date of every such acquisition or merger, the products involved and such additional information as may from time to time be required.

5. *It is further ordered*, That Avnet notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Dennison dissented for the reasons set forth in his dissenting statement.

IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

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

Docket 8803. Complaint, Nov. 21, 1969—Decision, Feb. 16, 1973.

Order requiring a New York City seller of battery additive, VX–6, and other articles of merchandise, among other things to cease misrepresenting earnings and profits from resale of its products; failing to maintain adequate records which substantiate its earnings claims; representing that any product has been approved by a laboratory or other organization or person; and misrepresenting the results of scientific tests.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Dynamics Corporation, a corporation, and Elliott Meyer, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

*Reported as amended by the hearing examiner's order dated July 7, 1970.

PARAGRAPH 1. Respondent National Dynamics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 220 East 23rd Street, in the city of New York, State of New York.

Respondent Elliott Meyer is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of the battery additive, VX–6, and other articles of merchandise 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 products, when sold, to be shipped from their place of business in the State of New York 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 products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of including the purchase of said battery additive, respondents have made numerous statements and representations in circulars, periodicals and other materials with respect to the nature of their business, the earnings of their customers, the users of their product and the testing of it.

Typical and illustrative of the statements and representations in said advertising, but not all inclusive thereof, are the following:

You see, to help me round out my VX–6 sales organization, I need someone *right in your area right now.*

* * * * * * *

National advertising pre-sells VX–6 for you. Full-page magazine and newspaper ads read by millions of motorists.

* * * * * * *

We have a completely staffed and equipped engineering department to help you with any special sales and promotional matters that may come up. Don't hestitate to get our help in selling large users, or to make use of our engineering facilities to help you close any important orders. Our engineering department has been instrumental in getting some very big orders for a lot of our men.

* * * * * * *

Railroad Products Division.

* * * * * * *

As a Franchise Distributor—We guarantee to protect you on business developed, on accounts opened and ON REPEAT SALES—There will be only *ONE FRANCHISE PER COUNTY* so, if you desire additional counties later on or now, advise us immediately so we may prepare you for the ultimate goal—Exclusive State Distributor for VX–6 Battery Additive!!

* * * * * * *

Our men made MORE THAN $4,000,000 PROFITS and haven't even scratched the surface yet!

These aren't Miracle Men—THEY'RE NOT EVEN HIGH-POWERED SALESMEN!

Picture of an individual $1,554.00 One Week

INDUSTRIAL—'I sell VX–6 to plants for fork lifts and other trucks. Then they buy for all vehicles and fleets.!—R.D. Kelly, Canada.

* * * * * * *

I talk big figures, $10,000, $15,000, $25,000 a year * * * VX–6 is the Aladdin's Lamp of Specialty Selling.

* * * * * * *

Certificate of approval issued to VX–6 by Independent Testing Laboratories.

* * * * * * *

Tested Approved.

* * * * * * *

Laboratory Reports.

Don't forget—this wonder-working product (1) breaks up hardened, dense crystalized sulphate, converts it into ACTIVATED material for greater charging current, (2) insulates lead grids so they are not* readily corroded by damaging acid, (3) reduces shedding from plates, (4) cuts down internal heat, (5) makes separators last longer, (6) gives an uninterrupted flow of steady current, (7) reduces oxidation, (8) puts a stop to warping and buckling of plates, (9) eliminates undercharging in normal battery use, (10) reduces evaporation of 'water loss' and thus does away with frequent checking while on the road.

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import and meaning, but not specifically set out herein, respondents represent, and have represented, directly or by implication, that:

(1) Respondents have a nationwide sales force, a separate division for handling railroad products and an engineering department; and that they are seeking persons to join their nationwide sales force.

(2) Respondents use national advertising to promote the sale

*By hearing examiner's order dated July 7, 1970, the word "not" was inserted between the words "are" and "readily".

of the product to consumers and that consumer demand has been created for said product.

(3) Respondents have technical departments and trained professional personnel to assist distributors in the sale of their product to consumers.

(4) Respondents give exclusive franchises to distributors who receive protection in their areas of operation.

(5) Distributors of the product, VX–6, will regularly earn $1,554.00 per week, $25,000 per year and various other high amounts.

(6) Laboratories and certain users have approved and fully tested the product as to performance.

(7) Each of the use or performance representations made by respondents for the product has been substantiated by respondents through competent scientific tests or by authenticated, controlled and duly recorded user tests or both.

PAR. 6. In truth and in fact:

1. Respondents do not maintain a nationwide sales force, a special division for handling railroad products and an engineering department and they are not seeking persons to join a nationwide sales force. Respondents' primary sales effort is to induce so-called "distributors" to buy a quantity of their product for resale to the public. There is virtually no organized, directed sales force.

2. Respondents do not use national advertising to promote the sale of the product to consumers and there is little, if any, existing consumer demand. Respondents' advertising and promotional efforts are directed almost exclusively to the so-called "distributors."

3. Respondents do not have technical departments and trained professional personnel to assist distributors in the sale of the product to consumers. Respondents' operation is concerned solely with sales to distributors and prospective distributors.

4. Respondents do not give exclusive franchises and distributors who receive franchises are not given protection by respondents in their areas of operation. Respondents continue to make sales where franchise distributors are located.

5. Distributors of the battery additive, VX–6, do not realize the aforestated earnings; but, on the contrary, few, if any, attain such earnings.

6. Laboratories and certain users have not approved and have

not fully tested the product. Some of the laboratories were either non-existent or had not authorized the use of a seal of approval. Testing of the product had not been accomplished or was incomplete and named users had not approved and tested said product.

7. Use or performance representations made by respondents for the product have not been substantiated by respondents through competent scientific tests or by authenticated, controlled and duly recorded user tests.

Therefore, the statements and representations referred to in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

PAR. 7. Through use of published testimonials respondents represent, directly or by implication, that they are the statements of persons or organizations currently using respondents' product and that respondents have been given permission to publish such statements; whereas, in truth and in fact, in many instances, such testimonials are statements by persons or organizations who only used the product in the remote past and did not give permission for publication.

Therefore, the use of said testimonials was, and is, false, misleading and deceptive.

PAR. 8. 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 that sold by the respondents.

PAR. 9. 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 members of the purchasing public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

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

Mr. Michael C. McCarey and *Mr. Jeffrey Tureck* supporting the complaint.

Mr. Solomon H. Friend and *Mr. Jerold W. Dorfman,* New York, N.Y. for respondents.

INITIAL DECISION

BY DONALD R. MOORE, HEARING EXAMINER

MAY 24, 1971

CONTENTS

PRELIMINARY STATEMENT

The complaint in this proceeding was issued on November 21, 1969, and was served on respondents on December 10, 1969. The complaint charges respondents with misrepresentation in the advertising and sale of a battery additive designated VX–6, in violation of Section 5 of the Federal Trade Commission Act. On January 19, 1970, respondents filed an answer in which they essentially denied the allegations of the complaint.

After a series of prehearing conferences and several postponements—occasioned largely by successive substitutions of counsel

supporting the complaint as a result of illness, resignation, and reassignment—25 hearings were held between September 21, 1970, and January 21, 1971. Several recesses were necessary because of a variety of scheduling difficulties, including the unavailability of certain witnesses, religious holidays, and conflicts in the calendar of the examiner and of counsel.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint and by counsel for respondents. Counsel supporting the complaint filed a brief in support of their proposed findings, while counsel for respondents incorporated their brief in their proposed conclusions of law. Reply briefs were filed by counsel for both parties. Those proposed findings not adopted either in the form proposed or in substance are rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the hearing examiner makes findings of fact, enters his resulting conclusions, and issues an approprite order as follows.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items of evidence in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CB—Brief of Counsel Supporting Complaint in Support of Proposed Findings of Fact, Conclusions of Law, and Order to Cease and Desist.

CPF—Proposed Findings of Fact, Conclusions of Law and Order filed by Counsel Supporting Complaint.
CRB—Complaint Counsel's Reply to Respondents' Proposed Findings of Fact, Conclusions of Law and Proposed Order.
CX—Commission Exhibit.
RPF—Respondents' Proposed Findings of Fact, Conclusions of Law and Proposed Order.
RRB—Respondents' Reply Brief in Opposition to Complaint Counsel's Findings of Fact, Conclusions of Law and Proposed Order.
RX—Respondents' Exhibit.
Tr.—Transcript.

References to the proposed findings and briefs of counsel are to page numbers, preceded by one of the abbreviations listed above. References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Meyer 284.

FINDINGS OF FACT

1. Respondents and Their Business [1]

Respondent National Dynamics Corporation ("National Dynamics" or "corporate respondent"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 220 East 23rd Street, in the city of New York, State of New York. National Dynamics was incorporated in May 1957 by respondent Elliott Meyer and others.

Respondent Elliott Meyer has been president of the corporate respondent since its inception. In that capacity, as well as in his capacity as an important stockholder—now, in effect, the sole stockholder—he has formulated, directed, and controlled the acts and practices of the corporate respondent. Mr. Meyer's address is the same as that of the corporate respondent.

[1] Except for respondents' contention that the complaint should be dismissed as to Elliott Meyer because of "no evidence" that he "acted in his individual capacity" (RPF 30), there is no dispute as to the facts recited in this section. Record references for the facts here found, as well as for additional background facts, include the following: Complaint, Paragraphs One, Two, and Three; respondents' answer, Par. 1; Tr. 9–10, 185–87, 316–18, 321–22; Meyer 280–84, 287–90, 310, 312–14, 343–47, 355–56, 389–90, 1282–89, 1445–50, 1465–70, 1474–81; Cooper 2174; CXs 116 I–J, 153 A–I, 154 A–E, 158 A, 214 A–F, 215 A–G, 216 A–D. For comparison of National Dynamics advertising and that of Auto Electrolite, see CXs 92 A–B, 287 A–B; CXs 17 A–B, 288 A–B, 289; CXs 20 A–D, 290 A–D.

Mr. Meyer's stock ownership in National Dynamics has ranged from zero to 100 percent. Mr. Meyer owned 100 percent of the stock during the first year of National Dynamics' existence. Subsequently his interest went down to 33 percent, but he acknowledged that he formulated, directed, and controlled the acts and practices of the corporation during this period. Thereafter, all of the stock was acquired by another corporation, but Mr. Meyer continued to serve as president and to direct the activities of the company. In 1964 the stock of the corporate respondent was acquired by a corporation in which Mr. Meyer owned 50 percent of the voting stock. Since 1965, Mr. Meyer has been in complete control of the corporate respondent as sole stockholder and chairman of the board of a holding company which owns all of the stock of the corporate respondent.

Thus, despite the corporate organization and the involvement of other corporations and other individuals, the record reflects domination and control by Mr. Meyer individually.

In addition, Mr. Meyer has been since 1968 the sole shareholder and president and chairman of the board of directors of another corporation, Auto Electrolite Corporation, which sells a battery additive, advertising for which is similar to the advertising for VX–6. National Dynamics and Auto Electrolite have offices at the same address, and personnel of National Dynamics carry on the business activities of Auto Electrolite as well. Auto Electrolite had gross sales of $212,113 in 1969.

Respondents are now, and for more than 10 years have been, engaged in the advertising, offering for sale, sale, and distribution of the battery additive VX–6 and other articles of merchandise to the public. The business of respondents is substantial. During 1968 the total gross sales of National Dynamics amounted to $825,000. Total gross sales in 1969 were $1,000,000, of which sales of VX–6 accounted for $900,000.

In the course and conduct of their business, respondents now cause, and for more than 10 years have caused, their products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States; and they maintain, and for more than 10 years have maintained, a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondents are and have been in substantial competition in commerce with corporations, firms, and individuals engaged in the

sale of products of the same general kind and nature as that sold by the respondents. Although the evidence to support this allegation is somewhat sketchy (Meyer 374–74A; Halter 709–10; Miller 2097–99, 2102, 2107, 2129–30), there appears to be no real doubt that respondents sold VX–6 in competition with products of the same general kind and nature. Respondents did not deny the allegation (Answer, Par. 6), and their proposed findings and their reply brief do not address themselves to this matter.

In the course and conduct of their business and for the purpose of inducing the purchase of their battery additive VX–6, respondents have made numerous statements and representations in circulars, periodicals, and other materials with respect to the nature of their business, the earnings of their customers, the users of their product, and the testing of it. (The manner and form of respondents' publication and use of the challenged representations are set forth in CX 309 A–N (Par. 1–3, 5–13); in certain stipulations (Tr. 323–26, 334–38, 377–78); and in the testimony of Mr. Meyer (Tr. 374 K–374 L). Although respondents contend in their answer (Par. 2) that the representations quoted in Paragraph Four of the complaint were "reproduced out of context," the record fails to substatiate this contention.

II. Credibility Questions

Misrepresentations allegedly contained in respondents' advertising will be considered in the sections that follow. First, however, it is desirable to consider questions of credibility involved in several of these sections so as to avoid the necessity for repetitive comments. The credibility problem arises because of conflicts between the testimony of respondent Elliott Meyer, the president of the corporate respondent, and that of Donald Meany, a former employee of respondents.

Except for the fact that the testimony of Mr. Meany represents either the only evidence or the principal evidence to support some of the allegations of the complaint,[2] the verbiage devoted to it—both in the transcript and in the submittals of counsel—is hardly justified by its subject matter.

Mr. Meany's testimony dealt with the handling of respondents' business correspondence; the question of specialized departments

[2] Mr. Meany's testimony was presented as newly discovered evidence (Tr. 2195–2232). Without his dubious testimony on several of the allegations, the examiner is left to wonder what proof complaint counsel may have had in support of the allegations before Mr. Meany volunteered as a witness.

or divisions and the technical assistance available to distributors; respondents' franchise arrangements; and the extent of Mr. Meyer's participation in the operation of National Dynamics. Mr. Meany's testimony was also apparently designed to impeach the testimony of Mr. Meyer that certain records of respondents had been destroyed or damaged as a result of a fire (Tr. 1276–81, 1302, 1332, 1422–23). In fact, this initially appeared to be the primary purpose of calling Mr. Meany as a witness. However, even if his testimony (Tr. 3580–3609, 3666–75) were accepted at face value, it does not constitute convincing evidence that damage to records was as limited as he suggested.

Because complaint counsel have made such an issue of the matter—and this is because Mr. Meany's testimony is crucial to certain aspects of their case—the credibility question must be resolved. The mere fact that complaint counsel felt impelled to make such a labored defense of Mr. Meany's credibility (CPF 14–20; CB 34–37) tends in itself to detract from the weight of his testimony. In any event, in the opinion of the examiner, Mr. Meany's testimony does not measure up to the standard of "reliable, probative, and substantial evidence" upon which a finding of fact must be based (Rule 3:51(b)). The reasons for this determination are manifold.

First, and perhaps most important, Mr. Meany was employed by respondents in a clerical capacity for only some ten months in 1970 (Tr. 3553), whereas the advertising representations that his testimony purported to challenge were circulated during a prior period of time. Both the timing of his employment and the capacity in which he was employed are factors that materially detract from his testimony on crucial issues of fact.

Second, when this circumstance is coupled with evidence, developed in the course of his cross-examination (Tr. 3615–92), that calls into question his morality and his emotional stability and that also suggests the possibility of bias and prejudice against respondents (Tr. 3637–38, 3625–29, 3609–12, 3644–49, 3684), his testimony becomes of dubious value—hardly sufficient to constitute a predicate for findings that respondents engaged in acts and practices violative of the law.

