Syllabus

IN THE MATTER OF

NATIONAL INSTITUTE OF PRACTICAL NURSING ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5700. Complaint, Oct. 3, 1949—Decision, Apr. 30, 1952

The designation of "practical nurse", when applied to one who acquired it by attending a school, means, in its full sense, one who has satisfactorily completed a full-time, nine months' course of instruction which includes a substantial amount of time in a hospital or other institution for the care of the sick, with work under supervision at the bedside of patients therein.

Where a corporation and its two officers, engaged in the operation of a school, purportedly for the training of practical nurses, which included the furnishing of 38 printed lessons, classroom instruction consisting of two two-hour periods weekly extending over six months (a total of some 96 hours), a bath thermometer, clinical thermometer, nurse's uniform and cap, forceps and certain other equipment, class instruction given on the premises by registered nurses and one physician who lectured to each class about twelve times; and the giving of examinations to the students from time to time; but did not include any hospital training, demonstrations in which sick people were involved, or contact by the students with actual living patients, the "practical" training being given on manikins;

In representations which were in large part addressed to residents of Washington, D. C., and its immediate vicinity, who contemplated employment in the same area after taking the course, and which were contained in newspapers published in said District, and in postcards and letters sent to prospective students—

(a) Represented, directly and by implication, that there was no distinction or difference between "practical nurses", "trained practical nurses" and "graduate practical nurses", and that its graduates forthwith entered all of said categories, and were practical nurses in the full sense of the term;

(b) Represented that the course of instruction was complete and covered all the necessary subjects in such a manner that one who successfully completed it had become a practical nurse in the full sense of the term;

(c) Represented that many hospitals desire the services of and employed practical nurses; and

(d) Represented orally to some prospective students that they would be eligible for employment as practical nurses in Washington, D. C., hospitals; would be recognized as practical nurses; that the school was recognized by hospitals and the Red Cross; and that they would be qualified to practice in any hospital with a praduate practical nurse's qualifications;

(e) Falsely represented that a certain Washington hospital recognized "the diploma or certificate issued" to their graduates;

The facts being that their course of instruction fell far short of such a curriculum as connoted by the designation "practical nurse"; use of the term "complete" to describe their course and of the designation of their graduates as "practical nurse", "trained practical nurse" and "graduate practical nurse" was misleading; graduates did not meet the requirements for employment as practical nurses of the only hospital in the Washington area which employed such nurses, nor did they meet those of the Civil Service; and the hospital concerned did not employ practical nurses as such, but nurse's aides, whose status was lower, and in connection with which employment completion of their course constituted no additional recommendation;

With tendency and capacity to mislead many herein concerned with respect to the opportunity for employment in hospitals as practical nurses in the area in which they would be most prone to seek and desirous of obtaining such employment; and to mislead and deceive members of the public into the belief that the representations were true, and thereby into the purchase of a substantial number of said combinations of courses and equipment:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

As respects the use of the term "practical nurse" to describe the school's graduates in respondents' advertising of their school, it was the Commission's conclusion that the use of said term constituted a misrepresentation which was not susceptible of cure by the use of explanatory phraseology, and that any such attempt would result not in clarification but in contradiction, or at best confusion.

In the aforesaid proceeding, while it could not be found, on the weight of the evidence, that the representation that many hospitals desired the services of and employed practical nurses was false as a generalization, it was nevertheless misleading as used by respondent in view of the persons to whom such representations were in large part, if not primarily, addressed.

As respects other issues presented by the pleadings, which included the alleged false and misleading representation that respondents had placed hundreds of graduates in positions in hospitals, institutions and private cases; that no high school education was required and no previous experience necessary for a student; that enrollees would be placed in positions as practical nurses upon completion of the course; that doctors connected with the school would certify to the qualifications of the graduates; and with regard to respondents' alleged failure to advise enrollees that purchase of a class pin for $6.50 was required at the conclusion of the course, in addition to the cash payment, before the diploma was granted; and misuse of the word "institute", especially as used in connection with the trade name, and the word "diploma": The Commission concluded that the allegations of the complaint had not been proved.

Before *Mr. John W. Addison*, hearing examiner.

Mr. William L. Pencke for the Commission.

Mr. Simon E. Sobeloff and *Schonfield & Schonfield*, of Baltimore, Md., for respondents.

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 National Institute of Practical Nursing, a corporation, and Edward Williams and Lillian J. Williams, 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. National Institute of Practical Nursing is a corporation organized, existing, and doing business under the laws of Maryland. Edward Williams is President and Lillian J. Williams is Secretary of said corporation, and as such formulate, determine, and control all of the business policies and activities of said corporation. The principal office and place of business of said corporate and individual respondents is located in the Victor Building at 909–911 "G" Place, N. W., in the city of Washington and District of Columbia.

PAR. 2. Said corporate respondent is now, and has been for more than two years last past, engaged in the operation of a school in the District of Columbia for the training of practical nurses and in the sale of books and other supplies used in connection therewith. The volume of business done by respondents in the conduct of said school and the sale of said equipment as aforesaid has been and is substantial.

PAR. 3. In the course and conduct of said business, said corporate respondent makes use of advertisements in newspapers published in the District of Columbia and of circulars, letters, and other advertising material disseminated to prospective students, in and by which many false, misleading, and deceptive statements and representations are made in regard to the pursuit of said studies and to practical nursing and matters and things connected therewith. Typical of such statements and representations are the following:

PRACTICAL NURSES
EARN UP TO $10 A DAY

Fast, Efficient ACTUAL CLASSROOM INSTRUCTION Summer Classes Forming Now	The desperate shortage of nurses means opportunity for YOU. Doctors, hospitals, private cases, institutions are calling for practical nurses. Train in your spare time regardless of age or education. Morning, afternoon and evening classes. Convenient payment terms. Write, phone or visit.

Enjoy a professional career in practical nursing; be a part of this respected, well-paid profession. Many positions available now in private homes and institutions. Women 18–25 can easily and quickly prepare for a dignified career

with our short, complete course. NO high school education required. NO previous experience necessary.

To answer the tremendous demand for practical nurses throughout the country the National Institute of Practical Nursing . . . has been training successfully for the past several years hundreds of women between the ages of 17 and 55 years for a future which offers very excellent working conditions, high wages, job satisfaction and the prestige of a professional career. Hundreds of graduates have been placed by the Institute free of charge on private cases in doctors' offices, convalescent homes, private, Government and municipal hospitals, sanitariums and other institutions where the need for nurses has been and will continue to be a constant threat to the health, well being and recovery of sick patients UNLESS YOU and 40,000 or more women like you come to their aid.

Complete training given in a
short period of time.
Diploma awarded upon graduation.

PAR. 4. By means of the foregoing statements and representations and others similar thereto and not herein specifically set forth, respondents represent and imply that there is a desperate shortage of and tremendous demand for practical nurses; that professional practical nursing is well paid, dignified and highly respectable, and offers a professional career; that physicans, hospital institutions and private cases are calling for practical nurses; and that respondents have placed hundreds of graduates in positions with the aforementioned institutions and individuals without cost to such graduates; that the shortage of nurses is and continues to be a constant threat to the general public health and to the recovery of the sick unless 40,000 or more women undertake to become practical nurses; that respondents offer a fast efficient and complete course of training in a short period of time; and that no high school education is required and no previous experience is necessary.

PAR. 5. In truth and in fact all of said representations and many others similar thereto made by respondents, as aforesaid, are exaggerated, false, deceptive and misleading. While there may be a shortage of duly qualified practical nurses for whom employment in that profession may be available, respondents' graduates cannot so qualify, and respondents have not placed hundreds of graduates in positions of practical nurses, for the reason that said graduates are not licensed in States in which the licensing of practical nurses is required; neither are respondents' graduates placed upon the register of the National Association of Practical Nurses from which vacancies are supplied, nor are they recognized or registered by any other established and accredited practical nursing association. In virtually all cases in which respondents' graduates have found employment in hospitals or other institutions for the treatment of the sick, the employment has been

limited to that of nurses aids. In truth and in fact neither the general public health nor the care of the sick will be adversely affected if no students undertake the study of respondents' course in practical nursing. Because of said limitations respondents' graduates do not earn high salaries, nor do they enjoy the privilege of a professional career. Respondents' course of training is not complete for the reason that said students do not receive any practical training in hospitals with live patients under the supervision of competent nurses or teachers. In order to qualify as a practical nurse, it is highly desirable that students have a high school education. In many instances respondents have accepted as students individuals who had no education whatever and were in fact illiterate; and when upon discovery of such illiteracy in said students respondents terminated their studies, no refund of tuition paid by said students was made to them. In truth and in fact hospitals do not generally employ practical nurses for the reason that hospitals maintain a staff of trained registered nurses who in turn have nurses aids as assistants, said nurses aid being also trained by the hospital.

PAR. 6. In many instances respondents' sales agents in soliciting prospective students to enroll for said course of study have represented and implied that said enrollees would be placed in positions as practical nurses upon completion of said course; that the diploma or certificate issued to respondents' graduates was recognized by Georgetown Hospital in the city of Washington; and that the doctors connected with respondents' school would certify to the qualifications of said graduates. In truth and in fact while respondents have available an employment service, they do not place their graduates in positions as practical nurses upon completion of the course. Neither Georgetown Hospital nor any other reputable hospital or institution for the healing and care of the sick recognizes the certificate or diploma issued by the respondents, nor do any doctors certify to the qualifications of respondents' graduates. There is in fact only one physician connected with said school who occasionally delivers lectures to the students.

PAR. 7. Respondents' price for its course of training in practical nursing is $169.50 if paid upon the installment plan or $154.50 if enrollees pay cash therefor. At the time of enrollment enrollees are not advised that respondents require the purchase of a class pin at the conclusion of said course of study the price of which is $6.50, and that the purchase of said class pin is required before said diploma is granted.

PAR. 8. An "institute," as that term is generally understood in educational circles, is an organization for the promotion of learning, philosophy, art science and similar subjects with a staff of competent,

experienced and qualified educators offering training and instruction in said subjects. The primary object of the work of an institute is that of scientific investigation and instruction, and not that of commercial promotion or financial profit.

The term "institute" is also understood by the general public and in professional circles to be an organization of a special group of individuals having a common interest and being devoted to the promotion and consideration of such interests and the general welfare of the members of such organization.

Respondents, through the use of the designation "Institute" in their trade name, and particularly in connection with the word "National," represent or imply that their said business is a national organization established for the purpose of promoting the interests and welfare of practical nurses.

In truth and in fact, respondents' business is not an "institute" within the generally accepted meanings of said term. Respondents' business is that of teaching fundamental principles of practical nursing, which do not involve the study of subjects in higher education or the arts and sciences; in fact, respondents do not require a high school education for taking said course of study; nor is said National Institute of Practical Nursing a national organization devoted to the interest or welfare of practical nurses generally. Respondents' business is operated for the sole purpose of financial gain for the individual respondents.

PAR. 9. The word "diploma" is understood by the general public to mean written evidence of the successful completion of a prescribed course of study in academic or scientific subjects, and that such diploma is recognized by duly authorized, accredited and recognized educational institutions of higher learning.

Respondents' statement that diplomas are issued to students who have successfully completed said course of study, and the issuance by respondents of such "diplomas," together with the trade name "National Institute of Practical Nursing," all combine to represent and imply that holders of respondents' diplomas are recognized as duly qualified practical nurses and as such are eligible to be employed by hospitals and other institutions for the care of the stick, and are recommended by physicians generally, and that respondents' said diploma is recognized in the medical profession or otherwise as being evidence of respondents' school being an accredited school for practical nurses.

In truth and in fact, the diploma issued by respondents' school is of no validity or effect whatever. Neither said school nor the diploma issued by it are recognized or accredited by any recognized and ac-

credited school or organization of practical nursing, nor by any hospitals or physicians generally.

PAR. 10. The statements and representations made by respondents, as aforesaid, have had and now have the tendency and capacity to mislead and deceive members of the purchasing public into the belief that said statements and representations are true and to induce a substantial number thereof to subscribe to and purchase respondents' said course of study and to pursue the same on account thereof.

PAR. 11. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 3, 1949, issued and thereafter caused to be served upon the respondents named in the caption hereof its complaint, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing by respondents of their answer thereto, testimony and other evidence in support of and in opposition to the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and evidence were duly filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission upon said complaint, the respondents' answer thereto, the testimony and other evidence, the hearing examiner's recommended decision and the exceptions of counsel supporting the complaint and counsel for respondents thereto, briefs in support of and in opposition to the complaint, and oral argument of counsel supporting the complaint, counsel for respondents not appearing, although notified; and the Commission, having entered its order disposing of the exceptions to the recommended decision and being now fully advised in the premises, finds this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. National Institute of Practical Nursing is a corporation organized, existing, and doing business under the laws of the

State of Maryland. It was incorporated in August 1946. Edward Williams is president and Lillian J. Williams is secretary of said corporation, and as such they formulate, determine, and control all of the business policies and activities of said corporation. The principal office and place of business of said corporate and individual respondents is located in the Victor Building at 909–911 "G" Place, N. W., in the city of Washington and District of Columbia.

PAR. 2. Said corporate respondent is now, and has been for more than two years last past, engaged in the operation of a school purportedly for the training of practical nurses. For the sum of $169.50 the corporate respondent furnished students with thirty-eight printed lessons, classroom instruction consisting of two two-hour periods weekly extending over six months (a total of some ninety-six hours), a bath thermometer, forceps, graduated glass, gauze face mask, clinical thermometer, nurse's uniform and cap, medical dictionary, rubber gloves, and charts. The value of the bath thermometer and other items of equipment was represented by one of the corporation's agents as $50.00. Examinations on their lessons were given to the students from time to time. The volume of business done by the corporation in the conduct of its school and the sale of its combination of instruction and equipment, as aforesaid, was substantial. In 1947–1948 there were as many as five or six hundred students enrolled at one time, and in February 1950 there were some one hundred and twenty. In 1948 the school's gross annual income was approximately $139,000.00, and in February 1950 was some $40,000.00.

The school occupied 1,500 feet of floor space, in which were included two classrooms. All of the class instruction was given on the premises. The instructors were registered nurses and one physician who lectured to each class about twelve times. The instruction did not include any hospital training, demonstrations in which sick people were involved, or contact by the students with actual living patients. The "practical" training was given on manikins.

PAR. 3. In the course and conduct of the said business, the corporate respondent has made use of advertisements in various newspapers published in the District of Columbia and post cards and letters sent to prospective students; among and typical of the statements and claims made therein are the following:

YOU too can become a Graduate Practical Nurse.

Be a trained practical nurse; be a part of this respected, well-paid profession.

Become a Practical Nurse.

Graduate Practical Nurses are needed in great numbers * * *. Diplomas given upon graduation.

PRACTICAL NURSES
EARN UP TO $10 A DAY

Fast, Efficient ACTUAL CLASSROOM INSTRUCTION Summer Classes Forming Now

The desperate shortage of nurses means opportunity for YOU. Doctors, hospitals, private cases, institutions are calling for practical nurses. Train in your spare time regardless of age or education. Morning, afternoon and evening classes. Convenient payment terms. Write, phone or visit.

Enjoy a PROFESSIONAL CAREER in PRACTICAL NURSING * * * be a part of this respected, well-paid profession. Many positions available now in private homes and institutions. Women 18–55 can easily and quickly prepare for a dignified career with our short complete course. NO High School Education Required NO Previous Experience Necessary.

To answer the tremendous demand for Practical Nurses throughout the country, the National Institute of Practical Nursing, * * * has been training successfully for the past several years hundreds of women between the ages of 17 and 55 years, for a future which offers very excellent working conditions, high wages, job satisfaction and the prestige of a professional career. Hundreds of graduates have been placed by the Institute free of charge on private cases, in doctors' offices, convalescent homes, private, government and municipal hospitals, sanatoriums and other institutions where the need for nurses has been and *will continue* to be a constant threat to the health, well-being and recovery of sick patients UNLESS YOU and 40,000 or more women like you *come to their aid.*

Complete training given in a short period of time! Diploma awarded upon graduation!

PAR. 4. Through the use of the statements hereinabove set forth and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that there is no distinction or difference between "practical nurses", "trained practical nurses," and "graduate practical nurses," that graduates of the said school forthwith enter all of these categories, and are practical nurses in the full sense of the term; that the course of instruction is complete and covers all the necessary subjects in such a manner that one who successfully completes it has become a practical nurse in the full sense of the term, and that many hospitals desire the services of and employ practical nurses.

PAR. 5. The designation of "practical nurse" when applied to one who acquired it by attending a school means, in its full sense, one who has satisfactorily completed a full time, nine months' course of instruction which includes a substantial amount of time in a hospital or other institution for the care of the sick, with work under supervision at the bedside of patients therein. This course of instruction falls far short of such a curriculum. The use by respondents of the term "complete" to describe their course in practical nursing is misleading, as is their designation of graduates of the school as "practical nurses," "trained practical nurses," and "graduate practical nurses."

The Commission has duly considered the matter and has concluded that the use by respondents, in advertising their school, of the term "practical nurse" to describe or designate its graduates constitutes a misrepresentation which is not susceptible of cure by the use of explanatory phraseology. It is of the opinion that any such attempt would result not in clarification but in contradiction, or at best confusion.

PAR. 6. It cannot be found on the weight of the evidence that the representation that many hospitals desire the services of and employ practical nurses is false as a generalization, but it can be and is found to be misleading, as used by respondents.

The record shows respondents to have made these representations by means of advertisements in newspapers published in Washington, D. C. The witnesses who had attended respondents' school were almost without exception residents of Washington, D. C., or its immediate environs, at the time of their testimony, and the employment of respondents' graduates, so far as the record shows, was almost entirely in the same area. At least ninety percent of the school's graduates are residents of the District of Columbia.

These representations were in large part, if not primarily, addressed to the attention of persons who were residents of Washington, D. C., and its immediate vicinity, and who contemplated employment, after completion of the course, in the same area.

From the testimony of witnesses connected with seven Washington area hospitals it appears that only one, Gallinger Hospital, employs practical nurses as such. It is noted that respondents' graduates do not meet Gallinger's requirements for employment in this capacity, nor those of the United States Civil Service.

Respondents' said representation had the tendency and capacity to mislead many of those to whom it was addressed with respect to the opportunity for employment in hospitals as practical nurses in the area in which they would be most prone to seek, and desirous of obtaining, such employment. A number of graduates testified to their fruitless search for employment as practical nurses in hospitals in this area.

PAR. 7. Oral representations were made to some prospective students that they would be eligible for employment as practical nurses in Washington, D. C. hospitals; that they would be recognized as practical nurses; that the school was recognized by hospitals and the Red Cross; and that they would be qualified to practice in any hospital with a graduate practical nurse's qualifications.

The evidence is sufficient to sustain the finding, and the Commission does find that, as the complaint alleges, respondents represented that "the diploma or certificate issued to respondents' graduates was recog-

nized by Georgetown Hospital in the city of Washington," and that the representation was false.

Georgetown Hospital does not employ practical nurses as such, and in the employment of nurses' aides, who are lower in status than "practical nurses," the completion of respondents' course is no additional recommendation for a person who meets the hospital's requirements.

PAR. 8. The foregoing statements and representations used by respondents in connection with the offering for sale, sale, and distribution of their combination of courses of instruction and equipment had the capacity and tendency to mislead and deceive members of the public into the erroneous and mistaken belief that the said statements and representations were true, and into the purchase of a substantial number of said combinations by reason of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of respondents, as hereinabove found, were all to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The Commission has considered the record in connection with the other issues presented by the pleadings and has concluded that the allegations of the complaint with respect thereto have not been proved.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the respondents' answer thereto, testimony and other evidence in support of and in opposition to the complaint introduced before a hearing examiner of the Commission theretofore duly designated by it, the hearing examiner's recommended decision and exceptions thereto of counsel supporting the complaint and counsel for respondents, briefs in support of and in opposition to the allegations of the complaint, and oral argument by counsel supporting the complaint (counsel for respondents not appearing, although notified), and the Commission having issued its order disposing of the exceptions to the recommended decision and having made its findings as to the facts and its conclusion that National Institute of Practical Nursing, a corporation, and Edward Williams and Lillian J. Williams, individually and as officers of said corporation, have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent National Institute of Practical Nursing, a corporation, and its officers, and the respondents Edward Williams and Lillian J. Willians, individually and as officers of said corporation, and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of courses of instruction and study, whether separately or in combination with equipment for use in connection therewith, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting in any manner the opportunities for employment in any field of endeavor in which a course of instruction is offered.

2. Using the word "complete," or any word of similar import or meaning, to designate, describe, or refer to any course or curriculum of instruction in practical nursing which requires less than nine months of forty-hour weeks of supervised instruction, of which a substantial amount is in an institution for the care of the sick.

3. Using the words "practical nurse" to describe, designate or otherwise refer to any person who has not satisfactorily completed a course or curriculum of instruction in practical nursing of not less than nine months of forty-hour weeks of supervised instruction, of which a substantial amount is in an institution for the care of the sick.

4. Representing, contrary to the fact, that any diploma or certificate issued by them is regarded by any hospital or other institution as evidence of proficiency of the holder thereof in the field of endeavor to which such diploma or certificate relates.

