." [9] Mr. Knight is an electronic scientist employed by the Laboratory Division of the Federal Communications Commis-

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[7] 47 C.F.R. § 15.201 *et seq.* (1958).

[8] The hearing examiner found, and no exception is made to the finding, that the radiation limits provided by the Federal Communications Commission's rules were as follows: for 650 kilocycles 36.9 microvolts per meter at 100 feet; 15 microvolts per meter at 190 feet; for 950 kilocycles 15 microvolts per meter at 165 feet.

[9] CX 6 and CX 7, Advertisements in *Popular Science*, January 1957 and July 1958.

sion, where he is primarily concerned with radiating devices and the measurement of the intensity of their radiating field to determine whether they are in compliance with the rules and regulations of the Commission. His report, dated April 16, 1957, categorically states that although the Radi-Vox was in compliance with Part 15 of the Federal Communications rules then in effect, if operated with the small antenna provided, it would violate the rules when used with the large antennas suggested in the operating instructions furnished with the unit.[10]

Respondents have apparently abandoned the contention strenuously urged during the trial of this proceeding, that the tests were not relevant in view of the fact that the Federal Communicaions Commission had not tested respondents' regular production device but rather an experimental model with stronger radiation characteristics. The examiner resolved the conflict of evidence on this point between respondent Paul Beshore and the Commission's witness, David Ablowich, a former employee of the Federal Communications Commission, in favor of the latter, finding in fact that the Federal Communications Commission had secured two of respondents' regular production models for the purpose of these tests.

Respondents now contend that the tests made by Knight should be disregarded on the ground that in December 1957 an external antenna coupler was added to the Radi-Vox transmitter, which substantially reduced radiation and brought the transmitter into compliance wih new F.C.C. regulations on low powered communication devices which had become effective on January 1, 1958. In this connection respondents further claim that the coupler in question was added to the operating equipment approximately fourteen months prior to the issuance of the complaint herein. The evidence shows that respondents unqualifiedly claimed their device did not require a license when in fact use of the transmitter with an outside aerial as suggested by their instructions violated the Federal Communications Commission's rules in effect at the time the test was made, namely, April 1957. Under any circumstances, respondents' apparent claim of abandonment of the violation of F.C.C. rules some nine months after it was found out by that agency is not a valid bar to Commission action here with respect to respondents' misrepresentations. Moreover, the record indicates that even by the middle of 1958 respondents had failed to bring their device and representations into compliance with F.C.C. rules.

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[10] CX 3.

Also tested for compliance with Federal Communications Commission rules and licensing requirements was the transmitter purchased by Dr. Paul Vatterot in July of 1958 in response to respondents' advertisement in the July 1958 *Popular Science*, which represented without qualification that no license was needed in connection with the operation of the transmitter. These tests were conducted by Harold Bourell, the engineer in charge of the local Federal Communications Commission office in Kansas City, Mo. He testified that the unit, if used with the antenna attached to the device, would comply with Part 15 of the Federal Communications Commission's rules relating to incidental and restricted radiation devices, but that, if the unit were used with some of the lengths of wire and connections listed in the instruction sheet, measurement of radiation under these conditions did not comply with the Commission's rules.[11] In this connection, the witness stated specifically that the addition of a seventy-foot antenna would make the intensity exceed the radiation limits permitted under Part 15.

Respondents attack the validity of Bourell's test on several grounds. Respondents argue that it is inexplicable that Bourell got a result within permissible limits when the seventy-foot antenna utilized was grounded but exceeded the permissible radiation when using the same antenna with the ground disconnected. In their exceptions respondents also argue that the high reading in the tests was due to the fact that Bourell's test antenna was connected to the same post to which was connected a large amateur antenna belonging to the witness. Respondents rely on the testimony of Paul Beshore to the effect that the presence of Bourell's amateur antenna would increase the capacity between the amateur antenna and the seventy-foot wire resulting in an electrical length several hundred feet long. Respondents' exceptions fail to take note of Mr. Bourell's explanation that the amateur antenna on the post, although in close proximity to the test antenna, did not produce an unusual reading. The witness, on cross-examination elicited by respondents' counsel, expressly stated that such would not be the effect because of the tremendous differences in the wave lengths of the amateur antenna and the unit tested.[12] We find credible Bourell's explanation that the reason the seventy-foot antenna had a stronger signal with the

[11] The operating instructions to which the witness referred suggested outside aerials of any type, as well as specifically suggesting lengths of fifty to a hundred feet of antenna wire. (CX 16.)

[12] The witness explained that the amateur antenna was resonant at 14 megacycles, 14,000 kilocycles, and therefore was very short in comparison to the resonant frequency at 650 kilocycles, which was the frequency of respondents' device. (Tr. 218.)

ground removed was that at this length the ground showed an absorption of the signal and that this may have been due to some resonance at that particular frequency. The witness stated that he had made these measurements four different times with two meters to make sure they were correct.

Mr. Bourell's testimony on this point convinces us that his measurement of intensity with the seventy-foot antenna attached to respondents' device was accurate and his statement adequately answers the rhetorical question in respondents' brief, "Why should disconnecting the ground so drastically increase the radiation?" In the conflict between Mr. Bourell and respondent Paul Beshore we are inclined to give credence to Bourell's testimony on these points. The hearing examiner stated in detail his reasons for not finding the testimony of Mr. Beshore credible as a general matter. Furthermore, of the two witnesses, Bourell, on the basis of the record, is the better qualified in the measurement of field intensities. Finally, Bourell, unlike Beshore, had no direct interest in the outcome of this proceeding.

Further evidence of the falsity of respondents' unqualified representation that no license is required in connection with the operation of its device is the change in the text of the instructions accompanying the Radi-Vox transmitter. In the amended instructions, issued apparently in the latter part of 1959, purchasers were warned that connecting additional wires to the transmitter's antenna would make the device inoperative or ineffective. We agree with the examiner that this radical change in the operating instructions constitutes a tacit admission that the former recommended use of long antennas and extra hookups violated the Federal Communications Commission's rule requiring a license for the device when operated in this manner.

Respondents object that the examiner erroneously rejected the tests of respondent Beshore and Mr. Young on the field strength or radiation characteristics of the Radi-Vox. From our review of the record, we are convinced that the examiner decided the issue correctly. He explained in detail his reasons for finding that Beshore's testimony was lacking in credibility, and we see no reason for disturbing that conclusion. Young testified that, when used in accordance with respondents' amended instructions, the unit complies with the Federal Communications Commission's regulations. His test results, however, do not serve to rebut the findings of the Federal Communications Commission employees, Knight and Bourell. The total length of antenna and transmission line attached to the Radi-

Vox in Young's test did not exceed ten feet; the antenna used, therefore, fell short by a substantial margin of the fifty to one-hundred foot length suggested by respondents' instructions effective in the period relevant to this proceeding when they made the "No licensing required" claim which is challenged here. In fact, respondents' former instructions further suggested that outside aerials of any type be utilized with no limitations specified as to the length of the antenna.

Respondents take exception to paragraph 4 in the order entered below on the ground that they should not be required to disclose in their advertising modes of operation of their device which will violate the Federal Communications Commission's licensing regulations since their present instruction sheet does not recommend any uses which would require a license. In this exception respondents ignore the fact that they are not required to represent that no license is required in connection with the use of their device. However, if respondents desire to make representations of this nature they may be required to reveal the conditions under which operation of the device without a license would violate the law. Affirmative disclosures may, of course, be required by the Commission in those instances where a claim is misleading unless facts material in the light of such representations are stated in conjunction therewith. *Manco Watch Strap Co., Inc., et al.*, Docket No. 7785 (1962) [60 F.T.C. 495]. As the Supreme Court has stated, "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Company, et al.*, 352 U.S. 419, 431 (1957). Furthermore, there is, of course, no assurance that respondents will not at some time in the future again change their instructions or issue different instructions with another device resulting in the same type of misrepresentations with which we are faced here.

Moreover, respondents have already been advised with considerable force and clarity of the need for affirmative disclosure of the type required by the order entered below. By letter dated April 24, 1957, the Federal Communications Commission, the agency directly concerned, advised respondents:

> The [Federal Communications] Commission is charged with the responsibility of enforcing its Rules to prevent radio and television interference and your cooperation is desired. Please advise this office at an early date what steps you are taking to warn users of the Radi-Vox units that operations with aerial wires may result in excessive radiation for which severe penalties are provided by the Communications Act of 1934, as amended.

Respondents also raise the procedural issue that they were denied a fair hearing since the hearing examiner did not permit them to

examine a so-called "Final Report" referred to by the Commission's attorney examiner, Charles T. Snavely, when he testified in the hearing of March 29, 1960. Snavely's testimony does not go to any of the substantive issues raised in this proceeding. As Commission counsel stated during the course of the hearing, his testimony was taken for the purpose of continuity, namely, to prove that the transmitter tested by Messrs. Hester and Day was in fact secured from respondents' customer, John Mair. On examing the record we have determined that Snavely's testimony is not even required for that limited purpose and we have not relied upon it.[13] Respondents do not suggest anywhere in their exceptions that the Mair transmitter, identified as CX–2, was not the one tested by Mr. Day. Furthermore, even assuming for the moment that Snavely's testimony is required to bridge the transition of the transmitter from Mair to Hester, the fact remains that the particular report requested by respondents would have been of no utility in cross-examining Snavely on the subject. The report in question is simply a skeletal memorandum of transmittal consisting of one page, forwarding one of respondents' transmitters and listing the field reports submitted.[14] The report, confined to administrative matters, could not possibly be the basis for impeachment of Snavely as respondents suggest in their exceptions. Respondents, therefore, have not been subjected to any disadvantage by the withholding of this report. In view of our holding that Snavely's testimony was not necessary to lay the foundation for the testimony of Messrs. Hester and Day and our further holding that access to the report in question would in any case have been of no help to respondents in the cross-examination of the witness, discussion of the applicability of either the rule of *Jencks* v. *United States*[15] or the Jencks statute[16] to this proceeding would be superfluous.

We have already noted the necessity of revising the order entered below to preclude any misrepresentation by respondents of the operational range of their transmitters. The order should be modified in two other respects. The scope of the order relating to claims on

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[13] Respondents' customer, Mr. Mair, identified Commission Exhibit, for identification No. 2, as the transmitter he received from respondents. (Tr. 83.) Mr. Hester testified that Snavely came to him with the device "which was this Radi-Vox I believe it's called * * *." (Tr. 115.) From the record as a whole it is clear that the device with respect to which Hester testified was in fact the transmitter purchased by Mair. Furthermore, Day testified that the transmitter in question was given to him by Hester for purposes of testing. (Tr. 121.)

[14] Respondents' counsel, on oral argument, although not waiving the claim of error, stated he had no objection to inspection by the Commission of this document.

[15] 353 U.S. 657 (1957).

[16] 18 U.S.C. § 3500.

the operational range of respondents' transmitters and the lack of licensing requirements should be broadened to encompass respondents' representations in connection with any transmitter. That provision of the order relating to guarantee claims should be made applicable to any product sold by respondents. Unlike the other deceptive claims considered in this proceeding, the proper remedy for misrepresentation of a guaranty is not peculiar to radio transmitters.

Respondents' exceptions, except as noted, are denied. The initial decision, as modified and supplemented by the findings in this opinion, is adopted as the decision of the Commission.

Opinion on Respondent's Exceptions to the Proposed Order

SEPTEMBER 25, 1963

By MacIntyre, *Commissioner:*

On June 12, 1963, the Commission issued its opinion and proposed order* in this matter requiring respondents to refrain from misrepresenting the operational range of their radio transmitters, from representing that no license is necessary in the operation of their devices unless the conditions under which a license or permit would be required are clearly set forth in conjunction therewith, and finally from making deceptive claims on the guarantees attaching to their products.

This matter is now before us on respondents' objections to the proposed order and complaint counsel's answer thereto. Respondents contend that the order is too broad because it is not confined to precisely those deceptive claims they have made in the past but also covers possible allied and related misrepresentations. They also object the order is defective in that it is not confined to the particular transmitter with respect to which evidence was adduced below. These contentions require no extended discussion; respondents are here advancing an argument which can no longer be seriously entertained.[1]

Respondents also take exception to the provision in Paragraph (a) of the order requiring them to refrain from making representations that their transmitters have a satisfactory operational range

*Proposed Order is omitted, adopted as the Final Order of the Commission.

1 *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946); *Niresk Industries, Inc., et al.* v. *Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960) *cert. denied* 364 U.S. 883 (1960); *Maryland Baking Company* v. *Federal Trade Commission*, 243 F. 2d 716 (4th Cir. 1957); *Hershey Chocolate Corporation* v. *Federal Trade Commission*, 121 F. 2d 968 (3d Cir. 1941).

of any distance, unless they establish that their devices in fact have the capabilities specified. In this connection respondents state, in pertinent part:

> Paragraph (a) of the modified order is too broad and is confusing in that it confines respondents in future advertising claims to stating only those specific distances in operational range which they have established their transmitters possess. This provision not only requires that advertising claims be not deceptive but also that their truthfulness be shown or proven to some unidentified persons * * *.

Requiring respondents to establish the validity of their advertising claims on the effective range of Western Radio's transmitters should cause no undue hardship, assuming such representations are made in good faith. Unless there is a demonstrable factual basis for their representations on this point, the veracity of respondents' claim would at best be subject to the vagaries of happenstance. The necessity for placing such a burden on respondents is amply supported by their past exaggerations of the merits of Western Radio's transmitters documented by this record.

