

5. "Most Powerful Long Distance" Issue

The complaint charges that respondent has falsely represented that:

Its Model L14 radio set was the most powerful long-distance all-transistor portable available.

The aforementioned L14 radio, also known as the MOTOROLA RANGER 1000 radio, is a single-band transistor radio as distinguished from a "multi-band" or short wave transistor radio. (The previous section of this section also dealt with the L14 radio but on other issues.)

Respondent admits that it made the above-quoted representation but denies that it is false.

The only evidence presented by complaint counsel that the above-quoted representation was false is evidence to show that at the time the representation was made there were on the market "multi-band" or short wave radio sets with better abilities to get long distance reception than the L14 radio. In line with such evidence, complaint counsel contend that respondent's ads on the L14 radio are tantamount to representations that the L14 would outdo even a short wave portable radio in ability to get long distance stations.

Respondent, on the other hand, contends that no such meaning or interpretation can be properly drawn from its advertisements. It contends that its ads merely claim that the L14 radio had superior long distance ability over competing single-band transistor radios and that the ads do not represent, even impliedly, that the L14 could outstrip short wave radio sets in the matter of long distance reception.

Under these circumstances the texts of the various ads used by respondent to exploit its L14's ability to reach long distance or far away stations become pertinent. *Zenith Radio Corp., v. Federal Trade Commission, supra.*

As assembled by complaint counsel in their reply brief, respondent's various ads dealing with the L14's long distance ability read as follows:

- CX 9: 10 times more station-getting power
10 times more power to reject unwanted stations. Twice the audible volume
- CX 10C: 10 times more power to get stations with tuned RF stage
- CX 12: Most powerful long-distance all-transistor portable
10 TIMES MORE SENSITIVITY to get more stations with tuned RF stage
10 TIMES MORE SELECTIVITY to reject unwanted signals with 3-gang tuning condenser

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- CX 13: Powerful Long-Range Portable. With 10 times more power to get stations.
20% more power to reject unwanted stations. Twice the audible volume without distortion.
- CX 14: Most powerful long-distance all-transistor portable
10 TIMES MORE SENSITIVITY
TWICE THE AUDIBLE VOLUME
20% MORE SELECTIVITY
- CX 15: Most powerful long-distance all-transistor portable
* * * * *
50% more audible volume from new
audio circuit delivers power needed
to overcome outdoor noises, tone
quality for outstanding distortion-free sound

Although there is a good deal of bombast in the above advertisements, the examiner is unable to read into them any claim by respondents that the L14 radio was being compared with short wave radio sets in the matter of "powerful long distance" reception or any claim that the L14 was being featured as being able to outstrip a short wave radio in the matter of long distance reception. Certainly there is no direct representation to this effect.

If the representation is there, it is present only by implication. However, it is common knowledge that the average single-band radio owner holds the short wave radio, frequently advertised or called a transoceanic receiver, in awe for its capabilities for bringing in distant stations. The average radio user also knows that short wave radios sell at substantially higher prices than the single-band radio. The record shows that the L14 radio set here involved had a list price of \$75 and that the Zenith Royal 1000 short wave transistor radio to which it is being compared in the matter of long distance reception had a list price of \$250. The second short wave with which the L14 is being compared with respect to distance reception was the RCA 1-MBT-6. This had a list price of \$200. All the photographs of the L14 in respondent's advertisements show it to be a single-band radio; there is no attempt to deceive by showing, for example, a shadow multi-band radio at the side of the illustrated L14 radio set.

Although it is, of course, possible that, here and there, there might be a consumer who would be led to believe by the advertisements that representation was being made that the L14 would outdo a short wave receiver in matter of long distance reception, it is found that no significant portion of the consuming public would get such an impression. Even the uninformed radio user would no more expect a single-band radio to do as well in reaching long distance stations as a short wave receiving set than he would expect the fastest of

stock automobiles to equal or outdistance a racing car, no matter how much the "power" of the stock automobile might be stressed in an advertisement.

Since we have found that the ads in question do not represent that the L14 radio will surpass short wave receivers in ability to get far distant stations and since the only evidence adduced by complaint counsel in support of the charge of the complaint that the involved representation is false is evidence to show that certain short wave radio sets surpass the L14 in capacity to receive long distance stations, it is concluded that counsel supporting the complaint have failed to prove the charge of misrepresentation here under consideration.

Normally a conclusion such as the above would terminate the discussion of the issue. The examiner, however, recognizing the possibility that the Commission may disagree with his conclusion on appeal, deems it advisable to set forth certain additional findings of fact to the end that the Commission on appeal may have all facts required to dispose of this matter under any hypothesis.

The evidence shows that the ability of a radio to reach far distant stations is dependent upon two factors, to wit, its "power" and its "sensitivity". By written stipulation of the parties, "power" or "power output" (the two are interchangeable) is defined as the measurement of electrical force at work or the effect of the application of electrical energy. The parties have also stipulated that "sensitivity" is defined as the characteristic of a radio that determines the extent to which a radio is capable of receiving weak or distant signals. The "sensitivity" of a radio is also measurable. The components of a radio receiving set which have to do with "power output" are different than the components which have to do with its sensitivity.

From the parties' definition of the term "sensitivity" and from the record as a whole, it is found that the "sensitivity" characteristics of a radio plays the predominant role in the radio's ability to obtain long distance stations and that the "power output" aspects of a radio plays a minor or insignificant part in the ability of the radio to get far distant stations.

There are two sets of sensitivity measurements of the L14 radio in evidence. One ¹⁹ set consists of the measurements of two different L14 radios by Walter J. Miller, a radio engineer for Zenith. Miller tested the first of these sets in 1959 or about three years prior to

¹⁹ The second or other set of sensitivity measurements referred to is the set adduced by respondents in their defense of the issue here under consideration. This second set of sensitivity measurements are discussed on page 105 below.

the issuance of the complaint herein. The test was made in connection with his routine duties at Zenith and as part of Zenith's program to test not only its own products but also competing radios of other manufacturers. He tested the second L14 radio in 1962. The sensitivity measurements he got on the second L14 radio generally corroborated the sensitivity measurements he obtained in 1959 on the first L14 radio set. It is found that the sensitivity measurements made by Mr. Miller on the two L14 radios, one in 1959 and the other in 1962, are true and accurate and are accorded full credibility.

The record also contains sensitivity measurements of the Zenith Royal 1000 radio, the aforementioned Zenith multi-band or short wave radio. These measurements were made in 1957 by Zenith radio engineering personnel in the course of routine duty in accordance with Zenith policy to test competing brands of radios as well as their own products. Similarly the record contains sensitivity measurements on the aforementioned RCA 1-MBT-6, also a multi-band or short wave radio set,²⁰ made by RCA engineering personnel in routine testing procedure in 1958.

Based on a comparison of the sensitivity measurements of record for the above-described Zenith multi-band radio receiving set with the sensitivity measurements of record on the L14 radio as determined by Mr. Miller, it is found that the Zenith multi-band set enjoyed superior "sensitivity" ability to bring in long distance stations over that of the L14 radio. Similarly, based on a comparison of the sensitivity measurements of record for the mentioned RCA multi-band radio receiving set with the sensitivity measurements of record on the L14 radio as determined by Mr. Miller, it is found that the RCA multi-band set also enjoyed superior "sensitivity" ability to bring in long distance stations over that of the L14 radio.

The record also contains "power output" measurements for the L14 and the above-mentioned Zenith Royal 1000 and the RCA 1-MBT-6. The measurement of the "power output" of the L14 is shown on a document supplied by respondent to the Commission in 1960 in the course of the precomplaint investigation of this matter. That document is now in evidence as CX 101 A-C. (It should be noted that the same document does not reflect any "sensitivity" measurements for the L14 which, as shown above, is far more important than "power output" in the matter of bringing in long distance

²⁰ On page 64 of their proposed findings of fact, complaint counsel describe the RCA 1-MBT-6 as a "multi-band portable radio", but on page 32 of their reply brief, complaint counsel state "There is no evidence in the record establishing that the RCA 1-MBT-6 radio is a short wave set. The oral evidence conclusively shows that the mentioned RCA set is a short wave receiving set. See also CX 93 which shows the RCA set to be a seven-band receiving set. The Zenith Royal 1000 has eight bands.

stations.) The "power output" measurements of record for the Zenith Royal 1000 and the RCA 1-MBT-6 are the measurements made by the radio engineering personnel of Zenith and RCA, respectively, in routine tests performed several years prior to the issuance of the complaint. A comparison of the "power output" measurements of the L14 as reflected on the said CX 101 A-C with that of the Zenith Royal 1000 and the RCA 1-MBT-6 as shown from the laboratory test sheets of Zenith and RCA show that the latter have the superior "power output" measurements and would, therefore, have better ability to bring in long distance stations than the L14 radio insofar as "power output" affects such ability which, as shown, plays a minor part compared to the "sensitivity" of a radio. From this it is found that the Zenith and the RCA short wave radio sets have better capacity to obtain distant stations insofar as "power output" is concerned (as distinguished from "sensitivity" on which they are also superior) than the L14.

To counter the above evidence adduced by complaint counsel, respondent relies on certain sensitivity measurements²¹ it made in 1962 to show that the L14 radio had the "most powerful long distance" quality it attributed to the L14 in the advertisements shown above. In the month or two before the hearing herein started, respondent had its engineering personnel take the sensitivity measurements of six of its L14 radios and five competing single-band portable radios. The results of these tests are shown in RX 37. RX 37 shows that the average of the sensitivity of the tested six L14 radios was superior to the sensitivity of any of the tested five competing portables. Similarly a comparison of the mentioned average sensitivity of the tested six L14 radios with the sensitivity measurements made by the Zenith and RCA engineering personnel on the Zenith Royal 1000 and the RCA 1-MBT-6, above referred to, shows the L14 radio to have the superior sensitivity.

The examiner rejects the above favorable sensitivity measurements of the L14 radio adduced by respondent into the record as being without probative value for reasons similar to those shown above for the rejection of other *post-complaint tests* made in preparation for trial in connection with prior issues discussed above. As between measurements made routinely and without thought of use for purposes of hearing and measurements made just prior to hearing and for use as evidence, the examiner accepts the former and rejects the latter. This is the situation under the present issue as in previous issues discussed above.

²¹ This is the second set of sensitivity measurements of the L14 of record referred to earlier above.

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Finally it should be noted that no weight is being given to evidence adduced by complaint counsel showing that two competitive single-band transistor model radios manufactured by the Admiral Corporation have a superior "power output" to that of the L14 radio. This is because the record fails to show the "sensitivity" measurements for these two Admiral model radios. As shown above, the sensitivity measurements of a radio, as distinguished from its power output, plays the predominant role in the radio's ability to bring in long distance stations.

CONCLUSION

Bearing in mind that it has heretofore been found that respondent's representation that "Its Model L14 radio set was the most powerful long-distance all-transistor portable available" was not a representation that the L14 radio was more powerful than short wave radio sets in the matter of bringing in long distance stations and bearing in mind that it was also found above that there is no evidence true from both a "sensitivity" and "power output" point of view other than evidence adduced by complaint counsel to show that the above-described Zenith and RCA short wave radios surpass the L14 radio in ability to obtain long distance stations, the examiner now finds and concludes that complaint counsel have failed to meet the burden of proof required to show that respondent's representation that "Its Model L14 radio set was the most powerful long-distance all-transistor portable available" was false, misleading and deceptive.

6. "Tube Saving" Device Issue

The complaint charges that respondent has falsely represented that:

Its sentry system contained in certain of its receivers was a protective device that eliminated 3 out of 4 service calls, and tripled TV life expectancy.

Respondent admits that it made the above representation but denies that it is false or misleading.

The above-quoted charge of the complaint is based on an advertisement by respondent, also set forth in the complaint which reads as follows:

Golden Tube Sentry System * * * works automatically to protect every tube in the set against warm-up power surge * * * main cause of TV failure. It's engineered to eliminate 3 out of 4 service calls * * * triples TV life expectancy.

The above ad was published in a February 1959 edition of *Electrical Merchandising*. (CX 30 and Stip. of Facts, par. 23.)

Similar advertisements by respondents on its sentry system read as follows:

Saturday Evening Post and Life, September 1959.

Only Motorola TV has the Golden Tube Sentry System that ends warm-up power surge, main cause of TV failure * * * triples TV life expectancy * * * is engineered to eliminate 3 out of 4 service calls. (CX 41.) (See Stip. of Facts, par 23 re CX 41.)

In Life, February 1959 and Saturday Evening Post, February 1960.

NEW GOLDEN TUBE SENTRY SYSTEM * * * the electronic miracle introduced by MOTOROLA * * * now regarded as the industry's greatest advancement for trouble-free and reliable TV. The Golden Tube Sentry System protects every tube in your set against warm-up power surge (the main cause of premature TV failure), works to prolong automatically the life of each tube. Triples life expectancy of your television set * * * engineered to eliminate 3 out of 4 service calls. And the Golden Tube Sentry unit is so dependable, it's guaranteed for five years! (CX 42 and Stip. of Facts, par. 23.)

In May 1959 Edition of Chicago Stagebill.

Recent tests proved Motorola to be best in performance * * * by far the most reliable of all makes tested. *The reason?* Exclusive Tube Sentry protection. Tube Sentry ends main cause of TV failure * * * triples TV life expectancy * * * is engineered to end 3 out of 4 service calls. And only Motorola TV has Tube Sentry. (Emphasis supplied.) (CX 39 and Stip. of Facts, par. 23.)

From our analysis of the above-quoted ads and all other statements in the full advertisements from which the quotations were taken, the examiner finds that respondent through such quoted ads represented to the purchasing public that its "Golden Tube Sentry System" would in and of itself and without assistance from any other components in its television sets eliminate 3 out of 4 service calls and triple the TV life expectancy. *Zenith Radio Corp. v. Federal Trade Commission, supra.*

In other advertisements respondent does not make the representation that its sentry system will alone "end 3 out of 4 service calls" but states that its sentry system *in combination* with its so-called "Golden 'M' Tubes" will accomplish this result.

Thus an ad by respondent published in the *Home Furnishing Daily* in 1959 reads as follows:

Only Motorola Dealers can sell TV with * * * Premium-Rates Golden "M" Tubes * * * that last twice as long as ordinary TV tubes * * * This, *combined* with Golden Tube Sentry System that eliminates 3 out of 4 service calls and triples TV life expectancy, produces TV so reliable, Motorola backs every set you sell with an exclusive Golden Guarantee * * * (Emphasis supplied.) (CX 36 and Stip. of Facts, par. 23.)

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Similarly another of respondent's ads published in *Home Furnishings Daily* on an unspecified day in 1959 reads:

*Combined with long-life Golden "M" Tubes (which are 100% more reliable, on the average, than any other tube ever put into home TV * * * Golden Tube Sentry System now makes premature tube failure a thing of the past. * * *. (Emphasis supplied.) (CX 35 and Stip. of Facts, par. 23.)*

The above ads constitute an admission by respondent that its tube sentry system would not in and by itself end 3 out of 4 service calls as it represented in the charge here under consideration.

But wholly aside from this admission, there is abundant expert evidence of record from which a determination may be made as to the truthfulness of respondent's representation that its sentry system will end 3 out of 4 service calls.

Preliminarily, it is found from our analysis of the respondent's numerous advertisements that the term "service calls" as used in its ads would be interpreted by the consuming public to mean service calls not for all causes but only in connection with tube failures. This interpretation must follow from the very title or name of the device, to wit, "New Golden Tube Sentry System", which as will be noted includes the words "sentry" and "tube". The word "sentry", of course, means standing guard. When placed together, the two words, "tube sentry", convey the unmistakable impression that the "sentry" stands guard over the TV's tubes. This interpretation is borne out by many of respondent's ads which state and claim that the tube sentry system "protects every tube". We accordingly dismiss as being irrelevant, evidence adduced by complaint counsel to show that more than half of the service calls made by servicemen are unrelated to tube failures under which complaint counsel had sought to prove that the involved representation (*i.e.*, elimination of 3 out of 4 service calls through the use of the tube sentry system) is false *ipso facto*.

The issue here relates to respondent's so-called "tube sentry system". The evidence shows that respondent in its advertisements uses the phrase "tube sentry system" indiscriminately to describe two separate TV components or devices it installs in its TV sets. (Tr. 2562, 2671; see also complaint counsel's Proposed Findings, page 92, and their Reply Brief, page 35.) One of these two devices is more specifically described in some of respondent's ads as a "tube sentry unit" which will hereinafter be referred to as "sentry unit" or "unit". The "sentry unit" is used only in respondent's top or most expensive lines of television sets. Respondent in 1958 received a patent on the unit; it also caused the unit to be registered under the trade name of "Tube Sentry". It is manufactured for respondent pursuant to its

specifications by Chicago Telephone Supply Company at a cost of approximately 50 cents each but Chicago Telephone has a prior patent on a similar device designed for the same purpose as that advertised by respondent. Respondent's patented sentry unit has been made available by respondent through Chicago Telephone to all other television set manufacturers but neither respondent's patented sentry unit nor Chicago Telephone's patented device serving the same purpose have received anything like general acceptance by the industry. No major manufacturer of television sets uses the device except respondent.

The "sentry unit" is about the size and shape of the now rarely seen penny box of matches and is frequently illustrated in respondent's advertisements. Essentially it is a very simple device made up of a (1) resistor and (2) a thermostatic switch. The resistor, a small piece of metal, is used to cause the electrical current to be applied gradually to the *filaments* of the tubes in the television set and the thermostatic switch is used to delay the application of voltage to the *plates* of the tubes.

The second or alternative device used by respondent as a component in its TV sets under the advertised name of "Tube Sentry System" is a simple little resistor about the size and shape of a quarter but somewhat thicker which will hereinafter be called the "Wuerth device", as it is manufactured by the Wuerth Tube Saver Corporation. Respondent uses this device, which costs about 15 cents, in its lower or more popular priced TV sets. The device functions to allow a gradual application of electrical current to the filaments of the TV tubes. In this respect it works precisely as the first mentioned function of the above-described "sentry unit" but it lacks the latter's second mentioned function.

One or the other of the two devices have been used continuously by respondent in most of its TV models since 1958, except that the use of the "sentry unit" was commenced in 1957. As heretofore noted, the advertising phrase "Tube Sentry System" has been used by respondent to refer indiscriminately to one or the other of the two described devices. Respondent's various advertisements of record do not generally give the prospective customer any indication as to which of the two devices are used in the TV models illustrated in the ads.

But irrespective of whether the advertised TV set contains one or the other of the two devices as respondent's so-called "Golden Tube Sentry System", respondent in its advertisements represents that the said "Golden Tube Sentry System" will eliminate 3 out of 4 service calls and triple TV life expectancy.

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Complaint counsel presented expert witnesses to show that neither of the two devices used under the designation of "Golden Tube Sentry System" would fulfill respondent's representation of eliminating 3 out of 4 service calls and tripling TV life expectancy.

We take up first the expert testimony adduced by complaint counsel on the Wuerth device. Testimony was received on the results of life tests on the device from highly qualified TV engineers from the engineering staffs of Zenith and the Admiral Corporation. Both Zenith and Admiral have conducted controlled life tests on the Wuerth device. "Life tests" are performance tests, sometimes accelerated, designed to simulate the useful life of television parts. By the term "controlled", it is meant that life tests were performed simultaneously on a number of TV sets fitted with the Wuerth device and an equal number of TV sets which did not have the Wuerth device. The objective of such controlled life tests was to determine by experiment whether the Wuerth device had any value in preventing TV tube failures.

In tests which began late in 1956, qualified Zenith electrical engineers simultaneously operated three TV sets fitted with the Wuerth device and three other identical TV models without the device for a total of 1000 hours under identical on and off cycling conditions designed to simulate actual use by consumers. The aim of the testing of this limited number of devices was to determine whether there was sufficient promise in the contrivance as a tube failure preventer to justify more extensive tests on the device. The results of the life tests on the Wuerth devices were found by the Zenith engineers to be so completely lacking in promise as a tube saver that the Zenith laboratories abandoned further life testing thereon and recommended to management against the adoption of the device in Zenith TV sets. Zenith has never over the course of the years used the Wuerth device in any of its TV models.

Admiral conducted similar life tests in late 1958 on the Wuerth device but on a more extensive scale, as ten such devices were used in the tests. Ten TV sets equipped with the device and ten identical TV sets without the device were played for a total of 1,850 hours. As a result of these life tests, Admiral's engineering staff concluded that the Wuerth device had no value as a tube saver. Admiral has never used the device on any of its TV models.

Respondent did not offer any evidence to show that the Wuerth device affixed to its lower priced TV models and advertised as the "Golden Tube Sentry System" had any value as a preventer of tube failures.

Based upon the life tests conducted by Zenith and Admiral, it is found that the Wuerth device is wholly without value as a component to prevent tube failure.

To return now to the somewhat more complicated "sentry unit" used in respondent's top line of TV sets and also described in its advertisements as the "Golden Tube Sentry System", the record herein similarly contains the result of life tests made on the unit by respondent's competitors, including the aforementioned Admiral and Zenith companies and in addition General Electric Company.

It is specifically found that each of the above-named competitors conducted its life tests with "sentry units" identical in design with those used by respondent as manufactured by Chicago Telephone and as made available to them by Chicago Telephone by agreement of respondent as aforementioned.

General Electric conducted life tests on the "sentry unit" in late 1958 and early 1959 in which 72 identical TV sets were used, of which half were equipped with the unit and the other half, not. Each of the 72 TV sets was played for a total of 4,000 hours or the equivalent of two years of actual operation. As each set had 16 tubes, a total of more than 1300 tubes was involved in the life tests. As a result of the tests, the G.E. engineering staff in charge of the testing concluded that no significant improvement in the reliability of the tubes can be attributed to the "sentry unit". They also concluded that the unit would have no significant effect on the number of service calls required to keep a television receiver in operating condition. General Electric has never adopted respondent's "sentry unit" or equivalent in the production of television sets.

Zenith conducted life tests on the "sentry unit" in early 1958. Fourteen identical TV sets were used in the test, half of which were equipped with the unit and half were not. The sets were operated for a period equivalent to at least four years of actual use in the home. Upon analysis of the test results, Zenith engineers concluded that the "sentry unit" was useless as a tube saver. Zenith has not at any time adopted the "sentry unit" or any similar device in its lines of television receivers.