Mr. Meany's admission of homosexual acts (Tr. 3637–38) is merely one facet of a personal history of emotional instability that disqualifies him as a reliable witness on matters of crucial significance. By his own admission, he falsified the employment application that he filed with respondents and initially undertook

to continue the same deception on the witness stand (Tr. 3616–18). Although Mr. Meany ultimately answered with apparent candor further questions reflecting adversely on himself, the examiner is unable, on the basis of the entire testimony, including observation of his demeanor on the stand, to give full faith and credit to Mr. Meany's statements.

No useful purpose would be served by a lengthy discussion of the question whether, standing alone, Mr. Meany's admission of homosexual acts may provide a basis for questioning his credibility. Research indicates that in a jury case in a federal court, an objection to such a question would probably be sustained on the ground of relevance.[3] But here the question was asked and answered without objection (Tr. 3637). It may be stated parenthetically that complaint counsel's discussion of the law on this subject (CB 34–37) is somewhat of an oversimplification, ignoring the distinction frequently drawn between discrediting information elicited on cross-examination and the introduction of collateral evidence on the subject.[4] Be that as it may, the problem here is whether the admission should be disregarded in assessing the credibility of the witness.

Despite respectable authority to the contrary, the examiner believes that it is a factor that may be taken into account as bearing on the emotional stability of the witness and as seemingly illustrative of an "anything goes" philosophy on his part. When there is also evidence suggestive of bias and prejudice against respondents despite protestations to the contrary, the fabric of his testimony is not such as to inspire confidence in its reliability.

Under the circumstances presented by this record, the familiar rule authorizing an adverse inference from a party's failure to call a rebutting witness (CB 15–16) is not applicable to bolster Mr. Meany's testimony. Neither is the picture materially changed by a stipulation that another of respondents' employees would give testimony "substantially the same" as that of Mr. Meany (Tr. 3698–99).

The examiner finds unpersuasive the lengthy argument of complaint counsel attacking the credibility of Mr. Meyer (CPF 35–52).

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[3] *United States* v. *Nuccio*, 373 F.2d 168, 171 (2d Cir. 1967), *cert. denied*, 387 U.S. 906; *United States* v. *Bowe*, 360 F.2d 1; 15 (2d Cir. 1966), *cert. denied*, 385 U.S. 961; *Salgado* v. *United States*, 278 F.2d 830, 831 (1st Cir. 1960); *United States* v. *Provoo*, 215 F.2d 531, 535–37 (2d Cir. 1954); see also *Tinker* v. *United States*, 417 F.2d 542, 544 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 864.

[4] III *Wigmore on Evidence*, §§ 922–924, 977–87, (3d ed. 1940); 58 *Am. Jur.* Witnesses §§ 758–760.

Obviously Mr. Meyer was not a disinterested witness, and there may be some basis for discounting some of his testimony on the basis of his natural bias. The examples of inconsistency and faulty memory relied on by complaint counsel are not impressive. In view of the period covered and the mass of detailed information involved, the fact that Mr. Meyer was unable to furnish specific details concerning many matters is hardly surprising. The examiner finds no substantial basis for rejecting his testimony.

III. Representations As to The Nature and Scope of Respondents' Business

A. *"Nationwide Sales Force"*

The first representation challenged by the complaint (Paragraph Five (1)) is that respondents have represented that they have a "nationwide sales force" and that they are seeking persons to join this nationwide sales force. This representation was made in sales letters containing such statements as these:

* * * I urgently need a man in your area to help me round out my National VX–6 Sales Organization. (CX 14 A)

* * * [T]o help me round out my Nationwide VX–6 sales organization, I need someone *right in your area right now.* (CX 17 A)

In alleging these representations to be false and misleading, the complaint (Paragraph Six (1)) alleges—and complaint counsel purpose a corresponding finding (CPF 33)—that:

Respondents do not maintain a nationwide sales force, * * * and they are not seeking persons to join a nationwide sales force. Respondents' primary sales effort is to induce so-called "distributors" to buy a quantity of their product for resale to the public. There is virtually no organized, directed sales force.

Complaint counsel concede that respondents solicit and secure distributors from all parts of the country—numbering 12,000 in 1969—but they contend that "this group of salesmen is not organized, nor in any way directed, nor a sales force." This contention they profess to base on evidence that they characterize as "for the most part circumstantial" (CPF 33–34), but their proposed findings are based more on unsupported opinion than on documented facts. Their so-called circumstantial evidence is as follows:

(1) A statement, without any record citation, that "In essence, respondents sell to anyone who will buy their product, and once

a customer does buy, respondents are not particularly interested in anything else but selling him more."

(2) Their *ipse dixit* that it is "obvious" that with only 12 or 15 executives and employees, respondents could not "organize and direct" these 12,000 distributors "even if they wanted to do so"—and "respondents did not want to do so."

3. The testimony of a former employee that he was instructed to "skim" incoming mail.

(4) The fact that whereas the sales manager "described his duties * * * as 'overseeing the general sales and work[ing] with our distributors'," he "did not describe his job as organizing or directing a sales organization of some 12,000 sellers of VX–6."

(5) The facts that respondents are direct mail sellers; that they purchase mailing lists to acquire names of prospective salesmen; that they correspond by form letter; that they do not sell on consignment; and that they do not extend credit.

(6) Their unsubstantiated conclusion that respondents "have neither the time, facilities, personnel, nor desire to organize or direct a 12,000-man sales force." (CPF 33–34).

Merely to state such a basis for a proposed finding of misrepresentation is to expose its insufficiency.

The examiner finds no misrepresentation here. Respondents have 12,000 distributors throughout the United States (CPF 33–34). Respondents furnished to these distributors advertising literature, sales aids, demonstration kits, booklets, advertising mats, TV scripts, and radio scripts. Respondents processed and answered inquiries from distributors and offered sales assistance by mail, by telephone, and by personal visit. The testimony of one employee concerning the "skimming" of mail from distributors—even if fully credited (see *supra*, pp. 6–8 [pp. 497–500 herein])—does not prove that respondents' distributor network is not a "nationwide sale force."

This case is to be distinguished from a line of Commission cases involving sellers who falsely represent that they are seeking "employees" when they are actually seeking to sell merchandise. Such is not the thrust of the complaint's allegations regarding respondents' sale force. In any event, the fact that respondents' distributors are independent contractors rather than employees does not prove that respondents do not have a nationwide sales force.

As a matter of fact, both the allegations of the complaint and the contentions of complaint counsel are self-contradictory. The same

paragraph of the complaint that alleges that respondents "are not seeking persons to join a nationwide sales force" also alleges that respondents' "primary sales effort is to induce so-called 'distributors' to buy a quantity of their product for resale to the public." Similary, complaint counsel contend, on the one hand, that respondents are interested only in selling more VX–6 to their distributors and, on the other hand, that respondents do not want to organize and direct these distributors so as to obtain reorders.

Whatever may have been the theory of the complaint regarding respondents' alleged misrepresentation of a "nationwide sales force," the evidence fails to show any misrepresentation, and the charge should be dismissed.

B. *Specialized Divisions and Technical Assistance*

Other challenged representations are to the effect that respondents have a separate division for handling railroad products, an engineering department, and technical departments with trained professional personnel to assist distributors in the sale of their product to consumers. (Complaint, Paragraph Five (1), (3)) These representations were contained in respondents' advertising as follows:

> We have a completely staffed and equipped engineering department to help you with any special sales and promotional matters that may come up. Don't hesitate to get our help in sellling large users, or to make use of our engineering facilities to help you close any important orders. Our engineering department has been instrumental in getting some very big orders for a lot of our men. (CX 111 D; see CX 48 D)
>
> Naturally, if there is ever a need for technical information in reference to batteries or VX–6—our trained staff of technicians are always at your service. (CX 62 C)
>
> I, and the rest of my staff of technicians, have been instructed to give you all the cooperation and assistance possible. (CX 87 B)
>
> You'll have full access to our Engineering and Industrial Departments, at no extra cost to you in engaging and closing of any important orders that will prove beneficial and profitable to all of us. (CX 95 B)
>
> RAILROAD PRODUCTS DIVISION. (CX 9A)

The evidence to support the allegations that these representations were false, misleading, and deceptive (Complaint, Paragraph Six (1), (3)), is hardly substantial. Although the evidence tending to substantiate the challenged representations is not altogether satisfactory either, the burden is on counsel supporting the complaint to prove that respondents have not maintained a railroad

products division, an engineering department, or any technical departments with trained professional personnel to assist distributors in selling VX–6. This burden they have failed to carry.

There is credible evidence that respondents have had a railroad products division and an engineering or technical service department staffed by Orrin White, I. J. Luman, Edward J. Halter, Frank Murphy, and Ed Griffin and that, in addition, respondents have utilized private laboratories on a consultant or contract basis, particularly Industrial Testing Laboratories, which is in the same building as respondents' office. The record establishes that extensive sales were made to railroads; that there was a special industrial package of VX–6 utilized by railroads; that there was advertising specially directed to railroads; that National Dynamics was a member of the Association of Railroad Suppliers; that Messrs. White, Griffin, Murphy, and Halter visited railroads throughout the country for the purpose of assisting distributors in making sales to railroads, as well as in making direct sales to railroads; and that they otherwise provided technical assistance to distributors in person and by correspondence (Meyer 357–61, 368–74, 1290–1307, 1318–23, 1506–10; Halter 685–86, 693–96, 712–49, 753–57, 797–98; Murphy 4835–39, 4860–61; Rogers 1845–1932; Tr. 647–55; RXs 1–6, 10–16; CXs 242 A–G, 248–249 J, 265 A–B, 280 A–D).

In addition to questioning the credibility of Mr. Meyer and noting the evidentiary indication that most of the named individuals are now no longer connected with National Dynamics (CPF 35–54), complaint counsel rely primarily on the testimony of Donald Meany, a former employee of National Dynamics. Mr. Meany testified that he did "not know of any railroad products division of National Dynamics;" that there was neither an engineering department nor a technical department, although there was a technical manual; and that there was no one who worked in an engineering or technical capacity (Tr. 3557–58).

Mr. Meany was employed by National Dynamics from January 1970 until mid-November 1970 (Tr. 3553), and thus his knowledge concerning respondents and their business is limited to that period, whereas the challenged representations were disseminated prior to that time. In view of this time factor, and in view of the limitations of the positions that Mr. Meany held—primarily that of bookkeeper and correspondence clerk (Tr. 3553–56)—his testimony hardly measures up to substantial evidence of false advertising on the part of respondents. In addition, as noted *supra* (pp.

6–8, [pp. 497–500 herein]), his reliability as a witness is subject to question.

Against this background, the substantiality of complaint counsel's case regarding these representations is hardly aided by the fact that Mrs. Dorothy Ladden would have offered testimony which would have been "substantially the same as the testimony of Mr. Donald Meany" (Tr. 3698–99).

Moreover, the fact that Mr. Meyer's testimony leaves in doubt the question of how recently Mr. White and Mr. Luman have been associated with respondents in their business (CPF 36–40, 52–54) does not prove the case. At most, there may be a question whether respondents would be warranted in continuing these representations now that Mr. Halter is apparently the only person engaged in railroad sales and technical consultations. Although the term "engineering" may have been loosely used and the nature and the scope of the railroad products division and the technical service department may have been exaggerated, the fact remains that there is evidence of the existence of specialized persons engaged in the activities so designated. There is no evidence whatever of any failure on respondents' part to furnish technical information or sales assistance to their distributors.

The complaint makes the flat allegation that these departments were nonexistent and that there were no specialized personnel to assist distributors. This allegation has not been proved.

C. *National Advertising and Consumer Demand*

The complaint alleges that respondents have represented that they "use national advertising to promote the sale of the product [VX–6] to consumers and that consumer demand has been created for said product" (Paragraph Five (2)); whereas, "Respondents do not use national advertising to promote the sale of the product to consumers and there is little, if any, existing consumer demand. Respondents' advertising and promotional efforts are directed almost exclusively to the so-called 'distributors'." (Paragraph Six (2))

Respondents did make the representations alleged. For example—

National advertising pre-sells VX–6 for you. Full-page magazine and newspaper ads read by millions of motorists * * *. (CX 8 A)

[O]ur advertising and publicity campaign * * * is designed to pre-sell VX–6 for you. (CX 4 B)

* * * [S]o many more folks are hearing about VX–6 through our nationwide advertising campaign * * * . (CX 23 A, CX 85 A)

We have a multi-million dollar advertising, publicity and promotional campaign going in high gear *right now!* But all of this national advertising is aimed *right at your local level!* (CX 48 B)

OUR NATIONAL ADVERTISING CAMPAIGNS! This helps pre-sell VX–6 for *you!* Each day, the motoring public is becoming more and more aware of VX–6 * * * . (CX 62 L)

VX–6 is backed up with national advertising in magazines and newspapers to pre-sell your customers. (CX 112 B)

Complaint counsel have failed to prove that these representations are false and misleading.

There is no doubt that respondents engaged in national advertising; the only question is whether respondents used such advertising "to promote the sale of the product to consumers." Although most of respondents' newspaper and magazine advertising (CX 114) as well as their direct-mail literature, was designed primarily to obtain distributors to resell VX–6, there is no substantial evidentiary basis for finding that such advertising does not also have some impact on the consumer. As a matter of fact, Mr. Meyer testified that such advertising had a dual purpose—(1) to attract distributors and (2) to give exposure of VX–6 to the consuming public (Tr. 1402–05, 1538, 1545).

The nationally-circulated magazines in which CX 114 appeared are listed at Tr. 333–40, 377–78. Contrary to CPF 55–56, the record does not reflect that CX 114 was the only magazine advertisement used, nor does it show that a majority of the magazines in which it appeared were "oriented toward sales and salesmen." Complaint counsel's assumption (CPF 56) that the "exposure" of VX–6 in such publications "was quite limited" is not well-founded.

Moreover, consumer-oriented advertising was published and broadcast throughout the country—some placed directly by respondents; some placed on a cooperative basis with distributors; some placed by distributors on their own. (See CXs 57–60; CXs 103 A–B, 104 A–C; Meyer 374 I–R, 379–91, 1402–38, 1538–49.) The fact that the publication or broadcast of some advertisements was paid for in whole or in part by distributors does not detract from the fact that consumer-oriented advertising was disseminated on a national basis (CX 9 B).

The inadequacy of the proof is pointed up by the fact that

complaint counsel would predicate a finding that respondents could not have engaged in national advertising sufficient to pre-sell VX–6 or to create an appreciable national market for the product on an inference that, with only $1 million in sales during 1969, "respondents might have had some difficulty in squeezing the enormous outlays required for such an advertising effort out of their somewhat modest budget" (CPF 55). Similarly, the inference respecting limitations on cooperative advertising (CPF 56–58; CX 219 A)—an inference resting on a shaky foundation—fails to prove the point contended for. (Cooper 2157–71, 2182–83)

The fact is that respondents did use consumer-oriented national advertising of various kinds. This is established not only by the testimony of Mr. Meyer and by stipulations entered into between counsel but is also documented by the advertising actually used and by financial data indicating the extent of such advertising. Mr. Meyer testified that respondents did have a national advertising campaign that included advertisements in newspapers and magazines, television and radio commercials, direct mailing of consumer-oriented literature by respondents and by VX–6 distributors, point-of-purchase displays, and general public relations program. (Tr. 374–K, 384).

In 1969, respondents distributed 2400 advertising mats, 91 radio commercials, and 11 television films. The advertising mats were used in 39 states; the radio commercials were broadcast in 16 states, and the TV advertisements in 4 states. (RX 26) It is true that, compared to some advertising budgets, respondents' payments for TV and radio advertising were minimal. Cash payments for such advertising in 1968 and 1969 totaled about $4,000 (CX 124 I; RX 25 A–Z–18), but this was supplemented by some advertising that was broadcast on a "barter" basis (Meyer 385–86). Such broadcast advertising, coupled with published advertising, provides sufficient basis for respondents' claims concerning national advertising to overcome the allegation that these claims were false and misleading.

