

“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.

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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-

resenting 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.