It is further ordered, That said 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 this order.

IN THE MATTER OF

E. F. PLONER TRADING AS MICHIGAN CITY NOVELTY COMPANY

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5786. Complaint, June 26, 1950—Decision, Apr. 30, 1952

Where an individual engaged in the interstate sale and distribution of push cards and punch boards which, bearing explanatory legends or space therefor, were designed for use, and were used by the ultimate purchaser, in the sale of merchandise to the consuming public under plans whereby the purchasers of a punch or push who, by chance, selected concealed winning numbers became entitled to designated articles of merchandise at much less than their normal retail price, others receiving nothing for their money other than the push or punch—

Sold and distributed such devices to dealers in candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles, assortments of which, made up with said devices, were exposed and sold by their direct or indirect retailer purchasers to the purchasing public in accordance with the aforesaid sales plan; and thereby supplied to and placed in the hands of others means of conducting lotteries, games of chance or gift enterprises in the sale and distribution of their merchandise, contrary to an established public policy of the United States Government, and in violation of criminal law; and means for engaging in unfair acts and practices;

With the result that many members of the purchasing public were induced by the element of chance involved to deal with retailers who thus sold or distributed their merchandise; many retailers were thereby induced to deal with suppliers of such assortments; and gambling among members of the public was taught and encouraged:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.
Mr. J. W. Brookfield, Jr. for the Commission.
Mr. F. W. James, of Evanston, Ill., for respondent.

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 E. F. Ploner, an individual, trading and doing business as Michigan City Novelty Company, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in regard thereto would be in the public interest hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, E. F. Ploner, is an individual trading and doing business as Michigan City Novelty Company, with its office and principal place of business located at 410 Franklin Street, Michigan City, Indiana.

Respondent is now, and, for more than three years last past, has been engaged in the sale and distribution of devices, commonly known as push cards and punchboards and in the sale and distribution of said devices to dealers in various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia and to dealers in various articles of merchandise in the various States of the United States and in the District of Columbia.

Respondent causes and has caused said devices when sold to be transported from his place of business in the State of Indiana to purchasers thereof at their points of location in the various States of the United States and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices by said respondent in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his said business as described in Paragraph One hereof, respondent sells and distributes, and has sold and distributed, to said dealers in merchandise, push cards and punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondent sells and distributes, and has sold and distributed many kinds of push cards and punchboards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail.

Many of said push cards and punchboards have printed on the faces thereof certain legends or instructions that explain the manner in which said devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on said push cards and punchboards vary in accordance with the individual device. Each purchaser is entitled to one punch or push from the push card or punchboard, and when a push or punch is made a disc or printed slip is separated from the push card or punchboard and a number is disclosed. The numbers are effectively concealed from the purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much

less than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from said card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card and punchboard devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards and punchboards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by the respondent on said push card and punchboard devices first hereinabove described. The only use to be made of said push card and punchboard devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove alleged.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase and have purchased respondents' said push card and punchboard devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together with said push cards and punchboard devices. Retail dealers who have purchased said assortments either directly or indirectly have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards and punchboards in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof, many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above alleged, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public,

all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push cards and punchboard devices by respondent as hereinabove alleged supplies to and places in the hands of others means of conducing lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. The respondent thus supplies to, and places in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondent as hereinabove alleged are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated April 30, 1952, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 26, 1950, issued and subsequently served its complaint in this proceeding upon the respondent, E. F. Ploner, individually and trading as Michigan City Novelty Company, charging him with the use of unfair acts and practices in commerce in violation of the provisions of that Act. After filing his answer to the complaint, respondent filed a motion for leave to withdraw such answer and to substitute therefor an answer admitting all of the material allegations of fact in the complaint and waving the taking of testimony and other procedure, the substitute answer reserving, however, the right of respondent to appeal from any decision rendered in the proceeding by the hearing examiner and/or the Commission. The substitute answer was tendered on condition that the initial decision of the hearing examiner in the proceeding

be deferred until the final determination by the Commission of another proceeding, that of Superior Products, Docket No. 5561. Respondent's motion being granted by the hearing examiner, the substitute answer was received and filed as a part of the record in the proceeding. On January 29, 1952, the Commission rendered its final decision in the Superior Products case. Thereafter, the present proceeding regularly came on for final consideration by the hearing examiner, theretofore duly designated by the Commission, upon the complaint and substitute answer, all intervening procedure having been waived, and the hearing examiner, having duly considered the matter, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, E. F. Ploner, is an individual trading and doing business as Michigan City Novelty Company, with his office and principal place of business located at 410 Franklin Street, Michigan City, Indiana. Respondent is now, and for more than three years last past has been, engaged in the sale and distribution of devices commonly known as push cards and punchboards to dealers in various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, and to dealers in various articles of merchandise in the various States of the United States and in the District of Columbia.

Respondent causes and has caused his devices, when sold, to be transported from his place of business in the State of Indiana to purchasers thereof at their points of location in the various States of the United States and in the District of Columbia. There is now and has been for more than three years last past a course of trade in such devices by respondent in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business as described in Paragraph One, respondent sells and distributes to such dealers in merchandise, push cards and punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public. Respondent sells and distributes many kinds of push cards and punchboards, but all of them involve the same chance or lottery features when used in the sale or distribution of merchandise and vary only in detail.

Many of the push cards and punchboards have printed on the face thereof certain legends or instructions which explain the manner in

which the devices are to be used or may be used in the sale or distribution of various specified articles of merchandise. The prices of the sales on the push cards and punchboards vary in accordance with the individual device. Each purchaser is entitled to one push or punch from the push card or punchboard, and when a push or punch is made a disc or printed slip is separated from the push card or punchboard and a number is disclosed. The numbers are effectively concealed from purchasers and prospective purchasers until a selection has been made and the push or punch completed. Certain specified numbers entitle purchasers to designated articles of merchandise. Persons securing lucky or winning numbers receive articles of merchandise without additional cost at prices which are much less than the normal retail price of the articles. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a push or punch from the card or board. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of the push cards and punchboards have no instructions or legends thereon but have blank spaces provided therefor. On those push cards and punchboards the purchasers thereof place instructions or legends which have the same import and meaning as the instructions or legends placed by respondent on the push cards and punchboards first described. The only use to be made of the push card and punchboard devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable such ultimate purchasers to sell or distribute such other merchandise by means of lot or chance as hereinabove set forth.

PAR. 3. Many persons, firms and corporations who sell and distribute candy, cigarettes, clocks, razors, cosmetics, clothing, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase respondent's push card and punchboard devices, and pack and assemble assortments comprised of various articles of merchandise together with such push card and punchboard devices. Retail dealers who have purchased such assortments either directly or indirectly have exposed them to the purchasing public and have sold or distributed articles of merchandise by means of the push cards and punchboards in accordance with the sales plan described in Paragraph Two. Because of the element of chance involved in the sale and distribution of merchandise by means of such push cards and punchboards, many members of the purchasing public have been induced to trade or deal

with retail dealers selling or distributing merchandise by means thereof. As a result thereof, many retail dealers have been induced to deal with manufacturers, wholesale dealers and jobbers who sell and distribute merchandise together with such devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of such devices in the manner above described involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof, and teaches and encourages gambling among members of the public. The use of such sales plan or method in the sale of merchandise is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws.

The sale or distribution of such push card and punchboard devices by respondent as hereinabove described supplies to and places in the hands of others means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. Respondent thus supplies to and places in the hands of others means and instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The acts and practices of respondent as hereinabove set out are all to the prejudice of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, E. F. Ploner, individually and trading as Michigan City Novelty Company or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

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

which he has complied with the order to cease and desist [as required by said declaratory decision and order of April 30, 1952].

Commissioner Mason concurring in the findings as to the facts and conclusion, but not concurring in the form of order to cease and desist, for the reasons stated in his opinion concurring in part and dissenting in part in Docket 5203—Worthmore Sales Company.[1]

[1] See 46 F. T. C. 606.

Syllabus

IN THE MATTER OF

NORLON CORPORATION ET AL

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5741. Complaint, Feb. 20, 1950—Decision, May 1, 1952

The terms "arthritis" and "rheumatism" are general terms sometimes used interchangeably, which may refer to many diseases or pathological conditions including sciatica, neuritis, lumbago and bursitis, all of which are characterized by such symptoms and manifestations as pain, stiffness and inflammatory and destructive changes in the joints and tissues of the body, and which, as pathological conditions, are of known as well as unknown origin.

Where a corporation and two officers thereof, engaged in the interstate sale and distribution of a medicinal preparation designated "Sural"; in advertisements through radio broadcasts, in a newspaper of national circulation, and in a pamphlet distributed throughout the United States, directly or by implication—

(a) Falsely represented that said preparation taken as directed constituted an adequate, effective and reliable treatment for, and would arrest the progress and correct the underlying causes of arthritis, rheumatism, bursitis, neuritis and sciatica;

(b) Falsely represented that thus taken it constituted such a treatment for the symptoms and manifestations of said diseases and would afford complete and immediate relief from the aches, pains and discomforts thereof;

The facts being that there is no drug or combination of drugs which constitutes an adequate, effective or reliable treatment for any of the various forms of arthritis or rheumatism, or which can restore to normal the pathological changes which result from any such ailments; delay of proper diagnosis and appropriate treatment in such cases may result in irreparable crippling, especially in those forms caused by specific infections; and while said "Sural" might function as an analgesic and antipyretic, due to its salicylate content, it would have no significant effect upon severe pain, aches, and discomforts accompanying any such condition, but would afford temporary relief of only minor aches, pains, and discomforts;

(c) Falsely represented that said preparation might be taken in large quantities over long periods of time without harmful effect;

The facts being that the only therapeutically operative ingredient in their said preparation was the salicylate, acetylsalicylic acid, commonly known as aspirin, and that salicylates may not be taken over long periods of time without the danger of incurring certain harmful effects;

(d) Falsely represented that their said preparation was superior to and caused less gastric irritation than other salicylates; and

(e) Falsely represented that they were the manufacturers of said preparation;

With the effect of misleading and deceiving a substantial portion of the purchasing public into the erroneous belief that such representations were true, and with capacity and tendency so to do, and thereby induce its purchase of substantial quantities of their said product:

Complaint

Held, That such representations constituted false advertisements, and that such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted deceptive acts and practices in commerce.

In the aforesaid proceeding, while various of respondents' advertisements referred to said preparation as an anodyne and contained such statements as "Prompt relief of the pains of rheumatic ills", "For fast relief from the pains and misery of arthritis and rheumatism", and "Sural is not represented as a cure", such statements were less emphasized than the many others which represented and implied that the preparation was an effective treatment or remedy for rheumatic and arthritic conditions, and, in the light of their advertisements as a whole, did not restrict the represented efficacy of the preparation to the relief of pain alone.

Before *Mr. Clyde M. Hadley* and *Mr. Abner E. Lipscomb*, hearing examiners.

Mr. Joseph Callaway for the Commission.

Harte & Natanson, of New York City, for respondents.

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 Norlon Corporation, a corporation, and E. Edward Shinkel, Milton L. Marks, Ralph S. Marks and John J. Anthony, individuals, 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 Norlon Corporation is a corporation organized 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 5 West 46th Street, New York 19, New York.

The individual respondents, whose addresses are as follows: E. Edward Shinkel, 175 Riverside Drive, New York, New York; Milton L. Marks, 101 Willow Avenue, Larchmont, New York; Ralph S. Marks, 68 Pinebrook Drive, Larchmont, New York; and John J. Anthony, No. 1 Fifth Avenue, New York, New York, are officers of the corporate respondent. These individual respondents at all times mentioned herein formulated, directed and controlled the acts, policies and business affairs of the corporate respondent, including the acts and practices hereinafter mentioned.

PAR. 2. Respondents are now and have been for more than one year last past engaged in the business of selling and distributing a certain

drug product, as "drug" is defined in the Federal Trade Commission Act.

The designation used by respondents for said product and the formula and directions for use thereof are as follows:

Designation: Sural.

Formula: Each tablet contains: Calcium Succinate and Acetylsalicylic Acid.

Directions: "Dosage—2 to 3 tablets 4 times daily—8 to 12 tablets a day. In order to insure prompt absorption it is recommended Sural be taken on an empty stomach."

Respondents cause and have caused their said 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 product in commerce between and among the various States of the United States. Respondents' volume of business in such commerce is substantial.

PAR. 3. In the course and conduct of their business, respondents, subsequent to July 22, 1948, have disseminated and caused the dissemination of certain advertisements concerning Sural by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce directly or indirectly its purchase.

These advertisements include but are not limited to the following:

Radio continuities broadcast since June 22, 1948 over the following stations:

WONE—Dayton, Ohio.
KQV—Pittsburgh, Pa.
WEBR—Buffalo, N. Y.
WCBM—Baltimore, Md.
WFBR—Baltimore, Md.
WOL—Washington, D. C.
KCMO—Kansas City, Mo.
KHJ—Hollywood, Calif.
WHDH—Boston, Mass.
WNHC—New Haven, Conn.
WHB—Kansas City, Mo.
WPEN—Philadelphia, Pa.
WMGM—New York, N. Y.

A certain advertisement appearing in the Boston Sunday Advertiser, issue of April 24, 1949.

Pamphlet "How to get Prompt Relief from the Symptoms of Rheumatism and Arthritis."

Respondents have also disseminated and caused the dissemination of the advertisements referred to above for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase

of Sural in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Through the use of said advertisements, respondents have made, directly and by implication, the representations shown in the following sub-paragraphs identified as (A) to (F) inclusive. The said advertisements, by reason of said representations are misleading in material respects and constitute "false advertising" as that term is defined in the Federal Trade Commission Act, by reason of the true facts which are set forth in sub-paragraphs (1) through (6), inclusive.

(A) That Sural, taken as directed, is an adequate, effective and reliable treatment for arthritis, rheumatism, bursitis, neuritis and sciatica.

(1) Sural, however taken, is not an adequate effective or reliable treatment for any kind of arthritis, rheumatism, bursitis, neuritis or sciatica.

(B) That Sural, taken as directed, will arrest the progress of, correct the underlying causes of and will cure arthritis, rheumatism, bursitis, neuritis or sciatica.

(2) Sural, however taken, will not arrest the progress nor correct the underlying causes of and will not cure arthritis, rheumatism, bursitis, neuritis or sciatica.

(C) That Sural, taken as directed, is an adequate, effective and reliable treatment for the symptoms and manifestations of arthritis, rheumatism, sciatica, neuritis, lumbago and bursitis, and will afford complete and immediate relief from the aches, pains and discomforts thereof.

(3) Sural is not an adequate, effective or reliable treatment for the symptoms or manifestations of any kind of arthritis, rheumatism, sciatica, neuritis, lumbago or bursitis. The aches, pains and discomforts incident to those ailments may be of such nature that they will be in no way alleviated by the use of Sural, however taken, and in other cases the relief afforded will be limited to such degree of temporary and partial analgesic and antipyretic effects as its aspirin content may afford in the individual case, aspirin being the common name for acetylsalicylic acid. The beneficial effect of Sural when used in any of the ailments mentioned herein is limited to temporary and partial relief of minor aches and pains and fever.

(D) That Sural may be taken in large quantities over long periods of time without harmful effect on the body.

(4) If taken in doses significantly larger than those specifically mentioned in the directions over a prolonged period of time, Sural may produce such toxic effects as ringing in the ears, deafness, nausea,

vomiting, visual disturbances, skin rash, headache, marked sweating and abnormally rapid breathing, as well as adversely affect the clotting of the blood.

(E) That Sural is superior to and causes less gastric irritation than other salicylates.

(5) Sural is not superior to nor does it cause less gastric irritation than other salicylates.

(F) That respondents are the manufacturers of Sural.

(6) Respondents are not the manufacturers of Sural but the product is manufactured for them by others.

PAR. 5. The use by respondents of the said false advertisements with respect to Sural has had the capacity and tendency to mislead and deceive and has misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations and statements contained therein were true and into the purchase of substantial quantities of Sural by reason of such erroneous and mistaken belief.

PAR. 6. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER OF THE COMMISSION

Decision of the Commission, following its extension of the otherwise effective date of the hearing examiner's initial decision in the matter, and order to file report of compliance, dated May 1, 1952, follow:

Service of the initial decision of the hearing examiner in this proceeding having been completed on March 19, 1952, and the Commission having on April 17, 1952, extended until further order of the Commission the date on which the said initial decision would otherwise become the decision of the Commission; and

The Commission having duly considered the record herein and being of the opinion that said initial decision is adequate and appropriate to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 1st day of May, 1952, become the decision of the Commission.

It is further ordered, That the respondents Norlon Corporation, Milton L. Marks, and Ralph S. Marks, 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.

Said initial decision thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on February 20, 1950, issued and subsequently served its complaint in the above-entitled proceeding upon respondents Norlon Corporation, a corporation, and E. Edward Shinkel, Milton L. Marks, Ralph S. Marks and John J. Anthony, individually and as officers of said corporate respondent. After the issuance of said complaint and the filing of respondents' answer thereto, counsel for the respondents entered into a stipulation with counsel supporting the complaint, wherein it was stipulated and agreed that the entire transcript of all hearings held and to be held in the proceeding against Dolcin Corporation, et al., Docket No. 5692, should become a part of the record in the above-entitled proceeding to the same extent as if such transcript had been received in regular course of hearings herein, and that the above-entitled proceeding might be adjudicated upon the basis of such transcript, supplemented by the stipulations between counsel contained in the record in the above-entitled proceeding. Thereafter this proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, the above-mentioned transcript and stipulations, the presentation of proposed findings as to the facts and conclusions having been waived by counsel, and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Norlon Corporation 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 5 West 46th Street, New York 19, New York.

Respondents E. Edward Shinkel, 175 Riverside Drive, New York, New York; Milton L. Marks, 101 Willow Avenue, Larchmont, New York; Ralph S. Marks, 68 Pinebrook Drive, Larchmont, New York; and John J. Anthony, 1 Fifth Avenue, New York, New York, are individuals and officers of the corporate respondent, and at all times mentioned herein have formulated, directed and controlled the acts, policies and business affairs of the corporate respondent, including the acts and practices hereinafter found.

Respondents E. Edward Shinkel and John J. Anthony, individuals, shortly after the issuance of the complaint herein ceased to be officers of the respondent corporation, to own any stock therein, or to formulate, direct or control in any way the acts, policies or practices of said corporate respondent. Predicated upon these facts, a motion was made by counsel for respondents, and concurred in by counsel supporting the complaint, to dismiss the complaint herein as to said individual respondents, E. Edward Shinkel and John J. Anthony, without prejudice to the right of the Commission to institute further proceedings against them, should future fact so warrant.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the offering for sale, sale and distribution in commerce, among and between the various States of the United States and in the District of Columbia, of a certain medicinal preparation designated "Sural," which is a "drug" within the meaning of the Federal Trade Commission Act, and for which the formula and directions for use are as follows:

Formula:

Each tablet contains substantially the following:

Calcium succinate	2.8 grains.
Acetylsalicyclic acid	3.7 grains.

Plus excipients.

Directions for use:

"Dosage—2 to 3 tablets 4 times daily—8 to 12 tablets a day. In order to insure prompt absorption it is recommended Sural be taken on an empty stomach."

Respondents cause the said product, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in 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 product in commerce between and among the various States of the United States and in the District of Columbia. Respondents' volume of business in such commerce is substantial.

PAR. 3. In the course and conduct of their business, respondents, subsequent to July 22, 1948, have disseminated and caused the dissemination, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, of certain advertisements of the drug preparation "Sural," for the purpose of inducing, and which were likely to induce, directly or indirectly, its purchase; and have disseminated and caused the dissemination of such advertisements for the purpose of inducing, and

which were likely to induce, directly or indirectly, the purchase of said drug preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among such advertisements were radio broadcasts disseminated subsequent to June 22, 1948, by various broadcasting stations, and advertisements published in a certain newspaper having national circulation and in a pamphlet distributed throughout the United States. Typical of the statements and representations contained in such advertisements are the following:

The Norlon Corporation, Exclusive Manufacturers and Distributors of Sural.

Doctors' Amazing Prescription Formula For
RHEUMATISM, ARTHRITIS

Promises Quick, Blessed Relief—Safe, Effective

Now, thanks to biochemical research, you need no longer suffer the agony and torment of the pains of Arthritis, Rheumatism, Bursitis, Neuritis or Sciatica.

Clinically Developed.

An amazing hospital-tested formula has now been clinically developed for the prompt relief of the pains of rheumatic ills. This same type of scientific treatment is now available to you in an easy-to-take tablet called SURAL. . . . .

SURAL is the only thing I've ever found that really lived up to its promise to relieve my arthritic pains. Before using SURAL tablets, I tried everything without success. Now, after using SURAL, my pains are only a memory.

Doctors say that the best treatment for rheumatic ills includes the use of salicylates—*and* an eminent physician recently stated the Sural, quote "does better than other salicylates and with less gastric irritation." Unquote.

Get started on your SURAL treatment immediately—and once again enjoy a normal, active life. SURAL is now available at all drug stores. Insist on SURAL!