Admiral also engaged in life testing the "sentry unit". The tests made in 1959 involved 50 identical TV sets in which only half were fitted with the unit. Each of the 50 sets was played for a total of 2200 hours. Upon completion of the test, the Admiral engineers found that the "sentry unit" produced no results as far as reliability or prolonging the life of tubes is concerned. Admiral has never incorporated the "sentry unit" or its equivalent in any of its TV sets.

Through the testimony of several of complaint counsel's expert witnesses from the aforementioned competitors of respondent, it is

established that the introduction of the "sentry unit" in a TV set increases the possibility of trouble with the set because the unit adds another component to the receiver.

The record also shows that there has been a steady increase in the reliability of TV tubes over the years since 1955 by reason of technological improvements both in the manufacture of the tubes and in the design of TV receiving sets. Thus an engineering report of record by Sylvania Electric Products, Inc., states: "It is important to observe that the percent of tube types having no failures from 1955 to 1961 has shown a steady increase from 38.5% to 72.5% while operated under the accelerated conditions designed to increase the number of failures". (CX 106 C.) The same report shows that out of significant number of tubes tested by Sylvania the percentage of tube failures dropped from 4.3% in 1957-1958 (one year period) to 3.6% in 1958-1959 and 1959-1960 (two year period) and to 2.9% in 1960-1961 (one year period). (CX 106 B.)

Further evidence of record showing the improvement that has taken place in TV tubes in recent years is reflected in a communication dated February 7, 1961, from a tube manufacturing division of Columbia Broadcasting System, Inc., to the chief engineer of Admiral:

Our Mr. Herrell has forwarded your request for an answer to the question "Has the increased reliability of receiving tubes resulted in lower replacement sales of receiving tubes?" The answer to this question is unequivocally *yes*. (Emphasis as in communication.)

We, as a manufacturer of tubes for both the original equipment and the replacement markets, can attest to this. Furthermore, extensive life test records show that for a given failure rate of tubes, we have made approximately a three fold improvement in the past several years. (CX 105.)

In opposition to the evidence adduced by complaint counsel as set forth above and in defense of the charge here under consideration, respondent has introduced evidence intended to prove that its "sentry unit" has the tube saving virtues it claims in its advertisements, namely, the ability to end 3 out of 4 service calls and to triple TV life expectancy. For such defense, respondent relies in part on life tests it has made on the "sentry unit" and on the experience it has had over a number of years with the return of TV tubes under the warranty it issues with each set sold to consumers.

Respondent's life tests on the "sentry unit" is shown in a "Summary of Life Test Data" which is in evidence as RX 52. The tests shown therein were not "controlled" life tests in the sense that an equal number of identical TV model sets, half without the "sentry unit", were tested simultaneously for a stated number of hours as was done by General Electric, Admiral and Zenith as shown and

reported above. For example, in September of 1957, respondent began a life test on 20 TV sets equipped with the "sentry unit" but never (insofar as RX 52 shows) ran a test on the same model TV sets without the unit. RX 52 also fails to show that any tests were made at all in 1958 in preparation for respondent's 1959 line of TV receiving sets which received extensive advertising.

Summarizing the data shown on RX 52, it shows that respondent between 1957 and 1961 conducted five life tests on TV sets fitted with the "sentry unit", and that between 1960 and 1961, it conducted five life tests on TV sets not equipped with the "sentry unit". In the five tests with the "sentry unit", each test involved 10 TV sets except that the test conducted in 1957 (respondent's earliest) involved 20 TV sets. In the five tests without the sentry unit, each individual test involved ten TV sets except that one of the three tests made in 1961 involved five TV sets. The combined tube failure in the five tests of TV sets fitted with the sentry unit totaled .69 per TV set. The combined tube failures in the five tests of TV sets not equipped with the sentry unit totaled 2.36 per TV set.

The remaining evidence on which respondent relies for its defense against the charge here under consideration is the experience it claims to have had over the years with the return of receiving tubes under the warranty it issues with each TV set sold to consumers. It contends that this experience sustains its advertised claim that the "sentry unit" will eliminate 3 out of 4 service calls and triple TV life expectancy.

Respondent's assembled data on warranty returns of receiving tubes is reflected in RX 36. The exhibit shows a 11.6% return of tubes in 1954 and a dramatic drop in 1955 to 6.1%. This drop occurred at least two years before respondent commenced the use of the "sentry unit" in some of its TV models. In 1956 there was a smaller reduction of returns to 5.7% and in 1957 to 4.6%. In 1958 there was another sharp drop to 1.8%. This percentage of returns with slight or no change continued into 1959, 1960 and 1961.

One of respondent's highly placed engineers attributed the drop in tube returns in 1958 to 1.8% from the previous year's percentage of 4.6% to the incorporation of the "sentry unit" in respondent's TV sets. On cross-examination of respondent's engineers with respect to the return data on RX 36, it was shown that the tube returns in 1957 and earlier years reflected returns made within the then 90 day warranty period on such tubes whereas the tube returns in 1958 and subsequent years reflected returns made within the new one year warranty period. This would have the effect of depriving the large reduction of returns in the year 1958 over that of 1957 of any signifi-

cance as greatly unequal warranty periods of returns are being compared. It seems wholly likely that the returns in a warranty period as short as 90 days would exceed the percentage of returns over the longer warranty period of one year as it is reasonable to assume that manufacturing defects in tubes would show up within the first 90 days of operation.

The cross-examination and our findings above also show that not all of respondent's tubes in the years 1958 through 1961 were equipped with the "sentry units", as the evidence is quite clear that respondent used such units only on its top line TV sets. But the warranty data covers tube returns for all TV models sold by respondent, both with and without the tube sentry. Accordingly, it would be wholly improper to attribute the reduction in tube warranty returns in 1958 to the adoption of the "sentry unit".

The experience of other TV set manufacturers with tube return warranty data further shows that such data is virtually useless as statistical matter relating to tube life. The experience of Admiral, one of the major producers of TV sets, shows that "on the average, half of the tubes will be good that are returned from the field". Other difficulties pointed up in the record by the Admiral's chief television engineer with such warranty data is that it is submitted by field service personnel with little or no experience and even a hostility for the accounting procedures required to make such data accurate from any point of view. Thus, he states: "For example, in our returns [of tubes under warranty] we receive many tubes that Admiral Corporation has never used or, perhaps, tubes that we have used as much as ten and fifteen years ago. This is not uncommon." He further characterized the use of warranty return data for analysis of tube failures as "* * * after the-fact information; and we much prefer rather than to put the burden on the ultimate consumer, to determine reliability * * * We determine this at factory level and we do this with our accelerated life test * * *". (Tr. 3838-3839.) It is found that respondent's warranty data as contained in RX 36 is subject to the same inherent inaccuracies as related by Admiral's chief TV engineer as it must be assumed that respondent's field personnel have the same human frailties as Admiral's.

Respondent does not manufacture the receiving tubes it uses in the TV sets it produces. All tubes in a television receiving set other than the picture tube are known as receiving tubes. In the roughly four year period, 1957-1961, reflected in RX 52, Sylvania and General Electric were among respondent's principal suppliers of receiving tubes. It was shown above that Sylvania tubes enjoyed a marked improvement in reliability in the years between 1958 and 1961.

Similarly the reliability of G.E. receiving tubes was improved 25% to 50% in and about the year 1958.

The above completes our review of the principal evidence adduced by the parties on the question here under consideration of whether respondent's "sentry unit" is capable, as represented, of eliminating "3 out of 4 service calls". The clear weight of the evidence shows that the "sentry unit" is utterly without value as a preventative of tube failures. Such principal TV set manufacturers as Zenith, General Electric and Admiral have life tested the device and found it worthless as a tube saver. It will be remembered that these life tests by respondent's competitors were conducted two or more years before the complaint herein was issued for their own internal purposes and without thought of use in litigation; their accuracy and credibility cannot be challenged. Certainly, if the "sentry unit" could do what respondent claims it can, it would have been welcomed and hailed by the industry for its capacity to save tens of thousands of dollars in the way of tube returns during the warranty period. The fact remains that not one of respondent's major competitors has seen fit to incorporate the device in their TV sets.

The inherent defects in the life tests and tube return warranty data submitted in evidence by respondent as RX 52 and RX 36, respectively, appear from the mere recital of the facts with respect to each as set forth above. The most noteworthy fact about respondent's representation that the "sentry unit" would end "3 out of 4 service calls" is that the representation was made without any prior proof that the sentry would do what respondent claimed it would. Respondent's so-called life test of 1957 on 20 TV sets fitted with the device cannot, standing alone, constitute proper proof of the truthfulness of the representation. Convincing proof requires simultaneous life testing of an adequate group of identical TV sets divided equally into sets fitted with the device and those not fitted with the device. This is, as stated above, known as a controlled life test. This is the type of test that respondent's competitors, G.E., Zenith and Admiral made on the device. Respondent had not to the date of the hearing made any similar controlled tests on the "sentry unit".

Similarly the serious inherent defects in Respondent's Exhibit 36 or summary of receiving tube returns made within warranty periods compel the rejection of the summary. These defects are set forth in our evidentiary findings above. It is sufficient here to again note the fact that the warranty data includes returns of tubes from sets which were never even equipped with the "sentry unit". This in itself destroys the summary as having any value as proof that the

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"sentry unit" ends 3 out of 4 service calls as represented by respondent.

But even if the evidence adduced by respondent as outlined above in its attempt to substantiate its claim that the sentry unit eliminates 3 out of 4 service calls was accepted at full face value, it would be outweighed by the evidence showing that respondent's leading competitors have life tested the device and found it useless as a tube saver and by the further fact that none of the big TV set manufacturers, except respondent, have adopted the device. The evidence is also conclusive that the reliability of tubes has been improved three-fold in the years between 1957 and 1961. Any improvement respondent may have had in the way of fewer warranty returns of tubes since 1957 must be attributed to this factor.

Respondent's life tests and warranty data on the "sentry unit" designed to substantiate its claim that the unit ends "3 out of 4 service calls and triples TV life expectancy" are rejected as being without probative value.

CONCLUSION

It is found and concluded that respondent's representation that its sentry system contained in certain of its receivers was a protective device that eliminated 3 out of 4 service calls and tripled TV life expectancy is false, misleading and deceptive.

7. "New Tube-Saver Electron Gun" Issue

The complaint charges that respondent has falsely represented that:

The picture tubes contained in certain of its receivers were constructed to last 10 times longer than comparable picture tubes.

Although respondent in its pleadings denies that the above representation was made, the fact that the representation was made is now admitted by respondent in its proposed findings of fact. Respondent in its pleadings denies that the representation is false.

The complaint sets forth the following advertisement by respondent as typical of the advertisements which gave rise to the charge here under consideration:

Only Motorola Dealers get to sell TV with * * * NEW TUBE-SAVER ELECTRON GUN that makes Golden "M" Picture Tubes 10 times more reliable than ordinary picture tubes.

The above ad appeared in the November 12, 1959, issue of *Home Furnishings Daily*. (CX 52) The same representation in substance

also appeared in an ad in the November 29, 1959, edition of the *Chicago Sunday Tribune* wherein respondent represented:

Motorola-designed Golden "M" premium-rated picture tube has 10 times the effective cathode area for 10 times longer tube life than *conventional* picture tubes. (CX 44 N) (Emphasis supplied.)

Similar advertisements also appeared in *Life* and in one of respondent's multi-page brochures. (RX 1 and RX 1 G; CX 50 E) All of the advertisements of record relating to the representation here under consideration were published in 1959 and pertain to respondent's 1960 line of TV sets.

Respondent attributes the represented "10 times longer tube life" of its so-called Golden "M" Picture Tubes to the type or design of "electron gun" it uses therein.

All picture tubes, regardless of make and design, have electron guns. The function of the electron gun is to shoot focused streams of negatively charged particles, called electrons, on the viewing screen of the picture tube where the particles form the pictures the viewer looks at.

The electron gun is located at the narrow neck-end of the picture tube. It contains a cathode at the beginning of the neck-end of the tube and an adjacent or connecting series of hollow metal cylinders resembling the rod of a gun, hence the name "electron gun". The cathode, an alloy, when heated, is the emitting source of the electrons. The cylinders, being adjacent to the cathode, draw the electrons from the cathode by means of electrical force and pass them on in proper focus to the viewing screen at the other end of the picture tube. In the illustration of the electron gun here of record (RX 45), there are five such cylinders, usually called "grids" but more easily visualized as cylinders, in the depicted electron gun. Each cylinder or grid in the gun rod hastens the passage of the stream of electrons within it by its own separate application of voltage on such stream. In every gun, regardless of type, there are spaces between each cylinder or grid which are essential to their ability to make separate and different applications of voltage.

The above is a description of the basic, standard electron gun or picture tube. It will be hereinafter referred to as the *conventional* electron gun or picture tube.

The picture tube which respondent advertised as lasting 10 times that of the conventional picture tube is built essentially the same as the conventional electron gun or picture tube. The single physical difference of any possible significance (see respondent's Proposed Findings of Fact at page 64) between the conventional tube and respond-

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ent's advertised picture tube is that in the advertised tube one of its five cylinders or grids, known as the "G-3", protrudes into the "G-2" cylinder which in turn is directly adjacent to the cylinder, "G-1", which contains the cathode, whereas in the conventional electron gun there is no such protrusion of G-3 into G-2.

Respondent's advertised picture tube is known as the *intrusion* electron gun, presumably because of the protrusion of G-3 into G-2, and will be so hereinafter referred to. The design differences between the conventional and intrusion types of electron guns are frequently so vague that it is difficult for experts to tell when a tube leaves off being conventional and becomes an intrusion gun. (Tr. 1415, 2449, 3734)

In both the conventional and intrusion electron guns, the electrons are drawn from the surface of the cathode through a hole or aperture in the electron gun approximately 1/8th of an inch in diameter except that the Rauland Corporation, a leading cathode ray tube manufacturer, produces and distributes a conventional picture tube with an aperture 2.6 times as large as the emitting apertures of its competitors. (Tr. 3624)

The cathode has only a limited number of electrons which it can emit. When this limited supply of electrons has been used up, the picture becomes dead.

It is respondent's theory that the intrusion electron gun by reason of the protrusion of its Grid-3 into its Grid-2 is able to penetrate to a greater surface of the cathode in Grid-1 than is possible in the conventional electron tube and is thus able to reach and draw electrons from the outer surfaces of the cathode which the conventional gun because of its supposedly lower penetration into the cathode does not reach and make use of.

Respondent contends that this presumed utilization by the intrusion picture tube of a wider area of the cathode's electron emitting surface than that of the conventional picture tube gives the intrusion tube a ten times longer life than the conventional tube.

The record shows that respondent in 1959 and 1960 was not the only user of the intrusion type picture tube in the industry. There are a number of manufacturers of the intrusion tube, among them being Tung-Sol Electric, Inc., and National Video Corporation. The tubes are manufactured under serial number 21CBP4 or 21CBP4A by all tube manufacturers thereof. One of respondent's suppliers of the intrusion tube 21CBP4 during the period March 1, 1959 to March 1, 1960 was Tung-Sol. In the same period Tung-Sol also supplied the 21CBP4 picture tube to Emerson Radio & Phonograph Corporation, Trav-ler Radio Corporation, Olympic Radio & Television Company and a few to The Magnavox Company. The

21CBP4 tube manufactured by Tung-Sol for respondent was made to respondent's specifications. The record, however, shows that the tubes under this number supplied by Tung-Sol to all of its customers, including respondent, were of the same quality and essentially the same construction, and that differences in specifications did not significantly effect longevity or performance. National Video Corporation has also supplied respondent and some of its competitors with the 21CBP4 and the 21CBP4A picture tubes. The testimony of National Video's vice president in charge of engineering and research, Mr. A. D. Giacchetti, establishes that the tubes sold by National Video to respondent have no greater reliability, *i.e.*, longevity, than the tubes it sells to any of its other customers such as Admiral, Trav-ler, Muntz, and others. All tubes sold by National Video are subject to the same reliability test before they are released from its factory for distribution.

In its proposed findings of fact and reply brief, respondent appears to argue that "the application of the [receiving] tubes in the chassis" or in other words, its circuitry, is also in part responsible for the longer life it claims for its intrusion picture tube over the conventional picture tube. This is a departure from the issue here under consideration as respondent admits in its proposed findings of fact that it represented that its intrusion picture tube is "constructed to last 10 times longer than comparable picture tubes". (Emphasis supplied.) In other words, respondent's ads say that it is the construction of its picture tubes alone which make them last 10 times longer than the conventional picture tubes, not construction plus "tube application". The "tube applications" in respondent's TV sets are accordingly irrelevant to the issue. It was thus not up to complaint counsel to come forward with proof that respondent's "tube application" could not give respondent's intrusion picture tube any part of the claimed ten-fold longevity over the conventional picture tube and respondent did not come forward with any proof that its "tube application" could do this. The record does, however, show, as might be expected, that the "tube applications" of the major TV set manufacturers, including respondent, are pretty much the same. (Tr. 454)

It will be recalled that the issue here under consideration is whether the intrusion type picture tube used by respondent in its so-called Golden "M" Picture Tube does actually last 10 times longer than the conventional type picture tube as represented by respondent in its advertisements. On this issue the parties produced both theory and tests to substantiate their respective sides of the issue. Complaint counsel place their emphasis chiefly on actual comparative life tests performed on the two types of picture tubes to prove the negative

of the issue. Respondent places chief reliance and emphasis on theory to prove the affirmative of the issue; this appears from the amount of space, in both briefs and transcript, devoted to a defense based on theory as against test.

Counsel supporting the complaint placed in the record the results of life tests made on intrusion type picture tubes by the engineering laboratories of Admiral Corporation, one of respondent's major competitors, and by the Rauland Corporation, a manufacturer of television picture tubes. In the industry picture tubes are referred to as "cathode ray tubes".

Admiral uses the intrusion type picture tube and the conventional picture tube in almost equal amounts. Digressing for the moment from the issue of longevity to what the parties are agreed is the unrelated matter of picture quality, Admiral has found that there is a difference in picture quality produced by the two types of picture tubes under consideration but this difference shows up only in the larger or 23-inch TV sets. In the 23-inch TV set, the intrusion picture tube produces a better quality picture than the conventional picture tube. In the smaller 19-inch set, Admiral has found no difference in the picture quality produced by either of the two types of tubes. Accordingly, Admiral uses the conventional picture tube in its 19-inch TV sets and the intrusion picture tube in its 23-inch TV sets. As will be shown below, General Electric Company has also in the last two years begun to substitute the conventional tube in its TV sets to an undisclosed extent solely because the intrusion electron gun produces a better picture.

Returning now to the subject matter of the comparative longevity of the two types of picture tubes here under consideration, the record shows that the engineering staff of Admiral conducted extensive life tests on both the intrusion and conventional picture tubes. All tests were conducted for periods in excess of 1000 hours of playing but test results were taken at the end of 1000 hours of playing. The operation of a TV set for 1000 hours is roughly the equivalent of one year of normal use of a TV set in the home. The engineering staff of Admiral has set up certain predetermined life test standards to determine whether a picture tube after 1000 hours of playing passes or fails to pass these predetermined standards. At the end of 1000 hours of playing the tubes are measured for their cathode activity or more accurately stated for the rate of cathode emission from the electron gun. This measurement is compared with the aforementioned predetermined standards. The measurements are made by means of a meter.

Admiral engineers between January and June 1958 tested a total of 28 intrusion type picture tubes manufactured by Thomas Elec-

tronics and bearing the number 21CEP4A which is the standard identifying number for that picture tube in the industry. This group of 28 intrusion picture tubes were tested for their cathode activity at the end of 1000 hours of playing.

In the period between April and October 1958 Admiral also tested a total of 16 intrusion type picture tubes manufactured by the aforementioned National Video Corporation, one of respondent's regular suppliers of intrusion picture tubes. These 16 tubes bore the number 21DEP4 which is the standard identifying number for that picture tube in the industry. This group of 16 intrusion tubes were also tested for their cathode activity at the end of 1000 hours of playing.

The above relates to tests by Admiral on intrusion type picture tubes bearing different serial numbers than the serial numbers which identify the intrusion picture tubes used by respondents, to wit: 21CBP4 and 21CBP4A. (See Stip. of Facts, Par. 72) Identifying serial numbers are standard for the industry.

Admiral also conducted life tests on intrusion picture tubes bearing one of the two aforementioned serial numbers, to wit: 21CBP4. There were two such life tests by Admiral engineers on the 21CBP4. Each involved six tubes. These were also manufactured by Thomas Electronics but it is found from the record generally that on the longevity aspect, Thomas tubes were essentially the same as the tubes by the same number supplied to the respondent by Tung-Sol and National Video. The life tests on one of these groups of six intrusion tubes were commenced in June 1957 and the tests on the other group of six were started in March 1959. Each tube in the two tests—12 tubes in all—were measured by meter for their cathode activity at the end of 1000 hours of playing.

In addition to the above-described life tests on intrusion type picture tubes, Admiral also conducted life tests on two groups of conventional type picture tubes. One of these life tests, commenced in December 1958 and ended in April 1959, involved 15 conventional picture tubes. The other group of life tests, commenced in February 1959 and ended in July 1959, involved 18 conventional picture tubes. Each of the tubes in the two sets of life tests—33 picture tubes in all—were measured by Admiral engineers for their cathode activity at the end of 1000 hours of playing.

On the basis of the results obtained from measuring the cathode activity of both the intrusion and conventional types picture tubes involved in the above-described Admiral Corporation's life tests after the tubes had been each played for a total of 1000 hours, Admiral's picture-tube engineer, Raymond Magdziarz, by whom or under whose supervision the tests were made, rendered his expert

opinion that the intrusion type picture tube does not enjoy any advantage over the conventional type picture tube in the matter of longevity. It should be again noted that the measurements on which this opinion was made were by means of meters and did not involve any subjective judgments.