Finally, the allegation that "there is little, if any, existing consumer demand" was not proved. Obviously, some consumer demand has been created, and sales figures show that such demand is substantial enough to constitute more than a "little." The record does not establish that distributors have been stuck with their VX–6 inventory, so that it may be presumed that they resold most of it. As a matter of fact, Mr. Meyer testified without contradiction that over 10 million units of VX–6 had been sold since 1957 (Tr.

1564). In addition, respondents have made a substantial number of direct sales to consumers, primarily industrial consumers. Out of a total of 18,000 customers in 1969, 6,000 were direct-buying consumers (Tr. 172–73), including some of the industrial customers listed at Tr. 646–55.

The allegations of Paragraph Six (2) must be dismissed failure of proof.

IV. Representations As To Exclusive Franchises

The evidence substantiates the allegation (Complaint, Paragraph Five (4)) that respondents have represented, directly or by implication, that they give exclusive franchises to distributors, who receive protection in their areas of operation. Respondents advertised as follows:

> Just as soon as you prove to yourself the money making potential of VX–6, you can qualify for an exclusive territory. (CX 31 D)
>
> * * * You can work up to an over-ride on the sales of new men in your territory—or even up to statewide distributorship with VX–6!
>
> *We guarantee to protect you on new business you develop—on new accounts you open—AND ON YOUR REPEAT SALES!* Every account you open, is all yours as long as you remain active with us! (CX 48 D)
>
> * * * [T]here will be only ONE FRANCHISE PER COUNTY * * *. (CX 95 B)

The complaint alleges that contrary to these representations, respondents "do not give exclusive franchises;" "distributors who receive franchises are not given protection by respondents in their areas of operation;" and respondents "continue to make sales where franchise distributors are located." (Complaint, Paragraph Six (4)).

Respondents' franchise agreement reads in pertinent part as follows:

> Please accept this letter as our written agreement designating you our distributor for VX–6 for the terrritory of
>
> You can have this agreement remain in effect for one year, and can renew for another year upon writing to us within 30—90 days before the expiration date.
>
> Since franchise territories are awarded by quota, your next order for—— dozen VX–6, at $—— per dozen should be sent to us by ——. If you don't reorder the quota amount within this period, this agreement will then be void as of that date. To keep this agreement in effect, you must order the

quota amount per month. * * * If for some reason you don't maintain the monthly quota, this agreement will end on the 10th day of the month that quota wasn't met. * * *

* * * [W]e agree to continue servicing individual agents in the territory, if any, for a period of 42 days from this date * * * .

During this time, we will establish a —— % credit for you on any orders originating from your territory. After 42 days we send all orders and inquiries from your territory, directly to you for your handling." (CX 101 A; CXs 291–298).

As a Government witness, respondent Elliott Meyer disclaimed detailed knowledge concerning respondents' franchise operation but testified in effect that it was pursuant to the franchise agreement (CX 101 A; Tr. 362–65, 394–99, 1329–30). After he indicated that he had records to illustrate the franchise operation, counsel stipulated as follows:

* * * [T]he company has records which show that they have at different times forwarded the names and addresses of customers and prospective customers to franchisees serving the area from which the customers and prospective customers came, and that the company has made payments and given credits to franchisees on sales and shipments made by respondent to the customers in the franchisee's territory. (Tr. 1331; misspellings corrected.)

The only evidence indicating that franchises were not "exclusive" consists of 8 franchise agreements (CXs 291–298) purporting to show that in four instances in 1965, respondents had allocated the same territory to two distributors during overlapping periods of time as follows:

Hartford County, Connecticut, was assigned to one distributor on July 28, 1965 (CX 291) and to another distributor on August 30, 1965 (CX 292).

Morgan County, Indiana, was assigned to one distributor on October 19, 1965 (CX 294) and to another distributor on November 3, 1965 (CX 293).

Maricopa County, Arizona, was assigned to one distributor on July 26, 1965 (CX 296) and to another distributor on September 7, 1965 (CX 295).

Volusia and Seminole Counties in Florida were assigned to one distributor on October 18, 1965 (CX 298), and Seminole County was assigned to another distributor on November 12, 1965 (CX 297).

After having these agreements identified by respondent Elliott Meyer in the course of redirect examination, (Tr. 1511–13), com-

plaint counsel took the position that they "speak for themselves" and elected to ask no questions about them (Tr. 1527).

These 8 franchise agreements were among approximately 100 [4] such agreements in the investigational file (Tr. 1515, 1526–27). They were obtained by a Commission attorney-examiner in January 1967 (see reverse of CXs 291–298). Respondents objected to their offer in evidence on the ground, among others, that they had not been listed as exhibits in advance pursuant to the prehearing order (Tr. 1513). Complaint counsel explained that it was not until after the trial began that they realized that these 8 franchise agreements overlapped as to time period (Tr. 1517–18). After argument, respondents' objections were overruled, and the documents were received in evidence (Tr. 1524–25).

In the course of recross-examination by respondents' counsel, Mr. Meyer undertook to explain the overlapping of dates as to CXs 291–94 and 297–98. His "understanding" was that in each instance the original franchisee had advised respondents of his inability or unwillingness to continue the franchise (Tr. 1575–76, 1587–88, 1593–95). As to CXs 295 and 296, Mr. Meyer said there was no overlapping because CX 296, by its terms, expired if a reorder was not received by September 7, 1965.[5] He assumed that this is what happened, so that the county was awarded to another distributor (CX 295) on that date. (Tr. 1586–87, 1593–94)

This testimony came in over the objection of complaint counsel that it was hearsay (Tr. 1577–85).[6] The source of Mr. Meyer's information was Marvin Cooper who was respondents' sales manager during the period in question (Tr. 1595–96, 2152–53). Mr. Meyer telephoned Mr. Cooper to get the information during the luncheon recess (Tr. 1579–80, 1592). Mr. Meyer did not know the basis of Mr. Cooper's knowledge, but he testified that a record is kept of when franchise agreements expire and that, in addition, within a week or two after a franchise is awarded, the sales department contacts the franchisee (Tr. 1592).

During the colloquy, complaint counsel indicated that the Government would be calling Mr. Cooper "but not to explain these documents" (Tr. 1584). Respondents' counsel stated that if com-

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[4] The reverse of CXs 291–98 suggests that the Government had 115 franchise agreements. Mr. Meyer did not know how many franchised distributors respondents had (Tr. 397–98).

[5] Complaint counsel's contention that, if no reorder had been received, the agreement would not have expired until September 10 (CPF 62; CRB 2) is rejected as contrary to the agreement.

[6] The examiner put counsel for both sides on notice that the hearsay nature of Mr. Meyer's testimony would have to be taken into account in determining its weight (Tr. 1581, 1585, 1597–99).

plaint counsel failed to inquire of Mr. Cooper about CXs 291–298, he would do so (Tr. 1584, 1598–99).

Mr. Cooper was later called as a Government witness (Tr. 2151–86), but, unaccountably, neither counsel questioned him on the subject of the "overlapping" franchise agreements.

The only additional evidence that complaint counsel offered to support the franchise allegations was the testimony of former employee Donald Meany,[7] who testified to the effect that during his employment by respondents (January-November 1970), he had "never seen" any credits given or any orders or inquiries forwarded to franchised distributors. He did acknowledge that before a county franchise was awarded, a check was made to determine if the county was already franchised. The import of his testimony was that a franchise for a county was not offered if it had already been allocated to another distributor. (Tr. 3575–78).

The charge that respondents failed to honor their franchise agreements is not supported by "reliable, probative, and substantial evidence," as required by Rule 3.51(b).

The 8 franchise agreements showing overlapping assignments of territories (CXs 291–298) constitute the only evidence in support of the allegation that franchises are not exclusive, as represented. However, they do not, by any means, constitute conclusive proof that the same territory was assigned to two different distributors at the same time. They permit, but they do not compel, such an inference. At most, their introduction in evidence might be viewed as having shifted to respondents the *burden of going forward with the evidence* to explain the conflicting territorial allocations. But the *burden of proof* remained with complaint counsel; and the 4 instances of overlap (not 8 instances, as stated by complaint counsel at CRB 2–4; compare CPF 59) do not prove that respondents engaged in such a practice, particularly when such an inference is contradicted by the testimony of Mr. Meyer and Mr. Meany.

Respondents undertook their burden of going forward with the evidence by offering the hearsay explanations of respondent Elliott Meyer. Complaint counsel argue that Mr. Meyer's testimony is unrealible hearsay which should not be credited and that respondents' failure to call the hearsay source (Marvin Cooper) to testify creates an inference that his testimony would have been adverse

[7] See footnote 2, *supra*, p. 6 [p. 497 herein], and accompanying text. As previously noted (*supra*, p. 8 [p. 499 herein]), counsel stipulated that another employee would have substantiated Mr. Meany's testimony.

to respondents. Since Mr. Cooper was called as a Government witness but was not examined by either counsel on the subject, the adverse inference rule relied on by complaint counsel cuts two ways. With the burden of proof upon complaint counsel, their position is likewise subject to the same adverse inference that they would invoke against respondents. By the same token, their failure to call the original franchisees to testify whether, in fact, they had abandoned their franchises before they were reassigned permits an inference that their testimony would have been adverse to the Government's contentions.

Moreover, there is at least a substantial question whether only 4 such overlaps in 1965, out of at least 100 franchise agreements then in effect, constitute proof of a practice that warrants issuance of a cease and desist order in 1971.

Finally, against the stipulation conceding the existence of evidence that respondents otherwise complied with their franchise commitments (*supra*, p. 18–19 [p. 511 herein]), and Mr. Meyer's testimony to the same effect, the testimony of Donald Meany to the contrary does not satisfy the burden of proof imposed on complaint counsel. Their interpretation of the phrase "at different times" contained in the stipulation and their speculation as to respondents' noncompliance with the franchise terms (CPF 62; CRB 2) are not persuasive.

The allegations respecting franchises should be dismissed for failure of proof.

V. Representations As To Earnings

As alleged by the complaint (Paragraph Five (5)), respondents have represented, directly or by implication, that distributors of the product VX–6 will regularly earn $1,554 per week, $25,000 per year, and various other high amounts.

For example, in one advertising brochure (CX 2 A–D), under the heading:

Our men made MORE THAN $4,000,000 PROFITS and haven't even scratched the surface yet!

These aren't Miracle Men—THEY'RE NOT EVEN HIGH-POWERED SALESMEN!,

respondents attributed earnings to named and pictured individuals as follows:

$1554 one week.

$148 one day.
$2316.96 one week
$1028 one month
$500 one week
$350 one week.

Other representations included the following:

I talk big figures, $10,000, $15,000, $25,000 a year * * * VX–6 is the Aladdin's Lamp of Specialty Selling. (CX 4 A)

I'm going to show you how to enjoy an income of $1,000 or more a month * * * *without ever risking a penny of your own money.*

Sounds almost too good to be true, doesn't it? And yet, thousands of men all across the country are doing it right now! Ordinary men, with no special education or background. Most of them started with *no selling experience whatsoever,* (CX 1 A)

One Quick Phone Call—At My Expense—And You Can Choose How Much You Want to Earn This Year—( ) $2,000.00 ( ) $5,000.00 ( ) $10,000.00 ( ) $15,000.00 ( ) $25,000.00. (CX 31 A)

The fellows who are making $10, $15, even $20 per hour with VX–6 aren't some kind of Super Salesmen that could sell refrigerators to eskimos. They're ordinary men, from all walks of life. (CX 31 C)

You too can make $1,000.00 a month with VX–6 * * *. (CX 2 B)

IT'S NOT TOO LATE! What do you want to make of your life? * * * An independent business of your own? * * * An income of $15,000 to $50,000 per year? * * * Part-time earnings of $10, $15, $20 per hour? Money for a bigger or better home, a second car, college for your children, retirement for yourself and your wife? * * * These dreams can be a reality once you get on the job as an authorized VX–6 Distributor! (CX 36 B)

HERE'S HOW TO MAKE $46.00 A DAY—EASY! (CX 48 D)

HERE'S HOW TO MAKE $95.00 A DAY—EASY! (CX 48 D)

These advertising representations have the capacity and tendency to lead members of the public to believe that a substantial number of distributors of VX–6 will regularly earn in excess of $12,000 per year, even as much as $80,000 a year.

Although the record fails to support the allegation (Complaint, Paragraph Six (5)) that no distributor realizes the earnings claimed in respondents' advertising, there is basis for a finding that "few * * * attain such earnings."

None of the specific earnings claims was disproved,[8] and there was no testimonial or documentary evidence as to the actual

[8] But see CXs 113, 114; CX 299, CPF 44–45.

earnings of any VX–6 distributors. However, it was stipulated that of 12,000 distributors who purchased VX–6 from respondents during the calendar year 1969, not more than 60 distributors, or one-half of one percent of the total number of distributors, "made profits in excess of $10,000 through the resale of * * * VX–6;" that of these 60, not more than 20 made profits in excess of $15,000; that not more than 5 made profits in excess of $25,000; and that no distributor made profits in excess of $75,000 (Tr. 172–73).

Thus, the evidence is to the effect that while it may be possible for a distributor to realize earnings of the magnitude stated in respondents' advertising, the representation that a substantial number of distributors have made and can make the high profits indicated is false, misleading, and deceptive.

For example, whereas respondents have represented that by reselling VX–6, "thousands of men all across the country" were enjoying "an income of $1,000 or more a month," the fact is that not more than 60 made profits of such magnitude in 1969.

Respondents' argument (RPF 12) that representations of specified earnings for one week or for one month do not imply annual earnings on such a basis is rejected, as is the distinction sought to be drawn between part-time and full-time distributors. Respondents seek to relate the maximum number of 60 who may have earned more than $10,000 a year to an estimated 200 full-time distributors rather than to the 12,000 distributors cited in the stipulation. (Compare RPF 12 with CRB 4–7.)

VI. Use of Testimonials

The complaint alleges (Paragraph Seven) that:

> Through use of published testimonials respondents represent, directly or by implication, that they are the statements of persons or organizations currently using respondents' product and that respondents have been given permission to publish such statements; whereas, in truth and in fact, in many instances, such testimonials are statements by persons or organizations who only used the product in the remote past and did not give permission for publication.

In support of these allegations, complaint counsel presented evidence respecting 4 testimonials published by respondents (CXs 41 C, 41 F, 41 J, and 41 P). As published, none of the testimonials bore a date.

Regarding CX 41 C, the record shows only that this testimonial was written prior to 1966, when the writer left the employment

of the organization on whose letterhead he wrote. There is no evidence that respondents had been advised by anyone that their use of the testimonial was or is in any way questionable. (Martin 523–49).

As to the 3 remaining testimonials, the examiner finds as follows:

1. By publishing and circulating as late as 1969 testimonials from which the dates of origin had been deleted, respondents represented that the testimonials were recent statements of persons contemporaneously using VX–6; that respondents were authorized to publish them; and that the opinions expressed as to the merits of VX–6 were the opinions of the writers as of the time they were published and circulated.

2. The testimonials were written from 5 to 10 years ago—CX 41 F in 1962; CX 41 J, about 1961; and CX 41 P in 1966. The originals were dated.

3. Although none of the testimonialists repudiated the truth or accuracy of their statements as of the time they wrote them—in fact, they affirmed them—they did not use or endorse VX–6 at the time they testified (September 1970) and had not for some time prior thereto. However, in response to inquiries, one had confirmed the validity of his testimonial numerous times—most recently in 1968, at the same time that he requested respondents to discontinue using it (CXs 165–166). Respondents err when they contend that the writers "continued to subscribe to the opinions expressed in the letters" (RPF 14).

