

## Complaint

IN THE MATTER OF  
THE DRIVE-X COMPANY, INC.  
TRADING AS THE ELMO COMPANY ET AL.

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

*Docket 8615. Complaint, Feb. 14, 1964—Decision, Dec. 1, 1965*

Order dismissing the complaint against an Iowa concern dealing in drugs and medical devices and vacating the initial decision of the hearing examiner issued February 4, 1965, for the reason that the Commission determined it was no longer in the public interest to continue the proceeding.

## 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 The Drive-X Company, Inc., a corporation trading as The Elmo Company, and Craig Sandahl and Richard Johann, 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 The Drive-X Company, Inc., trading as The Elmo Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business at Second and Main Streets, in the city of Madrid, State of Iowa.

Respondents Craig Sandahl and Richard Johann are individuals and are officers of said corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the sale and distribution of certain preparations containing drugs and devices as the terms "drug" and "device" are defined in the Federal Trade Commission Act. The combination of the preparations and the devices is referred to by respondents as the "Elmo Palliative Home Treatment."

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

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*Designation:* Preparation No. 1—Ear Oil

<i>Formula:</i>	Gal.	Pts.	Ozs.
Alcohol .....		1	4
Methyl Salicylate U.S.P. (oil of wintergreen—synthetic).....			2½
Oil Eucalyptus .....			2½
Chloroform (Technical) .....		1	14
White Mineral Oil .....	2½		
Capsicum .....			1¾
Total—2 gallons, 7 pints, 13 ounces			

*Directions for Use:* Do not drop in ears—use the medicine dropper and put 2 or 3 drops—no more—on a piece of clean, sterile, absorbent cotton about ½ the size of a nickel. You can get this cotton at any drug store. Insert this cotton into the ear canal but not so deep that it cannot be easily removed with the fingers. Leave cotton in ears for about 10 minutes, while using the rest of the treatment. Then REMOVE THE COTTON AND THROW IT AWAY. Use Ear Oil once a day for one week. After one week use twice daily.

**IMPORTANT—NOTE:** If there is infection present in the ear canal do not use No. 1 Ear Oil for use may have the tendency to spread the infection to the deeper parts of the ear. Infection in the ear canal should be healed promptly by a competent physician for the spread of such infection could cause injury to the ear.

**DO NOT USE THE MEDICINE DROPPER WITH ANY OTHER MEDICINE.**

*Designation:* Preparation No. 2—Nasal Cleanser*Formula:*

Each 200 lbs. combines the following:

Sodium Chloride .....	95 lbs. 5 ozs.
Pwd. Sodium Borate.....	100 lbs.
Oil of Eucalyptus.....	3 pts.
Methyl Salicylate .....	2 pts.
Menthol Approx. ....	8 oz.
Aniline Pink #7264.....	1 gr. to each 1 lb.
Potassium Iodide .....	6 lbs. 2 oz. 350 gr.
Sodium Salicylate .....	2 lbs. 1 oz. 146 gr.
Sodium Benzoate .....	2 lbs. 1 oz. 146 gr.
Sugar of milk.....	20 lbs. to each 200 lbs.

*Directions for Use:* Fill No. 7 Nasal Douche about ¾ full with No. 2 Nasal Cleanser liquid from the bottle. Insert bulb end of the douche into one nostril, close the other nostril with finger pressure, and—while bending your head forward and downward—GENTLY snuff the medicine up into your nose. Refill No. 7 Nasal Douche and use in the same way in the other nostril.

Hold the liquid in both nostrils, for about a minute, to let the cleanser soak into the tissue and aid in cleansing catarrhal mucus from the nose. Use No. 2 Nasal Cleanser twice a day.

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If you snuff too hard, some of the nasal cleanser may pass into your throat. Spit it out if you can. If you swallow it will do no harm.

*Designation:* Preparation No. 3—Throat Gargle

*Formula:*

Each ounce of Special Formula Powder #3 contains the following:

Salicylate Acid .....	2-1/5 gr.
Carbolic Acid .....	9/20 gr.
Eucalyptol U.S.P. ....	9/20 gr.
Menthol U.S.P. ....	9/20 gr.
Thymol U.S.P. ....	9/20 gr.
Zinc Sulphate .....	55 gr.
Boric Acid .....	378-1/2 gr.