For over 20 years I've looked for relief from my rheumatic pains. Now, thanks to SURAL, I no longer have any pains in my legs. Though I've been inactive for several months, I'm now back on the job again.

Begin taking SURAL today and start back on the road to genuine relief and a happy carefree life. At all drug stores *now*. Insist on SURAL, the remarkable anodyne!

Go to your druggist *today* and get a bottle of SURAL tablets. Get started on your SURAL treatment immediately and you, too, may join the many, many men and women who now lead a happy, carefree life and once again are able to return to their former occupations. Insist on SURAL!

FOR RHEUMATOID ARTHRITIS CASES

In the comparatively rare cases of Rheumatoid Arthritis, this severe pain can be and frequently is relieved. In some instances, too, stiffness may be overcome after prolonged administration of SURAL. This is of tremendous importance, because, even though, as I've explained, SURAL has been designated for action—prompt action—the fact that it has no harmful effects, makes this amazing preparation ideal for *prolonged* administration as is frequently necessary in chronic and severe cases of Arthritis and Rheumatism.

I stress this point because the scientific world is aware of some medications, which are not only a great deal more expensive, but which have been known to have harmful effects on the body when taken in *large quantities* over a prolonged period. So when I speak of SURAL'S freedom from these hazards and its efficiency. I'm sure you'll understand why so many former sufferers of Rheumatic and Arthritic pains are singing the praises of SURAL.

Each package of SURAL contains a complete direction leaflet, which will guide you in using it correctly. This is important because we know that when SURAL is used according to these simple directions, in many cases it has succeeded in bringing relief from stiffness, while at the same time folks have reported they've gotten prolonged relief from pain.

PAR. 4. Various of respondents' advertisements refer to the drug preparation "Sural" as an anodyne, and contains such statements as ". . . prompt relief of the pains of rheumatic ills," "For fast relief from the pains and misery of arthritis and rheumatism," and ". . . Sural is not represented as a cure. . . ." Such statements and others similar thereto are, however, less emphasized than the many other statements representing and implying that said preparation is an effective treatment or remedy for rheumatic and arthritic conditions, and, in the light of respondents' advertisements as a whole, do not restrict the represented efficacy of said preparation to the relief of pain alone.

To assert that a preparation is "For Rheumatism, Arthritis" is to imply that such preparation is an effective treatment or remedy therefor. The statement "Begin taking Sural today and start back on the road to genuine relief and a happy, carefree life" implies successful treatment and cure, since "genuine relief" and "a happy, carefree life" denote complete freedom from any ailment whatsoever. Furthermore, the statement that "in many cases" Sural has "succeeded in bringing relief from stiffness" is a clear representation that the drug preparation "Sural" is an effective remedy for the underlying causes of such stiffness.

The representation that other medications are known to have harmful effects on the body "when taken in large quantities over prolonged periods" implies that the drug preparation "Sural" may be taken in large quantities over a prolonged period of time without harmful effects on the body. In addition, said preparation is directly represented as an "amazing preparation ideal for prolonged administration . . ." Accordingly, it is found that through the above-quoted advertisements and others similar thereto, respondents have represented, directly or by implication, as follows:

1. That the drug preparation "Sural," taken as directed, is an adequate, effective and reliable treatment for arthritis, rheumatism, bursitis, neuritis and sciatica;

2. That said preparation, taken as directed, will arrest the progress and correct the underlying causes of, and will cure, arthritis, rheumatism, bursitis, neuritis and sciatica;

3. That said preparation, taken as directed, is an adequate, effective and reliable treatment for the symptoms and manifestations of arthritis, rheumatism, sciatica, neuritis, lumbago and bursitis, and will afford complete and immediate relief from the aches, pains and discomforts thereof;

4. That said preparation may be taken in large quantities over long periods of time without harmful effect on the body;

5. That said preparation is superior to and causes less gastric irritation than other salicylates;

6. That respondents are the manufacturers of said preparation.

PAR. 5. The terms "arthritis" and rheumatism" are general terms, sometimes used interchangeably, which may refer to any of many diseases or pathological conditions including, among others, sciatica, neuritis, lumbago, and bursitis, all of which are characterized by one or more of such symptoms or manifestations as pain, stiffness, and inflammatory and destructive changes in the joints and tissues of the body. These pathological conditions are of known as well as unknown origin. Examples of those of unknown origin are rheumatoid arthritis, osteomyelitis and rheumatic fever. Examples of such conditions of known causes are infectious arthritis, such as arthritis of syphilis, arthritis of gonorrhea, and arthritis associated with pneumonia and tubercular infections. In addition there are forms of arthritis, such as gout, which are connected with disturbances of metabolism.

The term "neuritis" is a general term referring to an inflammation of the nerves, and denotes many different diseases resulting from various causes, such as infections, pressure on nerves from displaced organs or structures of the body, invasion of the nerve by neoplasm or tumor, intoxication with metals or toxins, and metabolic disturbances such as the form of neuritis occurring in diabetes.

Sciatica is a common form of neuritis felt along the course of the sciatic nerve. It is not a disease, but may occur as a symptom of many different diseases resulting from various causes, such as pressure on the sciatic nerve, a tumor in the spine, infection or inflammation of the sheath of the sciatic nerve, metabolic disturbances caused by toxins resulting from infection, fibrositis or arthritis involving the joints.

Fibrositis is a syndrome of pain and stiffness which arises in the fibrous tissues of the body.

Lumbago is a form of fibrositis manifesting itself as a painful condition in the lower part of the back, of varying severity, sometimes so mild as hardly to interfere with a man's business, in other instances

so violent as to render him unable to move in bed. Lumbago is associated with stiffness and muscle spasm provoked by attempts to move.

Bursitis is a form of fibrositis having specific reference to inflammation of a bursa, the fibrous sac or membrane surrounding a joint, and may result from invasion of the bursa by various germs, such as streptococcus, mycobacterium, gonococcus, and the tubercular bacillus, and from rheumatic or fibrositic inflammation.

Infectious arthritis is a form of arthritis resulting from invasion of a joint by any one of various germs, such as staphlococcus and streptococcus, which are carried to the joint through the bloodstream from a focus of infection in the body, caused by an external wound or by various infectious diseases.

Osteoarthritis refers to a disease characterized by degenerative changes in the joints and other tissues and organs of the body. The clinical phenomena associated with osteoarthritis are pain, painful stiffness associated with movement of the joint, enlargement of some joints, narrowing of joint spaces, increase in size of joint surfaces, growth of spurs and increase in the extent of margins of the joint.

Rheumatoid arthritis is a chronic, progressive, destructive disease affecting joints and organs of the body, characterized by pain, swelling, stiffness and limitation of motion in joints and deterioration of the patient's general health. This disease is accompanied by pathological changes in the joints, such as thickening of the lining membrane; production of excessive fluid in the bursa in some instances, and absorption of fluid in others; atrophy of muscles, and sometimes destruction of portions of the bone ends, resulting in deformation of the joint. The cause of rheumatoid arthritis is unknown.

PAR. 6. The various pathological conditions generally referred to as "arthritis" and "rheumatism" progress and develop differently. Likewise, they require different treatment, which will vary not only between different types of such ailments, but between different individuals suffering from the same ailment, and between different stages in the progress thereof. An adequate, effective, or reliable treatment for any kind of "arthritis" or "rheumatism" must, therefore, be predicated upon individual diagnosis, in order to determine whether the patient has arthritis or rheumatism, the particular kind of such ailment present, and whether it arose from a known or an unknown cause. Such a diagnosis may require any or all of the following determinations:

1. History of the patient, including information as to age, sex, marital status, occupation, chronology of the present ailment; family history, such as age and cause of death of parents and relatives; any illnesses from which the patient may have suffered previously, par-

ticularly rheumatic fever, scarlet fever and streptococcus infections;

2. Detailed physical examination of every part of the patient's anatomy; and

3. Laboratory examination, such as blood count, serological test for syphilis, urinalysis, and certain other tests as they may seem useful in the individual case, such as X-ray and analysis of fluids in individual joints.

PAR. 7. An adequate, effective, or reliable treatment of any of the various types of ailments included in the general terms "arthritis" and "rheumatism" may involve application of various therapeutic measure, including diet; rest or change of occupation; various types of physiotherapy, such as orthopedic or thermal procedures; and medication. Delay of proper diagnosis, with consequent failure to administer appropriate treatment, may result in the evolution of irreversible pathological changes, causing a crippled, useless joint or extremity, especially in those forms of arthritis and rheumatism known to be caused by specific infections. There is no drug, or combination of drugs, regardless of how administered, which will constitute an adequate, effective, or reliable treatment for the various forms of arthritis or rheumatism, nor is there any drug or combination of drugs which can restore to normal the pathological changes which result from arthritic or rheumatic ailments.

PAR. 8. The drug preparation "Sural" contains 2.8 grains of calcium succinate and 3.7 grains of acetylsalicylic acid, plus excipients of no therapeutic significance.

Calcium succinate, when taken orally, is converted by the liver into sugar, and no significant amount of succinate reaches the bloodstream. In order to be therapeutically operative in the body, succinates must be administered intravenously. When present in sufficient concentration to be operative, the effect of succinates on tissue metabolism is harmful. The quantity of calcium succinate contained in the drug preparation "Sural" is entirely too small to achieve or maintain a sufficient concentration in the body to have any effect whatever on the metabolism of the tissues.

Since calcium succinate, administered orally, is therapeutically inoperative, the only active ingredient contained in the drug preparation "Sural" is acetylsalicylic acid, commonly known as aspirin, the use and effect of which, as an analgesic and antipyretic, have been known for many years.

The drug preparation "Sural" contains acetylsalicylic acid in an amount insufficient to relieve the severe aches, pains and discomforts attendant upon arthritic and rheumatic conditions. The quantity of acetylsalicylic acid therein contained may, however, function as an

analgesic and antipyretic to a sufficient extent to afford temporary relief to the minor aches and pains accompanying arthritis and rheumatism.

PAR. 9. The drug preparation "Sural," however taken, will not constitute an adequate, effective, or reliable treatment for any arthritic or rheumatic condition, including, among others, sciatica, neuritis, lumbago, and bursitis, nor will said preparation arrest the progress, correct the underlying causes, or effect a cure of any of such conditions. The drug preparation "Sural," however taken, will not ameliorate the aches, pains and discomforts of any arthritic or rheumatic condition to any extent beyond the temporary relief thereof afforded by its salicylate content as an analgesic and antipyretic. The drug preparation "Sural," however taken, will have no significant effect upon severe aches, pains and discomforts accompanying any arthritic or rheumatic condition, and will afford temporary relief of only minor aches, pains and discomforts. With the exception of such temporary relief, the drug preparation "Sural" cannot be depended upon to have any effect whatever upon the symptoms accompanying any arthritic or rheumatic condition, including, among others, sciatica, neuritis, lumbago, and bursitis.

PAR. 10. The use of salicylates over long periods of time will tend to produce harmful effects upon the body, such as hypoprothrombinemia, or a tendency to prolong bleeding by delaying the formation of blood clots. In addition, salicylates may have toxic effects upon the body, mild manifestations of which are gastrointestinal upsets and ringing in the ears. More severe manifestations may be hemorrhage and destruction of tissue. Salicylates may not be taken over prolonged periods of time without the danger of incurring such harmful effects.

Since the only therapeutically operative ingredient in the drug preparation "Sural" is the salicylate, acetylsalicylic acid, commonly known as aspirin, said preparation may not be taken over long periods of time without the danger of incurring the same harmful effects upon the body which would result from similar use of other salicylates; nor can such preparation be taken safely by persons adversely affected by aspirin.

PAR. 11. Respondents are not the manufacturers of the drug preparation "Sural."

PAR. 12. Respondents' representations concerning the drug preparation "Sural," as hereinbefore found, are false and misleading in material respects; have had the capacity and tendency to mislead and deceive, and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that such

representations were true, and into the purchase of substantial quantities of said drug preparation as a result thereof; and constitute false advertisements within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The acts and practices of respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Norlon Corporation, a corporation, and Milton L. Marks and Ralph S. Marks, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug preparation "Sural," or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated, 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 the taking of said preparation will constitute an adequate, effective or reliable treatment for sciatica, neuritis, lumbago, bursitis, or any other kind of arthritic or rheumatic condition:

(b) that said preparation will arrest the progress or correct the underlying causes of, or will cure, sciatica, neuritis, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

(c) that said preparation will afford any relief of severe aches, pains, and discomforts of sciatica, neuritis, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever;

(d) that said preparation may safely be taken over prolonged periods of time;

(e) that said preparation is superior to and causes less gastric irritation than other salicylates;

(f) that respondents are the manufacturers of said preparation.

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 preparation, which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondents E. Edward Shinkel and John J. Anthony, without prejudice to the right of the Commission to institute further proceedings against them, should future facts so warrant.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That the respondents Norlon Corporation, Milton L. Marks, and Ralph S. Marks, 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 [as required by aforesaid decision and order of the Commission].

IN THE MATTER OF

RAY MERTZ TRADING AS RAY MERTZ & COMPANY

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5911. Complaint, Aug. 8, 1951—Decision, May 5, 1952

Where an individual engaged in the manufacture and interstate sale of various kinds of push cards, which, bearing explanatory legends or space therefor, were designed for and used only in the sale of merchandise to the consuming public through means of games of chance, under plans whereby, as typical, the price paid by purchasers for an article was determined by the push selected by chance, or whereby the purchasers who, by chance, selected a certain one of various feminine names displayed, received, without additional cost, an article of merchandise, the normal retail price of which exceeded the chance determined price of the push, others receiving nothing for their money other than the privilege of a push or punch or in some cases, a small piece of candy of less value—

Sold and distributed such devices to dealers in candy, cigarettes and other articles, assortments of which, along with said devices, made up by the dealers, and were exposed and sold by the direct or indirect retailer purchasers to the purchasing public in accordance with the aforesaid sales plan; and thereby supplied to and placed in the hands of others the means of conducting lotteries, games of chance or gift enterprise in the sale and distribution of their merchandise, contrary to an established public policy of the United States Government, and in violation of criminal laws; and means and instrumentalities for engaging in unfair acts and practices;

With the result that many members of the purchasing public were induced, because of the element of chance involved, to trade or deal with retailers who thus sold or distributed their merchandise; and many retailers were induced to deal or trade with manufacturers, wholesalers and jobbers who sold and distributed such assortments:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public, and constituted unfair acts and practices in commerce.

In said proceeding the only testimony offered by respondent in his defense—to the effect that competition in either the wholesale or retail sale of merchandise was not affected by the sale of punchboards in commerce, that the use thereof in the sale of merchandise did not divert trade, and that, consequently, their use did not constitute an unfair method of competition—was rejected as immaterial and irrelevant to the issues in the instant proceeding, since the complaint did not charge respondent with the use of such methods, but only with the use of unfair acts and practices in commerce.

Before *Mr. Frank Hier*, hearing examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Mr. F. W. James, of Evanston, Ill., for respondent.

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 Ray Mertz, an individual trading and doing business as Ray Mertz & Company, hereinafter referred to as respondent, has violated the provisions of the 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, Ray Mertz, is an individual trading and doing business as Ray Mertz & Company, with his office and principal place of business located at 525 South Dearborn Street, in the city of Chicago, Illinois. Respondent is now, and for more than two years last past has been, engaged in the manufacture of devices commonly known as push cards, and in the sale and distribution in commerce between and among the various States of the United States of said devices to manufacturers of and dealers in various articles of merchandise.

Respondent causes and has caused said device, when sold, to be transported from his aforesaid place of business in Chicago, Illinois, to purchasers thereof at their respective points of location in various States of the United States other than the State of Illinois. There is now and for more than two years last past has been a course of trade in such push card devices by said respondent in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his said business, as described in Paragraph One hereof, respondent sells and distributes, and has sold and distributed, to said manufacturers and dealers, push cards so prepared and arranged as to involve games of chance, gift enterprises, or lottery games when used in making sales of or distributing merchandise to the consuming public. One of said push cards has 50 small partially perforated discs on the face of which is printed the word "Push." Concealed within each disc is a number which is disclosed when a disc is pushed or separated from the card, the card bears a legend as follows:

CANDY BAR SPECIAL!!

May Cost Only 1¢ - - - Not Over 5¢
Each Sale Receives A
High Grade Full Value Candy Bar
Pay What You Push

1¢—2¢—3¢—4¢—5¢

Many other of said push cards have printed on the face thereof other labels or instructions that express the manner in which said devices are to be used or may be used in the sale or distribution of candy or various other specified articles of merchandise. Each purchaser pays an indicated price which may be determined either by the printed legend on the card or by the number appearing under the disc which he pushes. In the use of the card referred to above, the purchaser of each push receives a candy bar. Whether he pays 1¢, 2¢, 3¢, 4¢ or 5¢ for said bar is determined wholly by chance.

Other push cards sold and distributed by respondent bear various other legends and are used for the distribution of various articles of merchandise, the winners being determined by a number or name concealed in a master list. Typical of such push cards is one consisting of 12 concealed discs each of which bears a feminine name and a list for writing the name of the person who selects each name. This card contains a concealed master disc or master seal which is pushed after all the other discs have been sold and the winner is determined by the name appearing under said master seal. Prices of the purchase of each push on this type of card are determined by the number which appears under each seal so that the winner as well as the price to be paid by each purchaser of a push from the card is determined wholly by lot or chance. Persons securing by their push lucky or winning numbers or names receive articles of merchandise without additional cost, the prices of said pushes are less than the normal retail price of said articles of merchandise. Persons who do not secure winning numbers in some cases receive a small piece of candy of less value than the price paid for the push or in other cases receive nothing for their money. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards the purchasers thereof place instructions or labels which have the same or similar import or meaning as the instructions or labels placed by respondents on said push card devices hereinabove described.

Respondent sells and distributes and has sold and distributed many kinds of push cards but all of said devices involved the same chance or lottery features when used in connection with the sale or distribution of candy or other merchandise and vary only in detail. The only use to be made of said push cards and devices and the only manner in which they are used by the purchasers thereof is in combination with other merchandise so as to enable said purchasers to sell or distribute said other merchandise by means of lottery or chance, as hereinabove alleged.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, and within the various States of the United States, purchase and have purchased respondent's said push card devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise, together with said push card devices. Retail dealers who have purchased said assortments, either directly or indirectly, have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

PAR. 4. The sale of marchandise to the purchasing public through the use of, or by means of, such devices in the manner above alleged, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push card and punchboard devices by respondent, as hereinabove alleged, supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprise in the sale or distribution of their merchandise. The respondent thus supplies to, and places in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondent, as hereinabove alleged, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated May 5, 1952, the initial decision in the instant matter of hearing examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 8, 1951, issued and subsequently served its complaint in this proceeding upon respondent Ray Mertz charging him with the use of unfair acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of the allegations of said complaint were introduced before the above-named hearing examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Testimony was offered by respondent at a hearing held for that purpose but rejected by the hearing examiner for immateriality and irrelevance. Proffer of such testimony appears in the record. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, no proposed findings or conclusions having been filed by any counsel; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Ray Mertz is an individual trading and doing business as Ray Mertz & Company, with his office and principal place of business located at 525 South Dearborn Street, in the city of Chicago, Illinois. Respondent is now, and for more than two years last past has been, engaged in the manufacture of devices commonly known as push cards, and in the sale and distribution in commerce between and among the various States of the United States of said devices to manufacturers of and dealers in various articles of merchandise.

Respondent causes and has caused said device, when sold, to be transported from his aforesaid place of business in Chicago, Illinois, to

purchasers thereof at their respective points of location in various States of the United States other than the State of Illinois. There is now and for more than two years last past has been a course of trade in such push card devices by said respondent in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of his said business, as described in Paragraph One hereof, respondent sells and distributes, and has sold and distributed, to said manufacturers and dealers, push cards so prepared and arranged as to involve games of chance, gift enterprises, or lottery schemes when used in making sales of or distributing merchandise to the consuming public. One of said push cards has 50 small partially perforated discs on the face of which is printed the word "Push." Concealed within each disc is a number which is disclosed when a disc is pushed or separated from the card, the card bears a legend as follows:

CANDY BAR SPECIAL!!
May Cost Only 1¢—Not Over 5¢
Each Sale Receives A
High Grade Full Value Candy Bar
Pay What You Push
1¢—2¢—3¢—4¢—5¢

Many other of said push cards have printed on the face thereof other labels or instructions that express the manner in which said devices are to be used or may be used in the sale or distribution of candy or various other specified articles of merchandise. Each purchaser pays an indicated price which may be determined either by the printed legend on the card or by the number appearing under the disc which he pushes. In the use of the card referred to above, the purchaser of each push receives a candy bar. Whether he pays 1¢, 2¢, 3¢, 4¢ or 5¢ for said bar is determined wholly by chance.