4. None of the testimonialists had authorized respondents to publish the testimonials, but each had given his testimonial to a VX–6 distributor. Two of them had specifically or tacitly authorized the distributor to use the testimonial to promote the sale of VX–6. The third testimonialist (P. J. Mortellite) understood that his letter (CX 41 J) was simply for the distributor's files, but the fact is that the letter was addressed to National Dynamics, and Mr. Mortellite agreed that a reasonably prudent business man would assume that respondents had the right to use it for advertising purposes.

5. Two of the testimonialists had notified respondents of their objections to continued use of their testimonials—D. A. Downey in 1968; Mr. Mortellite in 1968 or 1969. Both were satisfied by respondents' assurances that their testimonials would be deleted in the next publication of the testimonial booklet. They understood

that existing copies would continue to be used. The third testimonialist (Wiley W. Hunter) had made no request that respondents stop using his letter.

6. Respondents had a policy and practice of obtaining a "Consent and Release" from testimonialists, but in some instances, they accepted the assurances of distributors that testimonialists had authorized publication of their letters.

Record references (in addition to Tr. 523–49; CXs 41 C, F, J, P and CXs 165–166) are as follows: Downey 446–87; Mortellite 501–22; Hunter 488–501; Meyer 1260–79; RX 9.

The evidence warrants conclusory findings as follows:

1. Respondents published and circulated on a nationwide basis testimonial letters without the authorization of the writers. The fact that two testimonialists authorized VX–6 distributors known to them to use their letters in making sales did not constitute authorization to respondents to use the letters in the manner they did. It is no defense for respondents to say that they agreed to withdraw the testimonials as soon as they learned of the writers' objections. Respondents have no right to impose on individuals who have not authorized them to publish their letters the burden of protesting such publication.

2. Respondents' use in advertising of undated testimonial letters written in the remote past [9] created the impression, contrary to fact, that they were recent statements of persons contemporaneously using VX–6 and that the statements represented the contemporaneous opinions of the authors. The fact that until a year or two before the hearings, respondents had had no notice that the testimonialists no longer used VX–6 and no longer endorsed it is no defense. Again, respondents have no right to impose the burden of such notice on testimonialists—particularly those who, as here, have not authorized respondents to publish their testimonials in the first place. It is respondents' duty to ensure that the testimonials they publish reflect facts and opinions existent at the time of publication and circulation.

Research reveals relatively few Commission cases on the issues here presented respecting testimonials. The cases and authorities cited by complaint counsel support the legal principles upon which these findings and the applicable order are based: *Tri-State Printers, Inc.*, 53 F.T.C. 1019, 1029, 1037 (1967); *Bureau of*

[9] Respondents concede that the testimonials in issue were written "in the remote past" (RPF 14).

Engraving, Inc., 39 F.T.C. 192, 198–99 (1944); *Cigarette Advertising Guides*, 2 CCH Trade Reg. Rep. ¶7894 (1955).

The examiner is issuing an order (Par. 3, *infra*) that is different both from Paragraph 9 of the tentative order appended to the complaint and from Paragraph 9 of the revised order proposed by complaint counsel (CPF 92; CB 41). The tentative order appended to the complaint reads as follows:

9. Using, publishing or referring to any testimonial or endorsement which is not of current origination and its use expressly authorized in writing.

The revised order proposed by complaint counsel reads as follows:

9. Using, publishing, or referring to any testimonial or endorsement unless such testimonial or endorsement is genuine in all respects, dated, and represents the current opinion of the author, and unless its use is expressly authorized in writing.

Complaint counsel state that their revised order is designed "to make it fairer for respondents and at the same time to add to the protection of the public." They further explain:

Respondents can be restricted to using only recently executed testimonials. However, as long as the testimonials are dated, and still reflect the current opinion of the authors, there is no overpowering reason to require respondents to have new testimonial letters executed every few years. So the order has been changed to eliminate the requirement that testimonials be of current origination. In addition, since the record indicates that all of respondents' testimonials are not genuine, a requirement of authenticity has been added to this provision of the order. (CB 41)

It seems to the examiner that both forms of order are unnecessarily restrictive—one in requiring that testimonials be "of current origination" and the other in requiring that they be dated. The point is that at the time a testimonial is published and circulated, it should reflect the facts then existent respecting the testimonialist's use of the product and his opinion thereof. If the testimonial does this, it is immaterial when the testimonialist purchased the product or wrote the testimonial.

The order being issued by the examiner, in addition to requiring express authorization, would simply require, in effect, that "respondents have good reason to believe that the person or organization named" in a testimonial "subscribes to the facts and opinions therein contained" at the time of publication and circulation. Because the facts in this case do not show any flagrant dereliction on the part of respondents, this less onerous and more

practicable order seems preferable to the other versions. The standard of "good reason to believe" is adopted from the *Cigarette Guides, supra.*

The proposed order of complaint counsel poses an additional problem in requiring that testimonials be "genuine." There is no question that testimonials should be genuine, but complaint counsel have cited no basis for such a specific requirement here. Their statement that not all of respondents' testimonials are genuine (CB 41) is wholly undocumented, and the examiner is aware of no evidence proving the lack of genuineness of any of respondents' testimonials (compare CRB 9). In any event, no such issue was presented by the pleadings.

VII. Representatives as to Testing

The complaint contains several allegations respecting the testing of VX–6 (Paragraph Five (6)–(7) and Paragraph Six (6)–(7)).

First, respondents are charged with having represented, directly or by implication, that "Laboratories and certain users have approved and fully tested the product as to performance," whereas—

(1) Laboratories and certain users have not approved and have not fully tested the product.

(2) Some of the laboratories were either non-existent or had not authorized the use of a seal of approval.

(3) Testing of the product had not been accomplished or was incomplete and named users had not approved and tested said product.

Second, a closely related charge is to the effect that respondents have represented, contrary to fact, that:

Each of the use or performance representations made by respondents for the product has been substantiated by respondents through competent scientific tests or by authenticated, controlled and duly recorded user tests or both.

The complaint does not specifically allege that the affirmative representations of testing constituted representations that the tests referred to were "competent scientific tests" or "authenticated, controlled; and duly recorded user tests." The charging paragraph relating to the testing and approval of XV–6 (Paragraph Six (6)) does not deal with this standard for testing. This standard appears to be applied only with respect to the implied representations of testing allegedly arising from the making of performance claims. As the case developed, there emerged the

novel theory that merely by claiming that VX–6 would perform in stated ways, respondents impliedly represented, contrary to fact, that each performance claim had been substantiated through competent scientific tests or by proper user tests.

Despite this apparent dichotomy, the issue posed is the same, whether the representations of testing were made directly or by implication. The question is whether the tests advertised by respondents were competent scientific tests or authenticated, controlled and duly recorded user tests. Nevertheless, these two aspects of the case initially require separate consideration. It is necessary to consider first the nature of the affimative representations respecting tests, as well as the facts respecting certain of the preliminary challenges to these representations.

It is beyond dispute that respondents represented that VX–6 not only had been "tested," but that it had been "tested and approved." By the depiction of laboratory seals and otherwise, the basic representation was that VX–6 had been tested and approved by laboratories. For example—

The cartons in which VX–6 is sold bear the words "Tested" and "Approved," accompanied by laboratory seals. The cartons formerly used contained the seals of Underwriters Laboratories,[10] American Testing Laboratories, and Public Service Testing Laboratories (CX 155). The carton used since 1965 or 1966 (CX 218) has substituted the seal of National Testing Laboratories for that of Public Service Testing Laboratories. (Tr. 374 A–G; see Tr. 334, 337–38, 1723–25.) A depiction of the carton, showing the words "Tested" and "Approved," as well as the seals, appears in CXs 24 D, 33 B, 36 A–B, 37 B, 39 D, and 62 P.

In addition, the words "Tested and Approved," usually accompanied by laboratory seals, appear in numerous advertisements (CXs 6 A, 49 D, 57–60, 73, 75, 115). One advertisement specifically states: "Tested and Approved by Independent Laboratories" (CX 32 D), and there are various other references to laboratory testing, seals, and reports (CXs 31 E, 113, 114).

Respondents also disseminated a simulated certificate bearing the words "Certificate of Approval to VX–6 by Independent Testing Laboratories" and the imprints of the seals of Underwriters Laboratories, American Testing Laboratories, and Na-

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[10] Complaint counsel made no claim that respondents misused the seal of Underwriters Laboratories (Tr. 4398). The Underwriters seal bears the words "Classified as to Fire Hazard Only."

tional Testing Laboratories (CX 43). They represented further that:

* * * [M]any leading national testing laboratories have tested and approved VX–6. (CX 1 B)

VX–6 has undergone the most strenuous tests and came through with flying colors. (CX 31 C)

Respondents reproduced the test report of National Testing Laboratories (CX 39 B–C), with a cover page (CX 39 A) that proclaimed in large type:

INDEPENDENT LABORATORY TESTS VX–6 BATTERY ADDITIVE * * *

Under the seal of National Testing Laboratories, the cover also contains the following text:

This Test PROVES and CERTIFIES that *VX–6 BATTERY ADDITIVE* * * *

Restores Active Life to *"Dead Batteries"!

Breaks Down Sulphation Corrosion—The Primary Cause of Battery Failure!

Improves the Electrical Storage Capacity of a Battery!

Allows a Battery to Perform Satisfactorily at 30° Below Freezing Temperatures—As Well As Under Extreme Heat Conditions of 168°!

Gives Recuperative and Self-Recharging Ability!

* * * *and Extends the Life of a Battery*

*Mechanically sound batteries that have failed due to excessive sulphation deposits.

The test report of Public Service Testing Laboratories (CX 221 A–D) was also used in advertising, with the words "Tested" and "Approved" on the cover page, together with the Laboratories' seal.

The only reference to so-called user tests appears to be CX 9 A, in which respondents advertised that one railroad had "successfully tested and used VX–6" for 3 years and that another "tested VX–6 for 4 years" and "approved" its use in its truck and car batteries, as well as in railroad diesel batteries. In CX 221 D, the product was represented as "ROAD TESTED" in 10,000 cars, trucks, boats, tractors, etc. Additionally, respondents circulated testimonial letters (CX 41 A–P).

Just as there can be no dispute about respondents' representations, so it is also beyond dispute that VX–6 had been laboratory-

tested—by at least 6 commercial testing laboratories—and that it was also subjected to testing in a municipal government facility (CXs 39 B–C, 40, 221 B–C, 226 A–W, 227 A–B, 229 A–J, 231 A–B, 232 A–E, 301 A–B, 302 A–D; see also RX 24).

Leaving for later consideration the question of whether these tests meet established standards of scientific competency, we turn now to the various other issues posed by the complaint on the subject of testing.

First, the evidence supports the allegation that laboratories have not "approved" VX–6. In general, the test reports tend to support various advertising claims made for VX–6, but the record is clear that no laboratory either approved the product or the advertising claims for it as such. (See RPF 16; 4405–08.)

Second, the record fails to substantiate the allegation that neither "certain users" nor "named users" had "approved and tested" VX–6. Despite a proposed finding to this effect (CPF 64), complaint counsel have not cited any evidence to support it. In response to respondents' plea that the allegations be "stricken" (RPF 14–15), complaint counsel simply cite the railroad advertisement (CX 9 A, *supra*, p. 33 [p. 519 herein]) plus a reference to "strenuous tests" in CX 31 C (*supra*, p. 32 [p. 519 herein]) and make the undocumented assertion that "these representations * * * are false" (CRB 11). They cite no proof, and the examiner is aware of none.

Third, the record fails to yield a definitive answer to the question whether VX–6 had been "fully tested"—or even to the question of what the term means. It is fair to say that it was not "fully tested" by any single laboratory; there were suggestions for supplemental and more extensive tests. But respondents can make a persuasive case that the combination of laboratory tests and user tests justifies a representation that VX–6 has been fully tested. Moreover, there is no evidence that respondents actually so claimed; the record fails to establish any standard for a "fully tested" product; and the proposed orders do not deal with the subject.

Fourth, despite the allegation in the complaint and complaint counsel's corresponding proposed finding that "Some of the laboratories were * * * non-existent" (CPF 64), this was stricken as an issue when complaint counsel conceded that they were not charging that the laboratories that tested VX–6 were fictitious but only that one of the laboratories (Botco Laboratories) had gone out of business (Tr. 187–97, 252–53).

Fifth, the record fails to contain "reliable, probative, and substantial evidence" (Rule 3.51(b)) to support the allegation that respondents used laboratory seals in advertising without authorization. The only instance cited by complaint counsel relates to the seal of Public Service Testing Laboratories (CPF 84–85), but the testimony of its president, Michael Di Martino, fails to clearly establish that respondents did not have such authorization. Although Mr. Di Martino first stated that his laboratory had not authorized the use of its seal or its test report (CX 221 B–C) in advertising (Tr. 1605–06, 1612–13), he acknowledged on cross-examination that the laboratory had authorized respondents to use the report and the seal for limited advertising purposes (Tr. 1732–40, 1748–67, 1772–78, 1844). (Compare CPF 84–85 with RPF 15–16.) In any event, the record indicates that the use of the Public Service seal was discontinued several years ago. (Compare CX 155 with CX 218; see Tr. 334, 337–38, 374 A–G, 1613–16, 1723–25.)

Sixth, the evidence fails to support the allegation that "testing of the product had not been accomplished or was incomplete." The question whether testing was "incomplete" is similar to the question whether VX–6 was "fully tested" (*supra*).

With the allegations of Paragraph Six (6) disposed of, the next question is whether respondents, by representing that VX–6 had been "tested," thereby further represented (1) that the tests were "competent scientific tests" or "authenticated, controlled and duly recorded user tests" and (2) that such tests substantiated each of the "use or performance representations" for VX–6 (Complaint, Paragraph Five (7) and Paragraph Six (7)).

As to representations concerning laboratory tests, it is altogether reasonable to infer that the public, or a substantial segment thereof, would expect such tests to be competent scientific tests. The examiner so finds.

Similarly, a representation that a product has been tested has the capacity and tendency to lead the public to believe that such tests substantiate the use or performance claims made for the product, particularly where the product has been advertised as "tested and approved." This was virtually conceded by respondents' counsel (Tr. 254–55).

A representation that a product has been tested and approved in actual use is in a different category. Complaint counsel have not shown that respondents' advertised that their performance claims were substantiated by "authenticated, controlled and duly recorded

user tests." Respondents did publish user testimonials CX 41 A–P; they referred to "road tests" (CX 221 D); and they advertised that railroads had tested and approved VX–6 (CX 9 A, *supra*, p. 33). In fact, the railroad advertisement is the only representation of a so-called user test included among the 58 challenged representations listed by complaint counsel (CPF 22–30; see No. 28 at CPF 26).

There is no evidence of any public understanding that user tests meet the specifications contained in the complaint. As a matter of fact, the Government's expert marketing witness, called to testify regarding user tests, acknowledged that there were no established standards for such tests, although he expressed his opinion of what criteria should be used in assessing their validity (Goodman 3387–91, 3337–60).

Moreover, it is significant that no such standard was applied either by the examiner or by the Commission in the case of *Pioneers Inc.*, 52 F.T.C. 1351 (1956). In that case, in which charges of false and misleading advertising of the battery additive AD–X2 were dismissed for failure of proof, the hearing examiner relied on user testimony to resolve a conflict in the scientific evidence. The examiner commented:

> From a scientific viewpoint there are of course valid objections to this user testimony. The most serious is that usually controls were not maintained, that is, untreated batteries maintained along with the treated, so that any differences in the behavior of the two groups could be observed. A further objection is that usually adequate records were not maintained. But after recognizing the validity of these objections and discounting the testimony accordingly, there still remains a very substantial body of reliable and probative evidence attesting the merit of the product. And such evidence would appear to be particularly significant and helpful in the present case, in view of the conflict in the scientific evidence. (52 F.T.C., at 1366; see 1369–70).