Before turning to respondents' other objections, it may be in order to clarify their duties under Paragraph (a) of the order and the manner in which this proviso is to be administered. Respondents need not volunteer experimental or other data prior to each advertisement, nor need they submit each advertisement to the Compliance Division prior to publication. Respondents are required, however to have at hand and to furnish to the Commission upon demand complete data supporting any advertising claims on the operational ranges of their transmitters. In general, such requests will be initiated by the Commission's Compliance Division.

Respondents' objection that the Compliance Division does not have the facilities for scientific testing or evaluation of data supporting respondents' claims is without merit. The Compliance Division, of course, whenever circumstances so require, may solicit the technical assistance of other government agencies or of scientists or engineers employed by private organizations.

The argument that it is an unlawful delegation of the Commission's powers to require evaluation by its staff of the data relied upon to establish the veracity of respondents' advertising claims is patently without foundation. Obviously, as a practical matter, the day to day burdens of the enforcement of Commission orders are initially borne by its staff. Equally groundless is the assertion that there would be no recourse to the Commission from the Compliance Division's evaluation of the data submitted to document the validity

of respondent's representations on their devices' capabilities. Moreover, under Rule 3.26(b) of the Commission's Rules of Practice effective August 1, 1963, respondents are explicitly given the privilege of requesting the Commission's advice whether any contemplated course of action will constitute compliance with an order. As in the past, respondents have the opportunity for informal consultation with the Compliance Division to facilitate adherence to the terms of the order. Furthermore, the staff of the Compliance Division will, on respondents' request, advise on the type of data required under Paragraph (a) of the order to substantiate respondents' advertising claims of transmitter capabilities.

Respondents' objections to the proposed order issued June 12, 1963, are rejected, and it will be adopted as the final order of the Commission.

FINAL ORDER

SEPTEMBER 25, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, in effect prior to August 1, 1963, respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondents having made timely filing of their exceptions to the order proposed which were opposed by a reply filed by counsel supporting the complaint and the Commission upon review of these pleadings having determined that respondents' exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It is ordered, That respondents Western Radio Corporation, a corporation, and its officers, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their products, including radio transmitters, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

   (a) That their transmitters with or without the use of additional equipment have a satisfactory operational range of any specified distance unless respondents establish that their devices in fact have the operational ranges specified.

(b) That no license or permit is required for any operational use of their radio transmitters unless the specific conditions under which such license or permit would be required are conspicuously set forth in conjunction therewith.

(c) That any product is guaranteed unless the terms and conditions of such guarantee are clearly and conspicuously set forth, including the amount of any service or other charge which is imposed.

It is further ordered, That the initial decision, as modified and supplemented by the Commission's opinion, be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

SPAULDING BAKERIES, INC., ET AL.

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

Docket 8047. Complaint, July 18, 1960—Decision, Sept. 25, 1963

Consent order requiring bakers in Binghamton, N.Y., to cease representing falsely in newspaper advertising, by radio broadcasts and otherwise, that their "new SLIM-ETTE WHITE BREAD" was a low-calorie food, substantially different in caloric value from ordinary bread, and would cause the consumer to lose weight and prevent him from gaining.

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 Spaulding Bakeries, Inc., a corporation, and Rexford W. Titus, Charles A. Struble and Edward S. Lecky, 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, Spaulding Bakeries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located in Binghamton, New York.

Respondents Rexford W. Titus, Charles A. Struble, and Edward S. Lecky are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution of a food product, as "food" is defined in the Federal Trade Commission Act. Said food product is known and designated as "Slim-ette Bread."

PAR. 3. Respondents cause the said food product, 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. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said food product 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 food product by the United States mail 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 and other advertising media, and by means of radio broadcasts transmitted by radio stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said food product; and have disseminated, and caused the dissemination of, advertisements concerning said product 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 food product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated, as hereinabove set forth, are the following:

(a) Trying to get your weight down? Want to have that smart slim look? Then this is for you! The *new SLIM-ETTE WHITE BREAD* now only 25 cents. Here's the loaf that helps you get slim and *stay slim*! Now, you can enjoy white bread at every meal or even in between meals and diet, too, because Slim-ette's special *high-protein, low-calorie* formula gives you that quick energy and yet satisfies hungry appetites.

* * * * * * *

So, if you're putting the squeeze on calories, slim down your meals and your figure * * * *switch* to the *new Slim-ette white bread* * * *. (radio advertising)

(b) Try the NEW Slim-ette White Bread. Helps You GET SLIM! STAY SLIM! (accompanied by slender vignettes) (newspaper advertising).

(c) Slim-ette White Bread Helps You GET SLIM, STAY SLIM. High in Protein, Low in calories (Calorie Counter). Only 45 Calories per slice (Calorie Counter) (Point-of-sale material).

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents represented, directly or by implication:

(a) That said bread is a low-calorie food;

(b) That said bread is substantially lower in calories than, and therefore substantially different in caloric value from, ordinary bread; and

(c) That eating said bread will cause the consumer to lose weight and prevent the consumer from gaining weight.

PAR. 7. The aforesaid advertisements referred to in paragraph 6 are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

(a) Said bread is not a low-calorie food;

(b) Said bread is not substantially different in caloric value from ordinary breads; and

(c) Eating said bread will not cause the consumer to lose weight and will not prevent the consumer from gaining weight.

PAR. 8. Through the use of the name "Slim-ette" as a designation for said bread, respondents likewise represented, directly or by implication, contrary to the fact, that said bread is a low-calorie food and that its use will cause the consumer to lose weight and prevent the gaining of weight.

PAR. 9. The dissemination by respondents of said false advertisements, as alleged herein, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Michael J. Vitale supporting the complaint.

Mr. Rexford W. Titus, Binghamton, N.Y., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the respondents on July 18, 1960, charging them with misrepresenting a food product designated "Slim-ette Bread" in violation of the Federal Trade Commission Act.

After the complaint issued, an agreement was reached between the parties to the effect that an agreement providing for the entry of a consent order would be submitted to the hearing examiner which would be in accordance with Commission action in another matter. Consonant with that agreement there was submitted to the hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order.

This agreement disposes of all of this proceeding as to all parties. In the agreement it is recommended that the complaint be dismissed insofar as it concerns respondent Edward S. Lecky, a former officer, in his individual capacity only, for the reason set forth in the affidavit attached to and made a part of said agreement.

Under the terms of the agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing, and the document includes a waiver by the respondents of all rights to challenge or contest the valadity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of the Rules of the Commission which are applicable to this proceeding.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, hereby accepts the agreement, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued:

1. Respondent Spaulding Bakeries, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located in Binghamton, New York.

Respondent Charles A. Struble is an officer of the corporate respondent. Rexford W. Titus, Jr., is also an officer of said corporation. His name was incorrectly set forth in the complaint as Rexford W. Titus. These officers formulate, direct, and control the policies, acts and practices of said corporation, and their address is the same as that of the said corporation. Respondent Edward S. Lecky resigned as an officer on May 23, 1960.

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

ORDER

It is ordered, That respondent Spaulding Bakeries, Inc., and its officers, and Rexford W. Titus, Jr., and Charles A. Struble, individually and as officers of said corporation, and Edward S. Lecky, as a former officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the food product designated as "Slim-ette Bread", or any other product of substantially similar composition, whether sold under the same name or under any other name or names, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement, by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that:

(a) Said bread contains fewer calories than other commercial breads;

(b) Substituting said bread for other commercial breads in the normal diet will cause a loss of weight or prevent a gain in weight, or that said bread is useful in a reducing or weight control diet, unless it is clearly and affirmatively disclosed in immediate conjunction therewith that said bread has no less calories than other commercial breads and its only usefulness in a reducing or weight control diet derives from the fact that its thinner slices enable the consumer to conveniently serve and consume smaller individual portions.

2. Disseminating or causing to be disseminated any advertisement, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, in which the words "Slim-ette" or words of similar import or meaning are used as the trade name or designation for respondents' bread.

3. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any such food product, which advertisements contain any of the representations prohibited in paragraph 1

hereof or the trade name or designation prohibited in paragraph 2 hereof.

It is further ordered, That the complaint insofar as it relates to respondent Edward S. Lecky in his individual capacity be, and the same hereby is, dismissed.

Decision of the Commission and Order to File Report of Compliance

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing examiner shall, on the 25th day of September 1963, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents, Spaulding Bakeries, Inc., Rexford W. Titus, Jr., Charles A. Struble and Edward S. Lecky, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Elman not participating.

In the Matter of

CHESEBROUGH-POND'S, INC.

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

Docket C-602. Complaint, Sept. 25, 1963—Decision, Sept. 25, 1963

Consent order requiring the manufacturers of "Vaseline Petroleum Jelly" to cease making a variety of unwarranted statements as to the therapeutic and protective qualities of its said product as in the order below sets forth.

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 Chesebrough-Pond's, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission, that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Chesebrough-Pond's, 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 busi-

ness located at 485 Lexington Avenue, in the city of New York, State of New York.

PAR. 2. Respondent is now, and has been for more than one year last past, engaged in the sale and distribution of a product which is within the classification of "drugs" as the term "drug" is defined in the Federal Trade Commission Act. The designation used by respondent for said product, and the formula thereof are as follows:

Designation: Vaseline Petroleum Jelly

Formula: Said designation is applied variously to White Petrolatum, U.S.P. and to Yellow Petrolatum, N.F.

PAR. 3. Respondent causes the said product, when sold, to be transported from its 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. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product 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 its said business respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said product 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, and by means of television broadcasts transmitted by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and has disseminated, and caused the dissemination of, advertisements concerning said product 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 product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations, verbally and pictorially, contained in said advertisements disseminated as hereinabove set forth are the following:

One of the best ways to help skin heal by far,—is to reach for the "Vaseline" Petroleum Jelly jar. Have you got chapped hands? Did you scratch your nose? Burn your finger? Stub your toes? Bark your skin? Get a cut on your chin? Well, remember, Vaseline Petroleum Jelly works better than leading medicated creams or lotions to protect an injury, promote healing.

"Vaseline" Petroleum Jelly actually gives better protection than any baby oil, lotion or powder. * * * Irritating moisture can't get through the protective

barrier that "Vaseline" Petroleum Jelly provides. * * * Remember, Mother, use "Vaseline" Petroleum Jelly for problems like diaper rash, cradle cap or chapping.

It works better than leading medicated creams or lotions to protect baby's injured skin.

"Vaseline" Petroleum Jelly works better two ways to help skin heal. (1) Works better than leading medicated creams and lotions to protect injury, promote healing. (2) Works better than lanolin to soothe and soften injured skin.

Use always for scabbed skin. Works better two ways to help skin heal—protect injury, promote healing.

Use always for diaper rash, chafing, chapping, scrapes, scabbed skin, sunburn, scratches, cradle cap, itching, burns, and 1001 other uses.

Nothing protects skin more safely, completely and lastingly than "Vaseline" Petroleum Jelly. * * * Keep bacteria out—Keep natural fluids in. * * * Helps nature heal more quickly.

The First Aid Kit in a Jar!

VIDEO	AUDIO
ECU "Vaseline" Petroleum Jelly jar in glamour setting. Super: MEDICAL TREATMENT THAT HELPS SKIN HEAL FAST	Like this doctor's family use * * * "Vaseline" Petroleum Jelly—the medical treatment that helps skin heal fast!
VIDEO	**AUDIO**
8. Test * * * ECU of hands * * * rub strainer with "Vaseline" Petroleum Jelly.	8. Watch * * * coat this kitchen strainer with "Vaseline" Petroleum Jelly * * *
9. Rub other strainer with baby lotion.	9. coat the other strainer with baby lotion.
10. Pour water into both strainers. Camera focus is on water dripping through and how VPJ is water proof and puddles water.	10. Now pour in water. "Vaseline" Petroleum Jelly holds back water—water floods through the baby lotion instantly.
11. Move in to ECU to see how VPJ strainer holds water. Then pour out.	11. But "Vaseline" Petroleum Jelly is waterproof—actually.
12. Cut to ECU of baby, cooing, laughing.	12. waterproofs baby against wet diaper irritation.
VIDEO	**AUDIO**
1. Open on MLS housewife working at utility table facing camera.	1. Announcer: (V.O.) Even in your own cheery kitchen * * *
2. Scissors, can opener, steam iron pop in fast sequence, foreground, framing woman.	2. * * * accidents can sometimes happen. And that's when its comforting to know * * *
3. Dissolve to ECU of V.P.J. jar held in woman's hand. Super in sync: *SAFELY, COMPLETELY, LASTINGLY.*	3. that nothing protects skin more *safely, completely,* and *lastingly* 3a. then "Vaseline" Petroleum Jelly.

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that:

1. Respondent's "Vaseline" petroleum jelly provides a protective barrier to the skin, protects against infection of, and promotes healing of, open wounds, burns, cuts, diaper rash, scabbed skin, scrapes, scratches, abrasions, and other skin injuries.

2. Respondent's "Vaseline" petroleum jelly is of therapeutic value in the treatment of open wounds, burns, cuts, diaper rash, scabbed skin, scrapes, scratches and abrasions.

3. Respondent's "Vaseline" petroleum jelly prevents cradle cap and is of therapeutic value in the treatment of cradle cap.

4. Respondent's "Vaseline" petroleum jelly is effective in the treatment of itching.

5. A jar of respondent's "Vaseline" petroleum jelly is an adequate substitute for a first aid kit.

6. Respondent's "Vaseline" petroleum jelly soothes and softens the skin more effectively than competitors' products.

7. Respondent's "Vaseline" petroleum jelly prevents escape of tissue fluids from the skin.

PAR. 7. In truth and in fact:

1. Respondent's "Vaseline" petroleum jelly will not afford any substantial protection against infection, and will not provide a protective barrier to the skin in excess of the water repellent effect provided by a continuous film of the product.