Other push cards sold and distributed by respondent bear various other legends and are used for the distribution of various articles of merchandise, the winners being determined by a number or name concealed in a master list. Typical of such push cards is one consisting of 12 concealed discs each of which bears a feminine name and a list for writing the name of the person who selects each name. This card contains a concealed master disc or master seal which is pushed after all the other discs have been sold and the winner is determined by the name appearing under said master seal. Prices of the purchase of each push on this type of card are determined by the number which appears under each seal so that the winner as well as the price to be paid by each purchaser of a push from the card is determined wholly by lot or chance. Persons securing by their push lucky or winning

numbers or names receive articles of merchandise without additional cost, the prices of said pushes are less than the normal retail price of said articles of merchandise. Persons who do not secure winning numbers in some cases receive a small piece of candy of less value than the price paid for the push or in other cases receive nothing for their money. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Others of said push card devices have no instructions or legends thereon but have blank spaces provided therefor. On those push cards the purchasers thereof place instructions or labels which have the same or similar import or meaning as the instructions or labels placed by respondents on said push card devices hereinabove described.

Respondent sells and distributes and has sold and distributed many kinds of push cards but all of said devices involved the same chance or lottery features when used in connection with the sale or distribution of candy or other merchandise and vary only in detail. The only use to be made of said push cards and devices and the only manner in which they are used by the purchasers thereof is in combination with other merchandise so as to enable said purchasers to sell or distribute said other merchandise by means of lottery or chance, as hereinabove alleged.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, and within the various States of the United States, purchase and have purchased respondent's said push card devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise, together with said push card devices. Retail dealers who have purchased said assortments, either directly or indirectly, have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards and punchboards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above alleged, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method, is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push card and punchboard devices by respondent, as hereinabove alleged, supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. The respondent thus supplies to, and places in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

CONCLUSIONS

1. The only testimony offered by respondent in his defense was to the effect that competition in either the wholesale or retail sale of merchandise was not affected by the sale of punchboards in commerce, that the use of punchboards in the sale of merchandise does not divert trade and that, consequently, their use does not constitute an unfair method of competition. However, the complaint in this proceeding does not charge respondent with the use of unfair methods of competition but is confined to a charge of the use by him of unfair acts or practices in commerce. Consequently, the evidence proffered by respondent is immaterial and irrelevant to the issues in this proceeding.

2. The aforesaid acts and practices of respondent, as hereinabove described and found, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Ray Mertz, an individual trading as Ray Mertz & Company, or under any other name or trade name, directly or through any corporate or other device, do forthwith cease

and desist from selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punchboards, push cards or any other lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of May 5, 1952].

Commissioner Mason concurring in the findings as to the facts and conclusions but not concurring in the form of order to cease and desist, for the reasons stated in his opinion concurring in part and dissenting in part in Docket 5203—Worthmore Sales Company.[1]

[1] See 46 F. T. C. 606.

Syllabus

IN THE MATTER OF

BOOK-OF-THE-MONTH CLUB, INC. ET AL.

COMPLAINT, FINDINGS, ORDER, AND MAJORITY AND DISSENTING OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5572. Complaint, June 30, 1948—Decision, May 8, 1952

In the enactment of Section 5 of the Federal Trade Commission Act, Congress declared "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce to be unlawful, and it has been well settled by the Commission and the courts that included within the statute containing such standards of conduct is the principle that a false statement or representation of a material fact in the sale and distribution of merchandise in interstate commerce, which has the tendency and capacity to deceive and injure competition or customers, is an unlawful method, act or practice calling for corrective action by the Commission in the public interest.

The problem involved in the use of the word "free" or similar words in the sale and distribution of merchandise should be approached by applying to the representation made, the same yard stick that should be applied to all advertising, viz.: "It it true or false?"

A statement in an advertisement which is totally false cannot be qualified or modified, nor may a seller make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end. And the fact that the careful observer would not be misled is not, of course, material, for the statute is intended to protect the unthinking and credulous members of the public as well as the more sophisticated and intelligent.

The word "free" as used in the sale and distribution of books in the instant case has the definite and absolute meaning of a gift or a gratuity given without charge, cost or condition; is unambiguous and without a secondary meaning; and since it makes a single representation and is untrue, cannot be qualified but can only be contradicted.

The astute advertiser well knows that once the average mind has received the impression conveyed by the word "free", it can never be completely eradicated by any other words of explanation or contradiction, and when a prospective customer is offered something "free", it is not unreasonable to assume that the conscious or subconscious appeal involved in the offer will influence his judgment so that the value of the so-called "free" article will divert the customer from the major inquiry into the quality of the article or of competing articles, at the risk of his dissatisfaction, in order to obtain the so-called "free" article.

As respects the drawing power of the word "free" and the drawing power of the lottery or chance, there is not the slightest difference in the psychological appeal of the two methods.

It is "THE FIRST IMPRESSION" that is of vital concern to the advertiser, and the advertiser who desires to use the word "free" or words of similar import in the sale and distribution of merchandise—even though ready and willing to explain immediately in conjunction therewith, that to obtain the so-called "free" article, some other merchandise must be purchased, action performed, or service rendered—knows the meaning conveyed to the prospective purchaser, knows that if once the impression is made in his mind that such goods are free, repeated subsequent contradiction will not completely eliminate that impression; and is motivated by his desire for the benefit of the tremendous drawing power imparted by such words.

The opportunity to sell is important, and the word "free" in advertisements attracts the eye and the mind and causes the reader to read advertisements which otherwise he would not, so that, even though the true facts are also disclosed, the seller has achieved the opportunity to sell by the use of a false and misleading representation; and such false advertising, which will induce the purchase of goods that otherwise would not be purchased, is unfair to the seller's competitors as well as to customers, and under the statute may constitute an unfair method of competition as well as an unfair and deceptive act and practice in commerce.

The Commission's administrative interpretation in regard to the use of the word "free" to describe merchandise, issued on January 14, 1948, 44 F. T. C. 1427, is not a "rule" within the meaning of the Administrative Procedure Act, was based upon the experience which the Commission had had in dealing with the problem as it affected the public interest, does not have the force of law, and was intended only to serve as a general guide for the business community and to outline the circumstances under which the use of the word "free" and words of similar import are likely to mislead.

The effects of certain trade practices on competition or on the consumer may change with changing conditions, and the concept and application of such a statute as Section 5 of the Federal Trade Commission Act, which, expressed in general terms, provides that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful, should not remain static. An agency charged with the duty of preventing such unfair practices must be alive to the facts of trade, and aware of the unfair effects on competition or on the consumer of unfair competitive practices.

The Commission, in a litigated case, must examine the factual record, and in the light of the whole record, if it is found that there has been a violation of law, prescribe a remedy, which is based on and justified by the record and is sufficient to prohibit the recurrence of the illegal act or practice found to exist.

The Commission, as an administrative agency charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action or lack of action on its part in the past, and principles of equitable estoppel may not be applied to deprive the public of the protection of a statute because of such action or lack of action on the part of public officials.

Where a corporation engaged in the interstate sale and distribution of books; in advertisements in publications of large circulation through the United States and in circulars and other advertising material—

Made such statements as "A FREE Copy . . . To New Members of the Book-of-the-Month Club", followed by the names of a number of current books, and "Please enroll me as a member. I am to receive, free, INSIDE U. S. A. with the purchase of my first book indicated below, . . .";

When in fact, the books thus designated as "free" were not gifts or gratuities or without cost to the recipient, but, on the contrary, the prospective member, before he was entitled to receive such books, was required to join the Book-of-the-Month Club and assume the obligation to purchase at least four books from it over a period of a year, and, in the event of his failure so to purchase, was called upon to make payment for the so-called "free" book:

With tendency and capacity to deceive, and with result of deceiving, members of the purchasing public into the mistaken belief that books offered by it as "free to new members" were in fact given without charge or obligation:

Held, That such acts and practices, under the circumstances set forth, were to the prejudice and injury of the public, and constituted unfair and deceptive acts and practices in commerce.

Respondent's contention in the instant proceeding that, although the books might not be free, the advertisements concerned contained statements which clearly disclosed what the customer was required to do in order to receive the so-called "free" books, and that such statements neutralized any probability or possibility of deception, was not well taken, since the word "free", as used by respondent, made a single representation which was untrue and could not be qualified, and, in said respect differed from various cases cited in which selection of qualifying words, effective to eliminate deception, was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which were true and some of which were untrue.

Other contentions of respondents, as special defenses, to the effect that the administrative interpretation above referred to was adopted and promulgated without notice to the public, etc., in violation of the Administrative Procedure Act, was invalid in that it was sought to be given retroactive instead of a prospective application, and was arbitrary, capricious and unlawful, were without merit since the complaint was not based upon alleged violations of any rule, but upon violations of the Federal Trade Commission Act, and because the interpretation was not a "rule" within the meaning of said Act, and in no wise violated any of its provisions.

As respects respondent's further special defense, namely, its allegation that the Commission's previous utterances as to the meaning of the word "free", and previous rulings favorable to respondents, constituted grounds for the dismissal of the complaint: while the Commission on a previous occasion considered the question of the adverse effects of the use of the word "free" to describe commodities which were not in fact free, and was then of the opinion that the public interest could be protected by a limited form of relief or remedy, the Commission, with the question again before it in the instant case, and following its examination of the factual record, was of the opinion that respondent had used the word "free" in violation of Section 5, and that the order which had been entered in the matter was appropriate and necessary in the circumstances.

The prior opinion of the Commission in the matter of *Samuel Stores, Inc.* Docket 3210, 27 F. T. C. 882, is overruled, to the extent that it is in conflict with the views expressed in the Commisssion's opinion.

As regards the allegation of the complaint that respondent's use of the term "book dividends" was false, misleading and deceptive the Commission was of the opinion, and found, that said charge was not sustained by the evidence.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. Jesse D. Kash for the Commission.
Wolfson, Caton & Moguel, of New York City, for respondents.

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 Book-of-the-Month Club, Inc., a corporation; Harry Scherman and Meredith Wood, individually and as officers of Book-of-the-Month Club, Inc., a corporation hereinafter referred to as respondents, have violated 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. The respondent, Book-of-the-Month Club., Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 385 Madison Avenue, New York.

The respondents, Harry Scherman and Meredith Wood, are individuals and are officers of corporate respondent Book-of-the-Month Club, Inc.

PAR. 2. Respondents are now and for more than two years last past have been engaged in the sale and distribution of books.

In the course and conduct of their business, respondents cause, and have caused their said products when sold, to be transported from their place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein, have maintained a course of trade in their said books in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondents, in the course and conduct of their said business, and for the purpose of inducing the purchase of their products have made representations and statements concerning their products, said statements and representations having been disseminated by respondents between and among the various States of the United

States and in the District of Columbia among prospective purchasers by use of the United States mails, by advertisements in newspapers, trade journals and by means of advertising folders, pamphlets, circulars and other advertising media all of general circulation. Among and typical of such statements and representations, but not all inclusive, are the following:

THIS CARD GOOD FOR Free COPIES OF Andersen's & Grimm's Fairy Tales—IF YOU SUBSCRIBE TO THE CLUB WITHIN THE NEXT 30 DAYS.

Please enroll me as a member. It is understood that I am to receive free copies of ANDERSEN'S and GRIMM'S FAIRY TALES; that I am also to receive, free, your monthly magazine which reports about current books; and that for every two selections I purchase from the Club, I am to receive free, the current book-dividend then being distributed. I agree to purchase at least four books-of-the-month from the Club each full year I am a member; and I may cancel my subscription any time after purchasing four such books from the Club.

If you do not wish Andersen's and Grimm's Fairy Tales as your free enrollment books write in title below of book-dividend you prefer. (See large circular for list of book-dividends.)

202E

Name Mr. _____
Mrs. _____
Miss _____

Please Print Plainly

Address _____

Postal District

City _____ No. (if any) _____ State _____

IMPORTANT: Please indicate—by writing the name of the selection below—whether you wish to begin the subscription with any of the books mentioned in the accompanying circular.

Dear Reader:

Time and again we have found that bookish persons who are extremely busy—as you may be—allow their subscriptions to lapse for some special temporary reason; then, later they decide to rejoin the Club, but just never get 'round to doing so. Because we feel this may be so in your case, we have decided to make this offer to you.

If you will rejoin the Club within the next 30 days, we shall give you FREE COPIES of two books that belong in every library—beautifully illustrated with full color—ANDERSEN'S FAIRY TALES and GRIMM'S FAIRY TALES. These two books are handsomely boxed and their retail price is $5.00.

You will remember that, as a member of the Club, you will receive in addition, a book-dividend of similar beauty and value to those shown in the enclosed circular with every second book-of-the-month you purchase.

FOR YOUR LIBRARY Free copies TO NEW MEMBERS
Andersen's Fairy Tales and Grimm's Fairy Tales

In Two Separate Volumes (Boxed)
with beautiful color illustrations and
numerous pen drawings

Retail Price $5.00

Right now you may begin your subscription to the club with any one of these national best sellers

"The Hucksters",
"Animal Farm",
"The Egg and I",
"Peace of Mind",
"Britannia Mews",

and receive free any one of the books offered on page 1 or any one of these other book-dividends and thereafter with every two selections you buy, you will receive another book-dividend free.

Free copy to new members—your choice of any one of these book-dividends

"Alice in Wonderland",
"The Hucksters",
"The Egg and I",
"A Treasury of Grand Opera."

Free copy to new members of the Book-of-the-Month Club John Gunther's absorbing new book about America "Inside U. S. A." Retail Price $5.00.

This card good for free copy of any one of the books offered in this circular if you subscribe to the club within the next 30 days.

PAR. 4. The use by the respondents of the word "free" and the term "book dividends" is false, misleading and deceptive. In truth and in fact, the books designated as "free" or as "book dividends" are not gifts or gratuities or without cost to the recipient but on the contrary the prospective purchaser or purchaser, before he is entitled to receive such books, must join respondents' club thereby becoming obligated to purchase at least four books from respondents over the period of a year, the fulfillment of which obligation inures directly to the benefit of, and profit to, the respondents.

PAR. 5. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act the Federal Trade Commission, on June 30, 1948, issued and subsequently served its complaint in this proceeding upon the respondents, Book-of-the-Month Club, Inc., Harry Scherman, and Meredith Wood, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by

it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding came on for final consideration by the Commission upon the complaint, answer thereto, testimony and other evidence, recommended decision of the trial examiner with exceptions thereto, and briefs and oral argument of counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the trial examiner, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent Book-of-the-Month Club, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business at 385 Madison Avenue, New York, New York.

Respondents Harry Scherman and Meredith Wood are individuals. Respondent Harry Scherman is and has been since 1931 president, and is and has been since 1926 a director, of respondent corporation. Respondent Meredith Wood is, and has been since 1931, executive vice-president, treasurer, and a director of respondent corporation. The participation of said individual respondents in the acts and practices hereinafter found has been only as officers of the corporation. The Commission is of the opinion that such participation in the absence of further showing as to their authority and control over and responsibility for said acts and practices does not constitute sufficient grounds for including them in this proceeding as individual respondents and the complaint as to them should be dismissed. As hereinafter used, the term "respondent" refers only to respondent Book-of-the-Month Club, Inc.

PAR. 2. The respondent Book-of-the-Month Club, Inc., is now, and for more than two years last past has been, engaged in the sale and distribution of books. In the course and conduct of its business respondent causes, and has caused, its books, 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 for more than two years has maintained, a course of trade in its said books in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business and for the purpose of inducing the purchase of its books, respondent has made statements

and representations concerning its books and the terms upon which such books may be obtained, by means of advertisements in publications of large circulation throughout the United States and in the District of Columbia, and by means of circulars and other advertising material disseminated throughout the United States and in the District of Columbia. Typical of such statements and representations are the following:

A FREE Copy . . . To New Members of the Book-of-the-Month Club
John Gunther's
absorbing new book about Americans
INSIDE
U. S. A.
Retail Price $5.00

Sumner Welles—"The wisest and most penetrating analysis of this country of ours that has ever been written."
Sinclair Lewis—"The richest treasure-house of facts about America that has ever been published, and probably the most spirited and interesting."
F. H. LaGuardia—"The United States as it really is . . . It will be read as long as people read."
Henry Kaiser—"An inspiration and a challenge to every American."
William L. Shirer—"A magnificant book about our wondrous and fantastic land. Nothing like it has ever been published."
Clifton Fadiman—"If any single book can tell what it means to be an American citizen, this is it."
Orville Prescott, N. Y. Times—"A tremendously impressive book . . . No other man alive could have written so comprehensively and yet so spiritedly."
Lewis Gannett, N. Y. Herald Tribune—Not since Bryce has any writer even attempted so inclusive a survey of the American commonwealth."
Harry Hansen, N. Y. World-Telegram—"The most sparkling, the most entertaining and the most personal letter to the folks back home."

Begin your subscription with *ANY ONE* of these good books

Gus The Great by Thomas W. Duncan Price to Members only $3.25	Thomas B. Costain's Latest Book The Moneyman a Rich Historical Romance $3.00	Peace of Mind by Joshua Loth Liebman $2.50
Back Home by Bill Mauldin $3.50	A Study of History by Arnold J. Toynbee $5.00	Red Plush by Guy McCrone Price to members only $3.25

A 1011E

BOOK-OF-THE-MONTH CLUB, INC.,
385 Madison Avenue, New York 17, N. Y.

Please enroll me as a member. I am to receive, free, INSIDE U. S. A. with the purchase of my first book indicated below, and thereafter for every two books-of-the-month I purchase from the Club, I am to receive, free, the current book-dividend then being distributed. I agree to purchase at least four books-of-the-month—or special members' editions—from the Club each full year I am a member, and I may cancel my subscription any time after purchasing four such books from the Club.

As my first selection please send me:

☐ Gus the Great
by Thomas W. Duncan ($3.25)
☐ The Moneyman
by Thomas B. Costain ($3.00)
☐ Peace of Mind
by Joshua L. Liebman ($2.50)
☐ Back Home
by Bill Mauldin ($3.50)
☐ A Study of History
by Arnold J. Toynbee ($5.00)
☐ Red Plush
by Guy McCrone ($3.25)

Name_____
(Please Print Plainly)
Address _____
City_____ Postal Zone No. (if any)_____ State_____

Book prices are slightly higher in Canada, but the Club ships to Canadian members, without any extra charge for duty, through Book-of-the-Month Club (Canada), Ltd.

You buy many books-of-the-month ANYWAY—why not get those you want from the Club, often PAY LESS, and share in the Club's book-dividends.

You do not pay any fixed yearly sum as a member of the Book-of-the-Month Club. *You simply pay for the particular books you decide to take*, and you have a very wide choice among the important books published each year.

Not only do the Club's five judges, every month, choose an outstanding book (sometimes a double selection) as the book-of-the-month; in addition, the Club makes available "special members' editions" of many widely discussed books—*making a total of fifty to sixty books* each year from which you may choose.

If you buy as few as *four of these books in any twelve-month period*, you get the full privileges of Club membership, and since there are sure to be, among so many good books, *at least four that you would buy anyway*, the saving to you is extraordinary.

You pay the regular retail price—frequently less—for the book-of-the-month, whenever you decide to take it. (A small charge is added to cover postage and other mailing expenses.) Then, with every two books you buy (from among the books-of-the-month and "special members' editions" made available) you receive—*free*—one of the Club's book-dividends.

These are beautiful library volumes, sometimes highly popular best-sellers. Last year the retail value of the free books Club members received was in excess of $16,000,000—books given to members, not sold! This year it will be more. Why not share in this distribution, *particularly since you need never take any book you do not want*, and actually pay less for many books?

Also, as a member, you are kept fully informed about all the important new books, and insure yourself against missing the ones you are particularly anxious

to read. These, briefly, are the sensible reasons why hundreds of thousands of book-reading families now belong to the Book-of-the-Month Club.

PAR. 4. The use of the word "free" to describe the "enrollment" book has tremendous advertising value in inducing people to sign and send in the membership coupon.

PAR. 5. The use by the respondent of the word "free" is false, misleading, and deceptive. In truth and in fact, the books designated as "free" are not gifts or gratuities or without cost to the recipient but, on the contrary, the prospective member, before he is entitled to receive such books, must join the Book-of-the-Month Club and assume the obligation to purchase at least four books from respondent over the period of a year, the fulfillment of which obligation inures directly to the profit of the respondent. Additional evidence of the fact that such books are not free is the fact that if a member does not purchase at least four books from the respondent within a year of his application for membership in the Book-of-the-Month Club, payment for the book theretofore designated as "free" is thereafter demanded by the respondent.

PAR. 6. Respondent's advertisements have the tendency and capacity to deceive, and actually have deceived, members of the purchasing public into the erroneous and mistaken belief that books offered by respondents as "free to new members" are in fact given without charge or obligation to new members of Book-of-the-Month Club.

PAR. 7. The complaint herein also charges that the respondents' use of the term "book-dividends" is false, misleading, and deceptive. The Commission is of the opinion, and so finds, that this charge is not sustained by the evidence.

CONCLUSION

The acts and practices of the respondent Book-of-the-Month Club, Inc., as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondents, testimony and other evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner with exceptions thereto, and briefs and oral argument of counsel; and the Commission having made its find-

ings as to the facts and conclusion that the respondent Book-of-the-Month Club, Inc., has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent Book-of-the-Month Club, Inc., its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the word "free," or any other word or words of similar import or meaning, in advertising to designate or describe any book, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Harry Scherman and Meredith Wood as individuals, but not in their capacity as officers of respondent Book-of-the-Month Club, Inc.

It is further ordered, That respondent Book-of-the-Month Club, Inc., 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.