*Directions for Use:* Use the gargle to help remove the catarrhal secretions, or mucus, from the throat. Use twice a day—use only 1 teaspoonful from your pint bottle each time.

*Designation:* Preparation No. 4—Vapor Inhaler

*Formula:*

	Gals.	Pts.	Ozs.
Oil Peppermint .....		3	2
Oil Eucalyptus .....		5	
Oil Mustard (Synthetic) .....			2
White Mustard Oil .....	1/2	1/2	3

*Directions for Use:* First, see that the nose and throat are CLEAN of liquid and mucus. Then remove the corks from each end of the Vapor Inhaler. Insert the tapered end into one nostril, close the other with finger pressure at the side, and GENTLY draw a deep breath. Then hold it, remove the Vapor Inhaler from your nose and pinch BOTH nostrils shut using the thumb and finger. Then, close your mouth and try to blow through your nose. While doing this—try to swallow once or twice.

Repeat this operation in the other nostril. Do this 2 or 3 times each day. KEEP CORKED WHEN NOT IN USE.

*Designation:* Preparation No. 5—Massage Ointment

*Formula:*

Cream White Petrolatum .....	10 lbs.
Oil of Capsicum .....	1 1/2 ozs.

*Directions for Use:* Apply just a very little ointment behind and in front of the external ear and rub downward to the angle of the jaw—about 15 or 20 strokes—or until the skin feels slightly warm. Then remove the ointment left on the skin.

Next, stand erect and hold your head straight—throw your shoulders back and move your head from side to side, towards each shoulder, 8 or 10 times. Then move it from the front to the back, 8 or 10 times. Do this mildly at first. Use No. 5 Massage Ointment and do this exercise twice a day.

*Designation:* Preparation No. 6—Nasal Ointment

*Formula:*

Cream White Petrolatum .....	15 lbs.
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32 oz. Oil Eucalyptus	} No. 6	Oil .....	30 ozs.
20½ oz. Oil Wintergreen			
16½ oz. Oil Peppermint			
Oil of Pine Needles .....		1½ ozs.	
Oil of Sassafras .....		1½ ozs.	

*Directions for Use:* Place a small amount on your little finger and spread well over the mucous membrane in each nostril. Do this twice a day.

*Designation:* Elmo No. 7 Nasal Douche

Elmo No. 7 Nasal Douche is a glass U-Shaped tube with openings at both ends, and one end tapered.

*Directions for Use:* Fill Nasal Douche three-fourths full with No. 2 solution. Insert tapered end in nose, holding head WELL FORWARD and DOWN. Snuff up contents of douche. Repeat in other nostril. Retain solution for a minute or two before gently blowing nose. Use twice daily, night and morning.

*Designation:* Elmo No. 8 Ear Vibrator

Elmo No. 8 Ear Vibrator is a glass tube device with a plunger or piston at one end and a bulb containing a small opening at the other end.

*Directions for Use:* Place glass bulb into hole in ear, holding so air cannot escape around bulb. Then draw piston SLOWLY in and out ten or twelve times. USE ONCE A DAY. When ear becomes accustomed to Ear Vibrator, use morning and night. For indicated ear conditions only. Read direction sheet before using.

**IMPORTANT—NOTE:** If there is infection present in the ear canal, do not use No. 8 Ear Vibrator for use may have the tendency to spread it. Read accompanying Directions before using.

*Designation:* Preparation No. 9—Re-Charge Liquid

*Formula:*

This preparation is the liquid used in the No. 4 Vapor Inhaler and the formula is the same as set out there. It is used to recharge the Inhaler.

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

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said preparations and devices by the United States mails and by various means in commerce, as "com-

merce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and by means of circulars and other advertising media, for the purchase of inducing and which were likely to induce, directly or indirectly, the purpose of said preparations and devices; and have disseminated, and caused the dissemination of, advertisements concerning said preparations and devices, by various means, including, but not limited to, the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said preparations and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

#### EAR NOISES

relieved!

\* \* \* thousands reported.