2. Respondent's "Vaseline" petroleum jelly is of no benefit in the treatment of open wounds, burns, cuts, scabbed skin, scrapes, scratches or abrasions, except to the extent of temporarily relieving the pain and itching of minor burns, scrapes, scratches or abrasions, and softening the skin scab; is of no benefit in the treatment of diaper rash except that form of diaper rash characterized by dry, scaly skin; will not prevent cradle cap or be of benefit in the treatment thereof, except to the extent of temporarily softening the crusts and scales; will have no beneficial effect upon itching, except itching from sunburned, dry, chapped, chafed or scraped skin or from other minor skin injuries; and is of no other benefit in promoting healing.

3. Respondent's "Vaseline" petroleum jelly is not a substitute for a first aid kit.

4. Respondent's "Vaseline" petroleum jelly does not soothe or soften the skin more effectively than competitors' products having substantially similar properties.

5. Respondent's "Vaseline" petroleum jelly will not be of value in preventing the escape of tissue fluids from the skin unless specifically limited to reducing the escape of moisture by evaporation.

Therefore, the advertisements referred to in Paragraph 5 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.

PAR. 8. The dissemination by respondent of the false advertisements, as aforesaid, constituted and now constitutes unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent, Chesebrough-Pond's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 485 Lexington Avenue, in the city of New York, State of New York.

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

ORDER

It is ordered, That respondent Chesebrough-Pond's, Inc., a corporation, and its officers, and respondent's representatives, agents and

employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Vaseline" petroleum jelly (White Petrolatum, U.S.P. or Yellow Petrolatum, N.F.), or any other preparation of similar composition or possessing substantially similar properties, do forthwith cease and desist from directly or indirectly:

1. Disseminating, or causing the dissemination of, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:

(a) That respondent's product is of value in preventing infection;

(b) That respondent's product provides a protective barrier to the skin unless limited to the water repellent effect of a continuous film of the product;

(c) That respondent's product:

(1) is of any benefit in the treatment of burns, scrapes, scratches or abrasions unless specifically limited to the temporary relief of pain and itching and softening scabs of minor burns, scrapes, scratches or abrasions,

(2) is of any benefit in the treatment of scabbed skin unless expressly limited to the softening of the scab and temporary relief of itching,

(3) is of any benefit in the treatment of diaper rash unless expressly limited to diaper rash characterized by dry, scaly skin,

(4) will prevent cradle cap or that it will be of any benefit in the treatment thereof unless expressly limited to the temporary softening of the crust and scales,

(5) will have any effect upon itching unless specifically limited to itching from sunburned, dry, chapped, chafed or scraped skin or from other minor skin injuries,

or is of any other benefit in promoting healing;

(d) That respondent's product is of any benefit in the treatment of cuts or open wounds;

(e) That respondent's product is a substitute for a first aid kit; or that the product is "The First Aid Kit in a Jar" unless such slogan is used in direct connection with or in close proximity to illustrations or descriptions of the unprohibited first aid uses of the product;

(f) That respondent's product will soothe and soften the skin better than competitors' products having substantially similar properties;

(g) That respondent's product prevents the escape of tissue fluids from the skin unless specifically limited to reducing the escape of moisture by evaporation.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, to purchase of respondent's preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 hereof.

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

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION D/B/A WHITEHALL LABORATORIES

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

Docket 8478. Complaint, Apr. 16, 1962—Decision, Sept. 27, 1963

Order requiring New York City distributors of a liquid anesthetic designated "Outgro" to cease representing falsely through advertising in newspapers and magazines, and especially by television broadcasts, that their said preparation would instantly relieve and would cure ingrown toenails and the pain and infection therefrom; and to cease using the word "Outgro" without a conspicuous accompanying statement that the product would not affect the growth or position of the toenail.

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 American Home Products Corporation, doing business under the trade name Whitehall Laboratories, hereinafter referred to as respondent, has violated the provisions of said Act, and it appeared 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 American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 685 Third Avenue in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation which comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

Designation: "Outgro".

Formula: Active Ingredients: 21.0 grains of Chlorobutanol (a chloroform derivative) to each fl. oz., Tannic Acid, and Isoproponol (anhydrous) 81.22%.

Directions: Outgro is a local anesthetic. Apply several drops in crevice where nail is growing into flesh. Work Outgro well under the nails. Let dry thoroughly. Don't rub off! Apply a few drops several times a day. Do not apply if toe is infected, but see your physician or foot specialist. Diabetics should not use Outgro. Do not use near fire or flame.

Keep all medication out of the reach of children.

PAR. 3. Respondent causes the said preparation, when sold, to be transported from its 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. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation 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 its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said preparation 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, and by means of television broadcasts over networks transmitted by stations located in various States of the United States and by means of other television continuities broadcast by stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including but not limited to the afore-

said media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation 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:

*VIDEO**	*AUDIO*
CU: OF TOES OF FOOT. REVEAL SWOLLEN AREA OF BIG TOENAIL AND PAIN LINES. TITLE ABOVE: "INGROWN TOENAIL."	ANNCR: (ECHO) Ingrown toenail (ECHO OUT) brings * * *
(A reproduction is attached hereto marked Exhibit "A" and made a part hereof)	
CONTINUE PAIN LINES.	pain and
CONTINUE PAIN LINES.	danger of infection.
FLIP TO TOES, REVEALING NORMAL BIG TOE. TITLE ABOVE: "OUTGRO."	(ECHO) Outgro (ECHO OUT) brings relief and protection!
CUT TO MCU OF ANNCR. BEHIND DESK.	Don't suffer pain or risk infection unnecessarily.
ANNCR. HOLDS BOTTLE OF OUTGRO. BOTTLE ZOOMS UP. LOSE ANNCR.	Get Outgro for ingrown toenail.
CUT TO CU OF TOES. PAIN LINES FROM BIG TOE. REVEAL APPLICATOR DROPS.	With the Outgro way, a few drops
(A reproduction is attached hereto marked Exhibit "B" and made a part hereof)	
PAIN FLASHES DISAPPEAR TITLE: RELIEVES PAIN INSTANTLY.	relieves pain instantly,
(A reproduction is attached hereto marked Exhibit "C" and made a part hereof)	
TITLE POPS OFF, POP ON TITLE: "GUARDS AGAINST INFECTION." MOVE IN TO ECU BIG TOENAIL	guards against infection,
(A reproduction is attached hereto marked Exhibit "D" and made a part hereof)	

*Pictorial Exhibits A, B, C, D, E, F, and G are omitted in printing.

VIDEO	*AUDIO*
LOSE TITLE AS NORMAL SIZED NAIL GROWS IN.	toughens skin underneath so nail can be cut
NAIL IS NORMAL, ADD TITLE ABOVE: "NORMAL FOOT COMFORT."	to restore normal foot comfort!
(A reproduction is attached hereto marked Exhibit "E" and made a part hereof)	
CUT TO SPLIT SCREEN TITLE LEFT. "INGROWN TOENAIL" ABOVE BIG TOE. TITLE RIGHT: "OUTGRO" ABOVE NORMAL BIG TOE.	So don't suffer pain and danger * * *
(A reproduction is attached hereto marked Exhibit "F" and made a part hereof)	
"X" OUT SCREEN LEFT.	of ingrown toenail. Use Outgro!
(A reproduction is attached hereto marked Exhibit "G" and made a part hereof)	
FLIP TO ECU OF OUTGRO BOTTLE AND PACKAGE.	Outgro! For immediate relief and protection!

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent has represented, and is now representing, directly and by implication:

1. That Outgro relieves pain of ingrown toenails instantly.
2. That Outgro relieves infection from ingrown toenails.
3. That Outgro offers immediate relief from ingrown toenails.
4. That Outgro will cure ingrown toenails.

PAR. 7. The said advertisements 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. The use of Outgro according to directions will have no significant effect upon pain or infection nor will it cure or offer relief from ingrown toenails.

PAR. 8. Respondents' use of the trade name "Outgro" is false and misleading in material respects in that it represents directly and by implication that the product will cure ingrown toenails. In truth and in fact "Outgro" will not cure ingrown toenails.

PAR. 9. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and

deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Frederick J. McManus and *Mr. Charles J. Connolly* supporting the complaint.

Carretta and Counihan, Washington, D.C., by *Mr. Albert A. Carretta* for respondent.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

DECEMBER 28, 1962

The Federal Trade Commission issued its complaint against the respondent on April 16, 1962. The complaint charged respondent with false and deceptive advertising as to therapeutic merits of a drug product sold under the trade name "Outgro". The complaint also charged that the trade name "Outgro" itself was deceptive.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent American Home products Corporation [1] is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 685 Third Avenue in the city of New York, State of New York.

2. Respondent is now and for some time in the past has been engaged in the sale and distribution of a product designated as "Outgro". The trade name "Outgro" is owned by the respondent and is registered with the U.S. Patent Office.

3. The active ingredients of the product "Outgro" are Chlorobutanol, Tannic Acid, Isopropyl Alcohol and Ethyl Cellulose.[2]

[1] The respondent was described in the complaint as "American Home Products Corporation d/b/a Whitehall Laboratories". The name was shortened, as appears herein, by order of the examiner with the agreement of counsel for both sides.

[2] The complete formulation of the ingredients appears on Commission Exhibit 5 A.

4. Respondent manufactures its product "Outgro" in Elkhart, Indiana, and shipments thereof are made therefrom to various other States of the United States and to the District of Columbia. Respondent maintains a course of trade in its product "Outgro" in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. The product "Outgro" is a "drug" within the definition of the term "drug" contained in the Federal Trade Commission Act.

6. The respondent has caused advertisements of its product "Outgro" to be disseminated in commerce by various means, including advertisements in newspapers and magazines, but principally by means of television broadcasts on networks transmitting such broadcasts across state lines. The purpose of such advertisements was to induce the purchase in commerce of respondent's product "Outgro" by the public.

7. The theme of respondent's advertising under consideration in this proceeding was that the product "Outgro" was an effective remedy for the condition generally known as ingrown toenail. The advertisements made claims that the product when applied as directed [3] was effective in relieving the pain and guarding against the infection of ingrown toenails. In addition, respondent's ads claim that "Outgro" offers immediate relief from, and will in effect cure, ingrown toenails.

8. An ingrown toenail is a condition resulting when the corner of the nail grows into the soft tissue at the outer end of the toe. It usually involves the great toe, but others may be involved. Another cause may be an excess of soft tissue at the outer end of the toe lapping over the nail.[4] The cause of this condition is usually improper trimming of the nail or improperly fitting shoes. As the nail presses into the soft tissue, it causes pressure on the tissue and may even penetrate the skin covering.

The usual symptoms of ingrown toenails are pain, inflamation and swelling. If the skin is penetrated and bacteria are present, there is danger of infection. In the examiner's opinion, however, it is imma-

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[3] The directions for the application of "Outgro" are as follows:
"*Directions*: Outgro is a local anesthetic. Apply several drops in crevice where nail is growing into flesh. Work Outgro well under the nails. Let dry thoroughly. Don't rub off! Apply a few drops several times a day. Do not apply if toe is infected, but see your physician or foot specialist. Diabetics should not use Outgro.
Do not use near fire or flame.
Keep all medication out of the reach of children."

[4] An ingrown toenail is defined in the American Illustrated Medical Dictionary by Dorland as "overlapping of the nail by the flesh," and the word "flesh" is defined as "the soft, muscular tissue of the animal body." Consequently, the technical definition of ingrown toenail is "overlapping of the nail by the soft, muscular tissue of the animal body."

terial whether or not there has been an actual penetration of the skin by the nail with the resultant danger of infection before the condition becomes an ingrown toenail. The respondent's advertising makes no such distinction, and an examination of the advertising establishes that the claims involved herein are made for the product regardless of whether a penetration of the skin has occurred.

9. Examples of the respondent's advertising in recent years include the following:

Nov. 11, 1956—May 22, 1958

June 19, 1961—Present

Is an ingrown nail hurting you? Now get immediate relief with OUTGRO. Just a few drops of OUTGRO brings blessed relief from the tormenting pain of ingrown nail! OUTGRO toughens the skin underneath the nail, allows the nail to be cut and thus prevents further pain and discomfort. So to get immediate relief from the tormenting pain of ingrown nail, to protect against dangerous infection * * * get OUTGRO today! Now at all drug counters!

May 23, 1958—May 7, 1961

Ingrown toenail brings pain and danger of infection. OUTGRO brings relief and protection! Don't suffer pain or risk infection unnecessarily. Get OUTGRO for ingrown toenail. With the OUTGRO way, a few drops relieves pain instantly, guards against infection, toughens skin underneath so nail can be cut to restore normal foot comfort! So don't suffer pain and danger of ingrown toenail. Use OUTGRO! For immediate relief and protection!

March 8, 1961—July 2, 1961

Ingrown toenail brings pain and danger of infection. With OUTGRO just three drops bring relief and protection! Now watch how OUTGRO relieves pain instantly, guards against infection. Used as directed OUTGRO toughens skin underneath so nail can be cut to restore normal foot comfort. Don't suffer the pain and danger of ingrown toenail. With OUTGRO just three drops brings relief and protection. Get OUTGRO!

Each of the three statements set forth above constitute the audio portion of a television advertisement which is spoken in conjunction with a series of slides or frames which are broadcast and appear visually on the television screen. The audio portion set forth above should be heard in connection with the visual portion of the ads to ascertain their full import. The film strips containing both the audio and the video portions of the ads are in the record.