Commissioner Mason dissenting.

Opinion

Mead, Chairman:

The Commission's complaint in this matter charges that the respondents' use of the word "free" and the term "book-dividends" is false, misleading, and deceptive and constitutes unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. The respondents, in their answer to the complaint, denied that their use of the word "free" and the term "book-dividends" is false, misleading, and deceptive, and in addition alleged a number of special defenses to the complaint. Hearings were held before a trial examiner of the Commission, during which considerable testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced, and the trial examiner made his recommended decision, in which he recommended the issuance of an order to cease and desist against the respondent Book-of-the-Month Club, Inc. The respondents filed numerous exceptions to the trial examiner's recommended decision, and the Commission has had the benefit of briefs and oral argument of counsel with respect to all the issues involved.

The trial examiner's recommended findings as to the facts and order to cease and desist are, in the opinion of the Commission, supported by and in accordance with reliable, probative, and substantial evidence in the record, and the Commission's findings as to the facts and order to cease and desist are substantially the same as those recommended by the trial examiner. The charge in the complaint with respect to respondents' use of the term "book-dividends" is not sustained. Also, it appears that the individual respondents Harry Scherman and Meredith Wood participated in the unlawful acts and practices only in their capacity as officers of the Book-of-the-Month Club, Inc. Such participation, in the absence of further showing as to their authority and control over and responsibility for the unlawful acts and practices, does not warrant the issuance of an order to cease and desist against them as individuals.

Substantially all of the material facts affecting the issues in this proceeding were either stipulated between counsel or proven by uncontroverted evidence. The material facts may be summarized as follows:

The respondent Book-of-the-Month Club, Inc. (hereinafter referred to as the Club) is engaged in the business of selling books by mail order to its subscribers, who are commonly known as members of the Book-of-the-Month Club. It has no salesmen and its business is solicited by circularizing, advertising, and similar promotional material. In soliciting new members the Club in its advertisements and circulars offers to new subscribers a "free" copy of any one of a number of designated books, provided the new subscriber or member agrees to purchase at least four books from the Club each year he is a member, with the right to cancel the subscription after purchasing four books from the Club. In other words, the socalled "free" or enrollment book is delivered to a new subscriber only after the subscriber agrees to purchase at least four of the books within a period of a year. The word "free" is featured in the circularizing, advertising, and similar promotional material used by the Club, as for example:

A FREE Copy . . . To New Members of the
Book-of-the-Month Club
John Gunther's
absorbing new book about Americans
INSIDE
U. S. A.
Retail Price $5.00

The advertisement in which the above-quoted statement was featured, as well as other advertising and promotional material dis-

seminated by the Club, contains additional information for prospective subscribers, including the fact that in order to get the "free" copy the subscriber must agree to purchase at least four other books from the Club during each year and that the subscriber may resign or cancel his subscription after four such books have been purchased. These facts alone are sufficient to sustain the charge in the complaint that the books represented as being "free" are not in fact gifts or gratuities given to the recipient without cost or other obligation. However, additional evidence that the books represented as being "free" are not in fact free is the fact that if a new subscriber fails to fulfill his obligation to purchase at least four books from the Club within a year, the Club demands payment from the subscriber for the so-called "free" book.

The enrollment books are either free or they are not free. They cannot be both. The advertisements feature a representation that the books are free. Elsewhere in the advertisements is the statement which indicates that such books are not free. At best, these statements are contradictory. One of the statements must therefore be contrary to fact. This is obviously the statement that the books are free.

The word "free" is one of those dynamic terms in our language which alerts us and calls to action certain emotions within us. It has both political and monetary connotations. Cynics may say that all of us should know that we cannot get something for nothing, yet the hope of getting something free has the habit of springing eternal in the human breast. Alas, however, on closer inspection there generally are found a few "provided, howevers" or other conditional strings to the so-called "free" offer. Such is the case here. The customers who did not buy the other books were obliged to pay for the "free" book.

In the enactment of Section 5 of the Federal Trade Commission Act (52 Stat. 111; 15 U. S. C. Sec. 45), Congress declared "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce to be unlawful. In so doing, Congress purposely failed to define such terms and left it to the Commission, subject to judicial review, to determine by the process of inclusion and exclusion what methods, acts or practices are encompassed therein. Detailing of specific methods, acts and practices was not attempted in an effort to preserve flexibility of the law and to make possible its application to any method, act or practice which might be devised in the future and found to be unfair. It has been well settled by the Commission and the courts that included within the statute containing these standards of conduct is the principle that a false statement or representation of a material fact in the sale and distribution of merchandise in interstate commerce which has the tendency and capacity to deceive and injure

competition or customers is an unlawful method, act or practice calling for corrective action by the Commission in the public interest. The Commission was authorized and directed by Congress to prohibit such methods, acts or practices and the courts have repeatedly sustained the Commission in so doing without the necessity of having to establish either deception or injury.

The problem involved in the use of the word "free" or similar words in the sale and distribution of merchandise should be approached by applying to the representation made the same yardstick that should be applied to all advertising, viz.: "Is it true or false"?

In the present case the word "free" as used by the respondent in the sale and distribution of its books has the definite and absolute meaning of a gift or a gratuity given without charge, cost or condition. So used the word is unambiguous and does not have a secondary meaning. Its meaning cannot be altered or qualified by other words. It can only be contradicted and the total representation made through use of the word "free" is false.

Respondent contends that although the books may not be free the advertisements contain statements clearly disclosing those things which the customer must do in order to receive the so-called "free" books and that these statements neutralize any probability or possibility of deception. We are unable to agree.

The contention might have some merit if the other statements in the advertisements only qualified the word "free." For illustration, in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212 (1933), the word "milling" imported the grinding of wheat into flour when in truth the Royal Milling Company only mixed and blended flour purchased from others engaged in grinding. The continued use of the trade name if used together with such qualifying words as "not grinders of wheat" was permitted. In *N. Fluegelman & Co.* v. *Federal Trade Commission*, 37 F. (2d) 59 (C. A. 2, 1930), the use of the words "Satinmaid" and "Satinized," which signified a fabric with a satin weave and a silk content, whereas the product in question was of a satin weave but of a cotton content, was permitted provided there was also used the phrase "a cotton fabric," "a cotton satin," "not silk," or equivalent modifying terms. In *Federal Trade Commission* v. *Good-Grape Company*, 45 F. (2d) 70 (C. A. 6, 1930), it was held that the name "Good-Grape" and the slogan "Fruit of the Vine" might be used if qualified by words making it appear that the product was an imitation, artificially colored and flavored. In *Federal Trade Commission* v. *Cassoff*, 38 F. (2d) 790 (C. A. 2, 1930), the word "shellac" in the trade names "white shellac" and "orange shellac" deceptively imported a product composed solely of genuine shellac gum dissolved

in alcohol. The use of the word "shellac" was permitted if there was also used in connection therewith the phrase "shellac substitute" or "imitation shellac," accompanied by a statement that the product was not 100% shellac.

It will be noted that in these cases the selection of qualifying words, effective to eliminate deception, was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which representations were true and some of which were untrue. Thus, in *Royal Milling Co.* case the representation of the word "milling" as to mixing and blending of the flour was true but the representation as to the origin of the flour, i. e., as to by whom it was ground, was untrue. In the *Fluegelman* case the representation of the words "Satinmaid" and "Satinized" that the fabric had a satin weave was true but the representation that it had a silk content was not. In the *Good-Grape* case the representation of the phrases "Good-Grape" and "Fruit of the Vine" that the product was like grape juice in color and flavor was true, but the representation that it was made of natural grape juice was untrue. In the *Cassoff* case the representation of the phrase "white shellac" and "orange shellac" that the product was composed solely of genuine shellac gum dissolved in alcohol was untrue, but the representation that it was like shellac, or that it could be used for the purpose of shellac, was true.

In these cases, for the reasons stated, qualifying words could be chosen which would eliminate the deceptive representation and leave standing the truthful one alone. In the present case, however, the other statements in the advertisements do much more violence to the word "free" than merely qualifying it. The word "free" as used by the respondent makes a single representation and, being untrue, cannot be qualified; it can only be contradicted. A statement in an advertisement which is totally false cannot be qualified or modified. *Federal Trade Commission* v. *Army & Navy Trading Co.*, 88 F. (2d) 776 (C. A. D. C., 1937); *Heusner & Son* v. *Federal Trade Commission*, 106 F. (2d) 596 (C. A. 3, 1939); *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. (2d) 103 (C. A. 7, 1946). A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end. *A. P. W. Paper Company* v. *Federal Trade Commission*, 149 F. (2d) 424 (C. A. 2, 1945); *General Motors Corporation, et al.* v. *Federal Trade Commission*, 114 F. (2d) 33 (C. A. 2, 1940); *Charles of the Ritz Distributors Corporation* v. *Federal Trade Commission*, 143 F. (2d) 676 (C. A. 2, 1944). The

fact that the careful observer would not be misled is not, of course, material, for the statute is intended to protect the unthinking and credulous members of the public as well as the more sophisticated and intelligent members. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112 (1937). The law was not "made for the protection of experts but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous." *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 F. (2d) 73, (C. A. 2); and 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." *Federal Trade Commission* v. *Standard Education Society*, *supra*.

Involved in this proceeding is the question whether the Commission will insist upon truth in advertising or will approve this type of falsity in advertising. If it is false, it is unfair, and if it is unfair, it violates the Federal Trade Commission Act regardless of whether actual injury or deception may be involved. While all deceptive acts are unfair, not all unfair acts are deceptive. It is possible to commit unfair acts without actually injuring or deceiving anyone, but in its unfairness lies the tendency and capacity to mislead and deceive, and as long as that tendency and capacity exist, such acts are unlawful.

The argument that respondent's advertisements lack both the tendency and capacity to deceive loses sight of or completely ignores the psychological effect created by the false use of the word "free." The word "free" is a lure. It is the bait. It is a powerful magnet that draws the best of us against our will "to get something for nothing." The astute advertiser well knows that once the average mind has received the impression conveyed by the meaning of the word "free" it can never be completely eradicated by any other words of explanation or contradiction. The meaning of the word "free" remains more or less fixed, and that meaning is the actual cause of the purchase. Without such use of the word "free," we are of the opinion that the sales of the books would have been considerably less and that purchasers were induced to buy books who ordinarily would not have purchased any, and in many instances purchased more books than they ordinarily would have purchased.

All advertisements are designed to excite demand for the advertised article and to call attention to the particular product. But when a prospective customer is offered something "free," it is not unreasonable to assume that the conscious or subconscious appeal involved in the offer will influence his judgment; the value of the so-called "free" article will divert the customer from the major inquiry into the quality of the article or of competing articles. The major inquiry is thus

subordinated, and the purchaser runs the risk of dissatisfaction in order to obtain the so-called "free" article.

Where is the distinction between a business conducted upon lottery and chance and a business based upon false representations that the books are free? Is the drawing power of the lottery or chance any greater than the drawing power of the word "free"? One plays the lottery or takes the chance solely in the hope that he will get something free, or something more than that for which he has paid. There is not the slightest difference in the psychological appeal of the two methods. In one you may get nothing, in the other you may get more, or at least think you are getting more, but the hope of getting more is stronger than the knowledge that you may get less or may get nothing, and the sucker plays the lottery or takes the chance while the gullible person purchases merchandise in order to get something "free." As in *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 365 (1916) the Supreme Court appropriately stated with respect to certain advertising practices that "they rely on something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such * * *."

An appropriate question could be asked: Why does an advertiser desire to use the word "free" or words of similar import in the sale and distribution of merchandise even though immediately in conjunction therewith the advertiser is ready and willing to explain that to obtain the so-called "free" article some other merchandise must be purchased, some action performed, or service rendered? The obvious answer is that the advertiser desires the benefit of the tremendous magnet and drawing power imported by such words. The advertiser knows the meaning conveyed to the prospective purchaser and knows that if once the impression is made in the mind of the purchaser that such goods are free, repeated contradictions thereafter will not completely eliminate that impression. It is THE FIRST IMPRESSION that is of vital concern to the advertiser. The opportunity to sell is important. The word "free" in advertisements attracts the eye and the mind and causes the reader to read advertisements which otherwise he would not. And although the true facts are also disclosed in the advertisement, the seller has achieved the opportunity to sell by the use of a false and misleading representation. Such advertisements will induce the purchase of goods that otherwise would not be purchased. We are of the opinion that such false advertising is unfair

to the seller's competitors as well as to customers and under the statute may constitute an unfair method of competition as well as an unfair and deceptive act and practice in commerce.

In the present case it is clearly established by substantial evidence that the use of the word "free" in respondent's advertisements is a material representation describing the "enrollment" book; that the representation has tremendous advertising value in inducing prospective purchasers to sign and send in the membership coupon; that the representation is false, and not only has the tendency and capacity to mislead and deceive, but actually has deceived prospective purchasers into the erroneous and mistaken belief that the "enrollment" book offered by respondent as "free" would in fact be given without cost or other obligation. We are of the opinion that the acts and practices of the respondent are all to the prejudice and injury of the public, that the public is entitled to be protected against this species of deception, and that its interest in such protection is specific and substantial.

In the matter of *Joseph Rosenblum, et al., trading as Modern Manner Clothes*, D. 5263, the Commission issued its order commanding respondents to cease and desist from

Using the word "free," or any other word or words of similar import or meaning, to designate, describe, or refer to wearing apparel, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the performance of some service inuring directly or indirectly to the benefit of the respondents. (47 F. T. C. Decisions 712, 722)

On petition to review in the United States Court of Appeals for the Second Circuit, the legal validity of the foregoing order was "Affirmed on authority of *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112; *Progress Tailoring Co.* v. *Federal Trade Commission*, 7th Cir., 153 F. (2d) 103; and *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 2d Cir., 143 F. (2d) 676." *Joseph Rosenblum et al. trading as Modern Manner Clothes* v. *Federal Trade Commission*, 192 F. (2d) 392 (C. A. 2, 1951). Subsequently, the Supreme Court denied a petition for writ of certiorari on March 24, 1952.

There is nothing in the order in the present case to prevent the respondent Book-of-the-Month Club, Inc. from distributing free books or from truthfully representing the facts. (See the opinion of Commissioner Ayres in the *Matter of Unicorn Press, et al.*, D. 5488, 47 F. T. C. Decisions 273.) The distribution of books which are in fact free may not be a profitable business endeavor. That decision, however, is for the respondent corporation. If the respondent does not

choose to distribute free books, there are sufficient words in the English language available to respondent which will accurately, truthfully and vividly describe the offer of respondent to its prospective purchasers. The respondent corporation is offering for sale many of the great works of literature. Certainly the advertisements for such subject matter can have customer appeal and yet be accurate.

The Commission, on January 14, 1948, issued the following administrative interpretation with respect to the use of the word "free" to describe merchandise:

"The use of the word 'free,' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act."

As special defenses to this proceeding the respondents contend that the complaint is based upon alleged violations of the above-quoted administrative interpretation, which they choose to call a "rule," and that said "rule" was adopted and promulgated without notice to the public and without furnishing an opportunity to interested parties to be heard, all in violation of the Administrative Procedure Act; that said "rule" is further invalid in that it is sought to be given a retroactive instead of a prospective application; and that said "rule" is arbitrary, capricious, and unlawful. These special defenses are without merit. The complaint in this proceeding is clearly not based upon alleged violations of any rule, but upon alleged violations of the Federal Trade Commission Act. The Commission's administrative interpretation in regard to the use of the word "free" to describe merchandise is not a "rule" within the meaning of the Administrative Procedure Act, and the Commission, in issuing its interpretation, in no wise violated any provision of the Administrative Procedure Act. The Commission's administrative interpretation was based upon the experience which the Commission has had in dealing with the problem as it affects the public interest. The interpretation does not have the force of law and was intended only to serve as a general guide for the business community and to outline the circumstances under which the use of the word "free" and words of similar import are likely to be misleading.

As a further special defense to this proceeding, the respondents allege that the Commission's previous utterances as to the meaning of

the word "free" and previous rulings favorable to respondents made by the Commission constitute grounds for the dismissal of the complaint.

Section 5 of the Federal Trade Commission Act provides that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful. This statute is expressed in general terms. The concept and application of such a statute should not remain static. An agency charged with the duty of preventing unfair practices in commerce must be alive to the facts of trade. It must be aware of the adverse effects on competition or on the consumer of unfair competitive practices. The effects of certain trade practices on competition or on the consumer may change with changing conditions. The Commission on a previous occasion considered the question of the adverse effects of the use of the word "free" to describe commodities which were not in fact free. The Commission at that time was of the opinion that the public interest could be protected by a limited form of relief or remedy. This question again came before the Commission in this case. The Commission in a litigated case must examine the factual record and, in the light of the whole record, find what the facts are. In the light of the facts so found the Commission must prescribe a remedy if it is found that there has been a violation of the law. This remedy must be based on and justified by the record and should be sufficient to prohibit the recurrence of the illegal act or practice found to exist. In the light of the facts in this record the Commission is of the opinion that the order to cease and desist which is being issued in this case is both appropriate and necessary.

The Commission is an administrative agency charged with the protection of the public interest, and is certainly not precluded from taking appropriate action to that end because of mistaken action or lack of action on its part in the past. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Houghton* v. *Payne*, 194 U. S. 88 (1904). Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials. *United States* v. *San Francisco*, 310 U. S. 16 (1940); *Utah Power and Light Co.* v. *United States*, 243 U. S. 389 (1917); *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. (2d) 52 (C. A. 4, 1950).

It is, therefore, the view of the majority of the Commission that the respondent Book-of-the-Month Club, Inc. has used the word "free" in violation of Section 5 of the Federal Trade Commission Act and that the order to cease and desist which has been entered in this matter is appropriate and necessary in the circumstances.

To the extent that the opinion of the Commission in the matter of Samuel Stores, Inc., Docket No. 3210, 27 F. T. C. Dec. 882, is in conflict with the views expressed herein, it is hereby overruled.

Commissioners Carson and Spingarn concur in the above opinion.

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON

This is a case about a company that gives its customers one book for every two they buy. The plan is simple. It is difficult to use more than three sentences explaining the whole thing.

Here it is:

The company sells books by mail order. You agree to buy four books a year. For every two books you buy, you get one free.

There it is.

A child past the Fourth Reader could understand it. For years, fifty thousand people a day bought the books and never complained they were fooled by a certain word in the ads which I shall not mention at this time. Nor, for that matter, was the Commission fooled on that certain word from 1940 to 1947. During this period, the Commission kept looking at and studying and analyzing the ads of the defendant, and from time to time advised defendants there was nothing objectionable in the way they used the word "free."

That's the word.

The Commission knew when it agreed to buy four books a year, it would get two books free. And if the Commission had done so, it would have gotten a jolly good bargain. The uncontradicted testimony showed the books cost no more and often less than the market price. Besides, the Federal Trade Commission would get a free book on top of all this for every two it purchased.

Things were fine, the consumers were getting good literature cheap, the company was distributing a million books a month, competitors were organizing rival book clubs, and everybody was happy. Even the Federal Trade Commission unbent enough to write the defendant that it saw nothing wrong with the idea of giving one book free for every two purchased.

Then in 1948 something happened. Just what, nobody knows. The urge to "tell someone off" and to issue mandates is a hidden hunger that crops up in unexpected places for unexplainable reasons. At any rate, there were rumblings around the Federal Trade Commission that all was not well with the word "free." Sinister implications and connotations wafted through our corridors. The word "free" was too emotional. It played on the credulities of the gullible American. People bought things to get something else free—a dangerous tendency

liable to stimulate trade, palliate unemployment and eradicate bankruptcy in the book business. Something had to be done to a merchandising plan that was so simple and so plain that it could be explained in 25 words—a plan that was selling millions of books and spreading education, culture and knowledge, along with a not unreasonable amount of tripe to the public.

The answer to all this well-being was, of course, for bureaucracy to promulgate an interpretation. There is nothing like a good promulgation to satisfy the emotional "id" of a Government agency.

So on January 14, 1948, the Federal Trade Commission issued its statement of policy on the word "free." In accordance with usual agency practice, the Commission took 214 words to explain what one word meant. Before this, the millions of people who dealt with defendant knew what "free" meant, but after the January 14 explanation, more bulletins were issued by Better Business Bureaus and other organizations for the public good, explaining the Commission's explanation, than ever before in the history of bureaucracy. Now no one has any moral certainty as to how free is "free."

Albeit the Commission's definition doesn't coincide with Mr. Webster, it must be remembered there was no Federal Trade Commission extant in Noah Webster's life. In those days, a word definition was not the subject of Government fiat. It rested entirely on common usage and custom. In fact, a dictionary maker was a historian, not a law maker. He merely noted accepted word usages in a handy volume. On the word "free" Mr. Webster (unabridged) records 24 separate uses. Some in Government believe this to be unfair. They hold to the "one-word, one-meaning theory"—a rose is a rose. From now on, Webster's is out and the Federal Trade Commission's unabridged is in.

Hereafter:

"The use of the word 'free,' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act."

Commissioners Freer and Mason voted against this definition.

On June 30, 1948, the Commission issued its complaint charging respondents violated Section 5 of the Federal Trade Commission Act in substantially the same language as that of the January 14 definition.