Wonderful relief from years of suffering from miserable ear noises and poor hearing caused by catarrhal (excess fluid mucus) conditions of the head! That's what these folks (many past 70) reported after using our simple Elmo Palliative HOME TREATMENT during the past 23 years. This may be the answer to your prayer. NOTHING TO WEAR. Here are SOME of the symptoms that may likely go with your catarrhal deafness and ear noises: Mucus dropping in throat. Head feels stopped up by mucus. Mucus in nose and throat every day. Hear—but don't understand words. Hear better on clear days—worse on bad days, or with a cold. Ear noises like crickets, bells, whistles, clicking or escaping steam or others. You, too, may enjoy wonderful relief if your poor hearing or ear noises are caused by catarrhal conditions of the head and when treatment is used as needed. Write TODAY for PROOF OF RELIEF and 30 DAY TRIAL OFFER.

The Elmo Palliative Home Treatment is a "time-tested" treatment used by thousands during the past 25 years. PROOF OF RELIEF is to be found in the great many letters I have received from people after using it as directed and as needed. \* \* \*

Our treatment is designed for catarrhal (excess fluid mucus) conditions of the head and for poor hearing and ear noises caused by such conditions. \* \* \*

This method of treatment is probably different than anything else you have tried before. DIFFERENT because it is based upon \* \* \*.

\* \* \* Medicines "time-tested" through more than 25 years of use, as its name indicated, our treatment is not intended nor recommended to take the place of professional attention but consists of proprietary medicines designed for palliative relief of catarrhal conditions of the head and for poor hearing and ear noises caused by such conditions.

My catarrhal condition is very much better. My hearing is now very good and seems back where it used to be. My ear noises are relieved. \* \* \*

Have not had any head noises since using your treatment. I can lay in bed now and hear my alarm clock tick and before I could not. \* \* \*

PAR. 6. Through the use of said advertisements and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication, that the use of its said preparations and devices, in combination, as directed, will cure or constitute an effective treatment for poor hearing or ear noises or head noises or catarrhal conditions of the head.

PAR. 7. In truth and in fact, the use of respondents' preparations and devices, in combination as directed, or otherwise, will not cure nor have any beneficial effect on hearing loss or ear noises or head noises or catarrhal conditions of the head, including the nose, ear and air passages.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respect and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

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

*Mr. Francis J. Charlton* supporting the complaint.

*Steadman, Leonard & Hennessey*, by *Mr. Geo. Stephen Leonard* of Wash., D.C., for respondents.

#### INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

FEBRUARY 4, 1965

#### STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on February 14, 1964, charging them with engaging in unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act, by the dissemination of false advertisements concerning certain preparations, containing drugs and devices, sold and distributed by them. After being served with said complaint, respondents appeared by counsel and thereafter filed their answer denying in substance, having engaged in the illegal practices charged.

Pursuant to notice duly given, a pre-hearing conference was convened on May 5, 1964, before the undersigned, theretofore duly designated to act as hearing examiner in this proceeding. An order

was issued by the undersigned on May 13, 1964, embodying the stipulations, admissions and agreements made at said pre-hearing conference, and controlling the conduct of this proceeding. In accordance with the understandings reached at the aforesaid pre-hearing conference, respondents filed separate motions for discovery of certain medical reports in the files of the Commission, and to dismiss the complaint on the ground that the institution of the present proceeding is in contravention of the Federal Trade Commission Act and of the Commission's Rules of Practice. By separate orders issued May 15, 1964, the undersigned (a) granted in part and denied in part the aforesaid motion for discovery, and (b) denied the motion to dismiss. Application by respondents for permission to file an interlocutory appeal from the examiner's order denying their motion to dismiss was denied by the Commission on June 9, 1964.

Hearings on the charges were thereafter held between August 17, 1964 and September 10, 1964, in Washington, D.C. and Philadelphia, Pennsylvania, in accordance with the prior order of the Commission granting leave to hold hearings in more than one place. At said hearings, testimony and other evidence were received in support of and in opposition to the allegations of the complaint, said evidence being duly recorded and filed in the Office of the Commission. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order were filed by the parties on October 26, 1964, and a reply to the proposed findings of complaint counsel was filed by respondents on November 5, 1964, complaint counsel electing to file any reply to respondents' proposed findings.