10. The first charge of deceptive advertising is that respondent falsely claims that its product "Outgro" will relieve the pain of ingrown toenail instantly. It is found that the clear import of the

respondent's advertising is that the application of the product "Outgro" to the affected area will immediately relieve the pain caused by an ingrown toenail. The product "Outgro" contains a small amount of Chlorobutanol, which is a topical anesthetic. The credible testimony in the record is that the use of the small amount of Chlorobutanol present in "Outgro" will have no appreciable effect upon the pain of ingrown toenail and that, if it has any, it is very slight and of short duration. The examiner finds that respondent's advertising claims that the use of "Outgro" will relieve the pain of ingrown toenail instantly are false.

11. The second charge is that respondent falsely claims that "Outgro" relieves infection from ingrown toenail. Respondent urges that its advertising is only to the affect that "Outgro" will "guard against" infection resulting from ingrown toenail. If the skin is not broken as a result of the ingrown toenail, there will generally be no infection present to guard against. If the skin is broken, the use of respondent's product which contains a small amount of Isopropyl Alcohol will have no effective antiseptic results. Respondent's claim that the tannic acid forms a "coating" over the affected areas which will prevent any infection from entering is without foundation. Tannic acid has no antiseptic effect and, in fact, the coating over the affected area may result in infectious matter being contained rather than permitted to exude naturally. The examiner finds that respondent's claims that "Outgro" will guard against or relieve the infection from ingrown toenails are false.

12. The third charge is that respondent falsely claims that the product "Outgro" offers immediate relief from ingrown toenail. The credible evidence in the record is that the product "Outgro" does not provide any immediate or any other relief from ingrown toenails. The examiner finds that respondent's claims in this regard are false.

13. The fourth charge in the complaint is that respondent falsely claims that "Outgro" will "cure" ingrown toenails. Counsel for respondent has conceded that the product "Outgro" will not "cure" ingrown toenails, and urges that the respondent has never so advertised. Respondent's advertising does not use the word "cure" anywhere in their text. The examiner has viewed the television tapes used by respondent in advertising "Outgro" and the clear import of the respondent's advertising is that the use of the product "Outgro" will effect an almost immediate cure of ingrown toenail. This is based principally upon the comparison in such television commercials of a swollen and infected ingrown toe with a perfectly normal toe which the advertising claims will result from the use of

"Outgro". The examiner finds that respondent's claims that "Outgro" will cure ingrown toenails, and that such claims are false.

15. The examiner accepts as credible the testimony of the experts in this field who testified on behalf of counsel in support of the complaint. Their qualifications as experts in their fields and in the subject matter herein involved are unquestioned. Their testimony, based upon their training, clinical experience and knowledge of the ingredients of the product "Outgro" and the directions for its use, is that the use of "Outgro" will have no significant effect on pain or infection, nor will it cure or offer relief for ingrown toenails. In fact, some testified that its use may well have aggravated the condition in at least some instances which they had observed in their practices.

The testimony of respondent's experts as to the effectiveness of the respondent's product "Outgro" is rejected. The two principal expert witnesses called by the respondent identified and testified about a clinical study which they had conducted on behalf of the respondent. This clinical study made by Drs. Grinnell and Brodey was received in evidence. Commission counsel requested that the names of the subjects of their study be given him for the purpose of interviewing them. This was ordered by the examiner. Counsel for respondent insisted that rather than permit the subjects to be interviewed by Commission counsel that respondent's counsel would bring them all from New York to Washington to be interviewed on the record before the examiner. Commission counsel refused this offer. Thereafter, interviews with certain of the subjects were conducted in New York City. At the request of respondent's counsel, he was present together with a reporter who transcribed the interviews verbatim. Of the 44 patients involved in the study, Commission counsel interviewed 11. Permission to interview the remainder was refused by Dr. Grinnell since the questions being asked by counsel in support of the complaint might endanger his practice. Counsel for respondent "would not permit my witness [Grinnell] to be endangered in his profession by questions asked by Counsel in support of the complaint." Whereupon, the examiner struck the studies from the record and all of the testimony of Drs. Grinnell and Brodey in regard thereto. In view of the refusal by Dr. Grinnell and counsel for respondent to have more than a few of the subjects of the study interviewed by Commission counsel, and having observed the demeanor of Dr. Grinnell and Dr. Brodey on the witness stand, the examiner is of the opinion that no credence can be given either to their clinical study or testimony.

16. The last charge is that "respondent's use of the trade name 'OUTGRO' is false and misleading in material respects in that it

represents directly and by implication that the product will cure ingrown toenails." Counsel for respondent has conceded that "Outgro" will not cure ingrown toenails. In support of this charge, counsel in support of the complaint requested the examiner to take "official notice that the respondent's use of the trade name 'Outgro' represents directly and by implication that the product will cause ingrown toenails to grow out again, thereby curing the ingrown toenail." This request was denied by the examiner.

The word "outgrow" from which respondent has obviously dropped the "w" to obtain its trade name, is defined in Webster's New International Dictionary as: "1. To surpass in growing. 2. To grow out of or away from." It is therefore quite clear that the secondary meaning of "outgrow" is directly applicable to and descriptive of a method of treatment of ingrown toenails; namely, to get the nail to grow out of or away from the flesh against which it has grown.

The testimony of the experts in the record is that an ingrown toenail can only be effectively treated and cured by surgery to remove the causative factor. This involves the removal of the offending portion of the nail including a portion of the matrix cells at the base of the nail. These matrix cells create the growth of the nail and it is therefore necessary to remove a portion of the matrix to prevent the nail from again growing in such a fashion that it becomes ingrown again. If the ingrowing nail is treated at an early stage, it can be packed so that the nail may grow up over the tissue thus preventing the nail from becoming ingrown. The record establishes that the product "Outgro" has no effect upon either the matrix cells of the nail or in the way that the nail grows. The product does not cause the nail "to grow out of or away from" the skin or tissue of the toe. The examiner is convinced that many members of the public purchasing respondent's products have and will purchase "Outgrow" with the mistaken belief arising from its trade name that it will somehow affect the growth of the nail and eliminate the symptoms of the ingrown nail. The use of the trade name "Outgro" advertised as it is as a preparation for use on ingrown toenails clearly has the capacity to mislead members of the public, and the examiner feels that the public interest requires an order prohibiting its use on respondent's foot care product.

CONCLUSION

The dissemination by the respondent of the advertising found above to be false and the use by respondent of the trade name "Outgro" in connection with its foot preparation constituted and now

constitutes unfair and deceptive acts and practices, in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondent American Home Products Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its foot preparation sold under the trade name "Outgro", or of any other product of substantially similar composition, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which:

(a) Represents, directly or by implication, that such product relieves the pain of ingrown toenails.

(b) Represents, directly or by implication, that such product relieves or guards against infection from ingrown toenails.

(c) Represents, directly or by implication, that such product cures or offers relief from ingrown toenails.

(d) Contains the word "Outgro" or any other brand name that represents, directly or by implication, that the product will cure ingrown toenails.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said medicinal preparation, which advertisement contains any of the representations prohibited in Paragraph 1, above.

OPINION OF THE COMMISSION

SEPTEMBER 27, 1963

By ELMAN, *Commissioner*:

The complaint in this matter charges respondent with disseminating advertisements misleading in material respects and hence constituting false advertisements within the meaning of Section 12 of the Federal Trade Commission Act, in connection with a medicinal preparation (a "drug" within the meaning of Section 15(c) of the Act) which respondent manufactures and sells, under the regis-

tered trade name "Outgro", for the treatment of ingrown toenails.

An ingrown toenail results when the corner of the nail, commonly the nail of the big toe, grows into the soft tissue of the outer end of the toe. In pressing into the tissue, the nail may penetrate the skin covering. The usual symptoms of an ingrown toenail are pain, inflammation and swelling; if the skin is penetrated and bacteria are present, there is danger of infection. There are two recognized, effective remedies for an ingrown toenail. The less drastic involves lifting up the corner of the nail over the soft flesh, usually by means of a wad of cotton, to permit the nail to grow out over the flesh. If the nail is too far ingrown for this remedy to be effective, then surgery—which involves cutting away the entire nail in the affected area, including the matrix (the skin immediately underneath the nail)—may be required.

"Outgro" is a local anesthetic in liquid form. Concededly, it cannot cure an ingrown toenail or an infection resulting therefrom. Indeed, if "Outgro" is used when infection has already set in, the tannic acid in the product may "seal" the infection in the toe, retarding treatment and possibly causing the infection to spread. Respondent does contend, however, that "Outgro" affords at least partial or temporary relief from the pain and discomfort resulting from ingrown toenail and, by toughening the soft flesh in the surrounding area, acts to some degree as a prophylactic against new infection resulting from ingrown toenail, and also facilitates the cutting of the nail should surgery prove necessary. Although the hearing examiner concluded that "Outgro" is without any therapeutic value, we find, on the basis of all the evidence, including a clinical study prepared by respondent which the examiner improperly excluded from evidence but which the Commission has fully considered on this appeal,* that complaint counsel has not sustained the burden of proving that "Outgro" does not have the limited properties argued for it by respondent.

In its advertising, however, respondent has made more sweeping claims for its product—claims which cannot be substantiated and are, in consequence, unlawful. The record in this case contains

*The basis of the examiner's ruling excluding the study in question (RX 9–11) was respondent's refusal to abide by an order of the examiner which gave complaint counsel permission to interview informally every one of the 44 patients who had participated in the study. Respondent, however, objected not to conventional cross-examination in respect of the study, but only to complaint counsel's interviewing the patients outside of the examiner's presence. Indeed, respondent freely provided complaint counsel with the names and addresses of each of the 44 patients and with all other information, notes and records which might have been helpful in impeaching the study on cross-examination. Since complaint counsel thus had ample opportunity for adequate cross-examination, the study should have been received in evidence, and we have considered it as part of the record upon which our findings are based.

many instances of excessive advertising claims. For example, in one television commercial for "Outgro" (CX 6a-6b) the viewer is shown first a toe with ingrown toenail, the corner of the nail buried under the soft flesh; then "Outgro" being applied to it; and immediately thereafter, the nail growing over the flesh to form a perfectly normal toenail. While this metamorphosis is occurring before the viewer's eyes, the announcer is remarking that "Outgro" "toughens skin underneath so nail can be cut to restore normal foot comfort". Even on the dubious assumption that the viewer would understand the reference to cutting to denote surgery by a doctor, and not mere trimming of the nail by the user of "Outgro" himself with scissors or nail clipper, the qualifying words are believed by the visual presentation, in which the ingrown nail, unaided by surgery or any other treatment besides "Outgro", is shown growing back to normal. Moreover, other statements accompanying the visual presentation are misleading because they omit essential qualifications: "Outgro brings relief and protection! Don't suffer pain or risk infection unnecessarily. Get Outgro for ingrown toenail"; "So don't suffer pain and danger of ingrown toenail. Use Outgro!"

The clear implication of the advertisement as a whole is that the use of "Outgro", without more, will restore an ingrown toenail to normal. No reference is made to surgery, packing of the nail, or other treatment that is ordinarily necessary. The average viewer of such an advertisement would probably believe that "Outgro" is a completely effective home remedy for ingrown toenail; he is not told, and would not be likely to understand, that "Outgro" is merely a local anesthetic and cannot give more than temporary, symptomatic relief, with some prophylaxis against infection.

In the case of a medicinal preparation having limited properties, such as "Outgro", the law requires in appropriate cases that the limitations also be clearly disclosed where the claim is made that the product has such properties. This duty not to mislead the public is not satisfied merely by refraining from making claims which in themselves are false. Section 15(a)(1) of the Federal Trade Commission Act expressly provides that, in determining whether an advertisement for a food, drug, device or cosmetic is misleading and hence false, "there shall be taken into account (among other things) not only representations made or suggested * * * but also the extent to which the advertisement fails to reveal facts material in the light of such representations * * *."

To a person seeking to be rid of an ingrown toenail, it is certainly material that "Outgro" does *not* cure the condition or infections resulting therefrom, does *not* effect a complete and permanent

cessation of pain and discomfort, and *should not* be used if infection has already set in. These limitations, which are the corollaries of the claims that "Outgro" relieves pain and "protects" or "guards against" infection, must be clearly expressed, for without them the unqualified claims become deceptive half-truths. Such express disclaimers are all the more necessary if the misconceptions created by respondent's affirmative misrepresentations of the properties of "Outgro" are to be dispelled. *Cf. Waltham Precision Instrument Co.*, F.T.C. Docket 6914 (decided October 16, 1962), 61 F.T.C. 1027, 1048, 1049.

The examiner found the trade name "Outgro" false and misleading *per se* and ordered respondent to cease using it in its advertising. We agree that the name is likely to deceive the prospective purchaser, who may be led by it to believe that the product will cause an ingrown toenail to grow out or away from the flesh against which it is pressing. However, while the fact that "Outgro" is a registered trademark is not controlling in this proceeding, *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F. 2d 676 (2d Cir. 1944), an order prohibiting altogether the use of a valuable trade name—here, one that has been used by respondent for more than thirty years—is a drastic measure which we prefer not to invoke if a less severe remedy is readily available that will adequately protect the public interest. See *FTC* v. *Royal Milling Co.*, 288 U.S. 212. In the present circumstances, it will suffice to require an appropriate affirmative disclaimer in conjunction with the use of the name "Outgro" in advertising. There are, to be sure, cases in which the addition of an affirmative disclaimer to a misleading trade name would only confuse the consumer—and in such cases, excision of the name may be the only practical remedy. See, *e.g.*, *Bakers Franchise Corp.*, F.T.C. Docket 7472 (decided July 19, 1961), 59 F.T.C. 70, 77. We are satisfied, however, that in the instant case an order requiring respondent to disclose, clearly and conspicuously, in immediate conjunction with the name "Outgro", that the product does not in any way affect nail growth, shape or position, will not confuse the consumer and will fully obviate any danger of consumer deception caused by the trade name.