During the trial, the defendant was able to extract an admission from the Commission's attorney that:

"The Club's method of operation is accurately described in the circularizing and advertising material filed as Commission's exhibits, provided that the new subscriber performs his contract with the Club by the purchase of four books within one year.

* * *

"The foregoing circulars, contract and subscription forms and advertisement set forth accurately and fully each and every obligation which a subscriber or new subscriber incurs by becoming a member of Book-of-the-Month Club, Inc. and also set forth accurately and fully the privileges of such members, provided that the new subscriber performs his contract with the Club by the purchase of four books within one year."

These admissions would probably force a less arduous agency to drop the allegation that defendants were deceiving the public. But no such candor kept the Commission staff from maintaining the January 14 Promulgation of Interpretation, etc.

Out of the millions of satisfied customers, there must be some who would testify that the word "free" misled them. A recess was taken by the prosecution for four months. During this breathing spell the Government got hold of all the deadbeats who owed the Book Club money—that choice $^{98}/_{100}$ of one percent of defendants' customers who would be the last called if the Government ever wanted to make a dispassionate and just analysis of its own operation. Out of this cull the Government was able to distill thirteen defaulters whose virtuous regard for truth and veracity was undoubtedly only exceeded by their financial integrity. Without reading their testimony, you can assume they agreed with the Commission's definition of the word "free" 110 percent, whether they understood it or not.

Must we reject facts and clasp to our hearts the opinions of the unhappy thirteen?

I cannot say so.

As points have been raised involving questions of procedure which do not directly bear on the ultimate judgment, I wish to add these technical observations in this dissent.

Respondents show that twice (in 1940 and 1947) the Commission by written memoranda said it had no intention of challenging the respondents' use of the word "free."

Then in 1948, the Commission changed its mind. Respondents apparently feel the Commission had no right to do this, at least in the manner it did.

I cannot subscribe to respondents' argument of estoppel.

Though I disagree with the altered position of the Commission, there is no doubt but that it has the power to change its mind as many times as it believes inconsistency is in the public interest. Nor do I quarrel with the very salutary effort to keep business men advised by issuing explanatory statements on Commission policy from time to time. The fault lies not in their being—but too often in their paucity and obscurity. In the instant matter, the fault, as I see it, lies in its lack of jurisdiction to define such words and our inability to sue for violations of those definitions.

If this order stands on appeal, perhaps the following week we shall define "good," "true" and "beautiful."

To sum up the area of agreement between the majority views and mine, one can say the administrative procedures leading to the cease and desist orders are in accord with sound judicial practice. There is also substantial agreement on the facts.

In fine, the issues in the instant case are, to my mind, clear-cut but invalid.

Just as clear-cut and invalid as if we were trying respondents for selling books on Saturday.

Saturday selling would be a clear-cut issue, and one which more than thirteen people in the United States would be willing to condemn. Suppose the Commission on January 14, 1948, had adopted a statement of policy with reference to Saturday selling, the same to be immediately effective, as follows:

"The practice of Saturday selling of merchandise sold or distributed in interstate commerce is considered by the Commission to be in violation of the Federal Trade Commission Act.

"Because certain business men have been selling books on Saturday and the Commission has heretofore not issued complaints against them for so doing, the Commission has reconsidered this matter and directs that an opportunity be extended to all those who have sold books on Saturday to execute a stipulation to cease and desist from so doing, with the further direction that if a satisfactory stipulation not be tendered, formal complaint issue in conformity with the statement of policy as above set out."

If respondents admitted the charges, we would certainly find them guilty on the clear-cut issue of Saturday selling. But would it be valid? Do we have the right to enter an order against doing business on Saturday?

A rule limiting what may be done on Saturday is no more valid than a rule limiting what may be done with the word "free" unless there is

factual support in a record before the Commission to give us jurisdiction over the days of the week or over the definitions of such qualitative words as in the instant case.

Our function under the statute is to prevent deception and other unfair acts in commerce. All that the Commission can do is to find as a body of experts, that certain advertisements are false and misleading and, therefore, must be inhibited.

In the instant case the Government admits the price of the gratuity was not added to the price of the purchased goods. If it had been secretly added, we could have very well entered a cease and desist order against such trickery. But realities have a way of killing off theories, and the harsh fact here is that the gratuity's cost was borne by defendants and not by the customer, and, therefore, it was in fact free.

The January 14 statement was not a rule properly promulgated according to the Administrative Procedure Act. Therefore, its violation could not be used as the basis for suit.

After taking testimony, the trial examiner (with an innate sense of propriety) having held that the January 14 statement was not a firm rule of law, recommended an order in language different from the rule,[1] thus demonstrating in this respect that he was trying the case on the facts, and not on a preconceived rule of the Federal Trade Commission.

Under his order, it was apparent the trial examiner rejected as not being sustained by the facts, the provisos composed by the Commission in its January 14, 1948, definition of "free."

But the Commission, not content with his delicacy, rejected his proposed order and inserted language identical to its January 14 statement.[2]

This, of course, does not of itself invalidate the order, but it does indicate what I believe to be the rationale behind the Commission's insistence on prohibitions in excess of our authority. It appears to me a simple order based on deception will not stand upon appeal. For there is the admission on the record, agreed to by Commission's attorney, that defendants' ads were accurate in their entirety. This being so, the order had to be directed against something more than

[1] "* * * do forthwith cease and desist from using the word 'free,' or any other word or words of similar import or meaning, to describe any book which is not in truth and in fact a gift or a gratuity furnished without cost or obligation to the recipient thereof."

[2] "* * * do forthwith cease and desist from using the word 'free,' or any other word or words of similar import or meaning, in advertising to designate or describe any book, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent."

deception or tendency to deceive, if the Commission was to maintain its suit.

The prohibition had to specifically follow the Commission's banning of "free" to include those new elements added in its January 14 statement.

Faced with the impossibility of finding deception in view of the prior admission on the record that defendants' ads were accurate, it will not, in my opinion, avail the Commission to extend the meaning of the word "free" past what the millions who got the books understood it to mean.

By this order the Commission sets itself up as a lexicographer with power to punish those who ignore our definitions.

By this order the Commission has fallen into the one-word, one-meaning fallacy which all semanticists regard as futile. Serious students of the problem hold that words shift and change in meaning, and that only by their context may they be known.

Even if we could limit by official definition the use of the word "free," a qualitative word like "good," "special" or "substantial," I believe the logistics of our agency condemn the expenditure of funds on such "Canuteisms."

But, in my opinion, it is not the function of the Commission to definite and limit the use of subjective words, which are always conditioned by the personal characteristics as well as the transitory state of mind of the individual at the time he contemplates the word.

I believe that this order reverses the whole historic concept of word authority by common usage. We supplant accepted usage with bureaucratic fiat.

And that I am against.

IN THE MATTER OF

PHILIP KREMER AND HARRY MONOKER TRADING AS THE MURD COMPANY

COMPLAINT, SETTLEMENT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5968. Complaint, Mar. 17, 1952—Decision, May 8, 1952

Where two individuals engaged in the manufacture and interstate sale and distribution of a rodenticide preparation designed by them as "Zurd"; in statements in advertisements concerning their product, directly and by implication—

(1) Represented falsely that said rodenticide preparation was 100% efficient in that it would kill all rats and mice on the premises; would achieve complete control of any rat or mouse problem and would prevent reinfestation by such rodents;

(2) Represented falsely that according to Department of Interior reports the ingredient Warfarin has been proven to eliminate all rats and mice on the premises; and

(3) Represented that Zurd was safe and would not be harmful to humans, pets or domestic animals; when in fact it contained a poison and, if ingested, might cause illness and even the death of any warm blooded animal;

With tendency and capacity to mislead a substantial portion of the purchasing public into the mistaken belief that such representations were true and to induce it, because of such erroneous belief, to purchase said preparation; whereby substantial trade was unfairly diverted to them from their competitors, and substantial injury was done to competition in commerce:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and their competitors, and constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. John Lewis*, hearing examiner.
Mr. Edward F. Downs for the Commission.
Einhorn & Schachtel, of Philadelphia, Pa., for respondents.

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 Philip Kremer and Harry Monoker, individuals and co-partners, trading as The Murd Company, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents, Philip Kremer and Harry Monoker, are individuals and as copartners trade as The Murd Company with their principal place of business located at 122 Cuthbert Street, Philadelphia, Pennsylvania.

PAR. 2. Respondents are now and for more than one year last past have been engaged in the manufacture, sale and distribution of a rodenticide preparation designated by them as "Zurd," with the formula and directions for use thereof as follows:

Formula: Active Ingredients:	Percent
Warfarin (3-(a-acetonylbenzyl)-4-hydroxycoumarin)	0.025
Inert Ingredients	99.975

Directions:

SUGGESTED USE: Place 2 ounces to 1 pound of contents of this package in locations frequented by rats and mice and protect from children, dogs, cats and livestock by means of bait boxes or cages where necessary. ZURD should be replaced as consumed.

Where a continuous source of infestation prevails from nearby dumps or fields, permanent bait stations should be used and ZURD replenished as needed.

IMPORTANT NOTICE: Baiting should continue until complete lack of feeding is noted. This should be from five to fourteen days.

Be sure that sufficient ZURD is at hand to complete a continuous 14-day feeding program. If ZURD is exhausted before rats or mice have been completely eliminated, it is important to obtain additional ZURD promptly and avoid a delay of more than 1 or 2 days in the feeding program. Continuous, uninterrupted feeding is what gives you control.

MICE: For controlling mice follow the same general directions as for rats except bait placements may be smaller and more placements should be made. Mice are more difficult to control than rats and complete control may take a longer period of baiting.

CAUTION: ZURD contains as its active ingredients an anticoagulant chemical which if taken accidentally by humans, domestic animals, or pets may reduce the clotting ability of the blood and serious hemorrhage may result. In case baits are accidentally eaten, give a tablespoonful of salt in a glass of warm water and repeat until vomit fluid is clear. Call a physician immediately.

NOTE FOR PHYSICIANS: When a human has been known to have accidentally ingested ZURD, blood transfusions combined with intravenous injections and oral doses of Vitamin K are indicated as in the case of hemorrhage caused by overdoses of DICUMAROL.

Respondents cause said preparation when sold to be transported from their place of business in the State of Pennsylvania to the 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 preparation in commerce among and between the various States of the United States and in the District of Columbia. Their volume of trade in said commerce has been and is substantial.

PAR. 3. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents have disseminated and caused the dissemination of certain advertisements, concerning their product, containing but not limited to the following statements and representations:

At last A 100% Efficient Scientific Method to KILL RATS and MICE with ZURD. New, Revolutionary Rodenticide, Made with Warfarin, Rids Farms, Stores, Homes of the Most Destructive Animals in the World and Prevents Reinfestation.

Complete Control Achieved.

U. S. Department of Interior reports prove complete elimination of rats and mice with Warfarin bait where the use of other poisons was not successful.

ZURD is harmless to humans, pets and domestic animals.

PAR. 4. Through the use of the statements and representations hereinabove set forth, and others similar thereto but not specifically set out herein, respondents have represented, directly or by implication, as follows:

(a) That Zurd is 100% efficient in that it will kill all rats and mice on the premises; that it will achieve complete control of any rat or mouse problem and will prevent reinfestation by such rodents.

(b) That according to U. S. Department of Interior reports the ingredient Warfarin has been proven to eliminate all rats and mice on the premises.

(c) That Zurd is safe and will not be harmful to humans, pet or domestic animals.

PAR. 5. The statements and representations used and disseminated by respondents in the manner above described are false, misleading and deceptive. In truth and in fact:

(a) Respondents' preparation Zurd is not 100% efficient in that it will not kill all rats and mice on the premises, nor achieve complete control of any rat or mouse problem or prevent reinfestation by such rodents.

(b) U. S. Department of Interior reports have not proven nor indicated that the ingredient Warfarin will eliminate all rats and mice on the premises.

(c) Respondents' preparation Zurd contains a poison and if ingested may cause illness and even the death of any warm-blooded mammal.

PAR. 6. Respondents, in the course and conduct of their business, as aforesaid, have been and are engaged in substantial competition in commerce with other individuals, and with firms and corporations in the sale of rodenticide preparations.

PAR. 7. The use by respondents of the foregoing false, misleading and deceptive statements and representations has had and now has the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase the preparation sold by respondents. As a result thereof substantial trade has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done by respondents to competition in commerce.

PAR. 8. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and 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.

CONSENT AND SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on March 17, 1952, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion,

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on May 8, 1952, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondent consents may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents, Philip Kremer and Harry Monoker, are individuals and as copartners trade as The Murd Company with their principal place of business located at 122 Cuthbert Street, Philadelphia, Pennsylvania.

PAR. 2. Respondents are now and for more than one year last past have been engaged in the manufacture, sale and distribution of a rodenticide preparation designated by them as "Zurd," with the formula and directions for use thereof as follows:

Formula: Active Ingredients:

Warfarin (3-(a-acetonylbenzyl) -4-hydroxycoumarin)	0.025%
Inert Ingredients	99.975%

Directions:

SUGGESTED USE: Place 2 ounces to 1 pound of contents of this package in locations frequented by rats and mice and protect from children, dogs, cats and livestock by means of bait boxes or cages where necessary. ZURD should be replaced as consumed.

Where a continuous source of infestation prevails from nearby dumps or fields, permanent bait stations should be used and ZURD replenished as needed.

IMPORTANT NOTICE: Baiting should continue until complete lack of feeding is noted. This should be from five to fourteen days.

Be sure that sufficient ZURD is at hand to complete a continuous 14-day feeding program. If ZURD is exhausted before rats or mice have been completely eliminated, it is important to obtain additional ZURD promptly and avoid a delay of more than 1 or 2 days in the feeding program. Continuous, uninterrupted feeding is what gives you control.

MICE: For controlling mice follow the same general directions as for rats except bait placements may be smaller and more placements should be made Mice are more difficult to control than rats and complete control may take a longer period of baiting.

CAUTION: ZURD contains as its active ingredients an anticoagulant chemical which if taken accidentally by humans, domestic animals, or pets may reduce the clotting ability of the blood and serious hemorrhage may result. In case

baits are accidentally eaten, give a tablespoonful of salt in a glass of warm water and repeat until vomit fluid is clear. Call a physician immediately.

NOTE FOR PHYSICIANS: When a human has been known to have accidentally ingested ZURD, blood transfusions combined with intravenous injections and oral doses of Vitamin K are indicated as in the case of hemorrhage caused by overdoses of DICUMAROL.

Respondents cause said preparation when sold to be transported from their place of business in the State of Pennsylvania to the 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 preparation in commerce among and between the various States of the United States and in the District of Columbia. Their volume of trade in said commerce has been and is substantial.

PAR. 3. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents have disseminated and caused the dissemination of certain advertisements, concerning their product, containing but not limited to the following statements and representations:

At last A 100% Efficient Scientific Method to KILL RATS and MICE with ZURD. New, Revolutionary Rodenticide, Made with Warfarin, Rids Farms, Stores, Homes of the Most Destructive Animals in the World and Prevents Reinfestation.

Complete Control Achieved.

U. S. Department of Interior reports prove complete elimination of rats and mice with Warfarin bait where the use of other poisons was not successful.

ZURD is harmless to humans, pets and domestic animals.

PAR. 4. Through the use of the statements and representations hereinabove set forth, and others similar thereto but not specifically set out herein, respondents have represented, directly or by implication, as follows:

(a) That Zurd is 100% efficient in that it will kill all rats and mice on the premises; that it will achieve complete control of any rat or mouse problem and will prevent reinfestation by such rodents.

(b) That according to U. S. Department of Interior reports the ingredient Warfarin has been proven to eliminate all rats and mice on the premises.

(c) That Zurd is safe and will not be harmful to humans, pet or domestic animals.

PAR. 5. The statements and representations used and disseminated by respondents in the manner above described are false, misleading and deceptive. In truth and in fact:

(a) Respondents' preparation Zurd is not 100% efficient in that it will not kill all rats and mice on the premises, nor achieve complete

control of any rat or mouse problem or prevent reinfestation by such rodents.

(b) U. S. Department of Interior reports have not proven nor indicated that the ingredient Warfarin will eliminate all rats and mice on the premises.

(c) Respondents' preparation Zurd contains a poison and if ingested may cause illness and even the death of any warm blooded mammal.

PAR. 6. Respondents, in the course and conduct of their business, as aforesaid, have been and are engaged in substantial competition in commerce with other individuals, and with firms and corporations in the sale of rodenticide preparations.

PAR. 7. The use by respondents of the foregoing false, misleading and deceptive statements and representations has had and now has the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase the preparation sold by respondents. As a result thereof substantial trade has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done by respondents to competition in commerce.

CONCLUSION

The acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and of respondents' competitiors and 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.

ORDER TO CEASE AND DESIST

It is ordered, That respondents Philip Kremer and Harry Monoker, individually and as co-partners trading as The Murd Company, or under any other name or names, their agents, representatives and employees, jointly or severally, 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 a rodenticide preparation designated "Zurd" or any other rodenticide preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name or names, do forthwith cease and desist from representing directly or by implication:

1. That said rodenticide preparation is 100% efficient, that it will kill all rats or all mice on the premises, or that it will achieve complete control of any rat or mouse problem or will prevent reinfestation by such rodents.

2. That according to the U. S. Department of the Interior reports the ingredient Warfarin has been proven to eliminate all rats or all mice on the premises.

3. That respondents' said preparation is safe and will not be harmful to humans, pets or domestic animals.

It is further ordered, That the respondents shall, within 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.

(s) *Murd Company*,
MURD COMPANY.
(s) *Philip Kremer*,
PHILIP KREMER.
(s) *Harry Monoker*,
HARRY MONOKER.

April 28, 1952.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 8th day of May 1952.

IN THE MATTER OF

DOESKIN PRODUCTS, INC.

COMPLAINT, DECISION, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5800. Complaint, Aug. 14, 1950—Decision, May 15, 1952

Where a corporation engaged in the manufacture and interstate sale of its "Sanapak" sanitary napkins; in statements on cartons in which it packaged its product, in a full page advertisement in an issue of a Chicago newspaper of wide interstate circulation, and through a large broadside or circular distributed widely among its dealers—

(a) Represented that tests conducted by Consumers Union showed its said product to be the safest and most absorbent of all sanitary napkins tested; facts being that all that the tests, as reported by Consumers Union, had shown was that respondent's napkins were among the first three in absorbency, and the actual ratings on absorbency—disclosed by the evidence but not included in the report—showed that according to the tests, respondent's napkin was the third or last in the group;

(b) Stated in said newspaper advertisement, which also carried the picture of a young woman, that its product had been endorsed or approved by a "famous New York stylist"; when in fact the person so referred to was a young lady who was employed by respondent as secretary to one of its officers and made no claim to being a stylist, and the picture in the advertisement was of a professional model;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to respondent's product and to cause it to purchase such product as a result of the mistaken belief so engendered:

Held, That such acts and practices under the circumstances set forth were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.

Mr. B. G. Wilson for the Commission.

Cravath, Swaine & Moore, of New York City, and *Wilmer & Brown*, of Washington, D. C., for respondent.

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 Doeskin Products, 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. Respondent, Doeskin Products, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 11 West 42nd Street, New York 18, New York, and maintains three manufacturing establishments in Massachusetts.

PAR. 2. The respondent is now and for more than two years last past has been engaged in the manufacture of sanitary napkins bearing the registered trade-mark "Sanapak" and in the sale and distribution thereof in commerce between and among the various States of the United States and in the District of Columbia.

Respondent causes its said product when sold to be transported from its places of business in the States of New York and Massachusetts and 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 its said product in commerce between and among the various States of the United States and in the District of Columbia. Respondent's volume of business in such commerce is substantial.

PAR. 3. In the course and conduct of its said business and for the purpose of inducing the purchase of its said product, said respondent has made in advertisements in newspapers having a general circulation, circulars and upon the containers in which said product is sold many statements and representations concerning the nature and quality of its said sanitary napkins and the results that may be expected to be obtained from the use thereof. Among the typical of such statements and representations are the following:

(Upon Containers)

Consumers Union tests report Sanapak safest.

(In Advertisements)

Consumers Union tests report Sanapak safest sanitary napkin.

. . . the scientific independent test made by Consumers Union clearly demonstrated the startling superiority of Sanapak's amazing absorbency—gave conclusive impartial proof of Sanapak's unsurpassed safety.

Depiction of an apparatus which it is stated is "to test the absorbency of sanitary napkins" accompanied by depictions of bacteriological culture tubes, a microscope, and an individual operating the apparatus, and the statement, "To test the absorbency of sanitary napkins a special test apparatus was set up by a completely independent testing laboratory. The type of apparatus is pictured above."

"You'd never dream anything could be as soft as Sanapak" says New York stylist. Joan Ellis, famous New York stylist, says: "I found a sanitary napkin that's a glorious improvement. It's Sanapak—and I never thought I'd find a napkin that's so amazingly soft and comfortable. You see, Sanapaks are

uniquely shaped to fit without bulk or chafing. Packed with cotton, too," accompanied by a depiction of a personable young woman.