After having carefully reviewed the evidence in this proceeding, and the proposed findings and conclusions, the undersigned finds that this proceeding is in the interest of the public and, based on the entire record and from his observation of the witnesses, makes the following:<sup>1</sup>

<sup>1</sup> Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to the proposed findings are made with the abbreviations, "CPF" for the findings of complaint counsel, "RPF" for the findings of respondents and "RR" for respondents' reply. References to the transcript in connection with the examiner's findings are made with the abbreviated symbol "Tr." References to exhibits introduced by complaint counsel or respondents are made with the respective abbreviated symbols "CX" or "RX." All such citations are intended to refer to the principal portions of the record relied upon by the undersigned, in connection with particular findings, but do not purport to be an exhaustive compendium of the portions of the record reviewed and relied upon by him.

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## FINDINGS OF FACT

*Identity of Respondents*

1. Respondent The Drive-X Company, Inc., trading as The Elmo Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business at Second and Main Streets, in the city of Madrid, State of Iowa. Respondent Craig Sandahl is the president and chief executive officer of the corporate respondent, and owns approximately 90 percent of its stock. Respondent Richard Johann is vice-president and assistant treasurer of the corporate respondent and owns approximately 10 percent of its stock. Respondent Johann is also the general manager of the corporate respondent and handles the placing of its advertising and related functions. The business address of the individual respondents is the same as that of the corporate respondent. It is concluded and found that the individual respondents formulate, direct and control the acts and practices of the corporate respondent.<sup>2</sup>

*The Drugs and Devices*

2. Respondents are now, and have been for more than one year last past, engaged in the sale and distribution of certain preparations containing drugs and devices, as the terms "drug" and "device" are defined in the Federal Trade Commission Act. The combination of the preparations and the devices is referred to by respondents as the "Elmo Palliative Home Treatment."

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

*Designation: Preparation No. 1—Ear Oil*

<i>Formula:</i>	Gal.	Pts.	Ozs.
Alcohol .....		1	4
Methyl Salicylate U.S.P. (oil of wintergreen—synthetic).....			2½

<sup>2</sup> The above findings are based on the substantially admitted allegations of the complaint, as amplified by the testimony with respect to the stock ownership and positions occupied by the individual respondents (Tr. 497, 548). In addition to admitting the allegations of the complaint respondents allege in their answer that the corporate respondent is the legal successor of The Elmo Company, Inc., respondent in Docket No. 5959. The examiner considers this fact immaterial to the disposition of the issues in this proceeding. However, to the extent such fact may be considered material, the uncontradicted evidence in the record supports the claim of respondents that the corporate respondent herein is the legal successor of The Elmo Company under the laws of the State of Iowa (RX 1; Tr. 498-502).



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<i>Formula:—Con't</i>	Gal.	Pts.	Ozs.
Oil Eucalyptus .....			2½
Chloroform (Technical) .....		1	14
White Mineral Oil.....	2½		
Capsicum .....			1¾
Total—2 gallons, 7 pints, 13 ounces			

*Directions for Use:* Do not drop in ears—use the medicine dropper and put 2 or 3 drops—no more—on a piece of clean, sterile, absorbent cotton about ½ the size of a nickel. You can get this cotton at any drug store. Insert this cotton into the ear canal but not so deep that it cannot be easily removed with the fingers. Leave cotton in ears for about 10 minutes, while using the rest of the treatment. Then REMOVE THE COTTON AND THROW IT AWAY. Use Ear Oil once a day for one week. After one week use twice daily.

IMPORTANT—NOTE: If there is infection present in the ear canal do not use No. 1 Ear Oil for use may have the tendency to spread the infection to the deeper parts of the ear. Infection in the ear canal should be healed promptly by a competent physician for the spread of such infection could cause injury to the ear.

DO NOT USE THE MEDICINE DROPPER WITH ANY OTHER MEDICINE.