Except as set forth in this opinion, the findings of fact and conclusions of law contained in the initial decision are adopted by the Commission. We have revised somewhat the terms and provisions of the order to cease and desist. As has been stated many times, the purpose of an order of the Commission is to guide and instruct in the requirements of law with a view to prevention of future violations, not to punish. This purpose is best fulfilled here, we think,

by an order which distinguishes between what is permitted and what is forbidden to respondent in clear and precise terms. The order in this case does not prevent or inhibit respondent from making truthful claims on behalf of "Outgro"; it requires only that those claims be expressed in such terms, and with such qualifications where necessary, that prospective purchasers will not be misled.

FINAL ORDER

SEPTEMBER 27, 1963

This matter has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner. The Commission has rendered its decision, granting the appeal in part but denying it in all other respects. The Commission has determined, for the reasons stated in the accompanying opinion, that the order to cease and desist contained in the initial decision should be modified and, as modified, issued as the Commission's final order. Therefore,

It is ordered, That respondent, American Home Products Corporation, a corporation, and its officers, agents, representatives and employees, doing business under any name or through any corporate or other device, in connection with the sale, offering for sale or distribution of the product that respondent manufactures and sells under the name of "Outgro", or any other product of substantially similar composition and intended use, do forthwith cease and desist from disseminating or causing to be disseminated,

(1) by United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said product, or

(2) by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of said product,

any advertisement which:

(A) states or implies, whether by words or pictures or a combination thereof, that said product can or will:

(1) cure, or provide an effective remedy for, the condition known as ingrown toenail;

(2) relieve pain or discomfort resulting from said condition, unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that such relief is partial and temporary only and is not complete or permanent;

(3) relieve, improve or cure infection caused by or accompanying said condition; or

(4) protect, prevent or guard against such infection, unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that said product is preventive only and cannot relieve, improve or cure an already existing infection, and should not be used if infection has already set in; or

(B) contains the word "Outgro" or any similar-sounding or similar-appearing word suggestive of growth, unless respondent clearly and conspicuously states, in immediate conjunction with any such word, that said product does not affect in any way the growth, shape or position of the toenail.

It is further ordered. That respondent shall file with the Commission, within sixty (60) days after service of the order herein upon it, a report in writing setting forth in detail the manner and form of respondent's compliance with the order.

IN THE MATTER OF

OLIVER L. ROHLFING DOING BUSINESS AS NATIONAL LABORATORIES OF ST. LOUIS

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

Docket 8541. Complaint, Oct. 30, 1962—Decision, Sept. 27, 1963

Order requiring an individual seller of vending machines and vending machine supplies in St. Louis, Mo., to cease representing falsely in advertisements in the "Help Wanted" and other columns of newspapers that he was seeking employees to operate his vending machines, and that the money he required to be invested was for merchandise to be dispensed in his machines and was fully secured by an inventory of such merchandise; to cease, in followup visits to persons responding to such advertisements, falsely representing that purchasers were assured of substantial earnings; and to cease misleading use of the word "Laboratories" as a part of his trade name when he operated no laboratory and did no research.

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 Oliver L. Rohlfing, an individual trading and doing business as National Laboratories of St. Louis, hereinafter referred to as respondent, has violated

the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Oliver L. Rohlfing is an individual trading and doing business as National Laboratories of St. Louis, with his principal place of business located at 4003 Wyoming Avenue, St. Louis, Missouri.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of vending machines and vending machine supplies to purchasers thereof located in various States of the United States.

PAR. 3. In the course and conduct of his aforesaid business respondent causes said vending machines and vending machine supplies to be transported from the place of business of the manufacturer thereof in the State of California into and through States of the United States other than the State of California to purchasers thereof located in such other States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said vending machines and vending machine supplies in commerce, as "commerce" is defined in the Federal Trade Commission Act. His volume of business in such commerce is, and has been, substantial.

PAR. 4. In the course and conduct of his business, at all times mentioned herein, respondent has been in substantial competition with corporations, firms and individuals in the sale of vending machines and vending machine supplies.

PAR. 5. In the course and conduct of his business, as aforesaid, respondent has published and caused to be published, advertisements in the "Help Wanted" and other columns of newspapers distributed through the United States mail, and by other means to prospective purchasers in the several States in which respondent does business, of which the following is typical.

WANTED
MAN OR WOMAN—SPARE TIME

To refill and collect money from our Hersheyett candy and sport card machines in this area. Easy to do. Excellent income, $440.00 cash required, secured by inventory. Include phone No. Write P. O. Box 1041, Wichita, Kansas.

PAR. 6. By means of the statements appearing in said advertisements, as set forth in paragraph 5, respondent has represented and is representing, directly or by implication, that:

(1) The advertisement was an offer of employment;

(2) Persons selected would operate and service vending machines owned by respondent;

(3) The amount of money required to be invested was for the purchase of an inventory of merchandise to be dispensed in respondent's vending machines;

(4) Any amount invested as aforesaid would be secured by an inventory worth the amount invested.

PAR. 7. In truth and in fact:

(1) Respondent did not offer employment to persons reading his advertisement. His sole purpose and intent was to sell his products to such persons;

(2) Respondent did not seek employees to operate and service vending machines owned by respondent but sought purchasers of vending machines and vending machine supplies offered for sale by respondent;

(3) The amount of money required was the purchase price of said vending machines and vending machine supplies and was not for the purchase of an inventory of merchandise to be dispensed in respondent's vending machines;

(4) The aforesaid amount of money required is not secured by an inventory worth the amount invested.

Therefore, the statements and representations referred to in Paragraph 6 were false, misleading and deceptive.

PAR. 8. In the course and conduct of his business respondent visits those persons who make inquiries concerning the nature of the offer made in his advertisement. Upon the occasion of such visits, respondent makes numerous oral representations which are intended to induce and do induce the purchase of said vending machines and vending machine supplies. Typical of such representations, but not all inclusive, are the following:

(1) Persons who purchase respondent's vending machines and engage in the vending machine business are assured of substantial earnings.

(2) That a person purchasing vending machines from respondent will receive such machines with the freight prepaid thereon.

PAR. 9. In truth and in fact:

(1) Persons who purchase respondent's vending machines and engage in the vending machine business are not assured of substantial earnings. In most instances such persons achieve only limited earnings and make little or no profit.

(2) Persons purchasing vending machines from respondent did not receive such machines with the freight prepaid thereon but were required to pay the cost of such freight before they could obtain delivery of the machines.

Therefore, the statements and representations referred to in Paragraph 8 were false, misleading and deceptive.

PAR. 10. Through the use of the word "laboratories" as a part of his trade name, respondent represents that he operates a laboratory and is engaged in research in connection with his business. In truth and in fact, respondent does not operate a laboratory and does no research in connection with his business. Therefore, the aforesaid statement and representation is false, misleading and deceptive.

PAR. 11. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's vending machines and vending machine supplies by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Robert J. Hughes supporting the complaint.

Mr. Claude Hanks and *Mr. Charles M. Shaw*, St. Louis, Mo., for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on October 30, 1962, issued its complaint charging Oliver L. Rohlfing, an individual trading and doing business as National Laboratories of St. Louis, with violation of Section 5 of the Federal Trade Commission Act. The complaint alleges that the respondent, trading and doing business as National Laboratories of St. Louis, has for some time last past been engaged in the interstate sale of vending machines and vending machine supplies.

Respondent, in aid of the first contacting of potential purchasers of the said products, is alleged to have caused advertisements to be published in the "Help Wanted" and other classified advertising columns of newspapers distributed through the United States mail and otherwise in the States in which the respondent does business, which

advertisements, directly or by implication represent that respondent is offering employment to selected persons for the operating and servicing of candy and sport-card vending machines owned by the respondent.

It is alleged that persons replying to the said advertisements are visited by the respondent and that on such occasions oral representations are made by the respondent as to assured substantial earnings to be obtained by persons engaging in the vending machine business. It is further alleged that respondent's said representations as to potential earnings are intended to induce and do induce the purchase of the vending machines and vending machine supplies being offered for sale by the respondent. It is finally alleged that through use of the word "Laboratories" as part of his trade name, that respondent represents that he operates a laboratory and is engaged in research in connection with his business.

The representation that employment is being offered, the inclusion of the word "Laboratories" in respondent's trade name and in various written materials, and the content of the aforesaid advertisements and respondent's oral representations as to earnings are alleged to constitute false, misleading and deceptive statements, representations and practices, and such use by the respondent is alleged to have had and now have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of the said vending machines and vending machine supplies from the respondent by reason of said erroneous and mistaken belief.

Answer to the complaint both admitting and denying various of the allegations of the complaint was filed November 21, 1962. Following a motion by counsel supporting the complaint, a prehearing conference was set for January 8, 1963, and later postponed until January 29, 1963. Upon motion by counsel for the respondent, the prehearing conference was further postponed until February 18, 1963. Subsequent to the prehearing conference, counsel supporting the complaint filed a motion requesting a Certificate of Necessity to the Commission for the holding of hearings in six different cities. Said motion was denied and the hearing was set to commence on March 19, 1963, in St. Louis, Missouri. Following the denial of a motion to quash a subpoena duces tecum directed to the respondent, the hearing was held in St. Louis, Missouri on March 19 and 20, 1963, and the case was closed on the record.

Eight witnesses appeared and testified during the presentation of the case-in-chief and Commission exhibits marked for identification one through sixteen were offered and received in evidence. Six witnesses also appeared and testified during the presentation of the defense and respondent's exhibits marked for identification one through eleven were offered and received in evidence. The record of testimony, including the prehearing conference made part of the record by agreement of respective counsel, consists of 322 pages. All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 4.12(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected. After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent Oliver L. Rohlfing is an individual trading and doing business as National Laboratories of St. Louis, with his principal place of business located at 4003 Wyoming Avenue, St. Louis, Missouri.[1]

2. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of vending machines and vending machine supplies to purchasers thereof located in various States of the United States.[2]

3. In the course and conduct of his aforesaid business respondent causes said vending machines and vending machine supplies to be transported from the place of business of the manufacturer thereof in the State of California into and through States of the United States other than the State of California to purchasers thereof located in such other States. Respondent maintains, and at all times mentioned here has maintained, a course of trade in said vending machines and vending machine supplies in commerce, as

[1] Admitted in respondent's answer. See Tr. 67-69 and 289-299 as to the nature of the occupied premises and the extent of respondent's business operations.

[2] Admitted in respondent's answer. See Tr. 88 and Comm. Ex. No. 5A-F, being a list of the respondent's customers sold in 1962.

"commerce" is defined in the Federal Trade Commission Act. His volume of business in such commerce is, and has been, substantial.[3]

4. In the course and conduct of his business, at all times mentioned herein, respondent has been in substantial competition with corporations, firms and individuals in the sale of vending machines and vending machine supplies.[4]

5. In the course and conduct of his business, as aforesaid, respondent has published and caused to be published advertisements in the "Help Wanted" and other columns of newspapers distributed through the United States mail, and by other means to prospective purchasers in the several States in which respondent does business, of which the following is typical:

WANTED
MAN OR WOMAN—SPARE TIME

To refill and collect money from our Hersheyett candy and sport card machines in this area. Easy to do. Excellent income, $440.00 cash required, secured by inventory. Include phone No. Write P. O. Box 1041, Wichita, Kansas.[5]

6. Respondent, trading under the name "National Laboratories of St. Louis", by his own testimonial admission, does not operate, own, or control a laboratory of any description whatsoever.[6] While respondent does not use such trade name in his newspaper advertisements,[7] it is used by respondent in letters to newspapers placing such advertisements.[8] Said trade name is also used verbally by the respondent in the initial contact of prospective purchasers,[9] in respondent's contract purchase forms[10] and in related correspondence.[11]

Respondent's aforesaid use of the word "Laboratories" as part of the trade name under which he does business constitutes a representation to the purchasing public that a laboratory exists for and does research in connection with said business. Said representation is false, misleading and deceptive. Respondent by his own testimonial admission as hereinbefore set forth, does not operate, own, or control a laboratory of any description whatsoever, and no re-

[3] Admitted in respondent's answer. See Tr. 73-75 for respondent's description of such offering for sale, sale and distribution. Tr. 107-109 shows that respondent's gross annual sales in 1961 were $28,530.30 and for 1962 were $48,968.83.

[4] Admitted in respondent's answer.

[5] Admitted in respondent's answer. See also, Comm. Ex. Nos. 1, 2, 3, 4, 11, and Tr. 70-72; 84-85; 189-192. See, further, respondent's admissions at Tr. 76.

[6] Tr. 84.

[7] Tr. 94.

[8] Tr. 97.

[9] Tr. 94; 195-196; 203; and see Tr. 286, where respondent's own witness states such use by the respondent.

[10] Comm. Ex. Nos. 6, 7, 8, 12, 14, 15; Resp. Ex. Nos. 1, 10.