Proved most absorbent of all leading brands by scientific fact-finding service—We publish this news independent of Consumers Union because we believe it to be of vital importance to the vast majority of American women.

PAR. 4. Through the use of the foregoing depictions, statements and representations and others of similar import not specifically set out herein, the respondent represents and has represented, directly and by implication, that a scientific independent test made by Consumers Union proved respondent's product Sanapak to be the safest and most absorbent sanitary napkin; that the apparatus depicted is the type used by Consumers Union in conducting its test, and that the microscope and culture tubes were used therein; that Joan Ellis is a "famous New York stylist," that the depiction is of her, and that she has honestly endorsed the softness, comfort, shape and freedom from bulk and chafing of Sanapak; that because of the alleged superiority in absorbency, Sanapak is superior for use under ordinary and usual conditions to other sanitary napkins under like conditions.

PAR. 5. The foregoing statements and representations used and disseminated by the respondent in the manner aforesaid are false, misleading and deceptive. In truth and in fact said test by Consumers Union does not show Sanapak to be either the safest or most absorbent of all sanitary napkins. The apparatus depicted in respondent's advertisements is not of the type used by Consumers Union in its test, and the culture tubes and microscope were not used therein. The "Joan Ellis" to whom respondent's advertisement refers is nonexistent, and the picture is of a person unknown to respondent. Under ordinary and usual conditions of use the alleged superiority in absorbency of Sanapak does no render it superior to many other sanitary napkins.

PAR. 6. The representations and claims hereinabove set forth, and others similar thereto not specifically set out herein concerning the properties of respondent's product as allegedly shown by the said test are misleading and deceptive for the further reason that respondent's product, as offered by means of the said advertisements, is not the same product as that which was tested by Consumers Union, is inferior to it in absorbency and is also inferior in that respect to many other sanitary napkins.

PAR. 7. The use by respondent of the aforesaid false, deceptive and misleading statements, depictions and representations has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations are true and cause a

substantial portion of the public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's said product.

PAR. 8. The aforesaid acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDERS AND DECISION OF THE COMMISSION

Order denying appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 5800, May 15, 1952, follows:

This matter came on to be heard by the Commission upon appeals by both the respondent and counsel supporting the complaint from the initial decision of the hearing examiner, briefs filed in support of and in opposition to both appeals and oral argument of counsel.

This proceeding relates to respondent's advertising claims for its product "Sanapak", a sanitary napkin. These appeals are concerned with the meaning and truthfulness of respondent's representations as to the results of a test of the comparative absorbency of its product and other brands of sanitary napkins conducted by Consumers Union and published in the magazine "Consumer Reports".

The representations referred to are as follows:

(1) As set out on one side of the carton in which respondent's product was sold:

CONSUMERS UNION TESTS
REPORT SANAPAK SAFEST!

(2) As set out on another side of its cartons:

Amazing Results of Independent, Impartial, Unsolicited Research CONSUMERS UNION TESTS REPORT SANAPAK SAFEST SANITARY NAPKIN Proved Most Absorbent of all Leading Brands by Scientific Fact-Finding Service Report Published in "Consumer Reports" Magazine.

(3) As set out in an advertisement published in a Chicago newspaper of wide circulation and in an advertising circular widely distributed by respondent to its dealers:

Amazing Results of Independent,
Impartial, Unsolicited Research!
CONSUMERS UNION TESTS REPORT
SANAPAK SAFEST SANITARY NAPKIN
Proved Most Absorbent of all Leading
Brands by Scientific Fact-Finding Service

Report Published in "Consumer Reports" Magazine

These startling tests published in the August 1949 issue of "Consumer Reports", official publication of Consumers Union, rated Sanapak most absorbent—thus, safest—of all leading sanitary napkins tested. The report stated: "In Sanapak . . . water-repellent paper was used between cores of filler; Sanapak had excellent absorbency."

This water-repellent material—both in the center of the napkin, plus three full layers at the back (Sanapak's famous "Pink Safety Back")—is the reason for Sanapak's amazing extra safety. It is the reason, too, why thousands of women have learned by actual experience that they prefer Sanapak to all other brands. Sanapak is so much safer—so much more comfortable. You know you're safe with Sanapak.

We publish this news independent of Consumers Union, because we believe it to be of vital importance to the vast majority of American women. Consumers Union is a subscription service for members only, and was not trying to increase Sanapak sales. It was testing solely to determine the facts, the unvarnished truth. Sanapak's amazing superiority was demonstrated solely on its merit.

Prove it to yourself. Get Sanapak today—without risking a single penny. Sanapak is the safest and most comfortable sanitary napkin you ever wore, or its makers guarantee double your money back!

The report of the results of the tests referred to in these advertisements, as published in "Consumer Reports" magazine, stated that the absorbency of respondent's product and of two other brands was excellent and that they were superior in this respect to the other brands tested. The magazine article did not contain any comparison of the results of the test as among these three brands rated excellent. The records of the actual test reveal, however, that respondent's product rated third in absorbency in this group. Upon this record the hearing examiner, in his initial decision, found that respondent had falsely represented that this test showed its product to be the safest and most absorbent of all sanitary napkins tested and prohibited it from making such representation in the future.

Respondent appealed from this decision upon the grounds that (1) respondent did not represent that the Consumers Union test did find Sanapak to be the most absorbent of all sanitary napkins; (2) these tests did find that Sanapak was the most absorbent of all sanitary napkins available to the average consumer; and (3) there is no public interest in this proceeding.

In support of its first ground for appeal respondent contends that a consideration of the complained of advertisements as a whole shows respondent represented that the tests found Sanapak to be the most absorbent of all leading brands of sanitary napkins, not that they found it to be the most absorbent of all brands. This contention is believed to be of no merit. The Commission is of the opinion that the representation "CONSUMERS UNION TESTS REPORT

SANAPAK SAFEST" clearly means that Sanapak was found by these tests to be the safest of all brands tested in the sense of having superior absorbency. Thus, this representation standing alone on one side of the carton in which respondent's product was sold, is clearly false.

As to those advertisements in which the representation "CONSUMERS UNION TESTS REPORT SANAPAK SAFEST SANITARY NAPKIN" was accompanied by the statement that these tests proved Sanapak to be the most absorbent of all leading brands, it is believed that this accompanying statement does not have the effect of showing that the tests found Sanapak to be superior to the largest selling brands only. The Commission is of the opinion that these advertisements considered in their entirety represent that these tests proved that Sanapak is the safest from a standpoint of absorbency of those brands of sanitary napkins tested, which brands included the best brands sold. This representation is false and misleading.

Respondent further contends that even if its advertisements were interpreted as representing that these tests found Sanapak to be the most absorbent of all sanitary napkins, that such representation would be true as the tests found that Sanapak was the most absorbent of all sanitary napkins available to the average consumer. The record does show that sales of Aimcee, one of the brands testing higher than respondent's product, had been discontinued prior to the publication of the results of said tests. However, the record shows that Sanflex, the other brand testing higher than respondent's product, was available to consumers in New York, Detroit and St. Louis. There is no evidence that it was not also available in many other areas. The record is silent as to the total sales of Sanflex or its position in the industry. The record does show that compared to Kotex and Modess, whose combined sales comprise ninety-five per cent of total sales in the United States, all of the other brands sales are small. Among these other brands Sanapak excels in total sales. However, inasmuch as Sanflex is available to consumers, respondent's contention that the test results as to it should be ignored is of no merit.

Respondent further contends that there is not sufficient public interest in this proceeding to support the Commission's jurisdiction because the proceeding is moot and involves only a private controversy. In support of its claim that this proceeding is moot, respondent contends that the practice has been stopped and that respondent offered to consent to an order to cease and desist. The record shows that prior to the publication of the complained of advertisements, respondent was informed by the organization which had conducted the tests that its proposed representation that the tests showed Sana-

pak to be safest was false. Even after the Commission's investigation in this matter respondent continued to sell its product in cartons on which were printed the complained of representations and told the Commission that it intended to continue to do so until its supply of cartons on hand was used up. At that time respondent had approximately 450,000 of such cartons on hand. After issuance of the complaint herein respondent stopped the complained of practice and offered to consent to an order to cease and desist, but at all times it has maintained that its advertisements were legal. The Commission is of the opinion that this record does not provide sufficient assurance that respondent may not at some time in the future resume such representations unless it is prohibited from doing so by an order of the Commission.

In support of its contention that this proceeding is only a private controversy, respondent states that this proceeding arose out of a complaint by Consumers Union, which organization was concerned with respondent's unauthorized use of its material rather than the truth or falsity of respondent's reports of the results of the tests conducted by it. Respondent further states that the proper forum for determination of this controversy is the District Court of the United States for the Southern District of New York in which Consumers Union has brought a private suit against respondent, seeking damages for the use of its test results and further seeking an injunction against the republication of the complained of representation. In fact this proceeding does not relate to respondent's unauthorized use of the results of the Consumers Union tests, but relates to the false and misleading nature of respondent's advertisements. The Commission is of the opinion that the hearing examiner correctly held that these advertisements contained false and misleading representations which had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public, and to cause them to purchase respondent's product as a result of the erroneous and mistaken belief so engendered. Therefore, the Commission is of the further opinion that the hearing examiner correctly concluded that the public interest is served by this proceeding and that respondent's contention to the contrary is of no merit.

Respondent's exceptions to Paragraphs Three (d), Three (e), Six (a), Six (b) and Nine of the findings contained in the initial decision are rejected for the reasons stated hereinabove.

Counsel supporting the complaint appeals from the failure of the hearing examiner to find that respondent's product is not the most absorbent sanitary napkin. The complaint alleges that respondent represented that Sanapak is superior for use under ordinary and

usual conditions to other sanitary napkins. It further alleges that "the alleged superiority in absorbency of Sanapak does not render it superior to many other sanitary napkins" and that respondent's product "is also inferior in that respect [i. e., absorbency] to many other sanitary napkins". Upon this issue the hearing examiner found that the evidence as to the relative absorbency of the various brands of sanitary napkins tested is at best inconclusive and that, therefore, this charge in the complaint has not been sustained. From this finding counsel supporting the complaint appeals contending that every test in the record shows that respondent's product is not the most absorbent, with the exception of certain tests by respondent which were improperly and unscientifically conducted.

The Commission is of the opinion that the hearing examiner properly concluded that on a basis of the evidence contained in this record the comparative absorbency of the brands of sanitary napkins tested cannot be determined. The variations in the results of the tests by Consumers Union and of the test by Foster D. Snell, Inc., are so great as to permit no conclusion to be based upon them as to the comparative absorbency of the brands tested.

The Commission is of the further opinion that all of the findings as to the facts contained in the initial decision are supported by the reliable, substantial, and probative evidence of record; that the conclusion contained therein is correct; and that the order to cease and desist is proper upon this record and is required to provide proper relief from respondent's illegal practices.

The Commission, therefore, being of the opinion that both of the appeals herein are without merit and that the hearing examiner's initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint and the appeal of respondent from the initial decision of the hearing examiner be, and they both hereby are, denied.

It is further ordered, That the initial decision of the hearing examiner shall, on the 15th day of May, 1952, become the decision of the Commission.

It is further ordered, That respondent Doeskin Products, Inc., a corporation, 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 the order to cease and desist contained in said initial decision, a copy of which is attached hereto.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY WILLIAM L. PACK, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 14, 1950, issued and subsequently served its complaint in this proceeding upon the respondent, Doeskin Products, Inc., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing by respondent of its answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named trial examiner theretofore duly designated by the Commission, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by the trial examiner on the complaint, answer, testimony and other evidence, proposed findings and conclusions submitted by counsel, and oral argument of counsel, and the trial examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Doeskin Products, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 11 West 42nd Street, New York, New York. Respondent maintains three manufacturing establishments, two of them being located in Massachusetts and one in Delaware. Respondent is now and for a number of years last past has been engaged in the manufacture and sale of sanitary napkins, such product being sold under the registered trade name "Sanapak."

PAR. 2. Respondent causes its product, when sold, to be transported from its places of business in the States of New York, Massachusetts and Delaware to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains and has maintained a course of trade in its product in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. (a): This proceeding involves the use by respondent of alleged misrepresentations in advertising its product. The first charge in the complaint is that respondent has misrepresented the results of certain tests of sanitary napkins made by Consumers Union, a non-profit organization in New York City which is engaged in the

work of obtaining and supplying to consumers information with respect to various products, such information being for use by consumers in making their purchases. As a part of its work Consumers Union investigates, examines and tests numerous products, and the information thus obtained is published by the Union in its printed reports which are issued monthly and have a circulation of some 400,000 copies throughout the United States.

(b) In June 1949 some nineteen different brands of sanitary napkins (pads) were tested for absorbency by Consumers Union and the results of the tests were published by the Union in its August 1949 report. With one exception, all napkins tested were found to be "acceptable" and the acceptable napkins were further divided into three groups. The first group comprised three different brands, including respondent's product Sanapak which appeared as the first on the list. Immediately above this group of three napkins appeared the following statement: "The absorbency of the following pads was excellent." The second group of napkins were listed under the statement: "The following pads, while less absorbent than those above, were considered adequate for average need." Above the third group was the statement: "The following pads were less absorbent than those in the groups above, but would be satisfactory for minimum needs." Near the top of the page and above all of the listings was the following caption, printed in large type and running across the entire page:

RATINGS OF SANITARY PADS AND TAMPONS: 19 brands of sanitary pads and 5 brands of tampons were tested by CU. Grouping is in terms of absorbency; choice will depend on individual needs. Listing within each group is by cost; the figures in parentheses show average cost per dozen when bought in the largest package size found by CU's shoppers at time of purchase.

(c) During the latter part of 1949, after the publication of the Consumers Union report, respondent began to market its napkins in a new carton. On one side of this carton appeared the legend: "CONSUMERS UNION TESTS REPORT SANAPAK SAFEST!," and on the other side the following:

Amazing Results of Independent,
Impartial, Unsolicited Research
CONSUMERS UNION TESTS REPORT
SANAPAK SAFEST SANITARY NAPKIN
Proved Most Absorbent of all Leading
Brands by Scientific Fact-Finding Service
Report Published in "Consumer Reports" Magazine

Respondent also inserted a full page advertisement in the February 2, 1950, issue of a Chicago newspaper which has a wide circulation

not only in Chicago and Illinois, but in other States as well, the advertisement reading in part as follows:

Amazing Results of Independent,
Impartial, Unsolicited Research!
CONSUMERS UNION TESTS REPORT
SANAPAK SAFEST SANITARY NAPKIN
Proved Most Absorbent of all Leading
Brands by Scientific Fact-Finding Service

Report Published in "Consumer Reports" Magazine

These startling tests published in the August 1949 issue of "Consumer Reports," official publication of Consumers Union, rated Sanapak most absorbent—thus, safest—of all leading sanitary napkins tested. The report stated: "In Sanapak . . . water-repellent paper was used between cores of filler; Sanapak had excellent absorbency."

This water-repellent material—both in the center of the napkin, plus three full layers at the back (Sanapak's famous "Pink Safety Back")—is the reason for Sanapak's amazing extra safety. It is the reason, too, why thousands of women have learned by actual experience that they prefer Sanapak to all other brands. Sanapak is so much safer—so much more comfortable. You know you're safe with Sanapak.

We publish this news independent of Consumers Union, because we believe it to be of vital importance to the vast majority of American women. Consumers Union is a subscription service for members only, and was not trying to increase Sanapak sales. It was testing solely to determine the facts, the unvarnished truth. Sanapak's amazing superiority was demonstrated solely on its merit.

Prove it to yourself. Get Sanapak today—without risking a single penny. Sanapak is the safest and most comfortable sanitary napkin you ever wore, or its makers guarantee double your money back!

In addition to its cartons and newspaper advertisement, respondent distributed widely among its dealers a large broadside or circular containing substantially the same statements as the carton and newspaper advertisement.

(d) In the examiner's opinion respondent's representations were inaccurate and misleading. The clear purport and implication of the statements was that the tests conducted by Consumers Union had shown respondent's product to be the safest or most absorbent of all sanitary napkins tested. Actually, this was not the fact. All that the tests, as reported by Consumers Union, had shown was that respondent's napkin was among the first three in absorbency. The only reason the product was listed first in this group of three was that it was lowest in price. In fact, the actual figures or ratings on absorbency disclosed by the evidence show that according to the tests respondent's napkin was third or last in this group. These figures were not included in the report and respondent therefore cannot be charged with knowledge of them. The report did, however, as shown above, expressly state

that "Listing within each group is by cost," and the prices listed in the report showed the price of Sanapak to be the lowest of the napkins in the first group.

(e) It is urged by respondent that it did not represent that the tests showed Sanapak to be the most absorbent of all napkins tested, but that it represented only that the tests showed Sanapak to be the most absorbent of all "leading brands" tested; that the two brands of sanitary napkins which enjoy the largest sales were not included by Consumers Union in the first group listed in the report; that respondent's product is next to these two napkins in sales; and that therefore the tests did show Sanapak to be the most absorbent of the leading brands. In the examiner's opinion the representations cannot be justified on this ground. In the first place, the statement on one side of the carton made no reference to leading brands but read simply "Consumers Union Tests Report Sanapak Safest!". Aside from this, however, the general purport and implication of the advertisements was that the tests had found Sanapak to be the most absorbent sanitary napkin of all those tested.

PAR. 4. In connection with the reference in its advertisements to the Consumers Union tests, respondent used a picture of a testing device or apparatus, which picture also included a microscope and certain test tubes such as are used for bacteriological cultures. The complaint attacks this picture as misleading, charging that the device pictured is not the same kind of device as that used by Consumers Union, and that no microscope or culture tubes were used in the tests. As for the device pictured, both it and the device which was actually used by Consumers Union were exhibited to the examiner during the hearings. While there are certain minor differences between the two, the apparatus of Consumers Union having certain refinements which are not present on the other device, the two devices are of the same general type and are operated in essentially the same manner. In the examiner's opinion the use by respondent of the picture of the device was not misleading. As for the microscope and culture tubes, these doubtless were included by respondent in the picture merely to connote scientific accuracy and care. It is difficult to see how their use could mislead the public. The matter would also appear to be so inconsequential as to be without public interest.

PAR. 5. (a): The newspaper advertisement in question also carried the picture of a young woman and immediately below the picture the following:

"YOU'D NEVER DREAM
ANYTHING COULD
BE AS SOFT AS SANAPAK"
SAYS NEW YORK STYLIST

Joan Ellis, famous New York stylist, says: "I found a sanitary napkin that's a glorious improvement. It's Sanapak—and I never thought I'd find a napkin that's so amazingly soft and comfortable. You see, Sanapaks are uniquely shaped to fit without bulk or chafing. Faced with cotton, too.

"Another feature is the 'Triple Protection' given by Sanapak's famous 'Pink Safety Back.' Get a box and see if you don't agree that they're wonderful!"

The carton and circular also carried the picture of the young woman and below the picture the legend "'You'd Never Dream Anything Could be as Soft as SANAPAK' says New York Stylist."

(b) The person referred to by respondent as Joan Ellis is, in fact, a young lady of another name who is employed by respondent in the capacity of secretary to one of its officers. She is not a stylist and makes no claims to that effect. As a part of her secretarial duties she occasionally answers letters from women regarding sanitary napkins, and particularly Sanapak, using in such correspondence the name Joan Ellis. Because of the nature of its product respondent feels that it is preferable that correspondence with women regarding the product be carried on under a feminine name, and the name Joan Ellis is merely the name chosen by respondent for that purpose. The picture in the advertisements is not that of the employee, but of a professional model. Obviously respondent's advertisements were unwarranted and misleading in that they represented or implied that its product had been endorsed or approved by an independent and impartial stylist or fashion authority.

PAR. 6. (a): Respondent urges that the element of public interest is lacking both with respect to the Joan Ellis issue and with respect to the representations concerning the results of the Consumers Union tests. In this connection respondent points out that the newspaper advertisement was inserted in only one issue of one newspaper; that while 750,000 of the cartons were manufactured, only 500,000 were packaged with sanitary napkins and of this number 200,000 were unpacked, in August 1950, and the empty cartons destroyed; and that subsequently, in December 1950, the remaining 250,000 empty cartons were destroyed. Thus, of the 750,000 cartons manufactured, only 300,000 actually reached the public. Respondent further asserts that it has no intention of using any of the questioned representations in the future.

(b) In the examiner's opinion these circumstances are insufficient to warrant a conclusion that the matters in question are without public interest. While it is true that the advertisement was inserted in only one issue of the newspaper, it was a full page advertisement in a news-

paper with very wide circulation and undoubtedly the advertisement was seen by hundreds of thousands of readers. Moreover, some of the 300,000 cartons of napkins were still being sold to the public by dealers at the time of the hearings, two of the packages being purchased at that time from retail drugstores in New York City by a representative of Consumers Union. In addition to the newspaper advertisement and the cartons there is the matter of the circular, which was widely distributed by respondent among its dealers.