*Designation:* Preparation No. 2—Nasal Cleanser

*Formula:*

Each 200 lbs. combines the following:

Sodium Chloride .....	95 lbs. 5 ozs.
Pwd. Sodium Borate.....	100 lbs.
Oil of Eucalyptus.....	3 pts.
Methyl Salicylate .....	2 pts.
Menthol Approx. ....	8 oz.
Aniline Pink #7264 .....	1 gr. to each 1 lb.
Potassium Iodide .....	6 lbs. 2 oz. 350 gr.
Sodium Salicylate .....	2 lbs. 1 oz. 146 gr.
Sodium Benzoate .....	2 lbs. 1 oz. 146 gr.
Sugar of milk.....	20 lbs. to each 200 lbs.

*Directions for Use:* Fill No. 7 Nasal Douche about ¾ full with No. 2 Nasal Cleanser liquid from the bottle. Insert bulb end of the douche into one nostril, close the other nostril with finger pressure, and—while bending your head forward and downward—GENTLY snuff the medicine up into your nose. Refill No. 7 Nasal Douche and use in the same way in the other nostril.

Hold the liquid in both nostrils, for about a minute, to let the cleanser soak into the tissue and aid in cleansing catarrhal mucus from the nose. Use No. 2 Nasal Cleanser twice a day.

If you snuff too hard, some of the nasal cleanser may pass into your throat. Spit it out if you can. If you swallow it will do no harm.

*Designation:* Preparation No. 3—Throat Gargle

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*Formula:*

Each ounce of Special Formula Powder #3 contains the following:

Salicylic Acid .....	2-1/5 gr.
Carbolic Acid .....	9/20 gr.
Eucalyptol U.S.P. ....	9/20 gr.
Menthol U.S.P. ....	9/20 gr.
Thymol U.S.P. ....	9/20 gr.
Zinc Sulphate .....	55 gr.
Boric Acid .....	378-1/2 gr.

*Directions for Use:* Use the gargle to help remove the catarrhal secretions, or mucus, from the throat. Use twice a day—use only 1 teaspoonful from your pint bottle each time.

*Designation:* Preparation No. 4—Vapor Inhaler

<i>Formula:</i>	Gals.	Pts.	Ozs.
Oil Peppermint .....		3	2
Oil Eucalyptus .....		5	
Oil Mustard (Synthetic).....			2
White Mustard Oil.....	1/2	1/2	3

*Directions for Use:* First, see that the nose and throat are CLEAN of liquid and mucus. Then remove the corks from each end of the Vapor Inhaler. Insert the tapered end into one nostril, close the other with finger pressure at the side, and GENTLY draw a deep breath. Then hold it, remove the Vapor Inhaler from your nose and pinch BOTH nostrils shut using the thumb and finger. Then, close your mouth and try to blow through your nose. While doing this—try to swallow once or twice.

Repeat this operation in the other nostril. Do this 2 or 3 times each day. KEEP CORKED WHEN NOT IN USE.

*Designation:* Preparation No. 5—Massage Ointment

*Formula:*

Cream White Petrolatum.....	10 lbs.
Oil of Capsicum.....	1 1/2 ozs.

*Directions for Use:* Apply just a very little ointment behind and in front of the external ear and rub downward to the angle of the jaw—about 15 or 20 strokes—or until the skin feels slightly warm. Then remove the ointment left on the skin.

Next, stand erect and hold your head straight—throw your shoulders back and move your head from side to side, towards each shoulder, 8 or 10 times. Then move it from the front to the back, 8 or 10 times. Do this mildly at first. Use No. 5 Massage Ointment and do this exercise twice a day.

*Designation:* Preparation No. 6—Nasal Ointment

*Formula:*

Cream White Petrolatum.....	15 lbs.	
32 oz. Oil Eucalyptus	} No. 6	Oil ..... 30 ozs.
20 1/2 oz. Oil Wintergreen		
16 1/2 oz. Oil Peppermint		

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Oil of Pine Needles.....	1½ ozs.
Oil of Sassafras .....	1½ ozs.

*Directions for Use:* Place a small amount on your little finger and spread well over the mucous membrane in each nostril. Do this twice a day.

*Designation:* Elmo No. 7 Nasal Douche

Elmo No. 7 Nasal Douche is a glass U-Shaped tube with openings at both ends, and one end tapered.