[11] Resp. Ex. Nos. 5, 6, 7, 8, 9.

search is conducted for or by the respondent in connection with the said business. Such a misrepresentation of business status in the course of doing business in commerce as herein set forth and described constitutes an unfair method of competition and an unfair act and practice in commerce.[12]

7. Respondent's aforesaid newspaper advertisements caused to be published and distributed as hereinbefore described in the furtherance and aid of respondent's aforesaid business activities in commerce represent, directly or by implication, that respondent is offering employment to such persons as are selected by the respondent to operate and service vending machines owned by the respondent.[13] Said representation is false, misleading and deceptive and constitutes an unfair method of competition and an unfair act and practice in commerce.[14] Respondent's sole purpose and intent, by his own testimonial admission, was not to offer such employment but to sell vending machines to potential purchasers replying to respondent's said newspaper advertisements.[15] The required $440 stated in respondent's said newspaper advertisements, to be secured by inventory, is not an outlay of money for a merchandise inventory to be dispensed in respondent's owned vending machines, as the said advertisements represent or imply, because, in fact, it is the purchase price set by the respondent for the sale of vending machines by the respondent. Included in such sales transactions, as shown in the respondent's purchase forms herein of record, are varying amounts of merchandise for dispensing in said machines "given" by the respondent in connection with such sales when later made to persons replying to the said advertisements.[16] Further, said monetary out-

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[12] In *Carter Products, Inc., et al.* v. *Federal Trade Commission,* (1951) 186 F. 2d 821, the court held that "The law is violated if the first contact or interview is secured by deception (*Federal Trade Commission* v. *Standard Education Society, et al.,* 302 U.S. 112, 115 [25 F.T.C. 1715, 2 S.&D. 429]), even though the true facts are made known to the buyer before he enters into the contract of purchase (*Progress Tailoring Co., et al.* v. *Federal Trade Commission,* 7 Cir. 153 F. 2d 103, 104, 105 [42 F.T.C. 882, 4 S.&D. 455])."

See also, the order to cease and desist on this point entered in the prior vending machine matter of *Keith E. McKee* doing business as *National Laboratories of Des Moines,* (1958) 54 F.T.C. 930 at 932. Respondent in this matter adopted the name of *National Laboratories of St. Louis* following his leaving the employ of Keith E. McKee, Tr. 92.

[13] Tr. 156, witness Hobbs, "Well, I was looking for a part-time job and I seen his job under the help wanted ads in the North County Journal," and Tr. 163, "Well, I thought that somebody wanted someone to service vending machines for them." Witness Bolin, at 228, "I was out of work and I was hunting work. I was answering any ad that looked like it might be something that would appeal to me, and that's the reason I answered this particular ad."

[14] *In the Matter of National Laboratories of Des Moines, supra; In the Matter of The Atlas Mfg. & Sales Corp., et al.,* (1958) 55 F.T.C. 828 at 845; *Exposition Press, Inc.* v. *Federal Trade Commission* (1961) 295 Fed. 2d 869 at 872-873.

[15] Tr. 76.

[16] Comm. Exhibits, Nos. 6, 7, 8, 12, 14, 15 and Resp. Exhibits, Nos. 1, 10.

lay is not secured by a merchandise inventory equal in value to the said $440 as respondent's newspaper advertisements represent or imply, because, in fact, the merchandise inventory obtained by the purchaser is of a substantially lesser value.[17]

For example, a typical transaction [18] shows the sale by respondent of eight vending machines at $55 each for a total of $440. The purchaser, for obtaining his own vending machine locations,[19] was offered and received one additional machine, or a total of nine vending machines under the sales contract. The record shows these vending machines [20] cost the respondent $21 each or a total $189 for the nine machines. The record also shows that at the time of such sale, respondent further entered into a repurchase agreement [21] valid for six months after the date of purchase under which the repurchase price was set at $117.44 for the said nine vending machines.

The purchaser in the sales transaction, in addition to obtaining nine vending machines of the then wholesale cost value of $189, also received from respondent 50 lbs. of gum, 50 lbs. of candy, and 20,500 assorted cards for dispensing in the said machines. This inventory of merchandise was testified by respondent [22] to be of the total wholesale value of $91, which is obviously substantially less than the $440 cash required, secured by inventory, stated in respondent's newspaper advertisements. Taking the word "inventory" in the broadest possible sense, as contended for by the respondent to include both the vending machines and the merchandise to be therein dispensed,[23] it is clear that, based on the total value of these nine machines at either respondent's cost price of $189 or the repurchase price of $117.44, and the wholesale value of only $91 for the merchandise allegedly given in the transaction, that there can be no inventory value secured in the amount of $440 as represented or implied in respondent's newspaper advertisements.[24]

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17 Tr. 89.

18 Comm. Ex. No. 8.

19 These locations are usually in small grocery stores, drugstores, supermarkets and the like. The store in which the vending machine is located obtains as space rental a percentage of the take from the machine owner, commonly 25 percent, more or less, of the money taken in by the machine. See Tr. 252–253 ; 289.

20 Tr. 89.

21 Comm. Ex. No. 10.

22 Tr. 89.

23 Tr. 77 ; 98–99.

24 Tr. 244–246 discloses testimony by the witness Boyd, with reference to his contract (Comm. Ex. No. 14) for these vending machines, to have made a later inquiry from respondent's manufacturing source and to have found that they could be purchased direct for $27.95 each by the witness, or a total of $251.55 for nine such machines.

Respondent's aforesaid representations are, therefore, false, misleading and deceptive and constitute an unfair method of competition and unfair acts and practices in commerce.[25]

8. Respondent, in the course and conduct of his aforesaid business, visits such persons as make inquiries concerning the nature of the offer made in respondent's newspaper advertisements.[26] During such visits, respondent makes oral representations to such persons which are intended to induce and do induce the purchase from the respondent of vending machines and the accompanying necessary merchandise supplies.[27] These representations, in the main, are directed to the expounding of the excellent income representation appearing in respondent's newspaper advertisements. It is during this interview that persons replying to respondent's newspaper advertisements are first informed that respondent is not offering employment but is attempting to sell vending machines. Respondent bolsters his sales argument as to assured potential earnings following the purchase of his machines by exhibiting letters from customers which indicate that they are satisfied with respondent's vending machines and are being successful in making sales.[28] Respondent's sales argument is further tailored as the occasion may require, to meet the expressed income needs and expectations of the potential purchaser.[29]

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[25] *In the Matter of National Laboratories of Des Moines; In the Matter of The Atlas Mfg. & Sales Corp., et al., supra.*

[26] In the words of the respondent, at Tr. 75:

"First I get a post office box where my mail comes and I send my ads to the papers, place the ad in their classified section, which I am doing now, for a period of three days, and if cash in advance is needed we will send remittance and upon return of the tear sheet and the statement we will send them a check. Then I will go into the area where I am working and pick up my replies and start contacting the people and then I will set up my interviews."

[27] Respondent, at Tr. 314, admitted to having made in the neighborhood of three or four hundred sales presentations during the past two years.

[28] Tr. 319–321; Resp. Ex. No. 2 is such a letter written by the witness Sack. This witness testified it was written to respondent in 1959, at respondent's request, a month after the purchase of respondent's vending machines. At Tr. 116, Mr. Sack testified as follows:

"Q. Do you still have the vending machines which you purchased from Mr. Rohlfing?

A. Yes, I do, but I hate to tell you where I have them. I have all ten of them but they are not in any places of business.

Q. Why did you withdraw them from service?

A. They were not paying that we felt it was worth our time to go out and service these machines."

[29] With reference to respondent's assured potential income earnings, the witness Boschert, at Tr. 129, testified:

"A. I thought I was going to make—he stated that I could make fifty to sixty dollars a month, a car payment of fifty to sixty dollars a month could be made from operating these nine machines.

Q. Mr. Boschert, did you ever make that amount of money from these vending machines?

A. No, I never did. I only had them for six months, but in that time in my locations it was impossible to make that amount."

See also, witness Hobbs at Tr. 159.

Respondent's representations as to assured potential earnings to be made in the operation of the vending machines he offers for sale are based on numerous hypothetical merchandise turnovers in hypothetical good locations which respondent, from experience, has reason to know cannot be expected to usually occur. That these exaggerated assured potential earnings in the operation of respondent's vending machines are not usually obtained is clearly demonstrated by the testimony of record in this proceeding.

Respondent's sales argument addressed to the uncritical ears of potential purchasers unacquainted with the problems attendant to the locating and the operating of vending machines, is based on the supposition that if the required number of good sales locations is secured and if the public buys sufficiently and all the vending machines turn over their merchandise content the specified number of times, then assured earnings in certain stated dollar amounts will result. Respondent supported this argument by a series of written mathematical figures [30] based on the foregoing supposition which disregarded the fact that, based on respondent's business knowledge and past experience, such a required number of good sales locations [31] and merchandise turnovers [32] were usually obtainable.

Unsupported by the record evidence is the final allegation of the complaint that the purchaser must pay the freight for delivery of the vending machines purchased from the respondent contrary to respondent's alleged oral representation to the purchaser as to prepayment in such regard.[33]

Respondent's aforesaid representations as to assured substantial earnings are false, misleading and deceptive and constitute an unfair

[30] Comm. Ex. No. 9 and Tr. 197–198; Comm. Ex. No. 16 and Tr. 257–258; 263–264.

[31] Witness Kelsey was able to locate only two of the nine machines purchased and stated, "When we asked a number of places, they already had some or they didn't want to bother with them, so we were only able to place two of them." This effort extended "for about three to four weeks after they were obtained" (Tr. 259–260). With regard to the products received for sale in the vending machines, the witness testified, "They are still at home" (Tr. 263). Witness Bolin testified that he was unable to place the nine machines he purchased (Comm. Ex. No. 12) stating, "Upon trying in two or three places, they were full up with other machines and they wouldn't let me place them" (Tr. 231).

[32] Witness Sack stored his machines because they did not pay out enough to be worth the time of servicing (Tr. 116). Witness Boschert found after six months experience that it was impossible to make the dollar amounts stated by respondent. The witness resold his nine machines costing $400 back to the respondent for $117.44 (Comm. Ex. No. 6; Tr. 129–130). Witness Hobbs testified that he was told that within six months time he would have his investment back (Comm. Ex. No. 7). Such did not happen and the machines were stored in his basement (Tr. 159–160). Witness Cowan testified that respondent stated they should have all their money back (Comm. Ex. No. 8, nine vending machines purchased for $440) except for $117.44 at the end of six months (Comm. Ex. No. 9, Tr. 198). The machines were on location approximately a year and returned only $112 (Tr. 200) and not $322.56, the amount forecast by respondent's assured earnings representation.

[33] Tr. 230. But, see. Tr. 233–235 and Tr. 220; 249–250; 263; 305–307.

method of competition and unfair acts and practices in commerce.[34]

Appropriate to the instant proceeding is the following from a United States Supreme Court opinion:

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.
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> * * * * * * *
>
> To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth.[35]

9. Testifying on behalf of the respondent were the respondent, his part-time office secretary and bookkeeper,[36] one purchaser of vending machines from the respondent,[37] and three persons who accompanied the respondent on certain different sales trips for the followup interviews of persons replying to respondent's aforesaid newspaper advertisements.

Respondent's testimony on his own behalf, in the main, was directed to an explanation of his various changes in business address[38] and a denial of the alleged misrepresentations challenged by the complaint and testified to by the witnesses in support of the case-in-chief.[39] In the light of the accepted credible testimony of these witnesses, respondent's testimony to the contrary is given little or no probative weight. Respondent admitted to the making of three to four hundred oral sales presentations during the last two years. Respondent asserted in such connection that while he did not remem-

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[34] *In the Matter of National Laboratories of Des Moines; In the Matter of The Atlas Mfg. & Sales Corp., et al.*, supra; *Goodman* v. *Federal Trade Commission* (1957) 244 F. 2d 584 at 595–596 and 598–600.

[35] *Federal Trade Commission* v. *Standard Education Society, et al.*, (1937) 302 U.S. 112 at 115–116. Respondent mistakenly has cited the lower court opinion in support of his position herein. The lower court was expressly overruled by the Supreme Court on this point.

[36] This witness testified only as to incidental matters such as various changes in respondent's business address and also served to identify certain correspondence.

[37] Witness Politte, a factory worker, testified to the purchase of five vending machines from the respondent for $275 (Resp. Ex. No. 10) in June, 1960 and five more during 1961 and 1962. The gist of this single witness's testimony was that he was satisfied with the business as a side-line, although, as of January 1, 1963, he had only grossed his original investment in the machines. Such amount, according to the witness, however, did not take into account the cost of merchandise bought and the expenses of doing business and operating his route (Tr. 272–273). It will be also noted that this particular testimony is not relevant to disproof of the issues herein and, further, does not refute the preponderant probative weight of the credible record testimony to the contrary. See, *Independent Directory Corporation, et al.* v. *Federal Trade Commission* (1951) 188 F. 2d 468 at 471 citing cases.

[38] Tr. 296–300.

[39] Tr. 303–312.

ber the conversations that took place in all such presentations, variations in such oral presentations would be very small from customer to customer.[40]

The following testimonial excerpts are herein set forth as speaking most eloquently of the nature of respondent's oral presentations:

Q. Would you please relate in your own words what took place when Mr. Rohlfing visited you? Please tell us who was there and what was said as best as you can remember.

A. Mr. Rohlfing, my husband, and myself. They were the only ones there.

Q. Where did this interview take place?

A. At our home. He gave a very convincing talk on the merits of his proposition, which then turned out to be selling us vending machines.

Q. Let me interrupt for just a second. At the time you saw this advertisement that you responded to, what were you interested in, what led you to respond to the ad?

A. We thought it was a part-time job.

Q. And would you explain just briefly why you were interested?

A. My husband is retired and we were interested in making a little additional income. Part time would give him something to do. I might say, besides just sit around the house. Perhaps I don't mean that quite technically. It would give him something to look forward to, something to occupy spare time.

Q. This was the interest that led you to write in when you saw the ad?

A. Yes.

Q. I am sorry I interrupted you. Please go ahead.

A. May I state here that prior to Mr. Rohlfing's coming to the house he called my husband on the phone and asked if the money was going to be available. My husband told him that it was and he made the appointment to come down. He made a very good presentation of what we thought would be a part-time job in his employ, but, as I said, turned out to be the selling of these two-penny vending machines.[41]

* * * * * * *

Q. When Mr. Rohlfing made his sales talk, did he exhibit to you any literature, any photographs?

A. Yes; a photograph purporting to be their factory.[42]

* * * * * * *

Q. I don't want to get you off the track here, but when Mr. Rohlfing came to your home, how did he introduce himself, do you happen to recall?