Thus, although respondents represented that VX–6 had been successfully tested in use, they did not represent that their advertising claims were substantiated by authenticated, controlled and duly recorded user tests.

Before considering the validity of the tests that respondents rely on as substantiating both their testing claims and their performance claims, it is necessary to consider a further issue raised by Paragraph Five (7) and Paragraph Six (7) of the complaint—that is, whether, in the absence of affirmative claims that VX–6 has been tested, the dissemination of performance

claims necessarily implies that such claims have been substantiated by valid laboratory tests or by valid user tests.

Because of the plethora of specific affimative claims that VX–6 had been tested (*supra,* pp. 31–33 [pp. 518–20 herein]), it hardly seems necessary to reach this issue of implied claims of testing. Nevertheless, with evident "reason to believe" that respondents had made affirmative claims of testing, the Commission injected this admittedly new concept as an issue in the case. Although this is not readily apparent from the text of the complaint, the provisions of Paragraph 8 of the tentative order appended to the complaint make it abundantly clear that the theory of the case is that even in the absence of any specific or clearly implied representations of testing, it is an unfair practice to advertise performance claims for a product unless the advertiser has substantiated them by tests meeting a specified standard. This was recognized by counsel and by the examiner from the outset of the proceeding, although respondents objected to retaining such an issue in the case both on legal grounds and on pragmatic grounds (Tr. 84–87, 202–23, 225–28, 253–79).

Both parties have now extensively briefed and argued the issue, and it should be resolved.

In condsidering whether performance claims necessarily imply that they have been substantiated by proper tests, we begin with the fact that the record is wholly devoid of evidence that any member of the public so interprets the performance representations made by respondents concerning VX–6.

According to complaint counsel, such evidence is unnecessary. They contend that the implied representation of testing is an inference that the examiner and the Commission may draw from the reading of the advertising claims. In their brief, complaint counsel contend that "performance claims, by their very nature, create an implication that tests were performed to substantiate them." This implication of testing, they argue, is the "logical interpretation to be given to performance claims." (CB 1)

Complaint counsel concede that to infer such a representation from the making of performance claims is a new theory that is without precedent, except that such allegations have been made in 3 other cases [11] now in litigation. They acknowledge that these cases constitute the first time the theory of implied representations

[11] *Firestone Tire & Rubber Co.*, Docket No. 8818 [81 F.T.C. 398]; *Pfizer, Inc.*, Docket No. 8819 (dismissed by Hearing Examiner Bennett April 16, 1971) [81 F.T.C. 23]; *E. I. du Pont de Nemours & Co.* (Notice of intention to issue complaint), File No. 702 3285.

of testing has been litigated in a Commission proceeding, but they insist that there are decided cases that lend support to their interpretation of performance claims as incorporating an implied claim of testing.

The argument that the examiner and the Commission may now so interpret performance claims without any evidence of such public understanding is not persuasive. The Commission has been dealing with advertising claims for more than half-century, but until it issued the complaint in this case, it had never taken such a position. Complaint counsel urge that the Commission "has a special expertise in determining the meaning of advertisements and the inferences to be drawn therefrom" and that, therefore, "the Commission's interpretation of the performance claims in this case must be given the utmost consideration" (CB 3–4). These principles are applicable to the Commission sitting in its adjudicative capacity, but the issuance of a complaint is not an adjudicative act. The theory of implied representations of testing is merely an allegation; the Commission had "reason to believe" that performance claims involved implied representations of testing. At this stage, however, the examiner must adjudicate the question.

The adjudicative determination here made is a narrow one—that the record in this case does not permit an inference that performance claims per se involve an implied representation of substantiation by testing. This determination has been made with full awareness that consumer testimony as to the meaning of advertisements is not ordinarily required—that the Commission may draw its own inferences from its examination of the advertisement.[12] But decisions to this effect are subject to limitations based on fundamental principles of fairness so well-recognized that no elaborate citation of authority is required: The inference drawn must be one that is reasonably implied; it may not be arbitrary.[13]

On this record, the examiner considers the inference contended for would be unreasonable and its adoption arbitrary and unwarranted.[14] The record is silent as to the nature of the revelation that

[12] *Niresk Industries* v. *FTC*, 278 F.2d 337, 342 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *Mohr* v. *FTC*, 272 F.2d 401, 405 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960); *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 680 (2d Cir. 1944); *Zenith Radio Corp.* v. *FTC*, 143 F.2d 29, 31 (7th Cir. 1944).

[13] *Leach* v. *Carlile*, 258 U.S. 138, 140 (1922); *Gulf Oil Co.* v. *FTC*, 150 F.2d 106, 108 (5th Cir. 1945); *A.P.W. Paper Co.* v. *FTC*, 149 F.2d 424, 426 (2d Cir. 1945).

[14] Compare the *General Motors* case, 66 F.T.C. 267, 272 (1964) (consent order), where an order against representations, direct or implied,

"that any product has been tested, either alone or in comparison with other products, and that

led the Commission and its staff to believe, after 50 years, that the public—or a substantial segment thereof—now infers that merely by making performance claims for a product, an advertiser thereby assures the public that he has "competent scientific tests" or "authenticated, controlled and duly recorded user tests" to back up such performance representations.

Even complaint counsel seem unsure of the validity of their position. Not only do they point out other inferences that the public may draw from a performance claim, but they simply argue that it is "not unrealistic to assume" an inference of testing (CB 1–3). Moreover, the exact application of this new theory is left in some doubt by their brief. The first 17 pages of the brief are devoted to an argument that "the public does infer from the making of performance claims that valid tests were run to substantiate the claims" (CB 17). Nevertheless, in proposing revision of Paragraph 8 of the tentative order appended to the complaint, complaint counsel seem to have receded in large measure from the theory they espoused in the first 17 pages of the brief. Paragraph 8 of the tentative order appended to the complaint would prohibit respondents from:

> Representing, directly or by implication, that any product has various uses or performance characteristics or will accomplish certain results unless each said use, performance or accomplishment claim has been fully and completely substantiated through * * * [proper] tests.

Complaint counsel's revision would forbid any representation, direct or implied, that:

> use or performance claims have been substantiated by * * * [proper] tests unless each use or performance claim has been so substantiated * * * .

In explanation of this proposed modification, complaint counsel say that Paragraph 8 of the tentative order appended to the complaint—

> appears to assume that all use or performance claims imply that substantiating tests were run. This is an unnecessarily broad, and possibly incorrect, assumption. The order should prohibit false claims of testing, rather than unsubstantiated performance claims, since without the implication of testing an unsubstantiated performance claim is perfectly permissible. (CB 40–41).

There is no explanation of the manner in which, in the absence

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such test proves or supports a claim as to the performance of such product, unless such representations clearly and accurately reflect the test results and unless the tests themselves are so devised and conductd as to constitute a creditable basis for any such representation,"

contained a proviso that: "This paragraph shall not prohibit any advertisement which does not reasonably imply that a test has been made."

of specific claims of testing, it may be determined whether a performance representation also impliedly represents that it has been substantiated by testing.

Complaint counsel's proposed modification of the order does make clear, however, that the issue here is an evidentiary question—whether there are implied representations of testing. In this setting, we do not reach the related question of whether, in the absence of express or implied representations of testing, the mere dissemination of performance claims nevertheless constitutes an actionable unfair practice if those claims are not substantiated by proper tests, regardless of the truth or falsity of such claims. This was an issue in the *Pfizer* case, *supra*, but it is not an issue that is presented on this record. Accordingly, this inital decision does not deal with it.

On the evidentiary question, the examiner finds the arguments of complaint counsel unpersuasive and the cases cited in their brief essentially inapposite. The inferences drawn in the cases cited are clearly distinguishable. For example, the inference in the *Bristol-Myers* case, 46 F.T.C. 162, 173 (1949), *aff'd.* 185 F. 2d 58 (4th Cir. 1950) was "unmistakable." Similarly, the inferences of testing drawn from the use of a laboratory seal and the Good Housekeeping seal [15] and from the representation that products were certified and approved by a science institute [16] are clearly in a different category from the inference contended for here. The arguments founded on cases involving commercial warranties, express and implied (CB 14–16), do not resolve the issue.

Complaint counsel here seek to extend a principle expounded, *obiter dictum*, by Commissioner Elman in the *Universe Co.* (*Kirchner*) case, 63 F.T.C. 1282, 1294–95 (1963), *aff'd.* 337 F. 2d 751 (9th Cir. 1964). He there stated:

> * * * One who affirmatively advertises a product to be safe, in a context in which the prospective user's health or safety may be adversely affected if the claim is false, implicitly represents that he has a reasonable and substantial foundation in fact for making the claim.

It should be noted, first, that this dictum is limited to products related to health and safety. Second, and more important, the only inference that the Commissioner would draw from a representation of safety is the further representation that the advertiser "has a

[15] *Topval Corp.*, 54 F.T.C. 1862 (1958) (consent order).

[16] *Nationwide Industries*, Docket No. C–1356 [74 F.T.C. 78] (July 9, 1968) (consent order).

reasonable and substantial foundation in fact for making the claim" (63 F.T.C., at 1295)—not that valid tests were conducted.

In any event, although legal precedents provide some guidelines, the question presented is essentially one of fact. The difficulty is that the record contains no facts upon which this examiner can base a finding that, without any express or clearly implied claims of testing, the public reads into respondents' performance claims a representation that such claims have been substantiated by valid tests.

Complaint counsel argue that it "cannot be inferred that the interpretation of advertising advanced here is invalid merely because it came 53 years after the first advertising case had been decided by the Commission" (CB 7). The examiner has drawn no such inference, but it would be just as logical as—perhaps more so than—the inference they propose in an evidentiary vacuum. Such a belatedly-discovered interpretation of advertising demands some evidentiary basis beyond the *ipse dixit* of counsel. It is altogether possible that public understanding of performance claims may embrace an implied representation of testing, but the fact that the existence of such public understanding has escaped the expertise of the Commission for 53 years must be considered in assessing counsel's argument that their theory of implied testing representations "should be accepted because it is correct" (CB 17).

Finally, the argument that the adoption of this theory would simplify the Commission's enforcement burden in this age of consumerism is immaterial. It affords no proper basis for resolving such an important question.

We revert now to the question of what tests respondents' advertised claims of testing were based on, after which we shall consider whether such tests were valid and whether they substantiated respondents' performance claims.

The laboratory test reports that respondents relied on involved the following laboratories:

American Testing Laboratories, Inc. (CX 40),

Botco Laboratories (CX 226 A–W; see also RXs 21–24),

Electrical Testing Laboratories, Inc. (CX 227 B),
as interpreted and summarized by Industrial Testing Laboratories[17] (CX 227 A),

[17] The testimony of Wilson J. H. Rogers (Tr. 1845–1937) concerning other work of Industrial Testing Laboratories is also cited by respondents as constituting scientific support for their advertising claims.

National Testing Laboratories, Inc. (CXs 39 B–C, 232 A–E, 301 A–B, 302 A–D),

Public Service Testing Laboratories, Inc. (CX 221 A–C), and Stillwell & Gladding, Inc. (CX 231 A–B).

Respondents also relied on a test report entitled "New York Department of Sanitation Test Program" (CX 229 A–J) and a report by Edward M. Halter of a test conducted at the Naval Base in Torrence, California (CX 233 A–B). These reports are not laboratory reports; they are more in the nature of reports of user tests. Since, for a variety of reasons, these reports may be largely disregarded for decisional purposes, the examiner, in the interest of brevity, will not discuss the numerous points of controversy concerning them.[18]

In addition to the laboratory tests of VX–6 as a basis for the challenged advertising claims, respondents point to more than 60 documents attesting to the efficacy of VX–6. Respondents refer to these letters as reports of user tests or field tests. The users reporting satisfactory results included the following:

Operators of a trucking fleet in Albany, New York—"pleasing results" with VX–6; better starting power and brighter lights; battery failure virtually eliminated (CX 41 B).

Engineer for a television network, Birmingham, Alabama—eliminated starting problems with old battery; "convinced of the product's capabilities" (CX 41 C; see p. 26 [p. 513 herein], *supra*).

Plant manager for a construction company, Dublin, Georgia—VX–6 restored power to a "dead" battery (CX 41 D).

Radio station program director, Rocky Mount, North Carolina—VX–6 "improved the efficiency" of a battery used in mobile transmitter—no battery failure (CX 41 E).

Mechanic for fleet of ice cream delivery trucks, Cincinnati, Ohio—battery performance improved (CX 41 G).

Engineer of taxicab fleet (location not shown)—battery troubles "reduced to an unbelievable minimum" (CX 41 I).

Operator of school buses and tour buses, Platteville, Wisconsin—VX–6 installed in fleet of 21 buses; "very pleased with the performance of VX–6;" recommends its use (CX 41 K).

Funeral home, Fort Pierce, Florida—VX–6 used in all rolling stock for 3½ years and found to be "entirely satisfactory." (CX 41 L).

Neon sign company, Fall River, Massachusetts—"pleased with * * * performance" of VX–6 in delivery trucks (CX 41 M).

[18] The Government's expert witnesses concluded that neither report was descriptive of a competent scientific test (Tr. 2465–66, 4051, 4191–93). Other record references to CX 229 A–J are as follows: Meyer 1215; Donnelly 2050–71, Flynn 2071–84; Murphy 4806–15, 4840–56, 4862–67; Hamer 2350–2405, 2462–68, 2603–2749; see also Tr. 2667–68, 2684–87. Testimony regarding CX 233 A–B is found at Tr. 696–708, 750–51, 837–38 (Halter), 4050–96 (Hamer). See CPF 64–68, 79; RPF 22.

Construction company, Eunice, Louisiana—VX–6 installed in trucks, cars, and heavy equipment; VX–6 found "to be everything it claims to be" (CX 41 N).

Plant engineer, concrete products company, College Park, Georgia—VX–6 installed in truck fleet and other equipment with satisfactory results (CX 41 O).

Distributor for bottling company, London, Ontario, Canada—VX–6 installed in fleet of delivery trucks and in lift trucks; experience satisfactory; "amazing" results (CX 102).

Food wholesaler, Lufkin, Texas—results with VX–6 in "fleet of trucks and cars * * * amazingly good;" battery expense zero for 15 months after installation of VX–6 (CX 234).

Motor freight transportation company, Redfield, South Dakota—well satisfied with VX–6 installed in all trucks; "25,000 miles with no battery cost maintenance" (CX 235).

Equipment supervisor, construction company, Providence, Rhode Island—unserviceable battery restored to use by use of VX–6 (CX 237).

Used car dealer, Minneapolis, Minnesota—power restored to "dead" battery by use of VX–6 (CX 241).

Great Northern Railroad Company, St. Paul, Minnesota—use of VX–6 "very satisfactory" (CX 242 A–G).

Taxi service, Troy, New York—VX–6 used in taxicab fleet and funeral limousine; 65,000 to 75,000 miles without battery failure (CX 243).

Bottling company, Tyler, Texas—no battery trouble in truck fleet or in fork lifts since installation of VX–6 (CX 250).

Transportation supervisor, utility company, Indianapolis, Indiana—"tests so far bear out the facts that this additive does what is claimed for it—extend battery life, brings old batteries back" (CX 252).