As aforementioned the second life test on the intrusion picture tube adduced by complaint counsel was that of the Rauland Corporation, a manufacturer of cathode ray tubes. Rauland since 1948 has been a wholly owned subsidiary of Zenith's. It has never manufactured for commercial sale the intrusion type picture tube although it has from time to time made experimental models of the intrusion tube. Rauland's production of the cathode ray picture tube is devoted exclusively to the manufacture of the conventional picture tube. Along with RCA and Sylvania, Rauland is one of the top three producers of the cathode ray picture tube. In addition to competing with RCA and Sylvania, Rauland competes with National Video, Tung-Sol and others and formerly with the aforementioned Thomas Electronics, now out of business.

Rauland launched a comparative life test study on the intrusion type picture tubes in February 1959 under the supervision of its quality assurance manager, Ralph K. Reichenbach, an electrical engineer, whose responsibilities also include the analysis of competitive products.

Involved in the life tests commenced in February 1959 by Rauland were (a) six intrusion type picture tubes, bearing the aforementioned standard serial number, 21CBP4, manufactured by National Video and also supplied to respondent and (b) six conventional style tubes manufactured commercially by Rauland. Rauland's standard procedure for life testing was used on the tests here under consideration. This procedure was described by Reichenbach as follows:

" This would be to test the tube initially for electrical characteristics. By this, we mean checking the emission on the tube, the gas vacuum, interelectrode leakages, all electrical characteristics. We would put the tube on light test, test it periodically during the life test, and then test the same characteristics after the test had been designated as completed. (Tr. 1051-1052)

Under the Rauland life testing procedure, checks are made every 96 hours of the various electrical characteristics of the tubes listed by Mr. Reichenbach in his above testimony. The results of these checks were plotted on a curve.

Rauland in the aforementioned tests commenced in February 1959 tested the aforementioned six National Video intrusion type tubes (*i.e.*, the same as used by respondent) and the six Rauland conventional type tubes in accordance with the Rauland life testing pro-

cedure described above. All test measurements at the end of each 96 hours of operation were by means of electrical meters; no subjective element of judgment went into these measurements. The life testing of the intrusion picture tubes was abandoned at the end of 588 hours of operation and the conventional tubes, at the end of 3000 hours.

Mr. Reichenbach concluded at the end of 588 hours²² of life testing the National Video intrusion tubes that they had no advantages in any of the electrical characteristics measured for over the Rauland conventional tubes. More specifically he concluded that the National Video intrusion tubes did not show any evidence of having a potential for longer life than the Rauland conventional tubes. On the contrary it was Mr. Reichenbach's opinion that the Rauland tube had a greater potential for longevity than the National Video intrusion type tube. These conclusions on the comparative longevity of the two types of tubes were reached on the basis of the curves plotted every 96 hours from measurements of the aforementioned electrical characteristics of the cathode ray tubes (both types) under study and on the further fact that one of the six intrusion tubes showed a slackening of cathode electron emission. This slackening did not occur in the remaining five intrusion tubes under test nor in any of the six conventional tubes under test. As heretofore noted, all measurements were made by means of electrical meters.

On the basis of the results of the described life tests, Reichenbach recommended to his employer, Rauland, that it continue the manufacture of the conventional picture tubes and that it not embark on the manufacture of the intrusion type picture tube. If decision had been made to convert the Rauland plant from the production of the conventional tube to that of the intrusion tube, the expenditure needed for the retooling required for such a change would have been fairly nominal, only a few hundred dollars.

The above concludes the life test evidence on the intrusion type picture tube adduced by complaint counsel.

As part of their direct proof, complaint counsel also elicited the expert testimony of Everett L. Craig of General Electric Company, an electrical engineer of long and wide experience in the field of electron tubes, particularly cathode ray tubes, commonly known as television picture tubes. At the time of the hearing, Mr. Craig was General Electric's design engineer in charge of electrical products.

²² See also testimony of Rauland's vice president in charge of research, Dr. C. Szegho, at Tr. 3701, for reasons showing no particular advantage in extending test beyond 588 hours.

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From Mr. Craig's testimony, it is found that General Electric started to use intrusion type tubes in their sets in the year 1960, but the extent to which the intrusion tube is used by that company is not disclosed by the record. But the record is clear that GE did not adopt the intrusion tube because of any belief on the part of its engineering staff that it had a superior longevity over that of the conventional tube but only because the intrusion picture tube produced a better quality picture. It will be recalled that Admiral also adopted the intrusion tube for the same reason but only in their larger or 23-inch television sets because it had found that while the intrusion tube produced a better picture in the 23-inch set, in the smaller or 19-inch TV set the conventional tube produced as good a picture as the intrusion tube.

Although GE has not made any comparative life tests on the intrusion and conventional picture tubes for the purposes of determining which of the two has the superior longevity, Craig testified that such differences as may occur between tubes of any types in the matter of longevity would be due to differences in care in the manufacturing process and not to basic design or tube type. (Tr. 1353-1354) Prior to the issuance of the complaint in this proceeding, GE engineers had occasion to analyze respondent's involved intrusion tube and reached the conclusion that it had no better longevity than the conventional tubes used by most of the industry as will appear from the following quotation of record from a letter addressed by GE to the Federal Trade Commission under date of October 7, 1960:

The General Electric cathode-ray tube department engineers analyzed the Motorola [intrusion] type tubes and found that they were the same in design from the standpoint of aperture sizes and spacing as those used by most of the industry. They will, therefore, have about the same reliability [longevity] and operating characteristics. (Tr. 1427)

As its defense in part, respondent offered two comparative tests on the intrusion and conventional picture tubes designed to show that respondent's intrusion type picture tube has a ten-fold life over the conventional picture tube, as claimed by respondent in its advertisements. Respondent's tests are different in character from those adduced by complaint counsel, as described above, and unlike the tests adduced by complaint counsel contain subjective elements of judgment. But as heretofore indicated, respondent appears to place its major reliance on theory to support its advertised claims that its intrusion type picture tubes last 10 times as long as the conventional picture tube.

One of the tests adduced by respondent may be called the Hilary Moss brightness test, or more simply the Moss test, after the name of the man who invented the test. It should be noted preliminarily

that the Moss test is not in any sense a "life test". "Life tests", it will be recalled, are actual "performance tests, sometimes accelerated, designed to simulate the useful lives of radio and television parts." (Stip of Facts, Par. 39) Essential to the understanding of the Moss test is respondent's aforementioned premise or theory that the intrusion gun by virtue of its supposedly higher penetration due to its above-described construction difference over the conventional gun can reach and utilize electrons from the outer borders of the cathode surface²³ beyond the reach of the conventional gun and by the use of these border electrons, supposedly not used by the conventional type picture tube, cause the intrusion type picture tube to have ten times the life of the conventional type picture tube.

The Moss test is simply a method devised to demonstrate *by visual means* whether there is a difference in the ability of various types of electron guns to reach electrons farthest removed from the center of the cathode. Respondent's chief television engineer agreed, in effect, that proof by such visual means that one type of electron gun, let us say Type A, pulls and gathers electrons from a greater area of the surface of the cathode than Type B does not in itself, however, constitute proof that a picture tube employing the Type A electron gun will actually outlast a picture tube using the Type B electron gun. The record shows that only an actual life test (*i.e.*, *performance test*) under controlled conditions can demonstrate whether one type of picture tube will outlast another. The sole value of the Moss brightness test is that it lends credence to the theory that various types of electron guns vary in their ability to reach the outer borders of the electron-emitting cathode. (Tr. 2417-2418)

The Moss brightness test is a simple but ingenious device for measuring the electron producing areas of a cathode by means of photographing the cathode in action or more accurately the image of the cathode while it is in action. Prior to such photographing the cathode is covered by a mesh, best imagined as the ordinary window screen with its uniform network of open spaces. When the active cathode is thus photographed, it shows light through the network of open spaces in the mesh. The center of the mesh always photographs the brightest and the further one gets away from the center, the less bright are the open spaces until they fade into darkness altogether.

Respondent presented in evidence a photograph (RX 47) of a cathode activated by a conventional electron gun and a second photograph (RX 48) of a cathode activated by one of its intrusion electron guns. Garth J. Heisig, respondent's director of television engineer-

²³ It will be remembered that the cathode is simply a metal alloy. Respondent in its proposed findings of fact describes the cathode as being "dime-sized", presumably having a flat surface.

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ing, testified that the only essential difference between the conventional and intrusion electron guns employed in the Moss photographic tests was the above-described protrusion of the "G-3" grid into the "G-2" grid in the intrusion gun; the aperture size of the two guns were the same. The photograph of the cathode activated by the intrusion gun shows nine fairly lighted square-shaped spaces in the mesh as against only five fairly lighted square-shaped spaces in the photograph of the cathode activated by the conventional gun. On the basis of this difference in lighted squares, Garth J. Heisig, respondent's director of television engineering, estimated that respondent's intrusion picture tube would have seven and a half times the life of the conventional picture tube, if the ratio of the squares were squared, and twenty times the life of the conventional tube, if the ratio of the squares were cubed. Two other of respondent's expert witnesses, the aforementioned Dr. Jacobs and Mr. Briggs, from their study of the two Moss test photographs, predicted, respectively, that the intrusion tube would have "roughly" or "at least" ten times the life of the conventional tube.

Although the lighted squares in the two Moss test photographs (RX 47 and RX 48) can be counted, the measurements of the degree of their brightness is a matter of subjective judgment as a light meter was not used to determine the relative brightness of the squares in each of the photographs. This subjectiveness of judgment was admitted by respondent's Mr. Heisig. (Tr. 2403)

The two Moss test photographs were prepared for use at the hearing a few days before the trial herein was commenced.

Respondent's Moss test photographs and the conclusions drawn therefrom by respondent's witnesses came in for some very sharp criticism in rebuttal testimony from complaint counsel's expert witness, Dr. C. Szegho, Rauland's vice president of research (cathode ray tube research chiefly) and a pioneer in the field of cathode ray tube research. Three of these criticisms will be noted. The first is stated as follows: For comparative testing of two types of tubes as in RX 47 and RX 48, it is imperative to have absolutely representative samples of each of the two tube types (conventional and intrusion.) This is virtually impossible because the manufacturing process, no matter how good, cannot produce a sample which is truly representative for the kind of fine comparative testing required in the Moss test photographing attempted by respondent. Dr. Szegho stated: "And there are many hundreds really reasons which make it doubtful that two-in-every respect identical tubes can be manufactured." (Tr. 3662.) Furthermore, Dr. Szegho testified that the two tubes tested in RX 47 and RX 48 are experimental tubes by virtue

of the fact, among others, that for purposes of the test, a 500 per inch mesh had to be welded on the face of the cathode in each of the two tubes (conventional and intrusion). With reference to such experimental tubes, Dr. Szegho testified:

I have made experimental tubes all my life, many, many thousands of them, and I can't truthfully testify that each time you are making one kind of a tube for one-of-a-kind, you can never predict the outcome. It is good to say that the same craftsmanship and the same care has been taken, the same materials have been used; nevertheless, it is almost certain that if you only make one or two tubes of a kind, they will not come out the same. (Tr. 3661)

In the two experimental tubes involved in RX 47 and RX 48, Dr. Szegho believes that almost inevitable differences in the application of the mesh to the cathodes could easily throw comparisons off. Dr. Szegho noted that respondent "had to weld a 500-per-inch mesh onto the cathode. How do we know that some oxide from the welding didn't remain in one case on the cathode? How do we know that the coating is the same so that the mesh laid on exactly the same way in both cases?" (Tr. 3661-3662) The Moss test, Dr. Szegho stated, is "very suitable if you use it in any *one* tube to establish how varying certain tube parameters in that tube would change the emissive area or the distribution of the emission area" but if the Moss test is used "to compare the emission or the distribution of the emission of two different guns, then this method is of questionable value" for the reasons indicated above. (Emphasis supplied.) (Tr. 3660-3661)

Another reason advanced by Dr. Szegho for the unreliability of the two comparative Moss tests as reflected in RX 47 and RX 48 is that in the procedure described by respondent's engineer, Heisig, for making the Moss test photographs, it was inevitable, in order to avoid shattering the tubes used in such tests, that the anode voltage in the Moss test be lowered to about one-third of the voltage of that used when a picture tube is operated as a picture tube and not as an electro-microscope as required in the Moss tests. Accordingly, Dr. Szegho stated that "he could not accept as valid his conclusions [respondent's Mr. Heisig] from this test [RX 47 and RX 48]" since Mr. Heisig by lowering the anode voltage to "approximately a third which it should be, he indeed did change the cathode loading for those conditions for which he made this test * * *". (Tr. 3659)

We will note only one more reason why Dr. Szegho deems the Moss test photographs as reflected in RX 47 and RX 48 to have doubtful validity and this is best given by Dr. Szegho in his own words:

HEARING EXAMINER BUSH: You differ from the conclusions drawn from Respondent's Exhibits 47 and 48, is that correct? Is that what you had in mind?

THE WITNESS: Yes.

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HEARING EXAMINER BUSH: Very well. You may proceed.

THE WITNESS: The conventional gun cathode image on Exhibit 47 is blurred, unsharp, and distorted. The cathode image of the intrusion gun is sharp. I count a different number of squares across the diameters, and from this I deduce, and also from the differing size of the squares, that the electro-optical magnification was slightly different when these two pictures were taken, and I submit that if this electro-optical magnification would have been the same, and if the image shown on Exhibit 47 of the conventional gun would have been sharp, then there is a slightly longer exposure of the image shown on Exhibit 47, the distribution across the diameter, the light distribution across the diameter would be indistinguishable.

I also note that on Exhibit 47 the image shows distinct limiting. You can see the outline of some obstructing gun parts, whereas in Exhibit 48, such limiting is absent. From this I also deduce that the electron-optical magnification was different.

In view of all this, I place very little stock into these exhibits. (Tr 3664-3666)

The above concludes the principal evidence presented on the Moss tests.

The only other test adduced by respondent in support of its representation that its intrusion picture tube would last ten times longer than the conventional picture tube is a "life test" commenced in 1957 and concluded in January 1958. Involved in this so-called life test were eight of respondent's intrusion type picture tubes, advertised by respondent as shown above as the "Golden M" picture tube, and eight conventional type picture tubes. All of the sixteen tubes used in the test were manufactured by and purchased from National Video.

Although the test is referred to in the testimony as a "life test", it was not a life test in the sense that the sixteen picture tubes were operated in TV sets until they failed from exhaustion or, to put it another way, until they were worn out.

The sixteen tubes were operated on and off for a total of 2000 hours under identical conditions. At the end of the 2000 hours the test was terminated. At that time all sixteen tubes were still functioning and producing pictures. However, at the end of 2000 hours of operation, the sixteen tubes were tested for their ability to meet new picture tube specifications. The primary purpose of the test was to determine tube degradation or tube decline after 2000 hours of playing. Tube degradation is manifested by a significant drop in electron emission from the cathode, or by detectable damage to the cathode, or by a combination of these two phenomena.

The results of respondent's life test on the sixteen picture tubes are shown in RX 49. Although this exhibit shows a number of things the tubes were tested for, it is established from the testimony of the Motorola engineer who conducted the test that the only sig-

nificant columns in the exhibit from the standpoint of tube longevity are the columns entitled "Brightness" and "'K' Image", which stands for "cathode image." (Tr. 2489,2495.) Through a process developed for looking at the image of a cathode in action, it can be determined visually whether there are any spots on the cathode. Spots on the cathode indicate damage to the cathode. The "'K' Image" column shows such damage spots if they have occurred. At the end of the 2000 hour test, respondent's engineers determined the "brightness" of each of the sixteen tubes by means of a light meter. Such measurements for brightness were objective measurements without any elements therein of subjective judgment. The determination of whether there were spots on the cathodes of the sixteen tubes and, if so, the size of such spots, was to a large degree subjective in nature.

As seen, one of the manifestations of the tube degradation is a significant drop in electron emission from the cathode in the picture tube. This in turn causes a drop in the brightness produced by a picture tube. A measurement of a picture tube's brightness is thus an indirect method of measuring the strength of the electron emission from the cathode in the tube.

As heretofore stated, respondent's engineers at the end of the 2000 hour test measured the brightness of each of the 16 tubes in the test *as against respondent's new tube specifications* for brightness. With respect to such brightness measurements, RX 49 shows that there were no failures in the sense of meeting new tube specifications in any of the eight intrusion or "Golden M" picture tubes involved in the test and that there were five failures in this sense among the eight conventional tubes involved in the test.

With respect to damage spots on the cathode, RX 49 shows that at the end of the 2000 hour test three of the eight Motorola "Golden M" picture tubes had damage spots and all eight of the conventional tubes had damaged spots.

Except for the above-described 2000 hour life test of 1958, respondent has not conducted any other life tests to substantiate its advertised claim that its "Golden M" intrusion type picture tube will outlast the conventional picture tube ten times. (Tr. 2489)

Respondent in January 1962 discontinued advertising that its intrusion picture tube had ten times greater life than the conventional picture tube. (See respondent's proposed findings of fact at footnote on page 63) The chief television engineer ascribed this to the increasingly wider use of the intrusion tube in the TV manufacturing industry. (Tr. 2452) The record shows that as late as the trial of this proceeding in mid-year 1962, Rauland, one of the three

top producers of the cathode ray tube and a cathode ray tube supplier to many TV manufacturing companies, was still manufacturing only the conventional picture tube. Rauland's parent company, Zenith, was in 1962 using the conventional tube principally. Similarly in 1962, Admiral was using the conventional picture tube in its popular priced 19-inch portable TV sets.

Respondent appears, as heretofore noted, to place its principal defense, not so much on its above-described Moss tests and life tests *per se*, but on the theory that its electron gun is able to reach electrons from the outer borders of the cathode which are missed by the conventional gun, and is thus able to have ten times the life of the conventional gun. Thus respondent in its proposed findings of fact (at page 65) states the issue as follows: "The contested issue is whether or not the intrusion or high penetration type electron gun is able to draw electrons from a greater area of the cathode's surface without increasing the size of the aperture, and thereby increasing reliability or life of the cathode without loss of picture quality. The theoretical explanation for its ability to do this is that because of its 'intrusion' feature, a high penetration of positive electrical force is directed through the aperture nearest the cathode where it pulls or draws electrons from a larger area of the cathode than a conventional gun with relative low voltage penetration." As seen, the Moss test was used by respondent in the photographs RX 47 and RX 48 not to serve as direct proof that the intrusion gun can outlast the conventional tube ten times but only as visual proof of the theory advanced by respondent's expert witnesses that the intrusion gun attracts electrons from wider surface areas of the cathode than the conventional gun.

In opposition to respondent's above-described theory, counsel supporting the complaint adduced expert testimony to show that in actual fact the theory did not hold up.

Preliminarily it should be noted that the expert witnesses for both sides agree that any device which will reduce "cathode loading" (*i.e.*, lower cathode current density, Tr. 3625), without affecting picture quality, would give a picture tube using such device a longer life than a tube which didn't have the device. But on the question of whether the intrusion gun will cause reduced cathode loading due to its alleged higher anode penetration and thereby greater geographical use of the cathode's electron emitting surface area, the experts for the respective parties herein are in total disagreement.

Complaint counsel developed its defense in opposition to respondent's theory both by cross-examination of respondent's expert witnesses and by rebuttal testimony. Primary reliance, however, was

placed on the rebuttal testimony of aforementioned Dr. Szegho. Dr. Szegho is a pioneer in research on the cathode ray tube, having served as an associate of John Logie Baird of London, England who is generally recognized as the "father of television". Dr. Szegho's entire professional career, commenced in 1933, has been devoted primarily to research on the cathode ray tube. He has been associated with the aforementioned Rauland Corporation, one of the largest manufacturers of cathode ray tubes, since 1942. From 1942 to 1951, he was Rauland's director of research, and from 1951 to the present time, he has been Rauland's vice president in charge of research.

It will be our purpose here to highlight Dr. Szegho's rather lengthy and exhaustive but unfavorable analysis of respondent's theory. One of the first things pointed out by Dr. Szegho in his testimony is that a scientific article, based on the work of the aforementioned Hilary Moss and offered in evidence (RX 57B) by respondent in substantiation of its claim that its intrusion gun by reason of its alleged greater anode penetration reaches a larger surface of the cathode, does not in fact contain any such statement. On the contrary, Dr. Szegho showed that the involved article by Dr. Aurelius Sandor, of the General Telephone & Electronics Laboratories, states that the effective emitting area of emission of the cathode surface is dependent upon factors other than anode penetration and is in fact independent of anode penetration. (Tr. 3622-3623.) Since, according to the Sandor article, anode penetration plays no part in the more efficient use of the emitting electrons from the surface of the cathode as claimed by respondent, then it follows, Dr. Szegho testified, that there will be no difference between the intrusion and conventional types of electron guns with respect to longevity. (Tr. 3623)

Dr. Szegho also testified that the anode penetration of an electron gun was dependent upon the size of the aperture or hole in the gun facing the cathode. (It will be recalled that the electrons are drawn from the cathode surface through this aperture in the electron gun.) The larger the aperture, the easier it is for the gun to reach larger surface areas of the cathode. Testimony from sources other than Dr. Szegho shows that most cathode ray tube manufacturers limit their apertures to diameters of $\frac{1}{8}$ th of an inch because experience has shown that a larger aperture has an adverse effect on picture quality. Zenith, however, uses a larger aperture with no adverse effect on picture quality due to the special "low-condensation feature" of its tubes. Dr. Szegho pointed out that due to this special feature the conventional tube put out by his company, has an aperture so

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much larger than the aperture in respondent's intrusion type tube that his company's conventional tube will reach an emitting area in the cathode 2.6 times as large as that reached by respondent's intrusion gun. Under respondent's theory, this would mean, he testified, that the Rauland conventional picture tube would have an emission life (*i.e.*, picture tube life) between $6\frac{1}{2}$ to 18 times as long as respondent's intrusion gun. Although the witness did not carry through with this thought in his testimony, it is obvious that he meant that neither he nor his company makes any such claim. (Tr 3624-3628)

Dr. Szegho testified, as had General Electric's design engineer Craig (Tr. 1353-1354), that manufacturing procedures far overshadow the factor of anode penetration in the matter of tube longevity. (Tr. 3744) He further testified that tube exhaustion causes only a small amount of set failures. He was of the opinion, as were witnesses from Admiral and General Electric, that all tubes on the market, regardless of type, have about the same tube life.