A. I couldn't say the exact words. I just can't remember.

Q. Now, to get back to the——

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[40] Tr. 315 discloses the following:

"Q. So really, then, your only basis for the statement that you have never made certain representations to your customers is that you always stick to your sales presentation?

A. That is right.

Q. That's what you are relying upon as a basis for your position that you have never said these other things that your counsel asked you about?

A. That is right."

[41] Tr. 193–194.

[42] Tr. 194–195.

A. (Interposing) I think he introduced himself as Mr. Rohlfing of the National Laboratories.[43]

* * * * * * *

Q. During the sales presentation by Mr. Rohlfing, did he say anything to you about the amount of money you might expect to earn from the machines?

A. Yes.

Q. I would like to show you once again Commission's Exhibit 9, which is a sheet of paper with certain figures on it and certain writing. You have already testified that this is all in your handwriting and these figures were dictated to you by Mr. Rohlfing.

A. That is right; he said Now write, and I wrote what he said.

Q. With the assistance of this document, could you explain just as well as you can what Mr. Rohlfing told you you would make if you bought these vending machines and put them out on locations?

A. Put them out on location at the end of six months we should have all of our money back except $117.44, and if we were not satisfied with the machines then they would buy them back for $117.44.[44]

* * * * * * *

Q. Did you get back everything except—by that I mean, did you get back your investment less $117 within six months?

A. No, sir.[45]

* * * * * * *

Q. I have just a few points that I would like to pursue for a few minutes, Mrs. Cowan. Some mention has been made, counsel for respondent has raised a question of you being put under pressure to decide at the time Mr. Rohlfing visited you whether or not you wanted to enter into this transaction. Did Mr. Rohlfing, what, if anything, did Mr. Rohlfing say to you that in any way led you to believe or gave you the feeling of being put under pressure?

A. We felt that since he had taken two weeks to answer our application for what we thought part-time work we should be entitled to a little time to think it over, but he assured us that he was so busy he couldn't give us any time, that he had other people to interview and if we didn't take it, they would, and he had to be on his way, he didn't have any time to tarry and he didn't have any time to give for consideration. It was now or not at all.[46]

Witnesses Missler, Pahle and Moline testified to being present during some of the respondent's oral sales presentations. Witness Missler, who stated he accompanied the respondent solely as a friend and without receipt of any compensation for so doing, testified as to oral sales presentations of the respondent that he had attended. This testimony can be given no probative weight herein.[47] Witness Pahle, who stated the respondent to be his uncle and that he accom-

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[43] Tr. 195–196.

[44] Tr. 197–198.

[45] Tr. 200.

[46] Tr. 224.

[47] Tr. 141 discloses that the witness Missler was not present during respondent's interviews with any of the witnesses testifying in this proceeding, and his testimony, therefore, sheds no light on the conversations stated to have taken place in such interviews.

panied him on sales trips, without compensation, also testified to being present during certain of respondent's oral sales presentations. In particular, the witness testified he was present during the respondent's sales interview with the witness Kelsey. Mr. Pahle confirmed that the respondent had presented Mr. Kelsey with figures as to certain earnings to be obtained in the operation of the vending machines offered for sale by the respondent[48] but denied hearing that the respondent stated the machines would earn so much money within a definite period of time[49] as was testified to by Mr. Kelsey.[50] The testimony of this witness, under the circumstances shown of record herein, is rejected and that of the witness Kelsey accepted as being of substantially more probative value. Witness Moline, who stated he accompanied the respondent for compensation, confirmed respondent's use of the trade name "National Laboratories of St. Louis" in introducing himself to potential purchasers.[51] This witness, like witness Missler, was not present at respondent's oral sales presentation to any of the witnesses testifying in this proceeding, and his testimony is, therefore, rejected for the like reason.

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

CONCLUSIONS

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

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

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[48] Comm. Ex. No. 16; Tr. 276–277.

[49] Tr. 277.

[50] Witness Kelsey, at Tr. 258, testified:

"Q. What was said to you at the time of your interview with Mr. Rohlfing as to the earnings that you might get from these vending machines?

A. Basically that we would have all of our money back within at least a year's time.

Q. Mr. Kelsey, have you gotten your investment back or did you get it back within a year's time after you purchased the vending machines?

A. No, sir.

Q. Could you tell us, Mr. Kelsey, how much money you have, in fact, grossed from the vending machines that you have had out on locations?

A. Less than $50."

[51] Tr. 286 discloses:

"Q. You never once heard him say that he was National Laboratories of St. Louis?

A. Oh, yes, the introduction, but not in the sales pitch."

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

ORDER

It is ordered, That respondent Oliver L. Rohlfing, an individual, trading and doing business as National Laboratories of St. Louis, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of vending machines and vending machine supplies, or any other products, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

a. Employment is being offered when in fact the purpose is to obtain purchasers of vending machines and vending machine supplies or other products;

b. Persons are being selected and employed to operate or service vending machines;

c. The dollar amount of money required for the purchase of vending machines and vending machine supplies is only for the purchase of an inventory of vending machine supplies to be dispensed in vending machines; that said inventory is secured in said dollar amount; that there is no risk of losing the money invested; or that money is required for any purpose other than the purpose for which such money is in fact required;

d. The earnings or profits which will be achieved by persons purchasing vending machines and engaging in the vending machine business will be any dollar amount in excess of the actual earnings or profits usually and customarily achieved by persons similarly so engaged in said vending machine business.

2. Using the word "Laboratories" as a part of any business name, or representing in any other manner, directly or by implication, that a laboratory is operated by or for the said business, or that the nature of the said business in any manner differs from the actual fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision filed on May 17, 1963, and the Commission having determined that said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the aforesaid initial decision be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

IMPERIAL RELAMPAGO CORP. ET AL.

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

Docket C-603. Complaint, Sept. 27, 1963—Decision, Sept. 27, 1963

Consent order requiring New York City distributors of drug preparations to cease representing falsely in advertising in newspapers and magazines, by radio and television and otherwise, that the three preparations concerned would, respectively, be of benefit in the treatment of (1) fever, colds, grippe and aching muscles; (2) bronchial coughs; and (3) nervous disturbances, headache and insomnia.

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 Imperial Relampago Corp., a corporation, and Murray Goldenstein and Rose Goldenstein, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission 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 respect thereof as follows:

PARAGRAPH 1. Respondent Imperial Relampago Corp. 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 540 Ninth Avenue, New York 18, New York.

Respondents Murray Goldenstein and Rose Goldenstein are officers of the corporate respondent. They formulate, direct and control the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and have been for more than a year last past, engaged in the sale and distribution of preparations containing ingredients which come within the classification of drugs as the term "drugs" is defined in the Federal Trade Commission Act.

The designations used by respondents for said preparations, the formulae thereof and directions for use are as follows:

Designation: Alcolado Relampago

Quantitative Formula:

	Calculated Percent
Menthol, 6 pounds, 4 ounces	0.83
Camphor, 10 pounds	1.33
Oil of Fir Siber, 10 ounces	.086
Oil Eucalyptus, 2 ounces, 240 minims	.022
Menta Green, 10 grains	.00019
Tartrazine, 20 grains	.00038
Blue #1, 15 grains	.00028
Iso Alcohol 91%, 70½ gallons	71.0
Water q.s., 90 gallons	

Directions for Use:

FOR EXTERNAL USE ONLY For the external relief of discomforts of muscular aches due to exposure to cold or fatigue. To relieve local congestions due to cold rub into throat, chest and back. Relieves tired feet and refreshing for simple headache.

Designation: Bronkomulsion Relampago

Quantitative Bulk Formula:

	Calculated Amounts Per Dose
Special Percolate, 154 gallons	
Granulated sugar, 1,820 pounds	11 Gm.
Caramel, 45 pints	0.3 cc
4000 U Vitamin A+30%, 100,000 M.U.	1,320 U.
400 U Vitamin D+30%, 10,000 M.U.	132 U.
Menthol, 7½ ounces	3 mg.
Benzoic acid, 2 pounds, 2 ounces	13 mg.
1% Alcohol, 3 gallons 1 pint 4 oz.	1%
Acacia, 5 pounds	30 mg.
Oil of Orange 5 fold, 15 fluid ounces	.006 cc
Water q.s., 300 gallons	

Special Percolate Formula:

Ground White Pine drug mixture, 120 pounds	750 mg.
Pine Tar (8.75 lb=1 gal.), 15 pounds	90 mg.
Rice Hulls, 19 pounds	
Solution of caustic soda, 2½ pints	
Water q.s., 154 gallons	

Ground White Pine Drug Mixture:

White Pine Bark
Balm of Gilead Buds
Wild Cherry Bark
Sanquinaria
Spikenard Root
Sassafras
Cudbear

Directions For Use:

Adults one (1) tablespoonful every three (3) hours.

Children from eight to twelve years of age two (2) teaspoonfuls every three (3) hours.

IMPORTANT—If cough persists or recurs frequently, or high fever, consult your physician.

SHAKE WELL.

Designation: Serabrina La France

Quantitative Bulk Formula:

	Calculated Amounts Per Dose (15 cc)
Sodium Bromide, 11 pounds	396 mg.
Potassium Bromide, 11 pounds	396 mg.
Ammonium Bromide, 5 pounds 8 ounces	198 mg.
Calcium Glycerophosphate, 1 pound	36 mg.
Iron Glycerophosphate, 4 ounces	9 mg.
Oil Cassia, 250 minums	.0012 cc.
Caramel, 2 gallons	.6 cc.
Sodium Benzoate, 8 ounces	18 mg.
Soluble Saccharin, 2 ounces	4.5 mg.
Sugar, 100 pounds	3.6 mg.
Water q.s., 50 gallons	15 cc.

Directions For Use:

ADULT DOSAGE: One tablespoonful three times daily but do not exceed four tablespoonfuls in 24 hours.

CAUTION: Use only as directed. Do not give to children or use in the presence of kidney disease. If skin rash appears or if nervous symptoms persists, reoccur frequently, or are unusual, discontinue use and consult physician. Keep this and other medicines out of the reach of children.

According to the bottle label EACH FLUID OUNCE CONTAINS:

Sodium Bromide	12 grs.
Potassium Bromide	12 grs.
Ammonium Bromide	6 grs.

With Iron and Calcium Glycerophosphates

PAR. 3. Respondents cause said preprations, 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 preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said preparation 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, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations; and has disseminated, and caused the dissemination of, advertisements concerning said preparations 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 preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

1. Fever, colds, grippe with body ache is quite common. For external, rapid, safe relief use the sensational Alcolado Relampago. Alcolado Relampago is different, not like any other. It is entirely medicinal. From the earth plant extracts, from the laboratory chemical substances to produce the penetrating medicinal Alcolado Relampago. Splendid for rubbing on the chest, shoulders and throat for relieving the aches of chest congestion. Effective for the external relief of the discomforts of fever. Wonderful for relieving aching muscles in the shoulders, arms, back and legs due to exposure, cold or fatigue. The best of them all, a beneficience in the home, superb medicinal alcolado, Alcolado Relampago, Alcolado Relampago.

2. For the bad bronchial cough that torments and chest congested due to a cold, Bronkomulsion Relampago. For aid in loosening and clearing phlegm from the heavy feeling, congested chest, Bronkomulsion. For hoarseness, irrita-

tion and smarting of a dry, sore and painful throat, Bronkomulsion. Even for a strong bronchial cough of children or adults, direct, safe, amazingly rapid—Bronkomulsion, Bronkomulsion Relampago.

(Sound of Cough) Stop that cough! Wonderful relief from the first teaspoonful of the remedy that is prepared like a doctor's prescription—Bronkomulsion Relampago to loosen mucous due to chest congestion due to a cold, to soothe the irritation of a dry irritated throat, for coughs of adults and children—highly effective and safe, amazingly fast—Bronkomulsion Relampago. Direct, safe relief with the grand medicinal remedy Bronkomulsion Relampago.

3. For nervousness, irritability and restlessness—symptoms of functional nervous disturbances, the well known sedative—Serabrina La France. Calm tense nerves and for insomnia Serabrina. For nervous headache Serabrina. Take only as directed for calming agitated nerves and for restful sleep resulting in more energy and vitality. The grand tonic-sedative with glycerophosphates of iron and calcium—Serabrina La France.

Persons that suffer from functional nervous disturbance may suffer from these symptoms—irritability, restlessness, nervous tension headache or insomnia. At times they loose their calm easily, don't sleep well nor enjoy the repose that restores energy. How terrible long nights passed in insomnia, twisting and turning on the bed and sleep does not come. One arises with edgy nerves, feeling terribly tired. How is one to work and face the daily problems? As a result of this nervousness your family, your friends and the happiness of the home suffer the consequences. Calm nerves with Serabrina La France. Well known tonic-sedative with glycerophosphates of calcium, and iron for the blood. Serabrina, take only as directed. Serabrina La France. Serabrina.