Fuel oil company, Clearwater, Florida—VX–6 tested on automotive and heavy equipment batteries with "very satisfactory results" (CX 259).

Transportation department, wholesale fruits and produce company, Delaware, Ohio—VX–6 used in the batteries of 12 trucks for 5 years with complete satisfaction (CX 260).

Coal and fuel oil company, Scranton, Pennsylvania—VX–6 used for 3 years; battery life doubled (CX 261).

Maine Central Railroad Company, Portland, Maine—battery treated with VX–6 in September 1958 still in service at the end of April 1960; performance satisfactory (CX 265 A–B).

Construction company, Middletown, Connecticut—VX–6 used with success (CX 266).

President of bait corporation, East Dublin, Georgia—"dead" battery restored to service through use of VX–6 (CX 267).

Lee Petty, racing driver—VX–6 used to his satisfaction (CX 269 A–B). This was a paid testimonial (Meyer 1237).

Iron and fence company, Savannah, Georgia—discarded battery restored to service through use of VX–6 (CX 271).

Welding and equipment company, Sutter, California—"junk" battery restored to service with the use of VX–6 (CX 273).

Boats and boating column in Clearwater Sun, Clearwater, Florida—

VX–6 restored to service a 2-year sold battery that would not hold charge (CX 274).

Funeral home, Tulsa, Oklahoma—trouble-free battery service following the use of VX–6 (CX 275).

Taxicab company, Sacramento, California—VX–6 used satisfactorily in 11 batteries (CX 276).

Used car dealer, Sacramento, California—100 percent satisfied with VX–6 after use in entire used car inventory (CX 278).

House furnishing company, Mason City, Iowa—batteries "rejuvenated" by VX–6 (CX 279).

District storekeeper, Great Northern Railway, Superior, Wisconsin—Large batteries "rejuvenated" with VX–6 (RX 5).

Reports regarding satisfactory tests or usage of VX–6 were also presented from a variety of government agencies, federal, state, and local. Among them were the following:

Director of maintenance for school buses and trucks, Grandview, Missouri—"very well satisfied with VX6" (CX 41 H).

Chief Petty Officer, U.S. Naval Air Station, Memphis, Tennessee (CXs 222, 223 A–C). The writer later became a distributor of VX–6 (Meyer 416).

Fleet Captain, Marine Laboratory, University of Miami (CX 224).

Supply Chief, U.S. Marine Corps Recruiting Station, New York City (CX 225).

Department of Sanitary Engineering, District of Columbia (CX 230).

Mayor, city of Greenfield, Indiana (CX 236).

City Manager, Gallipolis, Ohio (CX 244).

Commissioners of Roads and Revenues of Laurens County, Georgia (CX 247).

District Tire and Battery Clerk, Greenfield Highway District, Greenfield, Indiana (CX 251).

Fire Chief, North Wilbraham, Massachusetts (CX 256).

Supervisor of Transportation, Bumcombe County Public Schools, Asheville, North Carolina (CX 257).

Assistant Superintendent of Maintenance, Baltimore City Fire Department, Baltimore, Maryland (CX 283).

Sheriff, Bridgeport, Connecticut (RX 19 A).

The record also contains reports of tests and satisfactory results in use from various persons connected with National Dynamics. For example, in February 1966, Orrin White reported on the satisfactory use of VX–6 by the Maine Central Railroad and its subsidiary, the Portland Terminal Company (CXs 245 A–B, 246 A–B).

Similarly, Ed Griffin reported successful tests or use of VX–6 by International Harvester Company, Maine Central Railroad, Nevada Northern Railway, Great Northern Railroad, Tidewater Oil Company, United Parcel Service, and United Fruit Company (CX 280 A–B).

Edward M. Halter,[19] who was a VX–6 distributor and also a consultant for respondents, attested to the satisfactory results obtained with VX–6 in tests and in actual use (CX 41 A, CX 282; CX 233 A–B; Tr. 685–838; RXs 1, 3).

A distributor in Lynchburg, Virginia, reported on his personal experience with the product, as well as a test made on a police car (CX 254 A–B).

Another basis for respondents' "user test" defense is a stipulation reading as follows:

> * * * [F]rom 1958 to the present National Dynamics Corporation and its distributors have received orders from and shipped battery additive VX6, often in significant quantities, to various industrial users and various federal, state, and municipal governmental agencies, departments and installations.
>
> Respondents were informed by their distributors that these orders, and in many cases reorders, were placed only after an evaluation was made by, for and/or with the purchaser of the performance of the product in relation to certain of the claims made for the product.
>
> Respondents do not have personal knowledge or data as to the details or procedures involved in such evaluations, but were informed by their distributors merely that these customers would not order or reorder unless they were satisfied that the product was useful or performed as claimed. (Tr. 647).

The stipulation includes "a list of industrial users and governmental agencies illustrative of the industrial users and governmental agencies * * * referred to." (Tr. 647–55)

Preliminary to a consideration of the validity of the laboratory tests, it should be observed that the record establishes that, except for Botco Laboratories, which went out of business in 1962, upon the death of its owner, the laboratories listed are well-established independent testing laboratories. For example, Stillwell & Gladding

[19] The examiner rejects complaint counsel's attack on Mr. Halter's credibility (CPF 79–81) as unwarranted. On the basis of the record and Mr. Halter's demeanor as a witness, the examiner finds no reason to doubt Mr. Halter's honesty and sincerity. Complaint counsel's doubts appear to be based on a misinterpretation of Mr. Halter's testimony (compare Tr. 720 with Tr. 727–29). The confusion evident in the latter part of his testimony is attributable to the fatigue of a 66-year-old man at the end of a long day on the stand. In the opinion of the examiner, the witness's difficulty in articulating scientific concepts (Tr. 786) does not impugn his standing as a "practical expert."

has been in existence for more than 100 years (Maltese 2039); Public Service Testing Laboratories has been in business for 25 years (Di Martino 1601); and Electrical Testing Laboratories was specifically recognized by one of the Governmental's expert witnesses as a reputable laboratory that might have done some work on behalf of the National Bureau of Standards (Hamer 2833–34, 4037–38). Industrial Testing Laboratories has been in business since 1876, although it acquired new management in 1958 (Rogers 1846, 1858). National Testing Laboratories was organized in 1956 (Konstandt 1939). The record is silent as to American Laboratories.

In the case of Botco Laboratories, complaint counsel not only contend that its test (CX 226 A–W) was neither scientific nor competent, but they also refer to an "uncanny correlation" between certain data and language in this report and that of the New York Sanitation Department test report (CX 229 A–J), which, together with other circumstances, leads them to find a "cloud of suspicion" that the Botco test was, in whole or in part, less than original work" (CPF 72–74). However, there is no evidence that the Botco Laboratories was other than a reputable laboratory. As a matter of fact, an official of the National Better Business Bureau gave at least tacit consent to respondents' selection of Botco Laboratories to conduct a test of VX–6 and report its findings to the National Better Business Bureau. The Bureau "did not approve" Botco or pass judgment on its competency, but its vice-president had no reason to believe that Botco was other than a reputable laboratory. (Miller 2088–89, 2095–96, 2123)

By their own admission complaint counsel did no more than to create "suspicion" regarding Botco. This is even less probative than respondents' suggestion that Yale University and a prominent chemistry professor were associated with the Botco test (Meyer 556–58, 1312–13, 1529–30; Murphy 4815–18, 4830–32).

The examiner also rejects as unfounded complaint counsel's contentions (1) that Mr. Botwick had little or no experience in the field of electro-chemistry and, specifically, in lead-acid storage batteries (CPF 69) and (2) that his recommendations for further testing (CX 226 W) demonstrate that the product "had not been fully tested" in the areas covered by his report (CPF 70; see Hamer 2493). The proposal was that the laboratory "investigate *other matters* * * * *not covered*" in CX 226 A–W and furnish "*additional* information and data" (CX 226 W; emphasis added).

The tests relied on by respondents were reviewed and appraised by two Government experts on the lead-acid storage battery: Dr. Walter J. Hamer, formerly chief of the Electro-Chemistry Section of the National Bureau of Standards, now a consultant for the Bureau, and Dr. Joseph C. White, Director of the Electro-Chemistry Branch, Chemistry Division, Naval Research Laboratory. Dr. Hamer testified in person, while the testimony of Dr. White was stipulated. The qualifications of Dr. Hamer are found at Tr. 2236–86 and in CX 303 A–G (see also Tr. 2327). Dr. White's qualifications are set forth at Tr. 4189–91).

There is no question of their expertise on the subject of the lead-acid storage battery. Dr. Hamer was involved in the testing of 20 or 30 battery additives some 20 years ago, including an additive involved in the case of *Pioneers, Inc.*, Docket No. 6190, 52 F.T.C. 1351 (1956), but he has had no recent experience in that field (Tr. 2252–55, 2286–87, 2302). Dr. White has never performed or supervised tests on battery additives (Tr. 4190).

All that complaint counsel have established through such expert testimony is that the reports of the laboratory tests and other tests relied on by respondents are "not descriptive of competent scientific tests" (Hamer 2350 *et seq., passim;* White 4191).

This was the net of Dr. Hamer's testimony, although it was considerably qualified by cross-examination in some instances.[20] The weight of his testimony is also materially lessened by a demonstration bias against battery additives such as VX–6. It is apparent that he harbors a deep-seated and sincere belief—not just a healthy scientific skepticism—that such products are worthless (see *infra*). Before dealing with Dr. Hamer's testimony in more detail, the basis of Dr. White's opinion should be set forth. His stipulated testimony is that respondents' laboratory reports

> are not, singly or in the aggregate, descriptive of competent scientific tests in that, although there are indications that some of the scientific principles and procedures required by the scientific community were followed to some degree in some of these tests, none of these tests as described by the test reports and testimony adequately and sufficiently conform to these scientific principles and procedures. (Tr. 4191).

It would unduly and unnecessarily extend this initial decision to include a documented analysis of all of the tests involved and the thousands of pages of testimony devoted to them—even if

[20] See, for example, Tr. 2761–68, 3154, 3185, 3194–3204.

time had permitted. Accordingly, the examiner will briefly summarize the salient facts.

Each of the laboratory representatives who testified vouched for the scientific validity of his laboratory's test, although in some instances they noted limitations on the generalizations that might properly be drawn, while Dr. Hamer was usually skeptical. Thus—

The president of Public Service Testing Laboratories testified that the test described in CX 221 B–C was conducted in accordance with sound scientific procedures, but that the test involving a single battery, had not been "extensive enough" to permit generalization (Di Martino 1603–06, 1646–1700, 1781).

After detailing the deficiencies he found in CX 221 B–C, Dr. Hamer said that the report "does not constitute a description of a competent and scientific test" (Tr. 3768–72). However, he noted that all he had was the test report and that he had not had access to the laboratory notebooks or other test data (Tr. 3779–80, 3806–09). He also conceded that as to both this test report and the National Testing reports, the difference between his opinion and the observations and conclusions in the reports represented an honest difference of opinion between scientists (Tr. 3798–3800, 3810–11).

A series of tests conducted by National Testing Laboratories (CXs 39 B–C, 232 A–E, 301 A–B, and 302 A–D), involving the use of 20 batteries, was designed to "update" the findings of the Public Service report (CX 221 A–D, *supra*). The president and technical director of National Testing described the tests as "a limited sampling of performance tests that the additive can do." He characterized the reports' conclusions as "accurate" and said they confirmed the findings of the Public Service test. (Konstandt 1955–56, 1973–99, 2004–07, 2015)

Although initially, Dr. Hamer was severely critical of the National tests, describing most of the performance tests as essentially meaningless and concluding that the reports were not descriptive of competent scientific tests, he nevertheless found acceptable, with some qualifications, many of the conclusions favorable to VX–6 (Tr. 3071–3204, 3712–61).

The Stillwell & Gladding test (CX 231 A–B) was conducted at the request of Industrial Testing Laboratories. Described as "preliminary in nature," it essentially involved a single battery. While the test results were favorable to VX–6, only limited generalizations of "probability" may be drawn. (Maltese 2025–30,

2033) The report was reviewed by Industrial Testing Laboratories, which found it adequate but "far from conclusive" (Rogers 1853, 1873–79, 1916–17).

After a detailed critique, in which he cited the lack of controls in the test, Dr. Hamer said he did not consider that CX 231 A–B reflected a competent scientific test (Tr. 3976–3989).

As to the American Testing Laboratories report (CX 40), Dr. Hamer said that even though it appeared to meet his criteria for a scientific test, the report was "filled with fallacies" and was not descriptive of a competent scientific test (Tr. 3817–3972). There was no other testimony about this test; the laboratory director who signed the report died in 1969 (Tr. 252–53).

Concerning the Electrical Testing Laboratories report (CX 227 B), Dr. Hamer found it to be a competent scientific test that demonstrated that VX–6 reduced the corrosion of lead in a sulphuric acid solution containing silver nitrate. He took the position, however, that the test had no relevance to a lead-acid storage battery because the test solution contained silver nitrate. (Tr. 4010–4049; see Rogers 1853–54, 1870–72, 1927–28.)

The Botco Laboratories report (CX 226 A–W) involved the most extensive tests, utilizing 80 batteries—60 new batteries and 20 used batteries. (CX 226 F.) Its conclusions tend to support respondents' claims regarding the effectiveness of VX–6.

As previously noted, the author of the report is dead, and there is virtually no definitive background information about Mr. Botwick [21] or his laboratory. The record does establish that respondents paid at least $3,000 for the test (Meyer 4819–29; RXs 32–34); that the test protocol was established in consultation with the National Better Business Bureau (Miller 2096–2117; RXs 21–23; Meyer 13708–1402, 1531; Murphy 4816); and that respondents had the Botco report reviewed by two other laboratories, both of which in effect approved it (RX 24 [22]; Meyer 1533–35; Rogers 1858–70, 1919–1921, 1930).

Regarding the Botco report (CX 226 A–W), Dr. Hamer was asked on direct examination whether the report was descriptive of a competent and scientific test. He first answered that it was not a competent scientific test "mainly because there are no data included in the report." When the variance between question and

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[21] Mr. Murphy thought Mr. Botwick had a Ph.D. degree (Tr. 4815–16).

[22] Dr. Hamer scoffed at this laboratory report. It did not change his adverse opinion (Tr. 2515–16).

answer [23] was called to his attention, he stated that the report was not a good description of a competent scientific test. (Tr. 2494–95; see also Tr. 2506–2507.)

Dr. Hamer conceded that it was possible that even though the report may not be descriptive of a competent scientific test, the test itself may nevertheless have been such a test, but he said that there was nothing in the report to indicate that to him. His basic objection was the lack of data to support its conclusions. (Tr. 2495–96; see Tr. 2487–93, 2752–2761, 2817–28, 2858–63.)

On cross-examination, Dr. Hamer did characterize the Botco test as a scientific test but stated that the report was not scientific because it did not contain enough specific data. He described the Botco report as a summary of tests and test conclusions but not a report of the "test results" (Tr. 2761, 2766). He then acknowledged that:

> The fact that a report is not scientific does not necessarily mean that the test reported on was not scientific (Tr. 2767–68).
>
> The fact that the data was not tabulated in the report does not mean that it did not exist (Tr. 2761–62). There might be data that he had not seen (Tr. 2828).
>
> It is impossible for a scientist to pass judgment on the validity of a test without having access to the evidence on which the conclusions are based (Tr. 2762–63; see Miller 2089–93, 2116–17, 2135–48).
>
> There was not enough data in the Botco report for him to evaluate the conclusions drawn or to make an informed judgment as to their scientific validity (Tr. 2817–18, 2828).

The record indicates that there were backup data sheets for the Botco report (Miller 2089–93, 2116–17, 2135–48).