DISCUSSION AND CONCLUSIONS

A review of the evidence shows that respondent is relying on (1) theory and on (2) its 2000 hour life test of 1958 to substantiate its advertised claim that its "Golden M" intrusion picture tube has a ten times longer life than the conventional picture tube. It is not here deemed necessary to restate respondent's theory as it has been stated a number of times above.

The examiner is of the opinion that theory can never serve as a verification for a flat statement of fact, such as is involved in respondent's representation of superior life for its "Golden M" picture tube. The error of using a theory as proof of an asserted fact is here compounded by the fact that the theory advanced by respondent is shown to be fallacious by a scientific article introduced into the record by respondent itself. We are here referring to Dr. Sandor's article in RX 57B. (Tr. 3622-3623.)

Similarly, respondent's 2000 hour life test of 1958 on eight of its "Golden M" picture tubes and eight conventional picture tubes cannot be accepted as valid proof of respondent's advertised claim that the "Golden M" tube will outlast the parent conventional tube ten to one. For one thing, the results of this test cannot be accepted because far more numerous tests by Admiral, involving many more conventional and intrusion type tubes, showed there was no difference between the two types of tubes with respect to reliability or longevity. The Admiral tests were made at times long prior to the

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issuance of the complaint herein. A similar test by Rauland engineers confirms the Admiral test results, not the respondent's life test results. But of even greater importance is the fact one of respondent's major suppliers of the "Golden M" picture tube, National Vidio, through its vice president of engineering and research, has stated that there is no difference in reliability or longevity between any of the tubes produced in its factory, including the "Golden M" and conventional picture tubes.

The record shows that the manufacturers of the "Golden M" tube made available to all of respondent's competitors essentially the same intrusion picture tube as the "Golden M", but that as far as the present record shows only respondent saw fit to advertise that it had a tube which was "10 times more reliable than ordinary picture tubes." This advertisement commenced in 1959 was continued to January, 1962 when it was discontinued. (See footnote at page 63 of respondent's proposed findings of fact.)

It is inconceivable that any of the large TV manufacturers in an industry as competitive as theirs would allow themselves to be out-classed by a competitor in the matter of long-life picture tubes when that competitor's picture tube was equally available from suppliers to all TV set manufacturers and in fact sold to a number of respondent's competitors. The evidence shows that such increase in the use of the intrusion picture tube in the industry as has taken place in recent years has been due to the intrusion tube's ability to produce a better quality picture in the larger TV sets and not to any superior life factor. Rauland's Dr. Szegho, however, declines to believe that the intrusion tube produces a better picture. Retooling for the intrusion tube would present no problem for Rauland from a capital expenditure point of view as the cost of such retooling would be only a few hundred dollars. Rauland continues to manufacture the conventional picture tube because its research convinces it that its conventional picture tube is the superior tube with respect to longevity and other factors.

The examiner rejects as lacking in probative value the evidence adduced by respondent to substantiate its representation that its "Golden M" intrusion picture tube has superior longevity to that of the conventional tube. The weight of the evidence compels the finding and conclusion that in the matter of longevity there is no essential difference between the two types of picture tubes.

ULTIMATE CONCLUSION OF FACT

The examiner finds that respondent's representation that the picture tubes contained in certain of its receivers were constructed to

last 10 times longer than comparable picture tubes is false, misleading, and deceptive.

8. "*First Tuner*" Issue

The complaint charges that respondent has falsely represented that:

Its Custom-Matic Tuner contained in certain of its receivers was the first tuner specifically designed for remote control.

Respondent admits that it made the above representation but denies that it is false, deceptive or misleading.

The representation was made in advertisements published in 1959.

The record conclusively shows that respondent's "Custom-Matic Tuner" was not the first remote control tuner on the market. This is acknowledged by respondent in its proposed finding of fact (at page 74) as follows:

In 1959, when respondent made the alleged representation, remote control television receivers had been on the market for many years. Respondent itself had had a remote control television receiver since 1956.

There is thus considerable justification for the following rather emphatic statement made by counsel supporting the complaint in their reply brief (at page 55 with supporting references to the record):

There is absolutely no question that respondent's representation that the Custom-Matic Tuner was the first tuner specifically designed for remote control is literally false.

Respondent's defense, however, is that the phrase in its above-quoted representation reading "specifically designed for remote control" requires an interpretation of the representation which would not be false to the buying public. Respondent contends that prior to 1959 when it made its said representation, all remote control tuners on the market were merely adaptations of the then existing manual tuners located in the TV chassis itself. A tuner, whether it be of the manual or remote type, is defined as that component of a TV receiving set which "receives the signal from the antenna, selects it, amplifies it and converts it to a common frequency to be acted upon by other parts of the receiver." (See respondent's proposed findings of fact at page 74.)

Respondent argues that its Custom-Matic (remote) Tuner was not an adaptation of any existing manual tuner, but was a completely new development in the TV industry and in that sense was the "first tuner specifically designed for remote control".

Respondent thus seeks an interpretation of the phrase "specifically designed for remote control" in the light of the *internal history* of electrical engineering in the development of remote control tuners.

This interpretation is rejected as there is nothing in respondent's representation which would lead a prospective consumer to make such an interpretation of the representation.

The examiner finds from his examination of the advertisements here in question that they constitute representations that the Custom-Matic remote control tuner was the first remote control tuner to be placed on the market. It is the examiner's opinion and finding that this is the reading of the advertisements that most prospective customers would give to the advertisements. As heretofore noted in connection with other issues, it has long been established that the meaning of an advertisement can be established from the advertisement itself. *Zenith Radio Corp. v. Federal Trade Commission, supra*. As respondent agrees that its Custom-Matic Tuner was not the first remote control tuner placed on the market, the representation that it was, is false.

If there is any ambiguity in respondent's representation, it is resolved against the respondent and favorable to the aim of the Federal Trade Commission Act to bar "unfair or deceptive acts or practices in commerce". The Supreme Court many years ago held in connection with a violation of a similar act (*i.e.*, Food and Drug Act of June 30, 1906) that: "* * * Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. * * *"
United States v. 95 Barrels of Vinegar, (1923) 265 U.S. 438, 443. See also *Rhodes Pharmacal Co., Inc. v. Federal Trade Commission*, 208 F. 2d 382, 387 (CA-7, 1953).

As noted above, respondent is seeking an interpretation of the involved representation to the effect that its Custom-Matic Tuner was a completely new development in the industry and in that sense was the "first tuner specifically designed for remote control". Even if this interpretation of the representation is accepted, the record shows such a representation would also be false. The testimony of a Zenith engineer shows that Zenith TV sets as early as 1950 were "specifically designed for remote control". (Tr. 869 et seq.) This was at least eight or nine years prior to the development of respondent's "specifically designed for remote control" Custom-Matic remote

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control tuner. Similarly, Philco and Admiral came out with remote control tuners many years before respondent's Custom-Matic with such important changes therein from Philco's and Admiral's manual tuners that their respective remote control tuners must be regarded as being "specifically designed for remote control". (Tr. 771 et seq., 773, 1032-1034) Ironically, although respondent claims that its Custom-Matic Tuner was "specifically designed for remote control", the testimony of respondent's chief of television engineering shows that the Custom-Matic Tuner was also used in Motorola TV sets which did not have remote control tuning. (Tr. 2811)

CONCLUSION

The examiner finds that respondent's representation that its Custom-Matic Tuner contained in certain of its receivers was the first tuner specifically designed for remote control is false, misleading and deceptive.

9. "Never Requires Fine Tuning" Issue

The complaint charges that respondent has falsely represented that:

Its Custom-Matic Tuner contained in certain of its receivers never required fine tuning.

The aforementioned term "fine tuning" is best defined by one of respondent's ads which reads as follows:

NEW LONG DISTANCE CUSTOM-MATIC TUNER NEVER REQUIRES
FINE TUNING WHEN CHANGING FROM CHANNEL TO CHANNEL

Before the introduction of this new Motorola tuner, you had to fine tune each channel *every* time you changed channels in order to get maximum performance. The new Motorola Custom-Matic Tuner ELIMINATES this. Now, you fine tune a station *just once* with the special oscillator control (explained below) and the station is *permanently fine tuned* * * * no further adjustment required.

Select station with station selector. Push in fine tuning control until it engages tuner. Then with control still engaged, rotate it until you get the best picture and sound * * * release control and you have automatically locked channel to best picture and sound permanently. Repeat this for every channel in your area and you never again need to fine tune your set. (Emphasis as in ad.) (CX 49 A)

The charge here under consideration was based on advertisements by respondent of which the above is typical. Other advertisements in which the same claim of "never requiring fine tuning" is made are shown below:

(1) Tune each channel just *once* and TV stays fine-tuned for good! (Emphasis as in ad.) (CX 32 and 56)

(2) One simple adjustment lets *you* fine-tune stations permanently! (Emphasis as in ad.) (CX 41)

Under the amendment to its answer to the complaint, respondent has entered a qualified denial of the charge here under consideration as against the flat denial in its original answer. As the pleadings now stand, respondent denies it directly or indirectly represented that its Custom-Matic Tuner never required tuning *except* that it admits it represented that its said tuner never required fine tuning "as you go from station to station".

Similar to the situation on the previous issue, we are here also presented with a question as to the proper interpretation of the representation made in the various advertisements on which the charge under consideration is based. The parties are in disagreement as to the interpretation to be given to the word "never" in respondent's advertisements. The precise question is whether the advertisements under consideration constitute representations that respondent's Custom-Matic Tuner never requires fine tuning under any and all circumstances, both internal and external to the tube. A decision on this question will be deferred until after the findings of fact have been set forth on the conditions or circumstances which require readjustments of the original "fine tuning".

In the presentation of their case-in-chief on the involved charge, counsel supporting the complaint offered no testimony in support of the charge but chose instead to rely on a stipulation of facts for the establishment of the charge. In their proposed findings of fact, complaint counsel have expanded this to include reliance on testimony given on direct examination by respondent's aforementioned Mr. Heisig, its chief of television engineering, the only witness called on the issue by respondent.

The stipulation relied upon by complaint counsel reads as follows: "There may be a need for periodic adjustment of fine tuning of the 'Custom-Matic Tuner' in 1960 Motorola television receivers as the set ages and because of changing conditions external to the set." (Stip. of Facts, Par. 74) Complaint counsel also relies on the direct testimony of respondent's Mr. Heisig which establishes that fine tuning of respondent's Custom-Matic Tuner would be necessary due to changes in the location of a transmitter or television antenna, changes in the power of a transmitting station, and deterioration due to aging. (Tr. 2835-2836) From Mr. Heisig's testimony, it also appears that the Custom-Matic Tuner may initially require more than one adjustment by the TV set owner before he obtains the picture focus and quality he desires. Complaint counsel urges this fact as evidence against respondent's claim that its described tuner "never

requires fine tuning". This argument is rejected as the examiner is convinced and finds from his study of the involved advertisements that the average consumer would expect that a certain amount of adjustment would be required before he could find the picture quality he wanted to lock in, notwithstanding such language in respondent's advertisement as in the above noted statement, to-wit: "Tune each channel just once and TV stays fine-tuned for good!"

Respondent's defense (see respondent's proposed findings of fact at page 79) is that the involved charge of the complaint as set forth above has been amended by a paragraph in the parties' stipulation of facts to read as follows:

Through the use of the statements contained in Paragraph Four of the Complaint, respondent has represented directly or by implication that: (d) * * * its "Custom-Matic Tuner" contained in certain of its television receivers * * * never required fine tuning as you go from station to station * * *. (Stip of Facts, Par. 30 (d))

The examiner rejects the contention that the above stipulation constitutes an amendment of the charge of the complaint here under consideration. As contended for by counsel supporting the complaint, it is found that the said stipulation is a partial admission of the representation charged by the complaint. This admission is formalized by respondent's "Amendment to Answer" filed on August 1, 1962, in which, as heretofore noted, respondent modified its original denial that it had made the representation charged in the complaint to a partial admission that it had represented that its Custom-Matic Tuner "never required fine tuning as you go from station to station". (It should be noted that the Stipulation of Facts was filed on July 9, 1962, as part of the "Hearing Examiner's Memorandum of Results of Pre-hearing Conference herein" whereas the respondent's "Amendment to Answer" was filed as noted above on August 1, 1962.)

With these findings of fact on the conditions or circumstances under which readjustments will be required of the original locked-in fine tuning, we return to the question of whether the advertisements under consideration constitute representations that respondent's Custom-Matic Tuner "never" requires fine tuning under any and all circumstances, both internal and external to the tube.

From the examination of the advertisements and the relevant evidence of record, it is found that the advertisements do not constitute a representation that TV sets containing the Custom-Matic Tuner would not have to be retuned because of conditions external to the set, such as changes in the location of a transmitter or television antenna and changes in the power of a transmitting station. The examiner finds that most consumers, including buyers less sophisti-

cated than the average, would not read into respondent's ads a representation that the Custom-Matic Tuner would not have to be retuned in the event of such described conditions external to the TV set itself.

With respect to the changes required in the original locked-in fine tuning of respondent's TV sets equipped with the Custom-Matic Tuner by reason of conditions internal to the TV set, such as deterioration due to aging, the situation is quite different. With respect to such internal changes, it is found that the advertisements in question do constitute a representation that no retuning of the original locked-in fine tuning would ever be required. The examiner finds that a significant portion of the consuming public would judge the advertisements to constitute a representation that once the original fine tuning had been locked-in by the Custom-Matic Tuner, the TV set would never require retuning due to any conditions internal to the set. *Zenith Radio Corp. v. Federal Trade Commission, supra.*

CONCLUSION

The examiner finds that respondent's representation that its Custom-Matic Tuner contained in certain of its receivers never required fine tuning is false, misleading and deceptive.

10. "4-Wafer Cascode Tuner" Issue

The complaint charges that respondent has falsely represented that:

Its 4-Wafer Cascode Tuner contained in certain of its receivers was the only tuner that turned out a stronger signal than the one it picked up.

In its proposed findings of fact, respondent admits that it made the above representation and that the representation is "literally false", but interposes a defense on the ground that "there is no evidence in the record that the average consumer understands what a tuner is, how it operates, or what he expects from 'the only tuner that turns out a stronger signal than the one it picks up.'" Respondent requests a dismissal of the charge on the ground that it has not been proven that respondent has made a meaningful and material false statement.

While it is, of course, true that there is no consumer testimony in the record on the meaning to consumers of the above-stated representation, this presents no problem because the language and message contained therein are sufficiently clear as to pose no problem of interpretation. The representation in fact appears self-explanatory. It is extremely doubtful that respondent would have authorized the ads which gave rise to the charge unless it was satisfied that they carried

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a message which would help sell the advertised product. As noted in other issues, the interpretation of an advertisement may be made from the advertisement itself. *Zenith Radio Corp. v. Federal Trade Commission, supra*. Although it is believed that the involved representation is self-explanatory, an elaboration can be made. For one thing, it is found that respondent represented that its described tuner could turn out a stronger signal for the benefit of the listener than the original signal the tuner received from the transmitting station. Secondly, it is found that respondent represented that its said tuner was the *only* tuner in the market that could do that. These representations of fact, contrary to the contention of respondent, are both meaningful and material. The falsity of these representations are now admitted by respondent.

CONCLUSION

The examiner finds that respondent's representation that its 4-Wafer Cascade Tuner contained in certain of its receivers was the only tuner that turned out a stronger signal than the one it picked up is false, misleading and deceptive.

11. "*Completely Hand-Wired Chassis*" Issue

The complaint charges that respondent has falsely represented that:

Its 1960 television receivers represented the only television line with completely hand-wired chassis.

As there is a dispute between the parties as to the meaning of this representation, an analysis of the advertisement in which the representation was made is set forth below.

The basis for the charge here under consideration is an elaborate eight-page advertisement in an unspecified fall 1959 issue of *Life* magazine introducing respondent's 1960 model TV sets. The same spread was also republished as a Supplement to the October 15, 1959, issue of *Home Furnishings Daily*, a daily trade newspaper. A copy of the eight-page advertisement is in the record as CX 54 A-H.

A stipulation by the parties (Stip. of Facts, par. 24) that the above advertisement was disseminated "on one occasion only—on October 15, 1959, in a special supplement to the trade publication, *Home Furnishings Daily*" is rejected because the advertisement as reflected in CX 54 A-H shows on its face that the ad was published in both *Life* magazine and the *Home Furnishings Daily*. The parties were accordingly in error in their stipulation.

Although the week of the publication of respondent's said advertisement in *Life* magazine is not shown in RX 54 A-H, it is found

that the ad in *Life* magazine was published either shortly before or shortly after the ad made its appearance as a Supplement to the October 15, 1959, issue of *Home Furnishings Daily*.

The front and last pages of the advertisement are in color. (See CX 54 A and H.)

In a box on the top of the front page of respondent's *Life* advertisement are the words:

INSIDE STORY OF THE MOST RELIABLE TV EVER

A CLOSE-UP OF EXCLUSIVES
IN THE ONLY TV LINE WITH COMPLETELY
HAND-WIRED CHASSIS AND TUNER

(Underscoring as in ad. CX 54 A.)

The center and largest portion of the front page of the *Life* magazine advertisement is devoted to what appears to be a factory scene at a Motorola plant depicting the handwiring of a Motorola chassis and tuner. Included in the picture is a young woman factory worker engaged in hand wiring a TV chassis. At her left is a picture of Mr. Heisig, respondent's chief of television engineering. Mr. Heisig is holding a tuner in one hand and pointing to it with a pencil in the other hand. At the bottom of the picture are the words: "Engineer Garth Heisig: 'Yes, Even the tuner is hand-wired.'"

Across the bottom of the front page of the ad is a brilliant red border about an inch and a half wide. Inscribed in white on this red border are the words "Motorola TV—1960".

The second page of the ad is devoted almost entirely to a picture of a Motorola TV chassis, with back removed, aimed at showing that the chassis is hand-wired, rather than printed.

The top half of the third page is devoted to an explanation as to why a "completely hand-wired chassis" gives "peak performance" and "the ultimate in reliability". The explanatory message reads in part: "Motorola engineers made exhaustive field tests and laboratory examinations of even well-designed TV sets * * * Their decision: printed circuitry sets fail to measure up to the standards of performance, reliability, uniformity and freedom from costly maintenance problem we feel Motorola customers are entitled to * * *."

The bottom half of the third page is devoted to respondent's explanation of why in its TV sets "Even the Tuner (most critical part of every TV set) is Hand-Wired". The text of the ad beneath this caption reads: "The way we figure it, the place where the signal first comes into a TV set had better be as foolproof and trouble-free as we could possibly design and build it. Here, too, hand-wiring was the one sure way to get the results we wanted. So * * * Motorola goes all the way * * * with a hand-wired tuner in every model."

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Pages 6 and 7 of the ad carries photographs of 27 different 1960 model Motorola TV sets, each of which is identified by model number. This was intended to show only part of respondent's 1960 line of TV sets as the bottom of page 7 states that there are: "More than 58 *different* models to choose from with handsome cabinets in *every* styling imaginable * * *." (Emphasis as in ad.)

The key sentence in respondent's said *Life* magazine advertisement on which the charge here under consideration is based is the one appearing on the top of page 1 therein which is here repeated for the convenience of the reader:

A CLOSE UP OF EXCLUSIVES IN THE ONLY TV LINE
WITH COMPLETELY HAND WIRED CHASSIS AND TUNER²⁴

(Underscoring as in ad.)

The parties are in disagreement as to the interpretation to be given to the above key sentence in the ad. Counsel supporting the complaint contend that the sentence must be interpreted, as charged in the complaint, as a representation that respondent's 1960 line of television receivers was "the only television line with *completely* hand-wired chassis" (emphasis supplied), or, put another way, that respondent represented that its *entire* 1960 line of TV sets consisted *solely* of TV sets with hand-wired chassis.

Respondent, on the other hand, contends that the ad merely means that respondent had the only TV sets in which *both* the chassis and tuner of each set were hand wired. Respondent's contention in its own words in this connection is as follows: "Both Heisig (R. 2857) and Farris (R. 1463), respondent's Director of Advertising, explained that at the time the advertisement was published respondent's competitors' TV sets had handwire chassis but their tuners contained printed circuitry; that respondent's advertisement was intended to inform the reader that respondent had the only TV sets which were completely handwired, in both the chassis *and the tuner*." (See respondent's proposed findings of fact at pages 83 and 84.)

This disagreement between the parties as to the message or representation conveyed by the advertisement in question can be resolved by an analysis of the advertisement itself and a consideration of other relevant evidence in the record that would aid in its interpretation. *Zenith Radio Corp. v. Federal Trade Commission, supra*.

An analysis of the advertisement under consideration compels the finding and conclusion that respondent represented in its advertise-

²⁴The above statement is shown as "typical" of respondent's advertisements in connection with the involved issue in "PARAGRAPH FOUR D" of the complaint. Respondent and complaint counsel agree that this statement is the key one. (See respondent's proposed findings of fact at page 83 and complaint counsel's reply brief at page 60.)

ment that its *entire* 1960 line of TV sets consisted exclusively of TV sets in which *both* the chassis and the tuner were hand-wired. This particularly follows from the following partial quotation from the aforementioned key sentence in the advertisement:

* * * THE ONLY TV LINE WITH COMPLETELY HAND-WIRED CHASSIS AND TUNER (Underscoring of words "And Tuner" as in advertisement; underscoring of "completely" added for emphasis.)

The above interpretation is implemented by other contents of the advertisement. Practically all of the second page of the advertisement is devoted to a portrayal of a hand-wired chassis. The whole tenor of the first three pages of the ad is to emphasize the hand wiring of respondent's TV chassis and tuner. The third page sets forth the reasons given by respondent for its decision to hand wire both the chassis and tuners of its TV sets.

The upper part of page 3 is devoted to a showing that a hand-wired chassis is superior to a printed chassis and although there is no direct representation therein that all of respondent's 1960 model TV sets have hand-wired chassis, the implication is clearly made that each and every set in respondent's 1960 line is hand-wired. The lower part of the same page expressly states that the tuner in "every" model is hand-wired. We quote again from the contents of page 3 of the ad: "So * * * Motorola goes all the way * * * with a hand-wired tuner in every model". The phrase therein "Motorola goes all the way" carries the clear and unmistakable implied representation that *every* chassis as well as every tuner in respondent's 1960 TV line is hand-wired.