*Directions for Use:* Fill Nasal Douche three-fourths full with No. 2 solution. Insert tapered end in nose, holding head WELL FORWARD and DOWN. Snuff up contents of douche.

Repeat in other nostril. Retain solution for a minute or two before gently blowing nose. Use twice daily, night and morning.

*Designation:* Elmo No. 8 Ear Vibrator

Elmo No. 8 Ear Vibrator is a glass tube device with a plunger or piston at one end and a bulb containing a small opening at the other end.

*Directions for Use:* Place glass bulb into hole in ear, holding so air cannot escape around bulb. Then draw piston SLOWLY in and out ten or twelve times. USE ONCE A DAY. When ear becomes accustomed to Ear Vibrator, use morning and night. For indicated ear conditions only. Read direction sheet before using.

IMPORTANT—NOTE: If there is infection present in the ear canal, do not use No. 8 Ear Vibrator for use may have the tendency to spread it. Read accompanying Directions before using.

*Designation:* Preparation No. 9—Re-Charge Liquid

*Formula:*

This preparation is the liquid used in the No. 4 Vapor Inhaler and the formula is the same as set out there. It is used to recharge the Inhaler.<sup>3</sup>

### *Sale and Dissemination in Commerce*

3. Respondents cause their said preparations and devices, when sold, to be transported from their place of business in the State of Iowa to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparations and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act. The

<sup>3</sup> The findings above made with reference to respondents' various preparations, including the designation, formula and directions for use thereof, are based on the allegations of the complaint which were substantially admitted in respondents' answer. Although respondents raised some question at the pre-hearing conference whether the allegations of the complaint properly reflected the directions for use or combination of use of their preparations (see Pre-Hearing Order of May 13, 1964, Paragraph 2), they conceded at the hearings that the allegations of the complaint are accurate with respect to the formula of their preparations and the directions for use (Tr. 117).

volume of business in such commerce has been and is substantial.<sup>4</sup>

4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said preparations and devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and by means of circulars and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations and devices; and have disseminated, and caused the dissemination of, advertisements concerning said preparations and devices, by various means, including, but not limited to, the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said preparations and devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.<sup>5</sup>

#### *The Advertising*

5. Respondents' initial contact with prospective purchasers of their preparations is made through advertisements inserted in various newspapers and magazines. Among the newspapers in which respondents' advertisements have appeared are: San Diego Tribune, Philadelphia News, Los Angeles Herald Examiner, and Lancaster (Pennsylvania) New Era-Intelligencer Journal. Among the magazines in which their advertisements have appeared are: New England Homestead, Our Sunday Visitor-Register Unit, St. Anthony's Messenger, and T.V. Guide. Typical of the advertisements inserted by respondents in such newspapers and magazines is the following (Tr. 105; CX 1-2):

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<sup>4</sup> The above findings as to commerce are based on the allegations of the complaint, which were admitted in respondents' answer except as to the substantiality of such commerce. However, such qualification in respondents' answer was later withdrawn and it was admitted that the volume of their sales in commerce was substantial (Tr. 493).

<sup>5</sup> The above findings are based on the allegations of Paragraph 4 of the complaint and the advertisements. Respondents admitted in their answer the placing of advertisements in the media referred to in the complaint "for the purpose of informing potential users of the nature of respondents' medications and seek[ing] thereby to interest such persons in the purchase thereof." Respondents contend that there is no basis for finding that their advertisements were "for the purpose of inducing \* \* \* the purchase of said preparations" since readers of the advertisements were invited merely to send for applications for respondents' preparations (RR, p. 2). It is clear from the statements, made in respondents' advertisements, which will be hereinafter more fully described, that the purpose of respondents' advertising was for the purpose of inducing the purchase of its said preparations and not merely the inviting of applications.

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relieved!

\* \* \* thousands reported.