PAR. 6. Through the use of said advertisements and others similar thereto not specifically set out herein respondents have represented and are now representing:

1. That Alcolado Relampago will relieve fever, grippe, colds and chest congestion;

2. That Bronkomulsion Relampago will relieve bad bronchial coughing, chest congestion, sore throat, and hoarseness, and will loosen and clear phlegm and mucous from a congested chest;

3. That Serabrina La France will calm tense nerves and be effective in relieving and treating functional nervous disturbances and nervousness, irritability, restlessness, nervous tension and headaches;

4. That Serabrina La France will correct insomnia, causing restful sleep resulting in more energy and vitality and improving the user's ability to work;

5. That the glycerophosphates of iron and calcium contained in Serabrina La France have tonic and sedative effects;

PAR. 7. In truth and in fact:

1. Alcolado Relampago will not be of benefit in the relief or treatment of grippe, colds or chest congestion, or the symptoms or discomforts thereof, or of fever;

2. Bronkomulsion Relampago will not be of benefit in the relief or treatment of bronchial cough, chest congestion or hoarseness; will

not be of any value in loosening or clearing phlegm from a congested chest or in loosening mucous due to chest congestion; and will have no beneficial therapeutic effect in excess of the temporary relief of a cough accompanying a common cold;

3. Serabrina La France will not be of benefit in the relief or treatment of any functional nervous disturbance, or of nervousness, irritability, restlessness, nervous tension or any other symptom of any functional nervous disturbance in excess of the temporary relief of such symptoms following several days of administration;

4. Serabrina La France is of no value in the relief or treatment of a headache;

5. Serabrina La France will be of no benefit in the relief and treatment of insomnia except the temporary relief thereof following administration for several days, and any sleep resulting from such administration will not increase energy or vitality, or improve ability to work;

6. Neither iron nor calcium glycerophosphates, in the amounts supplied by Serabrina La France, will be of any therapeutic value.

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.

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

DECISION AND ORDER

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

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

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

1. Respondent Imperial Relampago Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 540 Ninth Avenue, in the city of New York, State of New York.

Respondents Murray Goldenstein and Rose Goldenstein are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Imperial Relampago Corp., a corporation, and its officers and Murray Goldenstein and Rose Goldenstein, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Alcolado Relampago", "Bronkomulsion Relampago", "Serabrina La France", or any other preparations of similar composition or possessing substantially similar properties, do forthwith cease and desist from directly or indirectly:

1. Disseminating, or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act which represents directly or by implication that:

(a) Alcolado Relampago will be of any benefit in the relief or treatment of fever, grippe, colds or chest congestion, or the symptoms or discomforts thereof, or of fever;

(b) Bronkomulsion Relampago:

(1) Will be of any benefit in the relief or treatment of bronchial cough, chest congestion or hoarseness;

(2) Will be of any value in loosening or clearing phlegm from a congested chest, or in loosening mucous due to chest congestion; or

(3) Has any beneficial therapeutic effect in excess of the temporary relief of a cough accompanying a common cold;

(c) Serabrina La France will be of any benefit in the relief or treatment of any functional nervous disturbance,

or of nervousness, irritability, restlessness, nervous tension, or any other symptom of any functional nervous disturbance unless clearly and conspicuously limited to the temporary relief of such symptoms following several days of administration;

(d) Serabrina La France will be of any value in the relief or treatment of a headache;

(e) Serabrina La France will be of any benefit in the relief or treatment of insomnia unless clearly and conspicuously limited to the temporary relief thereof following administration for several days, or that sleep then resulting will increase energy or vitality, or improve ability to work;

(f) The iron or calcium glycerophosphates supplied by Serabrina La France will be of any therapeutic value.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' preparations, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 hereof.

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

By the Commission, Commissioner Elman not concurring.

IN THE MATTER OF

FAMILY PUBLICATIONS SERVICE, INC., ET AL.

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

Docket C-604. Complaint, Sept. 27, 1963—Decision, Sept. 27, 1963

Consent order requiring a corporate door-to-door seller of magazine subscriptions—jointly owned by Parents' Magazine Enterprises, Inc., and Time, Inc., and with branch offices located throughout the United States—to cease such unfair practices in attempts to collect delinquent accounts as representing falsely that such accounts had been referred to an independent collection agency through use of the fictitious name "UNITED STATES CIRCULATION CREDIT BUREAU"; sending to delinquents from their various branch offices letters and forms threatening to take legal action, when they had no such intention; and threatening in letters that the delinquent's employer would be informed of the debt, and that his wages would be attached or levied upon.

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 Family Publications Service, Inc., a corporation, and Eugene J. Foley, Roy W. Titus and Richard G. Brown, 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 Family Publications Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 52 Vanderbilt Avenue, New York 17, New York.

Respondent Family Publications Service, Inc., is an independent corporation owned equally by Parents' Magazine Enterprises, Inc., a New York corporation, with its principal office and place of business located at 52 Vanderbilt Avenue, New York 17, New York, and Time, Inc., a New York corporation with its principal office and place of business located in the Time-Life Building, Rockefeller Center, New York 20, New York.

Respondents Eugene J. Foley, Roy W. Titus and Richard G. Brown are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their addresses are the same as that of the corporate respondent, Family Publications Service, Inc.

PAR. 2. Respondents are now, and for some years past have been, engaged in the sale of magazine subscriptions on an installment basis to persons throughout the United States.

Respondents employ the following method of selling these subscriptions:

(a) A branch office is established in a locality by order, and under the control, of the respondents. Commission sales agents or representatives are employed by the branch office to sell magazine subscriptions door-to-door;

(b) When a sale is made, the purchaser signs a subscription form and makes an initial payment to the sales agent or representative who transmits the money received to his branch office. The branch office forwards the initial payment to respondents' offices in Bergenfield, New Jersey, and respondents notify the appropriate publishers to start service on the subscriptions.

(c) The magazines are sent by mail from the publisher direct to the subscriber. The subscriber pays a monthly installment to a collector from the local branch office. The branch office sends the installment to respondents' Bergenfield, New Jersey office where the publishers' portions of the payment are forwarded to the individual publishers.

PAR. 3. Respondents, through their arrangements with magazine publishers, cause the magazines sold in the manner described in Paragraph 2 hereof, to be shipped from the States in which such magazines are printed or published to subscribers located in various States of the United States other than those in which such magazines are printed and published.

Respondents, through the branch offices of Family Publications Service, Inc., located throughout the United States, send through the mails invoices and other instruments of a commercial nature. Monies obtained from subscribers by personnel of such branch offices throughout the United States are transmitted to respondents' places of business in Bergenfield, New Jersey, and New York, New York. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents have caused and cause to be sent, through the mails from their places of business located in the State of New Jersey and various other States of the United States letters, forms and other printed matter to subscribers whose accounts have become delinquent. Typical, but not all inclusive of such letters, forms and other printed matter is the following:

(SEAL)

UNITED STATES CIRCULATION CREDIT BUREAU

(Name of subscriber)

Date _____

Amount of claim_____

Contract No_____

Dear _____,

As our efforts to effect collection of your past due account have brought no response, you are hereby informed that settlement must be made by _____
(Date inserted)

Otherwise claim will be placed in the hands of an attorney in your locality for prompt action.

You will save unnecessary expense by immediate payment.

Remittances and communications should be sent to the Creditor, Family Publications Service, Inc.

Family Publications Service, Inc. (Local branch office address).

Your credit is invaluable—treat it as an asset

Respondents thereby represent that such delinquent accounts have been referred to an idependent organization engaged in the business of collecting delinquent accounts.

In truth and in fact, "United States Circulation Credit Bureau" is a fictitious name used by respondents in collecting delinquent accounts and the accounts in question have not been referred to an independent organization engaged in the business of collecting delinquent accounts.

Therefore, the aforesaid representations are false, misleading and deceptive.

PAR. 5. In the course and conduct of their business, respondents cause, and have caused, to be sent from their various places of business throughout the United States letters, forms and other printed matter to subscribers whose accounts have become delinquent. Said letters, forms and other printed matter contain many statements or representations as to the action that has been taken or will be taken to effect the collection of such delinquent accounts.

Typical, but not all inclusive, of such statements are the following:

Our attorneys have just advised us that unless payment on your account is in this office by ----------, legal action will be started.

Your account is being sent to our attorneys to take whatever action is necessary to protect our interest.

Copies of * * * OUR MONTHLY DELIQUENT REPORT * * * are sent to our Legal Department, our *Home Office* and to the *Local Credit Bureau.*

By means of the foregoing statements or representations, respondents represent, directly or by implication, that delinquent accounts not settled to respondents' satisfaction will be collected by legal action. In truth and in fact, respondents have no intention of collecting said accounts by legal action and do not resort to legal action to collect such accounts. Therefore, the aforesaid statements and representations were false, misleading and deceptive.

PAR. 6. In the course and conduct of their business, respondents cause, and have caused, to be sent from their various places of business throughout the United States many other letters, forms and items of printed matter to subscribers whose accounts have become delinquent. Said letters, forms and other printed matter also contain many statements or representations as to other action that has been taken or will be taken to effect the collection of such delinquent accounts.

Typical, but not all inclusive, of such statements or representations are the following:

(a) As you have neglected to make your payments on the above mentioned account, we have no other alternative than to seize your salary.

(b) Attorney's action frequently means contact at place of employment.

(c) Dear Subscriber:

We feel that we have given you ample time to pay this small amount. Therefore, we suggest that if it meets with your approval, *WE BRING THIS MATTER TO THE ATTENTION OF YOUR EMPLOYER.*

It is possible that your employer will advance this sum, thereby saving you the additional costs and embarrassment that legal action may involve.

This will be our final communication to you regarding your account.

(Facsimile signature) Collection Manager

(d) Settlement in full must reach us within five days from the date shown below or your EMPLOYER WILL RECEIVE IMMEDIATE NOTICE FOR ATTACHMENT.

THIS IS FINAL AND UNCONDITIONAL.

Legal Department,
S. M. ATWELL

(e) Notice of Assignment of Wages.

YOU ARE HEREBY NOTIFIED—

1. That you have defaulted in the conditions of our conditional sales contract secured by ASSIGNMENT OF WAGES made and executed by you in favor of Family Publications Service, Inc. * * *

2. That there is still due and unpaid the sum of _____ * * *.

3. That unless you call at the Collection Department Office at Family Publications Service, Inc., 22 West Park Avenue, Suite 201, Oklahoma City, Oklahoma, within THREE DAYS from date hereof to make satisfactory arrangements to redeem this obligation, said ASSIGNMENT OF WAGES will be served upon employer to hold all wages, salaries, commission, and other compensation for services, present and future, together with costs of collection, subject to our order.

By means of the foregoing statements or representations, respondents represent, directly or by implication, that if delinquent accounts are not settled to respondents' satisfaction, the debtor's employer will be informed of the debt and the debtor's wages will be attached or levied upon to satisfy the debt.

In truth and in fact, respondents do not inform the employers of delinquent debtors of the existence of the aforesaid debts and respondents do not intend and make no effort to attach or levy upon the wages of delinquent debtors. Therefore, the aforesaid statements or representations were, and are, false, misleading and deceptive.

PAR. 7. Certain of the letters, forms and other printed matter sent to delinquent debtors simulate legal process. By means of such simulated legal process, respondents represent, directly or by implication, that legal action has been instituted against said delinquent debtors. In truth and in fact, legal action has not been instituted against persons receiving such forms. Therefore, such representations are false, misleading and deceptive.

PAR. 8. By and through the acts and practices set forth in Paragraphs 4 through 7, hereof, respondents coerce and intimidate subscribers whose accounts respondents claim to be delinquent and lead such subscribers to believe that their accounts have been turned over to independent organizations engaged in the collection of past due accounts or to attorneys and that legal action has been or will be instituted or that subscribers' wages will be attached or levied upon, whereas respondents take none of these actions. Respondents' acts and practices constitute a scheme to induce subscribers to pay such accounts through deception and misrepresentation.

PAR. 9. The use by respondents as hereinabove set forth of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and to induce payment by respondents' subscribers whether or not the amounts claimed by respondents are, in fact, due and owing.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of

said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent, Family Publications Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 52 Vanderbilt Avenue, New York 17, New York.

Respondents Eugene J. Foley, Roy W. Titus and Richard G. Brown are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent, Family Publications Service, Inc., a corporation, and its officers, and Eugene J. Foley, Roy W. Titus and Richard G. Brown, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the collection of accounts in commerce, as "commerce" is defined by the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the name "United States Circulation Credit Bureau" or any other trade or corporate name of similar import or meaning or otherwise representing, directly or by implication that delinquent accounts not referred for collection to an independent agency or organization engaged in the collection of past due accounts have been so referred;

2. Representing that past due accounts are being or have been referred for collection to an attorney when these accounts are not being nor have they been so referred;

3. Representing, directly or by implication, that a debtor's employer has been notified that any or all of the following actions have been or will be taken when no such action or actions have been or will be taken:

(a) Suit instituted against the debtor to collect the alleged sum due;

(b) The debtor's wages attached;

(c) The debtor's wages garnisheed.

4. Using forms or any other items of printed or written matter which simulate legal process.

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

By the Commission, Commissioner Anderson not participating.

IN THE MATTER OF

STANDARD MILLS, INC., ET AL.

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

Docket 8484. Complaint, May 2, 1962—Decision, Sept. 30, 1963

Order requiring New York City converter jobbers of upholstery fabric—buying from mills the raw, unbleached grey goods which they then contracted with finishing mills to color and pattern and finally sold to furniture manufacturers, department stores, decorators and upholsterers—to cease the unqualified use in their trade name of the word "Mills", and to accompany the name on letterheads, invoices and labels with the words "Converters, Jobbers, and Distributors of Fabrics—not Textile Manufacturers or Mill Owners" in type ¾ the size of that used in the trade name and immediately under the name; and with a choice of using the same qualification as a footnote, preceded by an *asterisk* on all other *printed* matter.

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 Standard Mills, Inc., a corporation, and Arthur J. Smith and Lloyd Smith, 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 Standard Mills, Inc., is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 461 Park Avenue South, New York, New York.