The examiner's interpretation of the advertisement is thus broader than the charge of the complaint which merely charges that the respondent represented that its chassis are hand-wired but this interpretation is in no way in conflict with the charge of the complaint.

Respondent's contention that the advertisement be interpreted to mean merely "that respondent had the only TV sets which were completely hand-wired, in both chassis and the tuner" is rejected because the advertisement clearly indicates a representation that each and every TV set in respondent's 1960 line had a hand-wired chassis and tuner.

It is found that respondent's representation that each and every model TV set in its 1960 line had a hand-wired chassis was not literally true because by stipulation of the parties (Stip. of Facts, par. 28), it is established that respondent on October 15, 1959 had and was offering for sale under the Motorola trade mark a TV set with a plated circuit rather than a hand-wired chassis, identified as its Model 17P6. This was on the very day that respondent's above-

described, eight-page *Life* magazine advertisement was reproduced as a Supplement to the *Home Furnishings Daily*. (The eight-page advertisement, it will be recalled, is in the record as CX 54 A-H.)

Other pertinent facts with respect to respondent's said plated circuit TV Model 17P6 are these. It is a 17 inch so-called portable model. Although another portable model TV set bearing a closely similar model number, Model 17P5 is illustrated in CX 54, the plated Model 17P6 is not shown or referred to in CX 54.

The Motorola Model 17P6 was the only model in respondent's 1960 line of some 58 models which did not have a hand-wired chassis. The plated circuit Model 17P6 was discontinued about a year after its introduction to the market.

Respondent went to great advertising expense to promote the sale of the plated-circuit Model 17P6 as the model was made the subject of an eight-page magazine spread in an unspecified fall 1959 issue of *Life*. The same spread was also republished as a Supplement to the October 20, 1959 issue of *Home Furnishings Daily*, a copy of which is in the record as RX 1 A-H.

The eight-page *Life* ad (RX 1 A-H) prominently features the plated chassis of the Model 17P6 as "New engineering design * * * Revolutionary new manufacturing technique." Page 4 of the ad reads: "Heart Of This New Concept Is Motorola's History-Making Plated Chassis—Color Coded On Both Sides." Page 5 shows a large picture of the "Color-Coded Chassis".

Page for page, respondent gave its new single-model plated TV set as much advertisement space in *Life* and *Home Furnishings Daily* (RX 1 A-H) as it had to the prior announcements in the same media (CX 54 A-H) of its hand-wired *entire* 1960 line of TV models.

In the light of the above complex of facts, the question is whether such facts show "acts and practices" by respondent which are "to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act", as alleged in the complaint.

The examiner finds it difficult to believe that any prospective purchaser, be he ever so naive, would be misled into buying the highly proclaimed plated-chassis Motorola Model 17P6 under the belief that he was getting a handwired chassis TV set because of the representation in respondent's advertisement (CX 54 A-H) that every model in respondent's 1960 line of TV models was hand-wired.

Similarly it is difficult to see how any of respondent's competitors could possibly suffer any injury or damage from the fact that among

the 58 or more Motorola TV models which respondent advertised as its 1960 line of TV sets and represented as being all hand wired there was one which had a plated chassis when that very plated model was prominently advertised and featured as a plated model TV.

CONCLUSION

Although respondent's representation in CX 54 A-H that its entire 1960 line of more than 58 TV models contained hand-wired chassis is not wholly true due to the presence in such 1960 line of a single separately and prominently advertised plated-chassis TV model, the examiner finds that the said representation did not result in prejudice and injury to the public and of respondent's competitors and did not constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act. Accordingly the charge here under consideration will be dismissed.

12. *"Picture Power and Video Drive Voltage" Issue*

The complaint charges that respondent has falsely represented that:

All sets in its 1960 television line were equipped with 20,000 volts of picture power and 180 volts of video drive.

Respondent in its amended pleadings admits that not all of its 1960 line of television receivers were equipped with 20,000 volts of picture power and 180 volts of video drive.

It is found from the testimony of respondent's witnesses on the issue here under consideration that all of respondent's 14- and 17-inch TV sets in its 1960 line had less than 20,000 volts of picture power and less than 180 volts of video drive, and that the combined sale of such 14- and 17-inch TV sets represented 13.8 percent of respondent's total TV set sales. It is also found from such testimony that certain of respondent's 1960 model 21-inch sets did not have 180 volts of video drive and that only the standard and deluxe portion of the 1960 Motorola line contained 180 volts of video drive. (Tr. 1469 et seq.; Tr. 2858-2863.)

Respondent interposes a defense to the involved charge on the ground that the advertisement which gave rise to the charge cannot be interpreted to mean that respondent represented all of its 1960 model TV sets to have 20,000 volts of picture power and 180 volts of video drive, but must be interpreted to mean that only part of respondent's 1960 line of TV sets was represented as having these features. We must accordingly turn our attention to the advertisement which gave rise to the charge.

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A copy of the advertisement in question is reflected in CX 54 A-H. As shown in the previous issue, CX 54 A-H is a reproduction of an eight-page advertisement by respondent in an unspecified fall 1959 issue of *Life* magazine as republished as a Supplement to the October 15, 1959 issue of *Home Furnishings Daily*.

The pages of CX 54 which are pertinent to the issue here under consideration are pages 4 and 5 which are marked CX 54 D and 54 E. Clear across the very top of pages 3 and 4 which when open lie adjacent to each other is a line of reading material which reads as follows:

ALL ACROSS THE LINE THE MOST * * * inside.

On page 4 directly beneath part of the above-described top line of reading material appears the following:

Exclusives	Picture of
in the	hand-wired
hand-wired	chassis
chassis	

Beneath the above on page 3 appears the following:

Finest combination of picture-making features in TV today [This line appears in large type.]

—20,000 VOLTS OF PICTURE POWER puts a brighter picture on the screen

* * * * *

—180 VOLTS OF VIDEO DRIVE to give picture greater contrast

Turning now to page 5 of the advertisement, the following appears directly beneath a portion of the aforementioned top line which as shown spans the width of both pages 3 and 4 (*i.e.*, "All Across The Line The Most * * * inside"):

Exclusives	Picture of
in the	hand-wired
hand-wired	tuner
tuner	

Beneath the above appears the following:

—the first tuner specifically designed for remote control

Motorola's exclusive new long-distance Custom-Matic Tuner employs the First Frequency Controlled Oscillator Tube ever used in TV. Never requires fine tuning as you go from station to station.

Picture of
New Golden
Satellite IV
Remote Control

Respondent argues in support of its contention that the above advertisement does *not* represent that all of its 1960-TV sets have 20,000 volts of picture power and 180 volts of video drive as follows:

Complaint counsel's interpretation would discard "the most inside" so as to leave an incomplete statement; he would then complete it by jumping down the page of advertisement to the voltage figures. Thus, respondent's voltage claims would appear as a reference to *all* sets in the line. (Emphasis as in respondent's proposed findings of fact, see page 86.)

Although respondent makes reference to the advertisement's phrase "the most inside", it does not anywhere attempt to explain what it believes the phrase would mean to a prospective purchaser. The examiner in an effort to see if other portions of the involved advertisement carried representations of lesser voltages in portable TV sets has carefully examined the reading matter under seven pictures of respondent's "portable and table model" TV sets (presumably the 14- and 17-inch sets which the evidence shows have less than 20,000 volts of picture power and 180 volts of video drive) illustrated on pages 6 and 7 of CX 54 and finds that there is nothing in such reading matter relating to the picture power or video-drive voltage.

The examiner finds that the sentences in the advertisement here involved reading as shown above:

Finest combination of picture-making features in TV today
 —20,000 VOLTS OF PICTURE POWER puts a brighter picture on the
 screen

* * * * *

—180 VOLTS OF VIDEO DRIVE to give picture greater contrast

unmistakably represents that each and every TV set in respondent's 1960 line of TV sets has 20,000 volts of picture power and 180 volts of video drive. *Zenith Radio Corp. v. Federal Trade Commission, supra.*

CONCLUSION

The examiner finds that respondent's representation that all sets in its 1960 television line were equipped with 20,000 volts of picture power and 180 volts of video drive is false, misleading and deceptive.

13. "American Parts" Issue on Radio X23

The complaint charges that respondent has falsely represented that:

Its Model X23 [radio] was composed of essential and material parts manufactured in the United States.

Respondent in its pleadings denies that it made the above representation although it now admits by stipulation (Stip. of Facts,

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Par. 79) and also by an amendment to its answer (PAR. SIX E) that "parts essential and material to the operation of Respondent's Model X23 radio set are imported from Japan."

The representation as alleged in the charge shown above is based on an advertisement, contained in specifications distributed by respondent to its distributors and dealers, which reads as follows:

Motorola proudly introduces Model X23 which, to the best of our knowledge, is the smallest 6 transistor American brand radio * * * ever. (Stip. of Facts, Par. 29.)

Based on the above advertisement the examiner finds that respondent did represent, as alleged in the complaint, that its Model X23 radio was composed of essential and material parts manufactured in the United States. *Zenith Radio Corp. v. Federal Trade Commission, supra.*

In view of the fact that it is established by stipulation that parts essential and material to the operation of respondent's Model X23 radio set are imported from Japan, it is found that respondent's representation here under consideration is false.

CONCLUSION

The examiner finds that respondent's representation that its Model X23 radio set was composed of essential and material parts manufactured in the United States is false, misleading and deceptive.

14. "Failure To Disclose Country of Origin" Issue

The issues here under consideration are those arising principally from charges in paragraphs 7, 8, 9 and 11 of the complaint.

Summarized these paragraphs charge that respondent sells certain radio sets containing essential and material parts imported from Japan but fails to clearly and conspicuously disclose this fact to the prejudice of the purchasing public in violation of the provisions of Section 5 of the Federal Trade Commission Act.

Although originally denied, respondent now admits "that before offering certain of its radio sets for sale it does not place markings on the said radio sets and their containers and does not disclose in its instructions and warranties of said sets or elsewhere that parts essential and material to the operation of said radio sets are imported from Japan", as alleged in the complaint. (See respondent's amendment to its answer, par. 7.)

The central issue here is whether the purchasing public has a preference for radios, the essential and material parts of which are of domestic origin. In this connection, the examiner has taken official notice of the following facts:

(1) That, in the absence of an adequate disclosure that essential and material parts of a product, including radio sets, are of foreign origin, the public believes and understands that said essential and material parts are of domestic origin, subject to the right of respondent to present evidence to rebut such fact.

(2) That a substantial portion of the purchasing public has a preference for radios, the essential and material parts of which are of domestic origin, subject to the right of respondent to rebut such fact.

Manco Watch Strap Company, (1962) Docket 7785.

It appears from respondent's proposed findings of fact and reply brief that it interposes the following defenses: (1) that the testimony of its witnesses rebuts the first mentioned official notice and that the further testimony of the same witnesses and certain statistical data rebuts the second mentioned official notice; (2) that respondent's failure to disclose country of origin on foreign components is not deceptive and misleading to the purchasing public because "all of respondent's radios are fully engineered, designed and assembled in this country" (See respondent's proposed findings at p. 94); and (3) that due to "the difficulties and hardships that would arise if respondent's radios are to be marked as to origin of components" there should be no requirement for such markings of country of origin (*idem*, pp. 95-96).

Some background facts will be of assistance on the issues here involved. Respondent is one of the leading and largest producers of radio and television sets in the United States. As shown earlier herein, its sales from all sources in the year 1960 was nearly \$300,000,000. The record shows that respondent does not manufacture the components which go into its radio (and television) sets but functions chiefly as a designer and assembler of such sets which it sells under its nationally known name of "Motorola". It purchases the component parts for its radios from various supplier-manufacturers.

In early 1957, respondent's top management authorized its purchasing department to go "anywhere in the world to buy components" meeting its quality specifications if such components could be purchased abroad at a lesser cost than domestically. Although respondent imports some radio components from other parts of the world, its principal source of imported components is Japan and imports from other countries are nominal. (See Tr. 3057-3059; and RX 40 which shows percentage of total parts imported for use in seven representative Motorola transistor radios. Respondent in its proposed findings at page 94 acknowledges that all foreign com-

ponents in these seven representative models were from Japan.) The dominant factor in respondent's purchase of Japanese radio component parts has been their lower prices. (See testimony of respondent's executive vice president; Tr. 1889, 1892; 3129 et seq; 3352, 3358.) Respondent has had a full time purchasing agent in Japan since about the middle of 1958. (Tr. 1960.) It has been importing Japanese made radio parts longer than any of its principal competitors. (Tr. 1889, 1892, and RX 35 A-C and testimony with reference to said exhibit at Tr. 162-1972.)

The issues here under consideration involve foreign components used in transistor radios as distinguished from tube radios. In 1959, respondent had a line of 11 transistor model radios. (CX 5; Stip. of Facts, Par. 17.) In 1961, it had a line of 9 transistor radios. (CX 62 D; Stip. of Facts, Par. 29.)

One of respondent's 1961 transistor radio models was its Model X23 discussed under the previous issue above and advertised as the "smallest six transistor American brand radio * * * ever", generally known as a miniature transistor radio. (CX 62 D.) 45 percent of the components in the X23 radio are imported from Japan and include among other essential and material parts, such components as transistors, transformers and a speaker. Similarly, the cost of the Japanese components in the X23 constitutes 44 percent of its total cost.

At least six other transistor model radios, not identified as to year of model, have been or are being sold by respondent that contain components imported from Japan. In three of these, from 32 to 38 percent of their parts are imports from Japan. In the remaining three models, from 6 to 7 percent of their parts are imports from Japan, although some of these same models are also made of all domestic parts. (RX 40.)

A number of respondent's principal competitors, whose names like that of respondent are household words, also use Japanese components in the transistor radios they design, assemble, and sell, but as heretofore shown respondent has been importing Japanese made radio parts longer than any of its principal competitors. Like respondent, none of respondent's major competitors disclose to the purchasing public the Japanese origin of essential components in their radios. However, at least one of respondent's principal competitors, Zenith, uses only American-made components in Zenith trade-named radios and uses that fact as an advertising point. One of its advertising slogans is "Made in America by Americans". (Tr. 3115).

The Japanese components used by respondent in its transistor radios are equivalent in quality to those made in the United States.

Repairs or replacements for such foreign parts are as readily available to purchasers of respondent's transistor radios as they are for domestic components.

All of respondent's radios, including those containing Japanese parts, are engineered, designed, and assembled in the United States by personnel in the employment of respondent. The engineering design of a radio bears the same important relationship to the creation of a radio as architecture does to the creation of a building.

The above concludes our summary of background facts.

In rebuttal to the aforementioned official notice taken by the examiner that the purchasing public assumes that radios offered for sale are made up of American-made components unless it is put on notice to the contrary, respondent called five witnesses. None of these were consumer witnesses. All are retail dealers. Three of the five are engaged in the sale of radios, including the respondent's Motorola radios, as part of their furniture, appliance, or jewelry businesses. The remaining two witnesses are engaged in the business of selling and servicing radios and television sets, including Motorola radios.

From their long experience with hundreds of retail customers, these dealers generally testified that the buying public is familiar with and has faith in the nationally advertised names of Motorola, Westinghouse, Zenith, General Electric, and Admiral. From their testimony, it is further established that consumers when buying radios never inquire as to whether the aforementioned American-brand radios contain American or foreign components and never express any statement of belief, one way or another, when shopping for an American-brand radio, relative to country of origin of radio parts in such radios. From this testimony respondent argues in effect that the consumer is indifferent to the country of origin of components that go to make up well-known American-brand radios. (See respondent's reply brief, p. 12 et seq.)

In furtherance of the official notice taken by the examiner and in rebuttal of the testimony given by respondent's aforementioned dealer-witnesses, complaint counsel called two consumer witnesses, one being a schoolteacher and housewife, and the other, a photographer. Each had purchased a Motorola transistor radio within the past two or three years under the impression that all parts therein were American made because they were buying an American brand name radio.

The examiner finds that the testimony of respondent's dealer-witnesses insofar as such testimony purports to show that purchasers do not assume, in the absence of disclosure to the contrary, that the components of radios offered for sale are of domestic origin and

insofar as such testimony purports to show that purchasers are indifferent to the country of origin of such component parts, is without probative value and not entitled to credence. On the contrary, it is found that the official notice taken by the examiner that the purchasing public assumes, unless disclosure is made to the contrary, that the essential parts of radios offered for sale are of domestic origin, is sustained by the inferences which must be drawn from the testimony of respondent's dealer-witnesses and by the direct testimony of complaint counsel's two consumer witnesses. The official notice here involved, based on the manifold experience of the Commission over many years, cannot be lightly set aside by opinion evidence of dealer-witnesses, as to the unexpressed assumptions of consumers with respect to countries of origin of components in radios ostensibly selling as wholly American-made radios but actually containing foreign components.

The testimony of the same five dealer-witnesses was also elicited and offered in rebuttal to the examiner's official notice of the fact that a substantial portion of the purchasing public prefers to buy radios made of essential components manufactured in the United States. There are common threads running through all or most of such testimony. One of the five dealer-witnesses deals exclusively in nationally advertised American brand name transistor radios. The other four handled both nationally advertised American brand name radios, such as Motorola, G.E., Westinghouse, Zenith, Admiral and Philco, and nondescript Japanese made radios, selling under American names given them by their American importers, such as Ross, Mayfair, Honey Tone, Lloyd's, Viscount and Modern Age. All agree that low price has been the determinative factor in the sale of transistor radios. The sales of those handling both the American brand radios and the Japanese nondescripts have been predominantly of the latter because their prices have been cheaper.

In the experience of at least four of these five dealers, the largest body of purchasers have been teenagers with little money to spend or parents buying inexpensive radios for their children. Since the interest of this group has been primarily in price, these purchasers have readily accepted the Japanese imports because of their lower prices. The record shows, however, that as soon as American-brand radios began, as in recent years, to better compete in price with the Japanese nondescript transistors, a preference asserted itself on the part of many buyers for the well known American-brand radios, whenever they could be bought for about the same price or for only a few dollars more than the Japanese radios.

On the direct question of whether the purchasing public has verbally indicated a preference for radios composed of American-made

parts, one of respondent's dealer-witnesses testified: "That I can't tell, what the public has in its mind. *I am no mind reader on it.*" (Emphasis supplied) (Tr. 3395.) This was basically the response of all of respondent's dealer-witnesses to the same question. (See Tr. 3383.) But all of respondent's witnesses agree that the American public generally has a preference for well-known American brand names, such as Motorola, Zenith, Westinghouse and G.E., to foreign imports.

The testimony of the five dealer-witnesses here under consideration insofar as it purports to show that the purchasing public has no preference for radios, the essential and material parts of which are of domestic origin, is rejected as lacking probative value.

The testimony of complaint counsel's two consumer witnesses established independently and also gave corroboration to the official notice taken by the examiner that a substantial portion of the purchasing public prefers radios, containing domestically made component parts.

Although respondent relies principally on the testimony of its dealer-witnesses to rebut the official notice here under consideration, it also presented as "additional evidence" certain statistical data published by the Bureau of Census and other non-governmental sources for the purpose of showing "that the public has no preference for radios made only of domestic components." (See respondent's proposed findings, pp. 101-102.) This data is contained in Respondent's Exhibits Numbers 65, and 67.

RX 65 shows imports into the United States of radio receivers (except radio-phonograph combinations) and of receiving tubes and components such as resistors, capacitors and inductors, from all countries for the years 1952 through 1961. The exhibits show that the percentage of imports from Japan out of the total from all countries increased from a little less than one percent in 1952 to 76.5 percent in 1961. In 1960 and 1961, about 75 percent of the dollar imports from Japan was in the form of transistor radios. The described imports from Japan in 1961 declined one-half of one percent from that in 1960.

RX 67 deals with a comparison of the total United States production of portable radios, both of the transistor and vacuum tube types, with total imports of the same commodities from Japan in the years 1959, 1960, and 1961, but with incomplete figures for 1959. The total domestic production of such radio sets in this country increased from 4,534,616 in 1960 to 5,747,140 in 1961. Imports of radio sets from Japan in the same years increased from 6,395,815 in 1960 to 10,056,741 in 1961.

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On the basis of this reported data, respondent contends: "Certainly these figures belie the existence of any widely held prejudice against the Japanese product."

This contention is rejected because the evidence shows (1) that low prices have been the dominant factor in the growth of radio set imports from Japan and (2) that where the price differential between Japanese and American brand radios is narrowed, a preference for the American brand radio reasserts itself. In this connection the testimony of the largest of respondent's dealer-witnesses in point of transistor radio sales, is pertinent:

HEARING EXAMINER BUSH: You referred to radios which you call "nondescript Japanese radios." Do all of these radios fall in that category?

THE WITNESS: I would say they fall in that category.

* * * * *

HEARING EXAMINER BUSH: * * *

Do those radios then sell substantially less than comparable models manufactured by well-known American companies?

THE WITNESS: At one time they did, but in the last year or so, American radios have come out where they are competing with these nondescript Japanese radios, and a bigger portion of our business now is we are selling American brands in competition with the Japanese, whereas at one time, these Japanese radios had an absolute heyday. Now they don't have that anymore because for a few dollars more, the customer will now buy a Motorola or a General Electric or a Westinghouse, because we are only talking about a few dollars, not where formerly it was ten, fifteen dollars' difference in price. (Tr 3129-3130)

Since the evidence shows that the purchasing public prefers American-brand radios to Japanese imports when the former can be purchased at the same price or even for a few dollars more than the Japanese product, the statistical data in RX 65 and 67 cannot be interpreted or given any weight as showing an American preference for Japanese radios as against American-brand radios. But there are additional reasons why such statistical data is not entitled to any weight on the issue of preference. These have been succinctly stated by complaint counsel in their proposed findings of fact at page 135 as follows:

* * * The exhibits, taken together, cannot be understood to show that the public has a preference for Japanese radios and radio parts or does not have a very strong preference for American radios and radio parts, because there is absolutely no way of telling whether the imported components ended up in consumer products; or in what density; or whether the completed radios, if sold to the public, were clearly marked as to country of origin; or whether such complete radios were competitive with American brand radios or were one or two transistor, three or four dollar radios.* * *

The examiner finds that the statistical data here under consideration fails to rebut the official notice taken of the fact that a sub-

stantial portion of the purchasing public has a preference for radios, the essential and material parts of which are of domestic origin.