Nevertheless, Dr. Hamer later repeated his earlier statement that the Botco test was not a scientific test. His reason this time was that "some of the conclusions are not in keeping with scientific facts" (Tr. 2774–76).

This basis for his opinion bears scrutiny. It involves the bias mentioned *supra*. Throughout Dr. Hamer's testimony, particularly that relating to the Botco report, it is evident that some of his conclusions are predicated on opinions that he acknowledged are contrary to other reputable authority. For example—

1. Dr. Hamer does not consider that sulphation is a major cause of battery failure despite such a finding in the *Pioneers* case, *supra*,

[23] See Tr. 2465–66.

52 F.T.C., at 1352–53 (Tr. 3102–03, 3180–87, 3718, 3992–93). Examiner Pack reported 15 years ago in *Pioneers*:

> While Dr. Walter J. Hamer, Chief of the Electro-chemistry Section of the National Bureau of Standards, expressed the opinion (not without support from other witnesses) that relatively few battery failures are due to sulfation, this view is opposed to the great weight of the evidence. It is impossible upon the present record to fix percentages as to the various causes of battery failure, but it appears certain that sulfation, if not the major cause, is at least one of the major causes.

2. Two other basic preconceptions that persist throughout Dr. Hamer's testimony are (1) that a sulphate solution such as VX–6 (see formula, CX 309 G, M) could not dissolve or reduce "pernicious sulphation" and (2) that it would lessen the conductivity of the sulphuric acid solution that constitutes the electrolyte in the battery. Dr. Hamer initially referred to these opinions as scientific laws or rules. On cross-examination, however, he grudgingly acknowledged that there was respectable scientific opinion to the contrary. (Tr. 2482–85, 2776–77, 2798–2800, 2803–09, 2812–16, 3061–70; see Rogers 1849–51; 1861–62, 1901–16; also *Pioneers, Inc., supra,* 52 F.T.C., at 353, 1358–61.)

3. Dr. Hamer's doubts about the efficacy of—or even the need for— a battery additive such as VX–6 appears to be based in significant part on his opinion that pernicious sulphation can be eliminated in a mechanically sound battery by simply subjecting the battery to a charge (Tr. 2852–53, 2891, 3713, 3996–98). He conceded, however, that there were "reliable" opinions to the contrary (Tr. 2891–95, 3052–59, 3991–93).

The weight of Dr. Hamer's testimony is also lessened by the fact that he misread or misinterpreted certain test data (Tr. 2769–74, 2819–21) and insisted on giving a strained, tortuous interpretation to some of the conclusions. For example, Dr. Hamer interpreter Observation No. 12 in the Botco report [24] as meaning that VX–6 prevented the formation of lead sulphate—a process necessary to battery operation, although he ultimately admitted it could be read to refer to the formation of "pernicious sulphation" (Tr. 2480–81, 2778–81, 2787–2801, 2878–91).

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[24] Observation 12 reads as follows:

"In those cells treated with VX–6, both in the new batteries and in the mechanically sound sulphated batteries, the conversion of the desirable soft, spongy, porous mass of material of the grid surface of the negative plate into a harder, brittle, less porous—that is, sulphated condition, is inhibited. Accordingly, we can conclude that this inhibition will add to the usable life of a battery." (CX 226 U)

Nor is confidence engendered by Dr. Hamer's description of the manner in which he reviewed and evaluated the test reports and his evasive answers to questions about his use or nonuse of textbooks or other authorities (Tr. 2810, 2896–2908, 3155, 3191, 3758–60, 3804–08).

Finally, with perhaps two exceptions, he conceded that on their face, the procedures described in the test reports appeared to meet his definition of a scientific test as "one which is conducted with objectivity under controlled conditions with the purpose of determining the truth or falsity of a hypothesis, or to determine the properties or characteristics of an object, a system or a process" (Tr. 2346). In some cases, he was critical of the controls, or the lack thereof. He said all the test data should be recorded but did not specify that it must be in the report itself, although this is preferable (Tr. 2347–50, 2604).

Despite the doubts engendered by certain aspects of Dr. Hamer's testimony, when his testimony is considered in conjunction with that of Dr. White (*supra*), it may be found that at least some of respondents' test reports are not descriptive of competent scientific tests. Even without expert testimony, one would tend to want more than is offered by the reports of American (CX 40), Public Service (CX 221 B–C), and Stillwell & Gladding (CX 231 A–B). But respondents did not limit themselves to these tests but went on to more elaborate tests, such as Botco (CX 226 A–W) and National (CXs 39 B–C, 232 A–E, 301 A–B, 302 A–D). On the basis of the whole record, the examiner cannot reject these reports as nondescriptive of scientific tests. They are not without laws, but the reservations in the evaluations of both expert witnesses do not permit the finding sought by complaint counsel.

Nor can the examiner so lightly dismiss the Electrical Testing report (CX 227 A–B) as "irrelevant," as Dr. Hamer would do. Within limitations, it has a bearing on the claims for VX–6.

In any event, as Dr. Hamer noted, to find that test reports are not descriptive of competent scientific tests is not equivalent to finding that the tests reported were not competent scientific tests. Dr. Hamer's criticism of most of the reports—particularly Botco—was primarily based on the fact that the reports themselves did not contain sufficient detailed data to permit him to properly evaluate the observations and conclusions reported. He could not state, however, that such data did not originally exist in laboratory notebooks or other records. With admittedly incomplete data in their possession, the experts could not make an unequivocal

declaration that the tests themselves were not competent scientific tests.

Moreover, even if test data preferably should be found within the four corners of a test report, there is an obvious difference between a report prepared for a businessman and one intended for presentation to the scientific community.

One further point worth noting is that Dr. Hamer acknowledged that some of his exceptions to the reports represented honest differences of opinion between scientists (*e.g.*, Tr. 3798–3800, 3810–11; see Tr. 3396, 3405–08, 4161–77).

In summary, then, respondents had a basis for advertising that VX–6 had been laboratory-tested.

Now, as to the user tests, counsel stipulated that both Dr. Hamer and Dr. White would testify to the effect that neither the so-called user tests in evidence nor any tests described by Mr. Halter or by Mr. Rogers are, singly or in the aggregate, descriptive of competent scientific tests since, as described in the test reports and testimony, they were not conducted in accordance with the scientific principles and procedures required by the scientific community, including the fact that adequate controls were absent in each test [25] (Tr. 4099–4100, 4192–93).

Recognizing that the terms "competent scientific test" and "authenticated, controlled and duly recorded user test" are not synonymous, neither expert witness expressed any opinion as to whether these alleged tests constitute valid or competent user tests.

Finally, the stipulated testimony of both experts is that all of the laboratory and user tests, taken in the aggregate, do not constitute a competent scientific test (Tr. 4100, 4193).

Despite this stipulated testimony, as well as the testimony of Dr. Walter Goodman (Tr. 3302–3409), the examiner finds that although the so-called user tests were not "controlled" or "duly recorded" user tests, nor "competent scientific" tests, as those terms are used in the complaint, they constituted a reasonable basis for respondents to advertise that VX–6 had been subjected to user tests or tested in actual use. No question was raised as to their authenticity.

Finally, then, there remains the question whether the laboratory tests and the user tests, separately or collectively, substantiate the performance claims that respondents made for VX–6.

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[25] Both stipulations noted that CX 238 is not descriptive of a competent scientific test because, although controls are present, the test procedures are not described and no conclusions in regard to the efficacy of VX–6 are reached.

The expert witnesses took the position, in effect, that assuming the validity of all the test reports and the correctness of their conclusions, the tests substantiated all of the 10 performance claims *specifically* challenged by the complaint, with perhaps one exception. As quoted in the complaint (p. 4) these are to the effect that VX–6

> (1) breaks up hardened, dense crystalized sulphate, converts it into ACTIVATED material for greater charging current, (2) insulates lead grids so they are not readily corroded by damaging acid, (3) reduces shedding from plates, (4) cuts down internal heat, (5) makes separators last longer, (6) gives an uninterrupted flow of steady current, (7) reduces oxidation, (8) puts a stop to warping and buckling of plates, (9) eliminates undercharging in normal battery use, (10) reduces evaporation or "water loss" and thus does away with frequent checking while on the road.

Dr. White listed as unsupported by the test reports only duration-of-effect representations, such as

1. Ends battery troubles *forever.*
2. Assures like-new operation of batteries *for the life of the car.*
3. Makes new batteries trouble-free *for 5 years or more.*
4. Gives *years and years* of dependable battery service.
5. Reserve power is *endless.*
6. Makes a battery last *a lifetime.*
7. Every man you sell will have a *lifetime battery.*
8. VX–6 prevents sulfation from forming for the *life of the car.* (Tr. 4191–92; emphasis in original).

Dr. Hamer's list of claims that he considered unsupported by the test reports was essentially similar, except that he also initially questioned the ninth claim listed in the complaint—that VX–6 "eliminates undercharging in normal battery use"—as well as two other claims that are in the nature of "puffing."

Regarding the claim of eliminating undercharging, Dr. Hamer said after further questioning, that accepting all the tests at face value, respondents would be justified in claiming that undercharging in normal use is helped. Cross-examination also yielded concessions as to the test support for some other claims (Tr. 4103–48).

On the basis of this testimony, as well as the examiner's own consideration of the "duration" claims in the light of the test reports, the finding must be that such claims have not been substantiated.[26]

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[26] But see the conclusions, *infra.*

As to other advertising claims,[27] particularly those specifically listed in the complaint, the examiner cannot find as a fact that all such claims have been substantiated by competent scientific tests or by valid user tests. However, in view of the laboratory test reports on VX–6, the scores of letters from users attesting to the satisfactory performance of the product, and the purchases and repurchases of the product by industrial, commercial, and governmental customers in the circumstances described, the examiner finds that respondents had a reasonable basis for their performance claims. It cannot be found that they made advertising representations in reckless disregard of their truth or falsity. This finding will be further discussed in the conclusions that follow.

SUMMARY AND ANALYSIS

Before stating the legal conclusions based on the foregoing findings, some commentary is appropriate on the major issue presented by this record—the question of whether respondents' performance claims for VX–6 are substantiated by competent scientific tests or valid user tests or both. The examiner has essentially found that although all the test reports in evidence, with all their deficiencies, tend to substantiate respondents' principal performance claims for VX–6, the record does not permit a finding that they, in fact, do so. Nevertheless, in the examiner's opinion, respondents' data provided a reasonable and substantial foundation in fact for the performance claims (*Universe Co., supra*, 63 F.T.C., at 1295).

The examiner recognizes that ordinarily the intent or the good faith of the advertiser is not a controlling factor in determining whether an order should issue against advertising representations that have been proved to be false.[28]

In this case, however, the claims of testing are literally true. The product was tested, and the results tended to show its efficacy.

Even without the expert testimony, it is apparent that, standing alone, some of the tests are properly subject to scientific criticism. As noted, however, there is no evidence that the laboratories were other than reputable. There has been no showing that the tests

[27] In their reply brief, complaint counsel make a belated and wholly-undocumented assertion that other representations—including some listed in the complaint but not questioned either by Dr. Hamer or by Dr. White—"are not supported by any of respondents' tests" (CRB 17–18). This contention is rejected.

[28] But see *Parents Magazine Enterprises, Inc.*, Docket No. C–1133 (Consent Order, Oct. 25, 1966 [70 F.T.C. 1116]).

were "phony" or that respondents contracted for and accepted them other than in good faith. Having paid to have the product tested by such laboratories and having accepted the laboratory tests in good faith, respondents had a reasonable basis for advertising that VX–6 had been subjected to tests.

This would be a different case if, in fact, the performance representations had been proved to be false. In that circumstance, the existence of test reports tending to uphold the performance representations would not bar an order against claims proved to be false.

Ironically, Dr. Hamer testified that a valid scientific test of the efficacy of VX–6 might be made within 6 months or a year, using no more than six batteries (Tr. 2298–2302, 2801–09, 4031–32). The conflicting claims of counsel as to the cost of such a test do not appear to be grounded in any evidence of record.

Finally, regarding the so-called "duration" claims—clearly not substantiated—the examiner is of the opinion that this record does not warrant an order forbidding claims of testing because of such failure of substantiation. Those claims—although dubious on their face—are hardly of such a nature that the public would believe they had been substantiated by laboratory tests. They are in the nature of "puffing" but might nevertheless be subject to a prohibitory order had their validity been attacked directly.

The examiner cannot wholly accept respondents' argument that such representations are outside the scope of the complaint, but their argument does raise a question whether they constitute representations "similar" enough to the technical performance claims specifically listed in the complaint (top of page 4) to warrant an order singling them out for indirect prohibition.

CONCLUSIONS

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

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

3. The record establishes the allegations of Paragraph One of the complaint to the effect that respondent Elliott Meyer is and had been the president of the corporate respondent and that, both as an officer and as an individual, he has formulated, directed, and controlled the acts and practices of the corporate respondent. The fact that his personal participation in the acts challenged by the

complaint may have been minimal is not controlling; such participation was sufficient to hold him individually liable. In any event, the history of the corporate respondent and the role he has played therein, together with his control of another corporation engaged in the same line of business (*supra*, pp. 4–5), compels the conclusion that it is necessary that he be named in the order, both as a corporate officer and as an individual, so as to make the order fully effective and to prevent its evasion.

4. The record fails to support the allegations of Paragraph Six (1)–(4) of the complaint.

5. The record supports the allegations of Paragraph Six (5) to the effect that respondents misrepresented the earnings of VX–6 distributors. (The order proposed on this subject has been revised.)

6. The record supports the allegations of Paragraph Seven of the complaint.

7. The record establishes that VX–6 had been tested by laboratories but that it had not been approved by laboratories. The representation that laboratories had approved VX–6 was false, misleading, and deceptive.

8. The record fails to establish that none of the laboratory tests relied on by respondents were competent scientific tests.

9. Respondents did not represent that their performance claims for VX–6 were substantiated by "authenticated, controlled and duly recorded user tests."

10. Although the evidence does not permit a finding that respondents' performance claims for VX–6 are substantiated by competent scientific tests or by valid user tests, the examiner finds that respondents had a reasonable and substantial foundation in fact for making such performance claims. They did not make such advertising claims with reckless disregard of their truth or falsity. In the examiner's opinion, no order is warranted in respect to respondents' representations of testing.

11. The use by respondents of the statements, representations, and practices herein found to be false, misleading, and deceptive has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such representations were and are true and into the purchase of substantial quantities of respondents' product by reason of such erroneous and mistaken belief.

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

respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive, VX–6, or of any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that persons purchasing respondents' products for resale will derive any stated amount of gross or net profits or other earnings through representations as to the past earnings of purchasers of respondents' product unless, in fact, the past earnings represented are those of a substantial number of purchasers and accurately reflect the average earnings of such purchasers under circumstances similar to those of the purchaser to whom the representation is made; or misrepresenting in any manner the past, present, or future profits or earnings derived, or to be derived, from the resale of respondents' products.

2. Representing, directly or by implication, contrary to fact, that any product has been approved by any laboratory or by any other organization or person.

3. Using, publishing, or referring to any testimonial or endorsement unless (1) such use, publication, or reference is expressly authorized in writing and unless (2) respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained.

4. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That other allegations of the complaint as to practices not covered by this order be, and they hereby are, dismissed.

DISSENTING STATEMENT

BY JONES, *Commissioner*:

I dissent from that part of the Commission's decision which holds that respondents need only have a reasonable basis for making the battery performance claims challenged by this complaint and that on this test complaint counsel failed his burden to show that respondents did not have a reasonable basis to make the challenged claims.