Wonderful relief from years of suffering from miserable ear noises and poor hearing caused by catarrhal (excess fluid mucus) conditions of the head! That's what these folks (*many past 70*) reported after using our simple Elmo Palliative HOME TREATMENT during the past 23 years. This may be the answer to your prayer. NOTHING TO WEAR. Here are SOME of the symptoms that may likely go with your catarrhal deafness and ear noises: Mucus dropping in throat. Head feels stopped up by mucus. Mucus in nose and throat every day. Hear—but don't understand words. Hear better on clear days—worse on bad days, or with a cold. Ear noises like crickets, bells, whistles, clicking or escaping steam or others. You, too, may enjoy wonderful relief if your poor hearing or ear noises are caused by catarrhal conditions of the head and when treatment is used as needed. Write TODAY for PROOF OF RELIEF and 30 DAY TRIAL OFFER.

6. Persons responding to one of these advertisements receive a form letter in which respondents offer to sell the "30 Day Elmo Palliative Home Treatment" on a "trial" basis, *i.e.*, the purchaser will not have to pay the purchase price (\$10) for 30 days, at the end of which period payment will be expected if the user determines that the treatment has helped him (CX 3 C-D). The form letter, which is signed by L. A. Johann, contains the following statements with respect to respondents' preparations:

The Elmo Palliative Home Treatment is a "time-tested" treatment used by thousands during the past 26 years. PROOF OF RELIEF is to be found in the great many letters I have received from people after using it as directed and as needed. I am enclosing a pamphlet in which I have printed the substance of a few of their letters. These are taken from actual case records on file from folks, MANY PAST 70, who once may have suffered just like you! \* \* \*

Our treatment is designed for catarrhal (excess fluid mucus) conditions of the head and for poor hearing and ear noises caused by such conditions. \* \* \*

This method of treatment is probably different than anything else you have tried before. DIFFERENT because it is based upon \* \* \*.

\* \* \* Medicines "time-tested" through more than 27 years of use. As its name indicates, our treatment is not intended nor recommended to take the place of professional attention but consists of proprietary medicines designed for palliative relief of catarrhal conditions of the head and for poor hearing and ear noises caused by such conditions.

7. The pamphlet referred to in the above letter contains excerpts from letters which are stated to have been received from actual users of the Elmo Treatment, and the prospective purchaser is urged to: "Take the Word of Others" (CX 3 E-H). In most instances, the users purport to have been afflicted for a number of years with

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deafness or other forms of hearing difficulty, and with ear noises, and report that they were benefited by the Elmo Treatment. Concerning ear noises, the testimonial extracts contain statements that the ear noises "have stopped," or "are relieved," or "are cleared up now," and other statements to similar effect. Concerning difficulty in hearing or deafness, the extracts contain such statements as the following: "I can hear good again." "My hearing is so much better." "My hearing seems extra good." "My hearing has been improved to the point it seems nearly perfect."

8. Accompanying the form letter is an application for the Elmo Treatment, in which the prospective user is invited to "accept your generous offer to send me your REGULAR 30 DAY TREATMENT on Trial, postage prepaid" (CX 3-A). The application form requests the prospective user to answer the following three questions:

1. Do you have symptoms of CATARRHAL CONDITIONS OF THE HEAD?
2. Do you want Treatment for HARD-OF-HEARING due to Catarrhal Conditions of the HEAD?
3. Do you want Treatment for EAR NOISES due to Catarrhal Conditions of the Head?

The reverse side of the application form contains an explanation of these three conditions, and includes the following admonition: "If your poor hearing or ear noises are caused by accidents, auditory nerve trouble, any of the destructive fevers or running or discharging ears, this treatment is NOT indicated NOR recommended."

9. Of those responding to the invitation to send for the Elmo Home Treatment on a "trial" basis, respondents decline about one-third of the orders on the basis of answers to the questionnaire in the application form which indicate that the individuals may have an ear infection, traumatic injury or a disease for which the treatment would be ineffective (Tr. 106). Of the remaining two-thirds who receive the treatment, approximately 60% pay for it at the end of the 30-day trial period. Two follow-up letters are sent to the 40% who did not pay for the treatment at the end of the trial period to ascertain whether they have used the preparations and secured relief (Tr. 542). There is no indication in the record as to the reason these persons have not paid for the preparations.

10. Where persons responding to respondents' contact advertising do not reply to respondents' initial form letter inviting them to apply for respondents' home treatment on a 30-day trial basis, respondents send them a second form letter inviting them to apply for the treatment (Tr. 106; CX 4 A-B). The second letter suggests