PAR. 7. The complaint also charges that respondent's representations with respect to the Consumers Union tests are misleading for the further reason that there has been a change in the construction of respondent's napkin since the Consumers Union tests were made and that consequently the napkin now being sold by respondent is not the napkin which was the subject of the tests, being inferior to the tested napkin in absorbency. While there is some evidence in support of this charge, there is positive, unequivocal testimony, not only from officers of respondent but also from the employees who are actually engaged in manufacturing and testing the napkins, that during the last five years there has been no change whatever in the construction of the napkin, with respect to materials or otherwise. It appears that regular and frequent inspections of the napkins are made during the process of manufacture and also that the napkins are frequently tested for absorbency, all irregular or defective napkins being discarded. Respondent recognizes that occasionally a napkin which is irregular or defective may leave its plant, but respondent insists that such occurrences are accidental, being due to the factor of human error or to some temporary defect in the manufacturing machinery, and are not the result of any intentional change in the construction or method of manufacture of the product. In the examiner's opinion the weight of the evidence is against the complaint on this issue.

PAR. 8. (a): The complaint appears to raise also the issue of the relative merits of respondent's product as compared with other, competing sanitary napkins, this issue being wholly independent of the issue with respect to respondent's representations as to the results of the Consumers Union tests. The complaint alleges that respondent has represented that "because of the alleged superiority in absorbency Sanapak is superior for use under ordinary and usual conditions to other sanitary napkins under like conditions." The complaint then charges that "Under ordinary and usual conditions of use the alleged superiority in absorbency of Sanapak does not render it superior to many other sanitary napkins," and that respondent's product is "inferior in that respect (absorbency) to many other sanitary napkins."

(b) Obviously, a matter of this nature, involving a determination

of the relative merits of competing products, should be approached with the utmost caution. Certainly, such an adjudication should not be attempted except upon the basis of evidence which is clear and convincing. In the examiner's opinion such evidence is lacking in the present record. Tests made by Consumers Union and by an independent testing laboratory at the instance of Consumers Union after the publication by respondent of the newspaper advertisement in question tend to support the charge in the complaint. On the other hand, the first Consumers Union tests placed respondent's product among the three products in the first group. Also opposed to the complaint are certain tests made by respondent which, while apparently not conducted in as scientific and accurate manner as the other tests, are, in the examiner's opinion, not without some probative value. All of the tests indicate that sanitary napkins of the same brand and presumably the same construction frequently differ widely in absorbency. The tests appear, at best, to be inconclusive on the present issue. The examiner is therefore of the view that this charge in the complaint has not been sustained.

PAR. 9. The use by respondent of the erroneous and misleading representations set forth in Paragraphs Three and Five has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to respondent's product, and the tendency and capacity to cause such portion of the public to purchase such product as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of respondent as hereinabove set out are all to the prejudice of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Doeskin Products, Inc., 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, and distribution of sanitary napkins 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 tests conducted by the organization known as Consumers Union have shown respondent's product to be the safest or most absorbent of all sanitary napkins tested.

2. That respondent's product has been endorsed or approved by any stylist or fashion authority, unless the person referred to is in fact an independent stylist not connected with respondent, and unless such person has in fact endorsed or approved said product.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That respondent Doeskin Products, Inc., a corporation, 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 the order to cease and desist contained in said initial decision, a copy of which is attached hereto [as required by aforesaid order and decision of the Commission].

Syllabus

IN THE MATTER OF

UNITED STATES NAVY WEEKLY, INC. ET AL.

COMPLAINT, DECISION, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5841. Complaint, Jan. 18, 1951—Decision, May 15, 1952

Any qualification or explanation of the name "United States Navy Magazine" to the effect that a publication so entitled has no official connection with the United States Navy would only contradict rather than qualify the conclusion necessarily attendant upon the use of such name, and would not eliminate the tendency and capacity of the use of such name to mislead and deceive.

Where a private corporation, organized for profit, and its two officers, engaged in the publication and in the competitive interstate sale and distribution of their "United States Navy Magazine" and in soliciting advertising therein, and selling subscriptions thereto through methods designed to capitalize on the erroneous impression that it was officially connected with the Navy—

(a) Represented falsely in their advertising, letters and circulars that said publication was officially connected with or sponsored by the Navy, and that it was owned, edited and published by Navy personnel; the facts being that, owned and published by said corporation, the magazine was largely carried on by its president, who was its principal stockholder and a retired Navy Chief Warrant Officer, and not by persons on active duty in the Navy;

(b) Represented falsely, as aforesaid, that said publication contained a complete coverage of Navy news from correspondents on ships at Naval stations, bases and yards, and from Washington; and

(c) Represented, as aforesaid, that said publication had a national office in Washington, D. C. and editorial offices in several other cities of the United States;

The facts being their only editorial office was that of the said president in Philadelphia; the address given as their national office was only a mailing address; and the other addresses listed were mailing addresses of the offices of free-lance advertising agents authorized to sell advertising space in said magazine;

(d) Falsely represented and implied through use of the name, "United States Navy Magazine" as the title of their publication, that said magazine was an official publication of the United States Navy, notwithstanding affirmative statements therein and elsewhere to the contrary which, by reason of small type in inconspicuous locations and obscure language were of no substantial value in correcting the false impression thereby created;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into a mistaken belief that their publication was an official publication of the Navy, and that such other representations were true, and into the purchase of said publication or advertising space therein as a result, and thereby to divert to them from their competitors substantial trade in commerce:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Charles S. Cox and *Mr. J. F. Walsh* for the Commission.
Mr. Byron N. Scott, of Washington, D. C., for respondents.

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 United States Navy Weekly, Inc., a corporation, and George L. Carlin and Ray E. Fenstemaker, 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, United States Navy Weekly, Inc., is a corporation existing under the laws of the State of Virginia. Respondents, George L. Carlin and Ray E. Fenstemaker are President and Secretary-Treasurer, respectively, of respondent United States Navy Weekly, Inc., and, as such, formulate, control and direct the policy of said corporate respondent. All of said respondents have an office mailing address at Room 820 National Press Building, Washington, D. C.

Said respondents are now, and for more than ten years last past have been, engaged in the publication, sale and distribution of a publication known as United States Navy Magazine and in the sale of advertising space therein and subscriptions thereto. Respondents cause and have caused said publication to be shipped from their place of business in the District of Columbia or in the State of Pennsylvania to purchasers in States other than the State of Pennsylvania or the District of Columbia and at all times mentioned herein have maintained, and now maintain, a course of trade in said publication in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business as aforesaid, respondents have made many statements and representations concerning said business and the nature of the same in newspapers, letterheads, circulars and other literature. Typical of, but not limited to, such statements and representations are the following:

"United States Navy Magazine," "The Flagship of Navy Publications—At your Service Since 1927," "Owned, Edited and Published by Naval Personnel," and "All the News from Washington—Official—Reliable." "Please don't confuse our publication with the so-called service publications owned by civilians."

PAR. 3. The respondents in the manner aforesaid have represented that such publication is an official organ or publication of the United States Navy Department and the same is associated or connected with the United States Navy; that the same is the main publication of the Navy relative to all other publications of the Navy Department; that the said publication is owned, edited and published by naval personnel and that it contains all naval news from Washington of an official and reliable nature.

In truth and in fact, said United States Navy Magazine is in no manner connected with the United States Navy Department and is neither owned, edited nor published by naval personnel in that the same is privately owned and operated, and personnel employed in connection therewith is not that of the United States Navy or the United States Navy Department and is composed of civilians; said publication does not contain all the news from Washington of an official and reliable nature, but only contains a portion of news that has been released by the United States Navy Department to, and available through, all news agencies alike.

PAR. 4. Respondents in the manner aforesaid have also represented that they have publication, editorial and other offices located at various places and have within the times aforesaid included the following: publication offices at—South and Hanover Streets, Pottstown, Pa.; 675 N. Broad Street, Philadelphia, Pa.; 642 N. Broad Street, Philadelphia, Pa.; E. Madison Ave. at Holley Street, Clifton Heights, Pa.; editorial offices at—12 South 12th Street, Philadelphia, Pa.; and Schaff Building, 15th and Race Streets, Philadelphia, Pa.; 742 Market Street, Room 230, San Francisco, California; 228 West 4th Street, Room 305, Los Angeles, California; Kress Building, Room 507, Long Beach, California; and other offices at—1419 North American Building, Philadelphia, Pa.; Finance Building, Philadelphia, Pa.; Harry J. Collins, Suite 543, 7th and Liberty Avenues, Pittsburgh, Pa.; 11017 Cedar, Cleveland 6, Ohio; 424 S. Broadway, Los Angeles, California; 812 Pine Avenue, Room 205, Long Beach, California; 46 Burns Street, N. E., Washington, D. C., and Suite 820, National Press Building, Washington 4, D. C.

Respondents have, in the manner aforesaid, also made statements and representations as follows:

> We offer you complete coverage of the ships and stations of the Navy Correspondents on Navy ships, at Naval Stations, Bases and Yards.

PAR. 5. Respondents have thereby represented that their business is of such magnitude that it has publication, editorial and other offices

at the places listed, and has coverage of all the ships and stations and has accredited correspondents on all the ships, and at all stations, bases and yards, of the United States Navy.

In truth and in fact, respondents do not have publication offices at the places listed therefor but only have facilities available to said respondents for the purpose of publishing any given issue of said publication, United States Navy Magazine, under contract for same. In truth and in fact, respondents do not have offices at some of the addresses listed, and only have mailing addresses thereat. Respondents do not have coverage of any nature of most of the ships and stations nor accredited correspondents on any of the ships nor at any of the stations, bases or yards, of the United States Navy.

PAR. 6. In the course and conduct of said business respondents have also made the following representations and statements on circulars, letterheads and in letters addressed to prospective advertisers as follows:

SEND YOUR GREETINGS TO THE OFFICERS AND MEN AND PAY HONOR TO THE WORLD'S GREATEST NAVY AND THE FINEST PERSONNEL OF ANY NAVY

Send a Message of encouragement and congratulations to the personnel of OUR Navy that has never been licked in battle. PAY THEM A TRIBUTE.

LEST YOU FORGET!

NAVY CASUALTY TOTALS (Official Navy Figures as of November 9, 1945)

56,557 Killed 80,264 Wounded 8,624 Still Missing

Picture of
Cemetery with Crosses

Official U. S. Navy Photo.

HONORED, THEY LIE AT REST ON FAR-FLUNG ISLANDS, OR IN THE OCEAN'S ARMS

WE SHALL NEVER FORGET THEY DIED FOR US

UNITED STATES NAVY MAGAZINE

Owned and Operated by Active, Reserve and Retired Navy Personnel Exclusively!

Dedicates its May edition to the memory of our shipmates, the brave and heroic officers and men of the United States Navy killed while engaging the enemy in battle.

On this MEMORIAL DAY of 1947, we urge and request you to cooperate with the United States Navy Magazine and send your condolences and sympathy to the brave officers and men of the Navy who have battled side by side in the ships and on the stations of the Navy with men who died while engaged in the battle with the enemy.

NAVY DAY TRIBUTE
TO the Heroic Officers and Men of the United States Navy

Pay A tribute to the Brave Officers and Men of the Navy	Navy Day–October 27 sponsored by the Navy League of the United States

Boost The Morale. Send greetings to the Navy and Honor the Brave officers and Men.

PATRIOTIC NAVY DAY EDITION

Pay a Well Deserved Tribute to the Brave and Courageous Officers and Men of the United States Navy this Navy Day.

SHOW YOUR PATRIOTISM IN THIS GREAT NAVY DAY EDITION!

WE ASK YOU—was it too much to ask your firm to send a message of condolence to men out there who daily give their lives so you civilians may live in comfort. While I was on active duty, I would not have believed the indifference that YOU CIVILIANS exhibit toward the men of the service. What a heartless gang you must be.

* * * * * * *

Might I suggest that when you *sell* again—sell yourself a heart.

PAR. 7. In the manner aforesaid respondents have thereby represented that the placement of an advertisement in said publication, United States Navy Magazine, would thereby inure to the benefit of the advertiser as a tribute and act of patriotism in honor of naval personnel killed in action as well as all naval personnel who have served in the United States Navy, and that the placement of such an advertisement in said publication is definitely an act of patriotism and would be construed as an expression of appreciation by the advertiser of a debt of gratitude to the past and present personnel of the United States Navy; that any person or addressee receiving one of respondent's solicitations to advertise in said publication, who refuses to place an advertisement in such publication, thereby indicates a lack of patriotism on the part of said recipient and indicates an indifference towards the men in the service.

PAR. 8. In truth and in fact, said publication is privately owned and operated and does not inure to the benefit or credit of the United States Navy Department nor the men in the service of the United States Navy. No part of the proceeds from the advertisements placed in said publication is paid over to any naval organization, society or division of the United States Navy Department, and said business is conducted solely for the benefit and profit of the stockholders owning the stock in said corporate respondent herein.

PAR. 9. The use by respondents of the name, United States Navy Magazine, as aforesaid, has had and now has the capacity to, and does, mislead and deceive members of the purchasing public into the mistaken and erroneous belief that said publication is an official organ or publication of the United States Navy Department and because of such mistaken belief, causes them to purchase advertising space in said magazine.

PAR. 10. At all times mentioned herein, respondents, in the course and conduct of their business, have been in actual and substantial competition with other corporations and individuals and with firms and partnerships likewise engaged in the publication of magazines; in the sale of subscriptions thereto, of advertising therein and in the distribution thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 11. The use by respondents of the aforesaid acts and practices in connection with the sale and the offering for sale of their said publication in commerce as described herein, has had, and now has, a tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the belief that the above-described representations are true. As a consequence of such erroneous and mistaken beliefs, as herein set forth, the purchasing public has been induced to purchase and has purchased substantial quantities of advertising in said publication and subscriptions to said publication with the result that trade has been unfairly diverted from competitors of respondents.

PAR. 12. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and to respondents' competitors and constitute unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on January 18, 1951, issued and subsequently served its complaint in this proceeding upon respondents, United States Navy Weekly, Inc., a corporation, and George L. Carlin and Ray E. Fenstemaker, individually and as officers of said respondent corporation, charging them with the use of unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in

support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, and said hearing examiner, on May 31, 1951, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, counsel for respondents filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal and oral argument of counsel; and the Commission, having issued its order granting said appeal in part and denying it in part and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, United States Navy Weekly, Inc., is a corporation existing under the laws of the State of Virginia. Respondents, George L. Carlin and Ray E. Fenstemaker, are President and Secretary-Treasurer, respectively, of respondent United States Navy Weekly, Inc., and, as such, formulate, control and direct the policy of said corporate respondent. All of said respondents have an office mailing address at Room 820, National Press Building, Washington, D. C. The permanent address of respondent Carlin is 4749 North Thirteenth Street, Philadelphia, Pennsylvania. Respondent Carlin maintains an editorial office for respondent United States Navy Weekly, Inc., at 12 South 12th Street, Philadelphia, Pennsylvania.

Said respondents are now, and for many years last past have been, engaged in the publication, sale and distribution of a magazine named "United States Navy Magazine," and in the sale of advertising space therein, in commerce. Respondents cause said publication to be shipped from the State of Pennsylvania to purchasers thereof in States other than the State of Pennsylvania, and at all times mentioned herein have maintained, and now maintain, a course of trade in said publication in commerce among and between the various States of the United States and in the District of Columbia. At all times mentioned herein, respondents have been in actual and substantial

competition with others engaged in the publication and circulation of magazines, and in the sale of subscriptions thereto and of advertising therein, in commerce between the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of their business, as aforesaid, respondents have made the following representations in their magazine and in letters and circulars sent to prospective advertisers in their magazine:

> The FLAGSHIP of NAVY Publications—
> At Your Service Since 1927
> OWNED, EDITED AND PUBLISHED BY NAVY PERSONNEL
> Please don't confuse our publication with the ordinary so-called service publications owned by civilians.

PAR. 3. By the use of the above set out statements respondents have represented that their magazine is an official publication of the United States Navy and that it is owned, edited and published by persons on active duty with the United States Navy.

PAR. 4. In fact respondent United States Navy Weekly, Inc., which owns and publishes the magazine United States Navy Magazine, is a private corporation organized for profit. This corporation is not connected in any manner with, nor is its magazine an official publication of, or sponsored or endorsed by, the United States Navy or the United States Navy Department or any branch or division thereof. Nor is this magazine owned, edited or published by persons on active duty with the United States Navy. The actual editing and publishing work has largely been carried on by respondent George L. Carlin, a retired United States Navy Chief Warrant Officer, who is the principal stockholder in respondent corporation. His activities in connection with this magazine have been carried on by him while in an inactive retired Navy status.

PAR. 5. In the course and conduct of their business, as aforesaid, respondents have also made the following representations in their magazine and in letters and circulars sent to prospective advertisers in their magazine:

> Correspondents on Navy ships, at Naval stations, bases and yards.
> We offer you complete coverage of the ships and stations of the Navy.
> All the news from Washington Official—Reliable.

Respondents have also stated in their said publication that they maintain a national office in Washington, D. C., and editorial offices

in several other cities of the United States. The cities in which these editorial offices have been represented as being located have varied from time to time. Typical of such representations was respondents' listing of addresses in Philadelphia, Pennsylvania, San Francisco, Los Angeles and Long Beach, California, in one issue of their magazine under the heading "Editorial Offices."

PAR. 6. By the use of the above set out statements the respondents have represented that they maintain a large business organization with a national office in Washington, D. C., and with several editorial offices located in various other cities of the United States, and that their publication contains a thorough coverage of the Navy news from Washington, D. C., and from the Navy's ships, stations, bases and yards.

PAR. 7. In fact respondents' business is very small. Their entire paid staff consists of respondent Carlin. Their only editorial office is that of respondent Carlin's, whose office is now, and during the period of time in which the representations as to the editorial office hereinabove referred to were made has been, located in Philadelphia, Pennsylvania. The address given as respondents' national office is only a mailing address from which mail is forwarded to respondent Carlin. The addresses listed as editorial offices, other than in Philadelphia, are in fact either mailing addresses or the offices of free-lance advertising agents authorized to sell advertising space in respondents' magazine.

Respondents' magazine is presently published once every two months and has a total circulation of 2,500 copies per issue. Their Navy news sources, other than those contacts made by respondent Carlin personally, are limited to official news releases issued by the Navy Department, greetings and messages solicited from high-ranking Naval officers and special articles contributed gratuitously or on a fixed columnar basis by Navy personnel from time to time. They do not have or publish a full and complete coverage of the Navy news from Washington, D. C., or from the Navy ships, stations, bases and yards.

PAR. 8. The name "United States Navy Magazine," used by respondents as the title for their magazine, implies that the publication is an official publication of the United States Navy. Respondents have affirmatively stated both in said publication and in their letters and circulars soliciting advertising that said publication was not owned by the United States Navy. However, such denials when made in said publication were made in such small type and in such inconspicuous locations and when made in advertising circulars usually were made in such obscure language, that such denials were not of

any substantial value in eliminating the tendency and capacity of the use of said name to create the impression that said publication is an official publication of the United States Navy.

Respondents' methods of soliciting advertisements and of selling subscriptions to said publication are designed to capitalize on the erroneous belief that their publication is officially connected with the United States Navy. Practically all of the advertisements solicited and published by respondents are in the form of greetings or tributes by the advertisers to the men of the United States Navy. These advertisements are solicited through appeals to the patriotism of the prospective advertiser and to his gratitude to the men of the United States Navy. Respondents also solicit subscriptions for their magazine to be sent to Naval and Veterans hospitals, by similar methods.

PAR. 9. The use by the respondents of the name "United States Navy Magazine" as the title of their publication, and the use of the false, misleading and deceptive statements and representations, referred to in Paragraphs Two, Three, Five and Six of these findings, has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that respondents' publication is an official publication of the United States Navy and that such statements and representations are true, and into the purchase of said publication or advertising space therein as a result of such erroneous and mistaken beliefs. By reason of the erroneous and mistaken beliefs so engendered, the use of the name "United States Navy Magazine" as the title of respondents' publication and the use of such statements and representations have also had and now have the tendency and capacity to divert to respondents, from their competitors, substantial trade in commerce between and among the various States of the United States and in the District of Columbia.

CONCLUSION

1. The acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

2. Any qualification or explanation of the name "United States Navy Magazine" to the effect that a publication so entitled has no official connection with the United States Navy would only contradict rather than qualify the conclusion necessarily attendent upon the use of such name. The presence of such contradictory statements would

not eliminate the tendency and capacity of the use of such name to mislead and deceive.

ORDER

It is ordered, That the respondent, United States Navy Weekly, Inc., a corporation, and its officers, representatives, agents and employees and the individual respondents, George L. Carlin and Ray Fenstemaker, and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation for the sale of advertising space in, or the offering for sale, sale or distribution of respondents' magazine or any other publication in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the name "United States Navy Magazine" as the title of any publication not officially connected with or sponsored by the United States Navy, or using any other title which falsely represents, directly or by implication, that the publication so entitled is officially connected with or sponsored by the United States Navy.

2. Representing, directly or by implication:

(a) That said publication is officially connected with or sponsored by the United States Navy or the United States Navy Department or any of their branches or divisions.

(b) That said publication is owned, edited or published by naval personnel or by anyone acting in other than a civilian capacity.

(c) That said publication contains a complete coverage of Navy news from the ships, stations, bases or yards of the United States Navy or from Washington, D. C.

(d) That said publication has a national office or an editorial office at any location contrary to the fact.

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.