Respondent's second defense is that its failure to disclose the foreign origin of the essential and material components of its American trade-named Motorola transistor radios is not deceptive because "the part most important to the radio's performance, its design and engineering, is wholly American; and the craftsmanship involved in the process of assembling the components into the end product is also wholly American." (Respondent's proposed findings of fact, p. 98.)

The examiner agrees that the design, engineering and assembling of the involved radios are wholly American but disagrees that these aspects of putting a radio set together are more important than the essential and material components that go to make up a radio, as implied by respondent. Although we are not here concerned with the quality of the Japanese components used by respondent in its radio sets which we have found to be equal to that of their American counterparts, we are concerned with the preference by the American public for radios manufactured out of American-made components, as established by our official notice and by the only direct consumer evidence in the case. As the Commission has stated in the *Manco* case, *supra*, we note here that "* * * we neither approve nor disapprove the state of mind reflected by the consumer preference for American goods; we merely recognize that it exists."

The fact that respondent and its many competitors, both large and small, use Japanese components in their transistor radios but fail to disclose this fact to the consuming public, although the legal requirement for such disclosure has long been established, is indirect but additional evidence that those in the industry recognize the preference for American-made goods and remain silent about the foreign components in their radios out of apprehension that disclosure might adversely affect sales. The fact that at least one of respondent's principal competitors, Zenith, advertises its products as being wholly American-made under the apparent belief that this is a selling point is yet another indication of the soundness of the official notice taken herein that the American purchasing public prefers radios composed of parts manufactured in the United States.

Another facet of respondent's second defense is the contention that the disclosure of the Japanese origin of the components of its radios would be "more deceptive and misleading to the public than a failure to disclose" in that, as argued by respondent, the "word 'Japan' on respondent's radios may mislead some consumers into rejecting them because of doubt as to quality or convenience of repair and neither

would be warranted." (Respondent's proposed findings of fact, p. 97.)

The examiner is of the opinion that this contention is without merit. The evidence shows that the consuming public has great confidence in nationally advertised American-brand names and in the companies which put out such brand-name merchandise. There can be little doubt that if respondent put its prospective customers on notice concerning the foreign origin of some of its component radio parts the customers would be fully satisfied that respondents stood in back of such components as much as it did behind its domestic components. Similarly, the public would realize that respondent's nationwide service facilities would be available for the service of any parts of its products, whether they be of foreign or domestic origin. But in any event, in view of the public's preference for radios whose essential component parts are made in the United States, the consumer should not be deceived by the silence of a manufacturer into believing that a nationally advertised American brand product is made of parts manufactured in this country when in fact the components are of foreign origin.

Respondent's final argument is that "practical" difficulties in marking radio sets with the names of countries of origin of its foreign components would compel it "to abandon its imported components". The examiner is not impressed with the "difficulties and hardships" respondent claims "would arise if respondent's radios are to be marked as to origin of components." (Respondent's proposed findings of fact, pp. 95-96.) Since it appears that all foreign components in respondent's line of transistor radios are imported from Japan,²⁵ it is difficult to see why there should be any special or unusual difficulties in marking radios with only one country of foreign origin. Respondent's executive vice president testified that such markings would be only "somewhat impractical". (Tr. 1918.)

It is found that respondent would have no special or unusual difficulties in its manufacturing processes in segregating its foreign components, even if received from many foreign countries, in the manner required to assure easy identification for appropriate markings of foreign origin of component radio parts on completed radio sets or their containers. The right of the public to disclosure of foreign origins is paramount to such inconvenience and extra expense as respondent may have in the markings of foreign origins. The Com-

²⁵ Respondent's representative transistor radios which employ foreign components are shown in RX 40 and 64. All such components are imported from Japan as may be seen from the following statement made by respondent in its proposed findings of fact at page 94: "Respondent's exhibits 40 and 64 list representative models of respondent's radios and the extent to which each is comprised of Japanese-made parts."

mission in *Olson Radio Corporation*, Docket 7702 (May 9 and June 26, 1962) adopted the findings of fact in the Initial Decision therein which contains the following statement:

* * * If the corporate respondent sells in interstate commerce imported merchandise which presents insurmountable difficulties in complying with the foreign labeling laws, its responsible officials must choose between complying with the law or dropping such merchandise from their product line. The injury to the public is just as real whether failure to disclose the foreign origin of a product results from intentional fault, inadvertence, or difficulty of compliance.* * *

It is found that none of the evidence presented by respondent rebuts the evidence adduced by complaint counsel that a substantial portion of the purchasing public has a preference for radios assembled from essential and material component parts of domestic origin.

The evidence shows that respondent has furnished brochures, leaflets, radios, radio containers, warranties and operator's instructions to retailers to others which fail to disclose the foreign origin of components of certain of its radios. Accordingly, it is found that respondent furnished or otherwise placed in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the country of origin of essential and material parts of certain of their radio sets.

CONCLUSIONS

The examiner finds that the failure by respondent to disclose the foreign origin of material and essential parts of its radio sets have had, and now have, the capacity and tendency to mislead members of the purchasing public into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

15. "Abandonment" Issue

Respondent seeks a dismissal of all but one of the seventeen charges of false and misleading advertisements of representations contained in paragraph 5 of the complaint on the ground that the advertisement claims which lead to such charges were abandoned prior to the issuance of the complaint herein. A motion to the same effect made at the prehearing conference herein was denied. The present request will be considered as a renewal of the earlier motion.

Preceding sections of this Initial Decision show that all but two of the seventeen charges set forth in paragraph 5 of the complaint

have been fully sustained by the evidence of record herein after full hearing.

The facts of record show that respondent discontinued the involved advertising claims prior to the filing of the complaint in this cause. Respondent contends (1) that this discontinuance of the challenged advertisements constitutes "abandonment" of the use of such advertising claims and (2) that with respect to each of the "abandoned claims there are circumstances which exist which preclude the necessity of entering a cease and desist order to bar such claims". (Respondent's proposed findings of fact, p. 88.)

Summarized, the "circumstances" pleaded by respondent as justifications for the nonentry of a cease and desist order herein on the involved representations are: (1) that it has stopped manufacturing the radio and television receiving sets with respect to which it has made the challenged advertisement claims, (2) that it no longer makes the advertisement claim that its intrusion gun type picture tube will last 10 times longer than the conventional gun picture tube because the intrusion tube "has now become the most popular gun used and respondent admits that its claim of greater reliability, though validly made at the time, would not be valid today", (3) that it no longer advertises its Custom-Matic Tuner as being the first tuner specifically designed for remote control and never requires fine tuning because there are "now competitive tuners which perform all of the functions of respondent's Custom-Matic Tuner", and (4) that it has not for more than two years made its former advertised claim that its 4-Wafer Cascade Tuner was the only tuner which turned out a stronger signal than it picked up.

The term "abandonment" necessarily bears a connotation of an acknowledgment by a respondent of a wrongful practice and a bona fide showing of intent not to engage in the proscribed conduct in the future.

In the instant matter, the "abandonment", or more properly speaking, the discontinuance of the challenged advertisements was not due to any recognition of the wrongfulness of the involved practices and a desire to disengage from unlawful acts but was due entirely to the operation of normal business factors, as shown below.

Dealing first with respondent's contention that it is entitled to a dismissal due to the "circumstance" that it had stopped manufacturing the radio and television receiving sets with respect to which it has made many of the challenged advertised claims, the record shows that respondent, like other members of its industry, puts out a new line of radio and television receiving set models every year which it advertises as the following year's models. The seventeen charges above referred to relate principally to the advertised claims

made in 1959 with reference to respondent's 1960 line of radio and television sets. (Stip. pars. 6, 11, 17, 23 and 24.) Pursuant to respondent's policy of introducing a new line of radio and television receiving set models every year, the advertisements of respondent's 1960 models were necessarily terminated within a year of their commencement or for the most part in the latter part of 1959. It is hardly necessary to state that such a discontinuance of the challenged advertisements is entirely devoid of any elements of recognition of wrongful practices and could not in any sense constitute an "abandonment" of a character entitled to consideration as a basis for a dismissal of charges of false and misleading advertisements.

Similarly, the three other "circumstances" which respondent asserts as showing abandonment of the remaining challenged advertisement claims are also devoid of any recognition of deceitful practices. With respect to the "circumstance" relating to the "abandonment" of its representation that its 4-Wafer Cascade Tuner was the only tuner that turned out a stronger signal than it picked up, respondent asserts that there was only one advertisement on this character, that the advertisement took place about two and a half years prior to the issuance of the complaint, and that "it cannot reasonably be presumed that respondent's abandonment of the claim is less than permanent." Contrary to the respondent's contention that the advertisement was published only once, the record shows that advertisement was published at least three times. (CX 46, 47 and 58.) No explanation is given by respondent as to why it has discontinued the advertisement here under discussion and there is no acknowledgment that the discontinuance was due to the fact that the representation was false.

The "circumstances" asserted by respondent for the "abandonment" of its claim that its intrusion type picture tube would outlast 10 times the conventional picture tube and of its claim that its Custom-Matic Tuner was the first tuner specifically designed for remote control and never required fine tuning, constitute no more than admissions that it discontinued such advertisement claims because competitors now had the same features in their television receiving sets and not because as found *infra* that the original claims were false and misleading.

As seen, 15 of the 17 false and misleading advertising charges here under consideration have been found fully sustained after full hearing. Respondent has not only failed to acknowledge any wrong doing in making the advertising claims which lead to the said 15 charges but has also chosen to contest each of the charges and to insist that the advertising practices in question had been legal. On many of these charges, the defenses presented have been most

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tenuous. In the circumstances of this case, the fact that respondent discontinued the false and misleading advertisements prior to the issuance of the complaint is immaterial. *Ward Baking Company*, 54 F.T.C. 1919. In a case which closely parallels the instant proceeding on the issue of abandonment, the Court of Appeals in a *Per Curiam* opinion in *Spencer Gifts, Inc. v. Federal Trade Commission*, 302 F. 2d 267 (3rd Cir. 1962) held:

In this case the Federal Trade Commission has issued a cease and desist order with reference to certain deceptive advertising of the petitioner, despite the fact that the petitioner had discontinued the conduct in question several months before the Commission's inquiry began. The sole question now is whether the Commission was arbitrary in concluding that, the timing and circumstances of the abandonment of the illegal practice considered, there remained sufficient risk of its resumption to justify interdiction. We are satisfied that the Commission did not abuse its discretion, particularly since the petitioner insisted before the Commission that the practice in question had been legal.

In the present case there is not only an insistence, as in the *Spencer* case, that the challenged advertisements were legal but also no indication anywhere in the record or on brief that respondent intends to refrain from making similar false and misleading advertisements in the future. The evidence shows that the technical representations involved in the advertisements were generally made without advance clearance or approval from respondent's engineering staff. From the examiner's observation of respondent's fine electrical engineers, he is convinced that they would not have given advance approval or assumed professional responsibility for the representations made in the advertisements, if they had been called upon to render independent judgment on the proposed representations. Respondent is in need of a new advertising policy which would require independent clearance from its engineering staff on all technical representations proposed to be made in advertisements to the end that only true and accurate technical representations be made about its products which generally have high quality.

CONCLUSION

The examiner finds that the public interest requires denial of respondent's motion for a dismissal of 16 of the 17 charges of unlawful practices contained in paragraph 5 of the complaint, notwithstanding respondent's discontinuance of said unlawful practices prior to the issuance of the complaint herein. (It should be noted, however, that there will be a dismissal of 2 of said 16 charges on the merits of respondent's defenses thereto, rather than on the ground of abandonment.)

Order

ORDER

It is ordered, That respondent, Motorola, Inc., a corporation, and its officers, agents, representatives and employees directly or through any corporate or other device in connection with the offering for sale, sale or distribution of radio sets, television sets and replacement parts therefor in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication:

(a) That its Model 8x26 radio set or any substantially similar receiver has 9 times more capability than other receivers to select a desired radio station or that any of its receivers have selectivity in excess of the true facts.

(b) That its Model 8x26 radio set or any substantially similar receiver has the power output of a 10-tube radio or that any of its receivers has a power output in excess of the true facts.

(c) That its Models 8x26, L12 and L14 radio sets or any substantially similar receivers play for hundreds of hours on low priced batteries or that any of its receivers play on batteries for any number of hours in excess of the true facts.

(d) That the chassis or audio system contained in its Model L14 radio set or that any substantially similar chassis or audio system contained in any of its receivers is revolutionary or new or that any of its chassis or audio systems that are in general use in the radio industry are revolutionary or new.

(e) That its sentry system eliminates 3 out of 4 service calls or that any of its protective devices will reduce the necessity for repairs of receivers in excess of the true facts.

(f) That its sentry system triples TV life expectancy or that any of its protective devices prevent receiver failures for periods in excess of the true facts.

(g) That its picture tubes last 10 times longer than comparable picture tubes or that any of its picture tubes are constructed to last for periods in excess of the true facts.

(h) That its Custom-Matic Tuner or any substantially similar mechanism will not require fine tuning or that any of its tuners is the first tuner specifically designed for remote control.

(i) That any of its tuners is the only tuner to turn out a stronger signal than the one it picks up.

(j) That all or any of its receivers have picture power or video drive in excess of the true facts.

(k) That its receivers are manufactured in the United States when material and essential parts of said receivers are produced in a foreign country or foreign countries.

2. Misrepresenting in any manner the origin, power, economy of operation or performance of its receivers or component parts.

3. Offering for sale, selling or distributing products which are, in whole or in substantial part, of foreign origin, without clearly and conspicuously disclosing on such products, and if the products are enclosed in a package or carton, on the front of said package or carton, in such a manner that it will not be hidden, obliterated or easily removed, the country of origin thereof.

4. Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

It is further ordered, That the charge of the complaint relating to respondent's representation that its Model L14 radio "was the most powerful long-distance all-transistor portable available", as contained in PARAGRAPH FIVE C. and PARAGRAPH SIX C. of the complaint, be, and the same hereby is, dismissed.

It is further ordered, That the charge of the complaint relating to respondent's representation that "its 1960 television receivers represented the only television line with completely hand-wired chassis", as contained in PARAGRAPH FIVE D. and PARAGRAPH SIX D. of the complaint, be, and the same hereby is, dismissed.

It is further ordered, That respondent's motion for dismissal of all charges contained in PARAGRAPHS FIVE AND SIX of the complaint, except one, on the ground of abandonment of the unlawful practices therein alleged, be, and the same hereby is, denied.

OPINION OF THE COMMISSION

JANUARY 14, 1964

By Dixon, *Commissioner*:

I

This matter is before the Commission for consideration of exceptions by both parties to the hearing examiner's initial decision and

order dismissing two charges of the complaint and holding that respondent had violated Section 5(a)(1) of the Federal Trade Commission Act¹ on various other counts. In substance the complaint charges respondent with falsely advertising the capabilities and characteristics of its radio and TV sets and with failure to disclose the foreign origin of component parts of its radio sets. Although the facts were largely stipulated, their interpretation is sharply disputed.

II

Counsel in support of the complaint except only to the hearing examiner's dismissal of the charges of the complaint relating to respondent's allegedly false representations that: (1) its Model L14 radio was the most powerful long-distance all-transistor portable available (initial decision, pp. 101-102, 106, 162); and (2) its 1960 television receivers constituted the only television line with completely hand-wired chassis (initial decision, pp. 140-145, 162).

Both parties are agreed that a radio's "sensitivity," which is defined by stipulation as "The characteristic of a radio that determines the extent to which a radio is capable of receiving weak or distant signals," is the primary criterion of power in "the most powerful long distance" issue, and both introduced sensitivity measurements as proof. The hearing examiner dismissed the results of respondent's sensitivity tests on the ground that they were made just prior to the hearing and were likely biased in respondent's favor. He relied instead upon tests conducted by respondent's competitors, *viz*, tests by Zenith Radio Corporation in 1957, 1959 and 1962, and by Radio Corporation of America in 1958, showing that the Motorola Model L14 radio was less sensitive than the Zenith Model Royal 1000 and the RCA Model MBT-6. However, the hearing examiner found, and we concur, that the latter two models are not fully comparable to Motorola Model L14 because they are short wave radios containing many bands other than the standard band and are much heavier and more expensive radios. Since buyers of standard band radios do not expect to receive short wave reception, we find no likelihood of the consuming public being deceived by respondent's "most powerful long-distance all-transistor portable" allegation. Complaint counsel's exception to dismissal of the portion of the complaint relating to this issue is thus denied.

The exception by counsel in support of the complaint to dismissal of the completely hand-wired chassis charge is also disallowed. Respondent's advertisement in the October 15, 1959, supplement to

¹ 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C.A. 45(a)(1).

Home Furnishings Daily,² to the effect that its 1960 TV line was the only TV line with a completely hand-wired chassis and tuner, was, at worst, ambiguous rather than untrue or false. While such representations may be enjoined,³ the circumstances here present, including the facts that (1) only a single advertisement was involved, (2) the advertisement was published in a trade magazine not usually distributed to consumers, and (3) the single plated circuit model included in respondent's 1960 line was discontinued and all of its 1961, 1962 and 1963 models were completely hand wired, dictate dismissal.

III

Respondent's exceptions deal principally with the matter of foreign origin of component parts. In particular, respondent excepts to: (1) official notice by the hearing examiner (initial decision, pp. 148, 149) that a substantial portion of the purchasing public prefers radios, the essential and material parts of which are of domestic origin and, in the absence of disclosure to the contrary, the public believes and understands that such parts are of domestic origin; (2) the finding (initial decision, p. 157) that respondent's failure to disclose the foreign origin of material and essential parts of its radio sets has the capacity and tendency to mislead members of the purchasing public to purchase substantial quantities of respondent's products; (3) the finding (initial decision, p. 148) that respondent misrepresented that its Model X23 radio was composed of essential and material parts manufactured in the United States; and (4) the portions of the hearing examiner's order requiring disclosure of foreign origin (initial decision, p. 162).

Respondent does not manufacture all of the component parts of its radios, but, rather, purchases some parts from domestic and foreign manufacturers. Foreign parts, which are imported chiefly from Japan and to a lesser extent from Germany, Holland and England, include such elements as speakers, transformers, transistors, ceramic capacitors, coils, tuners, and tuning condensers. Respondent's 1961 line included nine transistor radio models, including the X23, which respondent advertised as "* * * the smallest six transistor American brand radio * * * ever!" Forty-five percent of the component parts, representing forty-four percent of the total cost of

² The hearing examiner erroneously found that this advertisement was also published in *Life* magazine.

³ "It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act." *United States v. 95 Barrels of Vinegar*, 265 U.S. 438 (1924).

Model X23, were of Japanese origin. Respondent's other 1961 transistor radios contained from seven to thirty-eight percent foreign-made parts. A purchaser cannot tell from looking at the exterior of such models that they contain foreign-made parts and rarely, if ever, do prospective purchasers examine the interior of radios. Inspection of the interior of Model X23 discloses that while the tuning condenser bears the name Mitsumi Electric Company, Ltd., the word "Japan" stamped on the speaker is completely concealed by a sticker. Most of the other foreign-made components are not marked to show origin and are indistinguishable in appearance from domestic parts, so that even an astute purchaser inspecting such parts would not be apprised of their origin.

Respondent introduced testimony of its senior project engineer and of its Japanese purchasing agent to the effect that many of its competitors, including the largest and best known radio manufacturers in the United States, also use foreign parts in their radios. It appears from the testimony that the practices of representing radio and television sets as American-made, even though such sets contain foreign-made components, and of failing to disclose the origin of such components are widespread in the radio and television industry.

In the light of the apparent industry-wide incidence of the aforementioned practices, the Commission, on September 3, 1963, directed that its Bureau of Industry Guidance, in consultation with the Bureau of Deceptive Practices, initiate proceedings looking to the promulgation of a trade regulation rule dealing with foreign-made component parts in the radio and TV industry, as provided for in § 1.63 of the Commission's Procedures and Rules of Practice (August 1, 1963), 28 Fed. Reg. 7080, 7083 (July 11, 1963).

In the exercise of its discretion, the Commission has decided to suspend consideration of the foreign-origin issues pending completion of the trade regulation rule proceeding, at which time we will take such action as we then deem to be appropriate.

Accordingly, in respect to the foreign-origin issues, we will not at this time adopt the hearing examiner's findings and conclusions numbered 13 and 14 at pages 147 through 157 of the initial decision nor paragraphs 1(k), 3 and 4 of the hearing examiner's order at page 162 of the initial decision. This action is not to be considered as a decision upon the merits of these issues.

IV

Respondent has also taken exception to paragraphs 1 and 2 of the examiner's order, contending that they are not reasonably related

to the practices disclosed on the record, are not sufficiently clear and precise in their terms, and are unnecessary to prevent continuance or repetition of the practices found. We find no substance to respondent's contention with respect to paragraph 1. In fact, respondent concedes that its objections to that paragraph are minor and we find that they are set forth principally in the form of a proposed order appended to its appeal brief. A review thereof discloses that respondent would limit the prohibitions in the subparagraphs of paragraph 1 to a specific model or type of radio, audio system or tuner or a "substantially similar" device. Such a restriction would make paragraph 1 of the order practically worthless in view of respondent's own statement that its products "are under continuous improvement and change with new models introduced each year." Respondent's appeal as to this paragraph is denied.

Paragraph 2 of the order would prohibit respondent from misrepresenting in any manner the origin, power, economy of operation or performance of its receivers or component parts. We agree with respondent that such a broad prohibition is not justified in this case. In our view, the subparagraphs of paragraph 1 of the examiner's order, which we are adopting, are sufficiently broad to bar future use of those deceptive representations shown in this record. Accordingly, the order in the initial decision will be modified by striking therefrom paragraph 2.

V

We have reviewed the entire record and are of the opinion that, aside from the portions of the record involved in the appealed issues, those portions of the initial decision dealing with the charges that respondent falsely represented that its tube sentry system eliminated three out of four service calls require revision. Specifically, we do not find, as did the hearing examiner at page 108 of the initial decision, that the consuming public would interpret respondent's advertisements of having eliminated three out of four service calls to refer only to service calls relating to tube failures. In the face of such unqualified claim, we cannot expect the purchasing public, unversed in TV electronics, to make such a restrictive interpretation. The fourth full paragraph of page 108 of the initial decision will accordingly be revised.

VI

The reference on page 66 of the hearing examiner's initial decision to "Federal Trade Practices Act" is obviously in error and will be changed to read "Federal Trade Commission Act."

VII

The hearing examiner's initial decision, modified and supplemented as indicated in this opinion, will be adopted as the decision of the Commission. An appropriate order will be issued.

FINAL ORDER AS TO ALL ISSUES EXCEPT THOSE PRESENTED UNDER PARAGRAPHS SEVEN, EIGHT, AND NINE OF THE COMPLAINT*

This matter having been heard by the Commission upon exceptions to the initial decision by both parties, and upon briefs and oral argument in support thereof; and

The Commission, for reasons stated in the accompanying opinion, having determined that the exceptions of counsel supporting the complaint should be denied and that respondent's exceptions should be granted in part and denied in part; and

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

It is ordered, That the beginning of the first sentence of the initial decision be, and it hereby is, amended to read:

"The general issue in this matter is whether the respondent, a distributor of radio and television receivers, is in violation of the Federal Trade Commission Act * * *."

It is further ordered, That the fourth full paragraph on page 108 of the initial decision be, and it hereby is, deleted in its entirety, and the following substituted therefor:

"In addition, counsel in support of the complaint adduced evidence to show that more than half of all service calls are unrelated to tube failures, evidencing that the alleged elimination of 3 out of 4 service calls through the use of the tube sentry system is false *ipso facto*."

It is further ordered, That the three paragraphs beginning on page 140 with the words "The basis for the charge" and ending on page 141 with the words "*Home Furnishings Daily*" of the initial decision be, and they hereby are, deleted in their entirety and the following substituted therefor:

"The basis for the charge here under consideration is an elaborate eight-page advertisement published as a Supplement to the October 15, 1959, issue of *Home Furnishings Daily*, a daily trade newspaper. A copy of the advertisement is in the record as CX 54 A-H.

* Final order of March 28, 1968, further modified hearing examiner's initial decision, and dismissed for failure of proof the charges relating to foreign origin of component parts.

“Although the advertisement is prominently captioned ‘ADVERTISED IN LIFE’, respondent admits that the advertisement was never published in *Life* magazine.”

It is further ordered, That decision as to the correctness and propriety of the hearing examiner’s findings, conclusions (numbered 13 and 14 appearing at pages 147 to 157 of the initial decision) and order to cease and desist (paragraphs 1(k), 3 and 4 appearing at page 162 of the initial decision) dealing with the question of foreign origin of component parts be reserved and withheld pending completion of the trade regulation rule proceeding described in the accompanying opinion.

It is further ordered, That the initial decision be modified by striking therefrom paragraph 2 of the order to cease and desist on page 162 thereof.

It is further ordered, That the initial decision as modified herein, and excepting those parts described in the above paragraph as to which decision is withheld, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent 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 as modified herein.

IN THE MATTER OF

WILSON CHEMICAL COMPANY, INC., ET AL.

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

Docket 8474. Complaint, Mar. 26, 1962—Decision, Jan. 14, 1964

Order requiring Tyrone, Pa., distributors of “White Cloverine Brand Salve” to cease making deceptive offers of “free” merchandise in advertising, directed mainly at children—by such statements as “GENUINE NICKEL SILVER SIGNET RING ABSOLUTELY FREE,” “YOURS FREE * * * REAL FOREIGN COINS”—to recruit sales agents for their “White Cloverine Brand Salve,” and using threats of legal action and other forms of intimidation to enforce payment of asserted delinquent accounts.

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 Wilson Chemical Company, Inc., a corporation, and George C. Wilson, III, Charles A. Wilson, and Sarah A. Hooker, individually and as officers and directors of said corporation, and Sally Ann Wilson and Michael B. Wilson, individually and as directors of said corporation, and all said individuals also as partners trading and doing business as Wilson Chemical Company, and J. McClellan Davis, an individual, 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 Wilson Chemical Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Tyrone, State of Pennsylvania.

Respondents George C. Wilson, III, Charles A. Wilson, and Sarah A. Hooker are officers and directors of the corporate respondent. Respondents Sally Ann Wilson and Michael B. Wilson are directors of the corporate respondent. Said individuals formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondents George C. Wilson, III, Sally Ann Wilson, Charles A. Wilson, Michael B. Wilson, and Sarah A. Hooker are also partners trading and doing business as Wilson Chemical Company. They formulate, direct and control the acts and practices of said partnership, including the acts and practices hereinafter set forth. Their address is the same as the corporate respondent.

Respondent J. McClellan Davis is the collection attorney for the aforesaid respondents trading and doing business as partners under the name of Wilson Chemical Company. His address is Farmers and Merchants Bank Building, Tyrone, Pennsylvania.

The corporate respondent and the individuals cooperate and act together in carrying out the acts and practices hereinafter alleged.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of a salve designated as "White Cloverine Brand Salve" to sales agents and others for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said

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product, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their product, designated "White Cloverine Brand Salve", respondents have made certain statements and representations in advertisements in comic books of national circulation to which children of tender years are attracted, and by other media, of which the following are typical:

WIN A BEAUTIFUL SIGNET RING. IT'S FUN. IT'S EASY! All You Do Is Name These Famous U.S. Presidents (Pictures)
Just Get All 4 Right * * * We'll Send Your GENUINE NICKEL SILVER SIGNET RING ABSOLUTELY FREE * * *
Win Genuine Nickel Silver SIGNET RING—ABSOLUTELY FREE! Just Name Correctly the 4 Famous American Presidents Pictured Above. Check Names on Coupon—Fill in Rest of Coupon and Mail to us. IT'S EASY TO WIN—ACT NOW!

* * * * *
GIVEN! GIVEN! YES, WE GIVE YOU PREMIUMS or CASH!
YOURS FREE! Genuine Money From Nations of the World * * * For sending coupon Now! REAL FOREIGN COINS.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import but not specifically set forth herein, respondents represented directly or by implication:

- (1) That merchandise is sent free without obligation.
- (2) That free merchandise is being offered for some purpose other than the recruitment of sales agents.

PAR. 6. The aforesaid statements and representations were, and are, false, misleading and deceptive. In truth and in fact:

- (1) Merchandise is not sent free without obligation.
- (2) The free offer is for the sole purpose of recruiting sales agents.

PAR. 7. In the course and conduct of their business, respondents have from time to time shipped merchandise to children of tender years who have by signing and mailing in the said coupon unknowingly ordered merchandise for resale and thereby purportedly obligated themselves as sales agents of respondents. Said merchandise would not have been unknowingly ordered by children of tender years except for the confusing, obscure, and deceptive manner in which the conditions of the free offer were presented in the advertising. Misled by respondents' advertising, such children were not capable of sufficiently understanding or accepting the terms and

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conditions of the offer. In their correspondence with such purported sales agents, respondents have contended that there is an indebtedness resulting from a bona fide order placed by such children. In some instances, in their attempt to enforce payment for their merchandise, respondents have written, or caused to be written, threatening letters on the stationery of the Wilson Chemical Company and attorney's demand letters on the stationery of the respondent J. McClellan Davis, to be sent to children of tender years threatening legal action, thereby frightening said innocent and unsuspecting children into believing that they would be subjected to legal action if no payment were made. Said statements and representations were false and misleading and constituted unfair and deceptive acts and practices.

PAR. 8. Respondents' merchandising program features advertising in comic books directed to children, a consumer group unqualified by age or experience to judge soundly the merits of respondents' offers or to recognize the obligations attending acceptance of shipments of respondents' merchandise for resale. Furthermore, the purpose and objective of respondents' program are to place shipments of respondents' merchandise in the hands of children without the prior knowledge or consent of their parents. Respondents' program is designed and tailored to exploit, unfairly and for commercial purposes, the affection and responsibility that adults, and especially parents, feel for children. Respondents traffic in the affection of adults for children to the exclusion of any significant attempt to sell the product on its merits. Respondents' practices in the foregoing respects are contrary to public policy and constituted unfair and deceptive acts and practices.

PAR. 9. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead children of tender years and other members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the ordering of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now

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constitutes, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Herbert L. Blume and Mr. Robert C. Harrington for the Commission.

Romeika, Hedner, Fish & Scheckter, Philadelphia, Pa., by *Mr. Alphonsus R. Romeika* for the respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

APRIL 25, 1963

1. The respondents are charged with violation of the Federal Trade Commission Act through the use of misleading advertising and other unfair and deceptive practices in promoting the sale and distribution of a medicinal product, a salve intended for use in the treatment of minor skin disorders. The therapeutic properties of the salve are in no way involved in the proceeding; the Commission's complaint relates to entirely different matters. Evidence both in support of and in opposition to the complaint has been received. Proposed findings and conclusions have been submitted by counsel for the parties, oral argument not having been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the record or the applicable law.

2. As will be observed from the names of the parties respondent appearing above, the two business concerns involved have almost identical names. The corporate respondent is *Wilson Chemical Company, Inc.* (emphasis added), and the partnership is *Wilson Chemical Company*. In referring to them in this decision the terms corporation and partnership will frequently be used. The individual respondents (except *J. McClellan Davis*) are joined in the proceeding both because of their alleged relationship to the corporation and because they are members of the partnership.

3. One of the principal issues in the proceeding involves the relationship between the corporation and the partnership; that is, whether the business operations and practices here involved were carried on by the corporation and partnership together, as charged in the complaint, or whether such operations and practices were those of the partnership only, as urged by respondents. As will be seen later, the hearing examiner has concluded that, at least insofar as the matters involved in the present proceeding are concerned, the activities of the corporation and of the partnership were inseparable.

The practices in question were carried on by both acting in cooperation each with the other.

4. Respondent Wilson Chemical Company, Inc., is a Delaware corporation, with its principal office and place of business located in Tyrone, Pennsylvania.

5. Respondent George C. Wilson, III, is president of the corporation and has virtually sole responsibility for the operation of its business. He formulates the policies of the corporation and directs and controls all of its major acts and practices.

6. Four of the other individual respondents, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson are officers and/or directors of the corporation. However, they have little to do with the actual operation of the business. None of them resides in or near Tyrone, Pennsylvania, where the corporation's principal office and place of business are located. Actually their main participation in the affairs of the corporation consists of attending a directors or stockholders meeting in Tyrone once or twice a year. It is therefore concluded that the complaint has not been sustained as to these four individuals insofar as their relationship to the corporation in their individual capacities is concerned. They, of course, can properly be held in their official capacities.

7. The failure of the record to establish a case against these four respondents in their individual capacities (insofar as their relationship to the corporation is concerned) would seem to make little practical difference because, as will shortly be seen, all of them are members of the partnership and as such can properly be held in their individual capacities. That is to say, they can properly be held individually as members of the partnership, regardless of what their relationship to the corporation may be.

8. Respondents George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson, and Michael B. Wilson are partners trading and doing business under the name Wilson Chemical Company. The address of the partnership is the same as that of the corporation—Tyrone, Pennsylvania.

9. For reasons which will be set out later, the hearing examiner has concluded that the complaint should be dismissed as to respondent J. McClellan Davis, and the terms respondents or individual respondents as used hereinafter will not include Mr. Davis, unless the contrary is indicated.

10. In summary, the term respondents as used hereinafter will, unless the contrary is indicated, include the corporate respondent, Wilson Chemical Company, Inc.; George C. Wilson, III, individually and as an officer of the corporation; Charles A. Wilson, Sarah

A. Hooker, Sally Ann Wilson, and Michael B. Wilson as officers and/or directors of the corporation; and George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson, individually and as partners trading under the name Wilson Chemical Company.

11. In the course and conduct of their business, respondents cause their salve product, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers located in various other States of the United States. At all times mentioned herein respondents have maintained a substantial course of trade in their product in commerce, as that term is defined in the Federal Trade Commission Act.

12. In the sale and distribution of their product respondents are in substantial competition in commerce with other corporations, partnerships, and individuals engaged in the sale and distribution of products intended for use in the treatment of the same conditions as those for which respondents' products is intended.

13. Respondents' product is known as "White Cloverine Brand Salve". The business of manufacturing and marketing the salve had its inception more than half a century ago and has from the first been operated by members of the Wilson family. Upon the death, in October 1951, of George C. Wilson, Jr. (husband of Mrs. Sarah A. Hooker and father of the other individual respondents), respondent George C. Wilson, III, assumed charge of the business. At that time Mr. Wilson was about twenty years old and was in college. He left college, returned to Tyrone, and has since been the operating head of the business, being not only president of the corporation, but also the managing partner of the partnership.

14. While the salve is to some extent marketed through wholesalers and retail stores, most of the sales are made through members of the public. In order to obtain members of the public to act as sales agents for the salve, respondents make extensive use of advertisements inserted in comic books which have wide distribution throughout the United States. The principal appeal of the advertisements is to children or young people.

15. Under the sales plan, if a member of the public sends in a coupon which is included in the advertisement respondents send him fourteen cans of salve which he is to sell to other members of the public at 65 cents (formerly 50 cents) per can. After all fourteen cans have been sold, the sales agent may deduct from the total amount collected a stated cash commission and remit the remainder to respondents, or he may elect to receive for his services, instead of the cash commission, a premium selected by him from a premium book supplied by respondents. In the latter event, he remits to

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respondent the total amount collected from the sale of the fourteen cans of salve. Along with the fourteen cans of salve respondents send to the agent a "free" article offered in the advertisement.

16. Featured in the advertisements are expressions such as "free", "given", "absolutely free", etc. For example, one advertisement reads in part:

LOOK KIDS!
BIG POWERFUL MAGIC MAGNIFIER
For Your Very Own!
IT'S FREE!
Just Mail Coupon
HURRY Get Yours While The Supply Lasts!
Magnifier Sent Absolutely FREE!

Toward the bottom of the advertisement appears the following:

Just Clip and Mail Coupon
for FREE Magnifier, Big Catalog and Order of Salve.
Yes—we'll send you the MAGIC MAGNIFIER absolutely FREE! Also—we'll send Salve, Pictures and Big Catalog showing dozens of wonderful premiums you can have. Cameras, Fishing Outfits, Dolls, Rifles, Radios, Watches, etc. (Sent postpaid). SIMPLY GIVE pictures with WHITE CLOVERINE brand SALVE easily sold to friends, relatives and neighbors at 50c a Tube (with Picture). Rush coupon to start.

The coupon in the advertisement reads as follows:

MAIL COUPON—Magnifier sent FREE!
Wilson Chemical Co., Dept. 115-12 Tyrone, Pa.
Date -----
Gentlemen: Please send me on trial 14 colorful art pictures with 14 tubes of White CLOVERINE Brand SALVE to sell at 50c a tube (with picture). I will remit amount asked within 30 days, select a Premium or keep Cash Commission as explained under Premium wanted in catalog sent with order, postage paid to start. Be sure to send my FREE "MAGIC MAGNIFIER"! [Following are spaces for name and address of sender.] (CX 1A)

Another advertisement reads in part:

BOYS! GIRLS! LADIES! MEN!
G I V E N ! G I V E N !
Yes, We Give Premiums or Cash!
* * * * *
YOURS FREE!
Genuine Money From Nations of the World For sending coupon Now!
REAL FOREIGN COINS
* * * * *
JUST MAIL COUPON!
Yes! We'll send you Genuine Foreign Coins absolutely free! Be a coin collector! Trade with other kids! Also, we'll send WHITE CLOVERINE Brand Salve and Big Catalog showing dozens of wonderful

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premiums you can have. Cameras, Watches, Radios, Rifles, Fishing Outfits, Dolls, etc. (Sent ppd.).
 You simply offer WHITE CLOVERINE Brand SALVE—easily sold to friends, relatives and neighbors at 50c a package. Rush coupon to start. Mail Coupon for FREE FOREIGN COINS, BIG CATALOG and ORDER OF SALVE (CX 4A)

Another advertisement reads in part:

BOYS! GIRLS! LADIES! MEN!
 WIN A BEAUTIFUL SIGNET RING
 Engraved With Your Own Initial
 IT'S FUN! IT'S EASY!
 All You Do is NAME THESE FAMOUS U. S. PRESIDENTS
 [Pictures]
 Just Get All 4 Right — We'll Send Your
 GENUINE NICKEL SILVER SIGNET RING ABSOLUTELY FREE!
 (CX 8A)

17. The complaint charges that through the use of such advertisements respondents represent, contrary to fact, that the articles of merchandise offered (magnifier, coins, ring, etc.) are sent free and without any obligation on the part of the recipient, and that such merchandise is offered for some purpose other than the obtaining of sales agents.

18. In the examiner's opinion, these charges are well founded. While a careful and thoughtful reader of the entire advertisement, including the coupon, probably would understand that the advertisement is for the purpose of obtaining sales agents and that the "free" article is available only if the salve is ordered, this would not be true of the average reader. The words featured in the advertisements are "free", "given", "absolutely free", etc. Moreover, it must be remembered that the advertisements are directed primarily to persons of immature age. Unquestionably the advertisements have the tendency and capacity to mislead a substantial number of such persons.

19. Actually, of course, the sole purpose of the advertisements is to obtain sales agents and thereby promote the sale of the salve. The so-called free articles are never sent by respondents except along with a shipment of the salve; that is, the coupon ordering the salve must be sent to respondents before they will forward the "free" article.

20. The hearing examiner was favorably impressed with Mr. George C. Wilson, III, and does not believe that there was any element of willfulness or wrongful intent on his part in the use of the advertisements. It is elementary, however, that neither willfulness nor wrongful intent is an essential element in a violation of the Fed-

eral Trade Commission Act. The test is the effect or probable effect of the advertisements.

21. It is urged by respondents that the corporation has nothing whatever to do with the advertising and marketing of the salve, that these functions are performed by the partnership alone. The testimony on behalf of respondents is that the corporation purchases the raw ingredients which go into the salve (petrolatum, turpentine, wax, perfume, etc.) and the metal containers in which the salve is packaged and also the cartons in which the salve is mailed to purchasers, and that all of these materials are sold by the corporation to the partnership, which manufactures, advertises, and sells the salve.

22. In the examiner's opinion this position is untenable in the face of the circumstances disclosed by the record. In the first place, there is the fact of the relationship of the parties. The entire project is a family enterprise. The same persons who own the corporation are members of the partnership. Mr. George C. Wilson, III, is the active head of both. All of the land and buildings used in the enterprise are the property of the corporation, as is all of the machinery used in the manufacture of the salve. The land, buildings, and machinery are leased by the corporation to the partnership.

Thus a situation is presented in which in practical effect the parties are selling to themselves, buying from themselves, and leasing property to and from themselves.

The facts already mentioned probably would be sufficient to negate any concept that the corporation and partnership are separate and distinct entities in the purchase of materials and supplies, on the one hand, and the manufacture, advertising, and sale of the salve, on the other.

23. But there are other circumstances. The very containers in which the salve is packaged and sold to the public bear on both front and back the statement: "Manufactured by the Wilson Chemical Co., Inc." (Emphasis added) (CXs 17, 95). Frequently, orders for supplies and raw materials were placed by the partnership, as well as by the corporation. In numerous instances, communications ostensibly from the partnership were signed by Mr. George C. Wilson, III, as "President", just as he would sign for the corporation.

24. Viewing the record as a whole, it is impossible to escape the conclusion that actually the entire enterprise of obtaining the materials and supplies and the manufacturing, advertising, and selling of the salve was a single enterprise carried on by both the corporation and the partnership acting in cooperation each with the other.

25. Another defense interposed by respondents is that the present case is barred by a former proceeding instituted by the Commission; that is, that the former proceeding is *res judicata* of the present one.

26. The former proceeding, Docket 2874, 23 F.T.C. 301, was directed solely against the corporate respondent, Wilson Chemical Company, Inc. As the other respondents were not parties to the proceeding, it is obvious that the defense of *res judicata* is without merit as to them. As to the corporate respondent, comparison of the complaint, findings, and order in the former case with the complaint in the present case makes it reasonably clear that at least one of the prerequisites for the application of the doctrine of *res judicata*—identity of issues—is lacking here.

Whereas the former case dealt with misrepresentations regarding the amount of salve to be sold and the amount of money to be remitted in order to obtain various premiums, the present case is concerned largely with the offer of so-called "free" goods for the purpose of inducing the prospect to send in an order. Another practice charged here, which was not involved in the former case, is the alleged use of high-pressure collection methods. Moreover, the present complaint, unlike the former one, appears to attack respondents' entire sales plan as inherently unlawful.

Finally, the former case was instituted and decided in 1936, prior to the enactment of the Wheeler-Lea amendments to the Federal Trade Commission Act. Thus the complaint charged only the use of unfair methods of competition in commerce. The complaint in the present case, on the other hand, charges that the practices challenged constitute not only unfair methods of competition in commerce, but unfair and deceptive acts and practices in commerce as well. This alone probably would be sufficient to distinguish the two cases and preclude application of the *res judicata* principle.

27. It is therefore concluded that the defense of *res judicata* has not been sustained.

28. As indicated above, a further charge in the present complaint is that respondents employ high-pressure collection methods; specifically, that they send threatening letters to persons who have ordered the salve and have not remitted the purchase price. Examples of the letters challenged, all of which are printed form letters, appear in the record as Commission Exhibits 28-35. Some of the letters are on stationery of respondents, while others are on the letterhead of respondent J. McClellan Davis, who is a practicing attorney at law in Tyrone, Pennsylvania. As to the letters which bear his name, Mr. Davis testified that he either prepared them or approved them. The actual printing and mailing of all of the letters is usually done by the other respondents.

The hearing examiner sees nothing illegal in the use of the letters. They appear to follow the forms frequently used by creditors, collection agencies, and attorneys.

It is respondents' practice to accept return of the salve in settlement of the obligation, so long as the return is made within a reasonable time. In fact, one of the letters, Commission Exhibit 30, specifically refers to the option to return the salve. Where the salve is in fact ordered and received, respondents would appear to be within their legal rights in insisting that the salve be paid for or returned, even though the persons involved may be of immature years.

29. It is therefore concluded that this charge in the complaint has not been sustained. And this being the only charge which involves respondent Davis, it follows that the complaint should be dismissed as to him. Additional reasons for dismissing as to respondent Davis are that he has no financial interest whatever in the business; his relationship to the business is nothing more than that of attorney.

30. Finally, the complaint (Paragraph 8) appears to attack respondents' entire merchandising program as inherently unlawful. The hearing examiner is unable to concur in that view. If respondents will remove from their advertising the misleading features pointed out above no legal reason is seen why they may not continue with their sales program.

31. The use by respondents of the misleading advertisements discussed above has the tendency and capacity to cause a substantial portion of the public to purchase respondents' salve and to agree to act as sales agents for such salve, with the result that substantial trade is diverted unfairly to respondents from their competitors. The acts and practices of respondents are therefore to the prejudice of the public and of respondents' competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. The proceeding is in the public interest.

ORDER

It is ordered, That respondent Wilson Chemical Company, Inc., a corporation, and its officers, and respondent George C. Wilson, III, individually and as an officer of said corporation, and respondents Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson as officers or directors of said corporation, and respondents George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson, individually and

as partners trading under the name Wilson Chemical Company, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product White Cloverine Brand Salve or any other merchandise, do forthwith cease and desist from:

1. Representing as free or without cost any article of merchandise the obtaining of which is contingent upon the purchase of other merchandise or the performance of some service, unless the terms and conditions upon which such article may be obtained are clearly and conspicuously set forth in immediate conjunction with such representation.

2. Representing directly or by implication that any merchandise offered for the purpose of obtaining sales agents is offered for any other purpose.

It is further ordered, That the complaint be dismissed as to the charges discussed in paragraphs 28, 29 and 30 of this decision.

It is further ordered, That the complaint be dismissed as to respondents Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson, and Michael B. Wilson in their individual capacities insofar as their relationship to the corporate respondent is concerned.

It is further ordered, That the complaint be dismissed in its entirety as to respondent J. McClellan Davis.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter alleges that the respondent salve manufacturers violated the Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 45 (1958), by the use of misleading and deceptive advertisements to recruit children and adults to sell "White Cloverine Brand Salve" and by the employment of a system of threatening and deceptive collection letters to coerce payment for the salve from children and adults to whom it had been sent as the result of contacts achieved through the deceptive advertising. One of the respondents, J. McClellan Davis, an attorney admitted to practice in the State of Pennsylvania, is charged with aiding the respondents in their scheme by allowing threatening and deceptive collection letters to be sent on his letterhead to recipients of respondents' salve.

The hearing examiner found that the advertisements had the tendency and capacity to mislead the public and issued an order

prohibiting their use without the addition of qualifying language. He found nothing illegal in the use of the collection letters, however, and dismissed the charge relating to this practice as to all respondents and dismissed the complaint as to respondent J. McClellan Davis. Counsel supporting the complaint has appealed the initial decision insofar as it concerns the dismissal as to the collection letters and J. McClellan Davis. Respondent's counsel, in his brief and argument before the Commission, contends that the collection letter of an attorney is not "commerce" as that term is used in the Federal Trade Commission Act and that, therefore, the Commission has no jurisdiction to consider whether the employment of the letters is unlawful. Respondents have taken no appeal from the examiner's findings as to the deceptive nature of the advertisements, and that matter is therefore settled by the initial decision.

The Wilson companies manufacture and sell a product called "White Cloverine Brand Salve." Although other means of distribution are used, the primary method is to send the product to children or adults who are induced to order the salve by advertisements in comic books. The majority of persons so responding are children. These advertisements offer "free" and "absolutely free" rings, magnifiers, and coins to those persons that send in the coupon which is attached to each advertisement. However, the ad does not clearly and adequately inform the reader that by sending in the coupon he is obligating himself to become a sales agent for the Wilson Chemical Company. This failure to disclose that the so-called "free" goods were given with an obligation was the basis of the hearing examiner's finding that the advertisements were misleading and deceptive.

When a coupon was received, the child or adult who mailed in the coupon would then be sent a package containing fourteen cans of salve, whose collective retail value was approximately seven dollars (\$7), the "free" goods, and a booklet. The booklet informed the addressee for the first time in conspicuous type that he was now a salesman, instructed him how to sell, and illustrated premiums that he could earn. If the recipient was dissatisfied with the manner in which he was made a salesman he was told to pay the postage and return the salve. However, if he did not do so within forty-five days, a follow-up notice was sent, informing the addressee that this means of terminating the obligation was foreclosed and that only the cash value of the shipment would be sufficient to close the account. If no reply was received from any person to whom the salve was sent within sixty days, the company began to use a series of letters in an attempt to induce payment in cash for the salve.

The letters that were sent always used the same language, without regard to whether the recipient was a child or an adult.

The first three letters of the series are written under the letterhead of the Wilson Chemical Company. Their tone changes from a friendly reminder to threats of legal action and consequent embarrassment and penalty if the recipient makes it necessary for the company to turn over the account to an attorney in the recipient's home town for collection by legal process.

If the first three letters do not accomplish their purpose of obtaining a cash settlement, the child or adult receives a series of letters under the letterhead of "J. McClellan Davis, Attorney At Law." In these letters the recipient is informed, among other things, that Davis has been retained by the Wilson Chemical Company to contact the addressee, that there is no question of the recipient's liability in this matter, that legal action would begin in ten days if cash was not remitted at once, that embarrassment and added cost could be saved by remitting now, and that if no payment was received promptly, legal action would be instituted by Mr. Davis' corresponding attorney in the recipient's home town.

If the Davis letters failed to produce the desired cash, Wilson Chemical Company took no further action. The company merely placed the name of the recipient on a bad debt list. Although suit was threatened as a means of ultimate collection, there is not a single case where suit was ever begun. The respondent, George C. Wilson, III, testified to the effect that he had no intention of instituting suit on the small claims involved. Furthermore, respondent Davis testified that he never had any corresponding attorneys nor would he insult one by referring such a small claim.

The Wilson Chemical Company has never referred, nor do they intend to refer, an individual account to respondent Davis. Mr. Davis has no records of his stated representation of the company as its collection attorney. In 1945, at the request of the Wilson Chemical Company, he prepared the wording of the letters which are purportedly sent by him. Then he delegated the authority to the Wilson Chemical Company to decide when the letters would be used, how they would be used, to whom they would be sent, and the number of letters that would be used in connection with any given child or adult. He receives compensation for the use of the letterhead and occasionally receives responses in the mailbox listed on the letterhead, which he then delivers directly to the company. He is familiar with the type of advertising used by the company. He also knew that some of the letter recipients were children and that no effort was made in the letters to distinguish between children and adults.

As stated, Wilson Chemical Company, through respondent George C. Wilson, III, decides each month which letters will be sent and to whom they will be mailed by consulting accounting records which are kept at the company's office. All other aspects of the operation are under the control of the company. It prints the letters in its plant as the needs of business require, addresses the envelopes, and mails them at the local post office. Any responses to the communications are usually picked up by company employees from the post office box listed on Mr. Davis' letterhead, to which the company had access. All expenses of this scheme are paid by the company, including paper, printing, postage, and rental on the post office box.

I

The advertisements which are used by the Wilson Chemical Company to induce persons to send for the salve have the tendency and capacity to mislead a substantial segment of the public. The misrepresentation in the advertisements that "free" goods are sent without obligation is material, for it induced readers to send in the attached coupons, a course they may not have taken if they had realized that by doing so they were committing themselves to becoming a Cloverine salve salesman. This misleading enticement to become a sales agent is the foundation for the order in the initial decision to clearly disclose the conditions under which the "free" goods are being offered. It also forms the basis for counsel supporting the complaint's contention that the collection letters violate Section 5 because they use threats to institute legal proceedings in a context of deceptive practices.

Several of the letters which are sent by the respondents to dun the children and adults contain threats to institute legal proceedings. These statements are coercively phrased, stating that prompt legal action will be taken if there is no answer within a few days; that penalty will be imposed upon the child if he does not respond quickly; and that embarrassment will occur if the account is referred to an attorney in the addressee's home town. These statements, taken together in the series of letters sent over a period of time, are definitely calculated to induce the recipient to respond immediately. They are strong letters to send to adults. Their coercive nature is increased when it is considered that in the majority of cases the recipients of these letters are probably children.

The Commission and the courts have had prior occasions to consider cease and desist orders against threats to sue in a context of deceptive practices. However, none of these cases has involved situations which are on "all fours" with the present case. Thus, a review

of these decisions is necessary to delineate the scope of this form of unfair trade practice. In one case, a circuit court sustained a Commission order which required the interstate seller to cease and desist from using threats to sue in an attempt to force customers to accept goods in excess of the quantities ordered or to pay larger sums of money than that agreed to be paid or to pay damages for cancellation of quantities of goods in excess of amounts ordered. *Dorfman v. Federal Trade Commission*, 144 F. 2d 737 (8th Cir. 1944). The seller in *Dorfman* used deceptive and misleading statements to gain orders for his goods, which he then "padded" by unilaterally increasing the quantities ordered or the money required to be paid. The Commission held, among other things, that the practice of padding orders was in violation of Section 5 and accordingly ordered the respondent to cease order "padding" and the accompanying use of threats to sue. The court affirmed and with reference to the threats of legal proceedings, said:

* * * threats to sue for the purpose of extorting money from customers where no money is due may be forbidden by the Federal Trade Commission, * * *. (144 F. 2d at 740.)

In *Norman Co.*, 40 F.T.C. 296 (1945), after adversary proceedings, the Commission issued an order against a seller, requiring it to cease and desist from shipping unordered goods to department stores and from using threats of legal proceedings to induce payment for the unordered goods. *B. W. Cooke*, 9 F.T.C. 283 (1925), presents a situation where the seller respondent used grossly false statements to induce persons to sign contracts for correspondence courses. After obtaining their signatures, the seller used threats of legal suits to recover from the customers who were induced to sign through the false statements. The Commission, on stipulated facts, issued an order to cease and desist the false advertising in all events and the threats to sue, except when the respondents in good faith believed them necessary to collect amounts legally due the seller for services rendered. Several other proceedings which have involved fact situations similar to the above cases have resulted in stipulations and consent orders.

These decisions adequately demonstrate that Section 5 is violated where an interstate seller of goods uses threats of legal proceedings in an attempt to coerce his customers to pay for goods which have been placed into the recipient's hands through practices which are unfair and deceptive. In this context for the seller to assert through coercive means that he will commence legal proceedings is unlawful.

The foregoing conclusions are controlling in the present case. The company, by misleading advertisements, placed their products into

the hands of children. It then proceeded to dun them with threats of legal proceedings if they did not send the retail value of the salve. Whether each individual who dealt with the company was legally bound on the contract is beyond the nature of these proceedings. However, it can be said, after considering the misleading advertisements and the fact many of the persons who sent in the coupons from the comic books were children, that the company did not have an unassailable claim to the full retail value of the salve. To use threats to sue under these circumstances is a violation of Section 5. See *Dorfman v. Federal Trade Commission, supra*; *Norman Co., supra*; *B. W. Cooke, supra*.

The collection practices of respondents contained another violation of Section 5 in the use of threats to sue when they had no intent of ever commencing legal proceedings. Several of the collection letters used threats to institute legal proceedings unless the account was settled quickly. However, they never resorted to such action nor did they intend to on the small claims which were involved. These practices have the tendency and capacity to mislead persons receiving the threats. Recently the Commission issued an order against such a practice, *Family Publications Service, Inc.*, No. C-604, 63 F.T.C. 971, September 27, 1963. The respondents in that case, among other things, were alleged to have threatened their debtors with legal proceedings unless the debtor paid the debt within a stated period. It was further alleged that respondents did not resort to legal action to collect accounts and had no intention of doing so. As to this practice, the Commission's order prohibits them from falsely representing that accounts have been referred to an attorney for collection. The respondents in the present case have used a similar practice. A practice unlawful when used to collect a valid debt is of course unlawful when it takes place in a merchandising program founded on deceptive advertising.

The letter writing campaign contained a third unlawful practice in that the source of the "attorney demand" letters was misrepresented. The final letters in the series sent to the recipients of the salve were on the stationery of J. McClellan Davis, Attorney At Law. These letters were phrased in terms of "we" and "I," thus representing to the receiver that the attorney was now writing them and that "I" intend to take certain legal actions if the account is not paid. In effect, a child or adult reading these letters would be led to believe, contrary to fact, that an attorney was now contacting him at the instigation of the company.

In many cases before the courts and the Commission, cease and desist orders have been issued which prohibit the seller from rep-

representing that a collection agency was an independent organization in an attempt to collect their accounts. *Wm. H. Wise Co., Inc.*, 53 F.T.C. 408 (1956), *aff'd per curiam*, *Wm. H. Wise Company, Inc. v. Federal Trade Commission*, 246 F. 2d 702 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 856 (1957); *International Art Company v. Federal Trade Commission*, 109 F. 2d 393, 396, 397 (7th Cir. 1940), *cert. denied*, 310 U.S. 632 (1940); *United States Pencil Co., Inc.*, 49 F.T.C. 734 (1953); *United States Stationery Co.*, 49 F.T.C. 745 (1953); *Norman Co.*, *supra*; *Perpetual Encyclopedia Corp.*, 16 F.T.C. 443 (1932); *B. W. Cooke*, *supra*; *National Remedy Company*, 8 F.T.C. 437 (1925).¹ The *Wm. H. Wise Co.*, *supra*, case presents an appropriate vehicle for an exploration of this concept because the only deceptive practice involved was the use of a purportedly independent collection agency. The respondent in that case sold various products throughout the country. When a customer did not pay he was sent several letters on the company's stationery. If these failed to produce payment, then the debtor received letters from a purportedly independent collection agency, which the Commission found to be part of the seller's enterprise and not independent from it. The Commission found that the representation that some organization other than the seller was contacting the debtor had the tendency and capacity to mislead and issued an appropriate order. The Commission believes that even delinquent debtors are entitled to know the source of letters which are sent to them. Sellers may not adopt a disguise to lead debtors to believe that someone other than the seller is dealing with the debtor's account. As said by the Commission in the *Wise* case in commenting on this type of violation:

It is true that all persons should pay their just debts. Within legal limits, creditors are entitled to pursue their collection methods energetically. That does not, however, justify methods that are deceptive under the law * * *. (53 F.T.C. at 426.)

II

The next issue before us is that raised by the respondent Davis. It is his contention that Section 5 does not apply to him because the collection letter of an attorney is not commerce within the Federal Trade Commission Act. Mr. Davis prepared the wording of the letter which was sent by the company in an attempt to collect cash for the salve. For this service he received, and continues to receive, compensation. Mr. Davis was aware that his letter would be used

¹ In *Perpetual Encyclopedia Corporation*, 16 F.T.C. 443, 525 (1932), the order as phrased seems to imply that if the seller in that case had obtained an attorney's consent, he would then be able to freely use letters on an attorney's stationery in an attempt to force customers to pay. However, we do not consider this position controlling because it ignores the long line of cases involving sellers who misrepresented that an independent collection agency was attempting to collect from the debtor.

to dun recipients of the salve. It was to this end that he delegated authority to the company to use the letters in any manner that they felt necessary. Having so participated in the preparation of the letters and their use in the collection scheme of the company, he must be equally as liable as the company for any violation of Section 5 which arises from the letters. Unquestionably, the company is engaged in interstate commerce in the salve business. The practices which they use to promote their sales in commerce are subject to the Act. Likewise, Mr. Davis, as a participant in these practices, is equally liable. It is true that no case has arisen under the Act which presents a fact situation similar to the present. However, it has been clearly established that a person who furnishes another with the means of violating Section 5 is also subject to a cease and desist order of the Commission. *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273, 281 (3d Cir. 1952). This principle is controlling in the present case because Mr. Davis has furnished the company with the form letters and the authority to use them as the company deems fit as part of their method of selling salve.

III

Inasmuch as the Commission has found the collection letters used by the respondents to be in violation of Section 5, the hearing examiner's initial decision will be modified by striking Findings 9, 28 and 29 and that portion of the order relating to the collection letters and respondent J. McClellan Davis. The initial decision will be further modified by the insertion therein of the Commission's findings of fact and conclusions on the questions discussed in this opinion. An order adopting the initial decision as so modified will issue.

In the hearing examiner's view the sales program of the respondents would be made lawful by the removal of the deceptive advertising (*i.e.*, Finding 30). This statement is not accurate because it overlooks the unlawful collection letters used by the respondents. Therefore, it will be stricken.

Commissioner Elman did not participate in the consideration or decision of this case.

FINAL ORDER

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision, filed by counsel supporting the complaint, and on briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision ruling on said exceptions and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion and, as so modified, adopted as the decision of the Commission:

It is ordered, That paragraph 9 of the initial decision be set aside and that the following paragraph be inserted in lieu thereof:

9. Respondent J. McClellan Davis, an attorney admitted to practice in the Commonwealth of Pennsylvania, represents himself as the collection attorney for the other respondents. In this position he has aided the other respondents in the development and use of their collection methods, which are used to obtain payment for "White Cloverine Brand Salve."

It is further ordered, That paragraphs 28, 29, 30, and 31 be set aside and that the following paragraphs numbered 28 through 38 be inserted in lieu thereof:

28. The respondents refuse to accept returns of salve after a limited period of time. If a return is accepted, the person who was misled into ordering the salve is required to pay return postage.

29. The primary purpose of the respondents is to secure the retail value of salve which is sent to persons who, in the majority of instances, are children. To this end, a series of coercive and deceptive collection letters are sent to the salve recipients. No effort is made to differentiate between children or adult readers in the text of the letters.

30. The first series of letters are sent on the stationery of the Wilson Chemical Company; they contain threats to institute legal proceedings unless the reader pays the asserted obligation.

31. In fact, the respondents have never instituted legal proceedings nor do they intend to do so.

32. The respondents' use of threat of legal proceedings has the tendency and capacity to mislead a substantial portion of the public into believing that if the recipient fails to accede to the companies' demand for payment, he will be subjected to embarrassing and expensive litigation.

33. If the foregoing series of letters do not accomplish their purpose, then the recipient receives another series of letters on the stationery of "J. McClellan Davis, Attorney At Law." By these letters the respondents represent to addressees that an attorney now has their account and is personally writing them as an attorney to effect a cash settlement and if said cash set-

tlement is not made quickly, the reader will be subject to embarrassing and expensive litigation which will be instituted by respondent Davis' corresponding attorney in the recipient's home town.

34. In fact, the letters are sent pursuant to the complete direction and control of the Wilson companies, who pay for all expenses in connection with their use. In effect, the companies are merely writing the addressee under a disguise. Respondent Davis prepared the wording of the letters and delegated the authority to the Wilson companies to use them; beyond this Davis has not rendered, nor was it intended that he render, any legal services whatsoever in connection with the collection of outstanding accounts.

35. Respondent Davis has never referred, nor does he intend to refer, any individual account to corresponding attorneys.

36. The respondent's use of the Davis letters has the tendency and capacity to mislead a substantial portion of the public into believing that they are, upon receipt of these letters, being contacted by an attorney and that if they fail to send a cash settlement, then they will be the subject of embarrassing and expensive litigation brought by an attorney in their home town.

37. The use of the entire series of letters is unfairly coercive because its use has the tendency to force children and adults to remit payment without considering whether they are actually liable to pay the claim.

38. The acts and practices of respondents, as found herein, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act. The proceeding is in the public interest.

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision.

It is ordered, That respondent Wilson Chemical Company, Inc., a corporation, and its officers, and respondent George C. Wilson, III, individually and as an officer of said corporation, and respondents Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson as officers or directors of said corporation, and respondents George C. Wilson, III, Charles A. Wilson, Sarah A. Hooker, Sally Ann Wilson and Michael B. Wilson, individually and as partners trading under the name

of Wilson Chemical Company, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product, "White Cloverine Brand Salve," or any other merchandise, do forthwith cease and desist from:

1. Representing as free or without cost any article of merchandise, the obtaining of which is contingent upon the purchase of other merchandise or the performance of some service, unless the terms and conditions upon which such article may be obtained are clearly and conspicuously set forth in immediate conjunction with such representation.

2. Representing, directly or indirectly, or by implication, that any merchandise offered for the purpose of obtaining sales agents is offered for any other purpose.

3. Using threats of legal action and other forms of coercion and intimidation to induce persons to accept and pay for merchandise which is sent to them as the result of advertisements in violation of paragraphs 1 and 2, above.

4. Using threats of legal proceedings in an attempt to gain payment of accounts, when in fact legal proceedings are not to be employed as a collection device.

5. Using correspondence which represents that some person or organization other than the aforementioned respondents is engaged in attempting to effect a cash settlement of an individual's asserted delinquent account.

It is further ordered, That individual respondent J. McClellan Davis, his representatives, agents, and employees, directly or indirectly, in connection with the offering for sale, sale or distribution of a preparation designated "White Cloverine Brand Salve" or any other products of the respondent Wilson Chemical Company, Inc., or the other individual respondents herein, do forthwith cease and desist from:

1. Using threats of legal action and other forms of coercion and intimidation to induce persons to accept and pay for merchandise which is sent to them as the result of advertisements which are in violation of paragraphs 1 and 2, above.

2. Using threats of legal proceedings in an attempt to gain payment of accounts, when in fact legal proceedings are not to be employed as a collection device.

3. Permitting, aiding, or abetting the other respondents herein in the violation of paragraph 5, above.

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

It is further ordered, That 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 the order to cease and desist.

By the Commission, Commissioner Elman did not participate in the consideration or decision of this case.

IN THE MATTER OF

JAMES M. DUDLEY TRADING AS
FIRE-PAK MANUFACTURING COMPANY

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

Docket 8542. Complaint, Nov. 5, 1962—Decision, Jan. 15, 1964

Order dismissing complaint charging a Jacksonville, Fla., seller of a shaker-type dry chemical fire extinguisher designated "Fire-Pak", with misrepresenting the effectiveness, purported tests, government approval, and superiority over competitive products.

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 James M. Dudley, an individual trading as Fire-Pak Manufacturing Company, 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 James M. Dudley is an individual trading as Fire-Pak Manufacturing Company, with his principal office and place of business located at 2220 Southside Boulevard in the city of Jacksonville, State of Florida.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of a shaker-type dry chemical fire extinguisher designated "Fire-Pak" to the public.