If the rule of law is sound that it is unfair to make certain types of claims without adequate substantiation, then it seems to me that irrespective of whether or not the proper test is generalized to be a reasonable basis, the real issue in each case will be as to what constitutes the reasonable basis for the particular type of claim in issue. In the instant case, specific performance claims about batteries were made. Respondent itself recognized that the validity of these claims could only be established by laboratory tests. Complaint counsel offered evidence to show that respondents did not have competent scientific tests to substantiate their claims. The evidence consisted of expert opinion directed to showing deficiencies in the laboratory *reports* of the tests run by respondents. I can find no basis in reason or logic for this Commission to hold in the face of this evidence that respondents were entitled to rely in support of their claims on something less, to wit the laboratory reports.

In the first place, I believe complaint counsel put in sufficient evidence to cast substantial doubt on the adequacy of the laboratory tests which respondent did run. I believe it was respondent's

burden to go forward to show the contrary. In the second place, however the substantiation standard is expressed by the Commission, I believe that for these types of specific performance claims only laboratory tests could constitute a reasonable basis for making them—a fact which respondent in effect recognized itself. Thirdly, despite the fact that respondent did run laboratory tests, the opinion concludes that respondent could rely simply on *reports* of these tests because it didn't have in-house expertise to evaluate. This to me flies in the face of all reason and logic. Respondent makes the batteries, they made the claims about their performance. To say that they lacked in-house expertise to evaluate the reports of the tests which they caused to be run provides a wholly unwarranted an unfair loophole to the Commission's standards of adequate substantiation. The Commission's opinion is a regrettable and unnecessary retreat from this standard.

OPINION OF THE COMMISSION

BY KIRKPATRICK, *Commissioner:*

I. THE ADMINISTRATIVE PROCEEDINGS

The complaint in this proceeding charged respondents, National Dynamics Corporation and Elliott Meyer, individually and as an officer of said corporation, with deceptive advertising through claims which falsely implied to consumers that there had been competent scientific testing and laboratory approval of VX–6 battery additive. Respondents were also charged with deception through the use of misleading (1) testimonial letters and (2) claims relating to the (a) earnings and franchise protection of VX–6 distributors, (b) extent of national advertising, and (c) professional qualifications of National Dynamics' personnel, all in violation of Section 5 of the Federal Trade Commission Act.[1]

On January 19, 1970, respondents filed their answer denying all substantive allegations of the complaint. After a full adjudicative hearing, the administrative law judge issued an initial decision finding against complaint counsel on all complaint alle-

[1] The following abbreviations are used for citations:
I.D.—Initial decision of administrative law judge:
Tr.—Transcript of testimony;
CX—Commission exhibit;
RX—Respondent exhibit;
App. Br.—Brief on Appeal of respondent (Res.) or complaint counsel (C.C.);
Ans. Br.—Answering brief;
Rep. Br.—Reply brief.

gations, except those concerning deception in the claims relating to the earnings of VX–6 distributors, the use of testimonials, and the representation that independent laboratories had approved VX–6. He also found the individual respondent had formulated, directed, and controlled the acts and practices of the corporate respondent and that such participation was sufficient to hold him individually liable.

This matter is now before the Commission on appeals by counsel supporting the complaint and respondents. Complaint counsel contend that the judge erred in dismissing those complaint charges relating to respondents' (1) failure to substantiate their performance claims; (2) representations that their product had been user tested; and (3) representation that it had been "fully tested." [2] Complaint counsel also appeal the judge's order on the ground that it does not adequately protect the public against the continued use by respondents of deceptive earnings claims and testimonials. Respondents challenge the judge's proposed order on the grounds that (1) it would preclude them from truthfully advertising the earnings of individual VX–6 distributors, and (2) it imposes an unnecessary and unreasonable burden by requiring respondents to distribute a copy of the order to all present and future VX–6 distributors.[3]

II. ISSUES OF LIABILITY

Respondents have made numerous claims concerning the performance characteristics of VX–6 as a battery additive. In this proceeding, such claims are challenged as unsubstantiated.

Typical of the claims which were alleged in the complaint as unsubstantiated are those which relate to (1) the specific effects of the product which improve the performance of lead-acid storage batteries, and (2) the period of time over which such effects may

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[2] Complaint counsel do not appeal the judge's dismissal of complaint charges relating to respondents' nationwide sales force, extent of national advertising, and franchise arrangements. We have carefully reviewed the pertinent sections of the record, and we find the evidence fully supports the judge's finding that the record failed to support these charges. The judge's conclusion that no liability was shown is, therefore, affirmed.

[3] Respondents do not appeal the judge's determination of corporate and individual liability with respect to complaint charges relating to earnings claims, use of testimonial letters, and claims representing that VX–6 had been approved by independent testing laboratories. We have reviewed the record evidence relating to these charges and the judge's findings; and to the extent they are not inconsistent with this opinion, they are supported by the record and accordingly are adopted by the Commission.

be expected to last.[4] These latter claims have been designated "duration-of-effect" claims.

Specifically, the complaint alleges that respondents' performance claims for VX–6 were not substantiated by "competent scientific tests or by authenticated, controlled and duly recorded user tests." In dismissing the complaint allegations relating to substantiation, the administrative law judge noted that complaint counsel failed to introduce any consumer testimony to support the inference that respondents' performance claims embrace an implied representation of testing. Thus, he found the record "wholly devoid of evidence that any member of the public so interprets" respondents' performance claims.[5] In his opinion, the allegation in the complaint that the challenged claims imply that they are substantiated by prior testing represents a novel interpretation of advertising claims and, therefore, it "would be unreasonable and its adoption would be arbitrary and unwarranted" in the absence of supporting consumer testimony. In effect, then, the judge held that, in the absence of consumer testimony, the implied representation of substantiation cannot reasonably be found in the challenged advertisements. Complaint counsel take exception to this finding.

A. Commission Expertise

It is well established that the Commission's expertise is sufficient to interpret an advertisement without consumer testimony as to how an advertisement is perceived by the public.[6] In applying its expertise in determining the meaning of an advertisement, the test is not the novelty of the implication the Commission is asked to draw or whether the interpretation is supported by consumer testimony. The test applied by the Commission is whether the interpretation is reasonable in light of the claims made in the advertisement.

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[4] Claims allegedly unsubstantiated include such representations as VX–6: allows batteries to perform satisfactorily at 30 degrees below zero as well as under extreme heat conditions of 168 degrees F.; gives recuperative self-recharging ability; makes separators last longer; increases the brightness of lights; restores active life to dead batteries; will make batteries last five years; and will make batteries last a lifetime (CX–1, 2, 6, 9, 24, 25, 31–39, 49, 50, 51, 57–70, 78, 103–4, 109, 113–14, 221).

[5] I.D. 37, 41 [pp. 523, 527 herein].

[6] *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965) *Nircsk Industries, Inc.* v. *FTC*, 278 F.2d 337, 342 (7th Cir.) *cert. denied*, 364 U.S. 883 (1960).

B. Implied Representation of Substantiation

Complaint counsel cite claims such as "quick starts in −40 degrees" and VX–6 "increases brightness of lights by 25%," and conclude that the very nature of the language of such claims, and indeed all performance claims, implies that they are supported by competent scientific tests or authenticated, controlled and duly recorded user tests or both.[7] Thus, we are urged to find respondents in violation of Section 5 of the Federal Trade Commission Act, unless we conclude the performance claims for VX–6 are based upon tests meeting the precise standards set forth in the complaint.

The Commission has previously considered and evaluated the capacity of performance claims to represent by implication that the advertiser had substantiation to support the advertised claims. In *Firestone Tire and Rubber Co.*,[8] we held it unfair and deceptive to consumers for a tire manufacturer to make a specific advertising claim relating to tire performance characteristics without substantial scientific test data to support it.[9] The Commission found respondent's claim led consumers to believe the tires had been adequately tested when in fact they had not. This finding led the Commission to conclude, "Clearly, respondent's advertisement thus had the capacity and tendency to deceive members of the public into an erroneous and mistaken belief as to respondent's product." In essence, respondent's stopping claim impliedly represented that respondent had a reasonable basis to support the claim; and in the circumstances of that case, particularly since it involved a matter of human safety, adequate scientific tests provided the only basis which could reasonably support the claim.

The record before us demonstrates that respondents employed the performance claim in advertising to inform consumers of the specific attributes of their product. In so doing, we find they represented to consumers that they had a reasonable basis for believing their claims were true. This is the impression respondents conveyed to the public. A performance claim is not a technique which can be used with impunity for ascribing specific attributes to a product based on nothing more than a guess that it will perform as represented. We find that the absence of a reasonable basis to support such claims would not only be a material fact, the knowledge of which might significantly affect consumer purchase

[7] CC App. Br. 12.

[8] Docket No. 8818 (Sept. 22, 1972 [81 F.T.C. 398]).

[9] *Accord, Universe Co.*, 63 FTC 1282 (1963), *aff'd sub. nom. Kirchner* v. *FTC*, 337 F.2d 751 (9th Cir. 1964).

decisions, but it would also mislead in light of the implied representation of substantiation. Thus, performance claims lacking a reasonable basis in fact may be found deceptive within the meaning of Section 5 of the Federal Trade Commission Act.[10]

1. Nature of Respondents' Substantiation

It is not disputed on appeal that respondents' battery additive had been tested by several independent laboratories. Under the standard set forth in *Pfizer*, these tests would provide a reasonable basis for respondents' claims, assuming they are valid, only if they existed prior to and supported the challenged claims. In this proceeding, however, complaint counsel challenge all of these tests, contending that they are invalid or incompetent scientific tests and, therefore, can not substantiate any of respondents' claims regardless of when such tests were actually performed. The evidence on the validity of respondents' substantiation is found in the test reports issued by six independent commercial laboratories, the testimony of representatives of the laboratories, and two expert witnesses who evaluated the laboratory test reports.

A. Original Tests

Prior to purchasing the formula for VX–6 in 1957, respondent Meyer had field tests submitted to him which had been prepared by a battery consultant.[11] Later, in 1958, the same battery consultant provided respondent Meyer with an additional written report on VX–6 which supported the conclusions found in the field report previously submitted to Meyer.[12]

In addition to the battery consultant's reports, Mr. Meyer engaged the Public Service Testing Laboratories (PSTL) to test the product and to verify certain performance characteristics of VX–6.[13] The report issued by PSTL concluded that the product

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[10] This application of the "reasonable basis" test, based on deception, is to be distinguished from the Commission's review of the question of advertising substantiation in the context of our recent decision in *Pfizer, Inc.*, Docket No. 8819 (July 11, 1972 [81 F.T.C. 23, 56]). There we considered the impact of unsubstantiated, affirmative product claims as a matter of marketplace fairness; and our decision was grounded exclusively on the unfairness jurisdiction conferred upon the Commission by Section 5 of the FTC Act. Whether an advertisement is analyzed from the standpoint of unfairness or deception, however, the standard for evaluating the substantiating material and test which is applied is the same—does the substantiation provide a reasonable basis to support the claim. Essentially, this is a factual issue to be formulated in the context of circumstances present in each case. *Pfizer, Inc.*

[11] Tr. 409–12.

[12] Tr. 410; CX 220.

[13] Tr. 412.

broke down sulphation corrosion, restored active life to the battery and enabled the battery to retain a charge; demonstrated recuperation and self-charging ability; enabled the battery to operate efficiently at 40 degrees F. below zero and at 160 degrees F.; increased brightness of lights by 25 percent after restoring active life to the battery; and enabled the battery to maintain full voltage after being subject to the above tests.[14]

Mr. Michael DiMartino, president and technical director, PSTL, testified that the purpose of this test was to determine whether the product had any merit; and in his opinion it represented a reasonably accurate scientific study to determine the performance characteristics of the product.[15]

B. Subsequent Tests

In addition to the PSTL test, and on the advice of certain employees, Mr. Meyer contacted Botco Laboratories for further tests to determine the merits of VX–6.[16]

On June 30, 1960, Botco Laboratories submitted its report to National Dynamics.[17] Two groups of batteries were tested. The experiment described in the report used 60 new batteries and 20 used and sulphated, but mechanically sound, batteries. The test was conducted over a six-month period; and based on data collected and interpreted by the laboratory, 12 specific conclusions were formulated which substantially confirmed the conclusions reached by PSTL.[18]

Mr. Meyer thereafter retained Industrial Testing Laboratory to

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[14] CX 221; Tr. 1600–03.

[15] Tr. 1605–06; 1646–47.

[16] Tr. 1311.

[17] Complaint counsel contend that the Botco test was never performed and that the report was "a plagiarism" of two tests reported in "Hearings before the Select Committee on Small Business, United States Senate, Eighty Third Congress, First Session, in Investigation of Battery Additive Ad–X2–March 31, June 22, 23, 24, 25 and 26, 1953." (Proffered CX 310 A–Z 33). The Judge excluded this exhibit on several grounds, the principal of which was his finding that "it does not have sufficient rational probative force to support the inference claimed for it by the government * * *" (Tr. 4254–63). Complaint counsel have appealed this ruling.

The fact that the conclusions of the reports are similar or even identical does not conclusively support the inference that the Botco report was plagiarized. Assuming identical test procedures were employed to test products with similar ingredients, it would be possible to observe substantially similar results leading to the conclusions found in the test reports.

The record is devoid of any evidence indicating that the Botco test was not performed. On the other hand, the record does establish that respondents paid at least $3000 for the test (Tr. 4825–30; RX 32–34), and the report was reviewed and approved by two other laboratories (Tr. 1858–70, 1919, 1921, 1930; RX 2422; Tr. 1533–35). In these circumstances, we agree with the judge's conclusion and we affirm his decision excluding proffered CX 310 A–Z–33 from the record.

[18] CX 226 L–U.

evaluate and provide a scientific opinion concerning the validity of the Botco report.[19] Mr. Wilson J. H. Rogers, a partner in Industrial and a consulting chemist, testified that in 1964 Mr. Meyer requested their opinion as to whether the Botco report was valid and whether it demonstrated the efficacy of the product.[20] After checking the mathematics for accuracy, evaluating the consistency of observations and conclusions and the test procedures employed,[21] it was the opinion of Industrial that the Botco report was sound in these respects.[22]

Many of the results reported by Botco were observed by at least four other independent laboratories, and each of these laboraties confirmed properties of VX–6 reported by Botco. Thus, the record shows that respondents, over a ten-year period, sought and obtained scientific evaluations of their product from six independent commercial laboratories.[23]

C. Reasonable Basis Test

The administrative law judge found that respondents had relied in good faith on the test reports furnished by the laboratories, and that such test reports provided a reasonable basis for their effectiveness claims, even though the record would not support a finding that such claims were substantiated by competent scientific tests or valid user tests.[24] On appeal, complaint counsel contend that it was erroneous for the judge to find reasonableness to be a defense to a charge of misleading advertising.

In upholding the judge's decision in respect of the performance claims in issue we appreciate that we are, in effect, amending the complaint in this matter. The complaint is based in these respects on the allegation that the performance claims were not supported by competent scientific or valid user tests, and the record before us does not show otherwise. However, this matter is now before us upon the full record; and it is our view that the standard set forth in the complaint is not the standard that should be here applied. We believe that, in light of *Pfizer* and *Firestone*, the complaint in this matter sets forth a standard which is too narrow for the purposes of evaluating the substantiation in this case. In these circumstances, however, we do not believe that the Com-

[19] Tr. 1866.
[20] Tr. 1866.
[21] Tr. 1868–70.
[22] Tr. 1868.
[23] CX 231 A–B, Tr. 2002–03, 2015.
[24] I.D. 60 [p. 541 herein].

mission should be straight-jacketed by the standard set forth in the complaint. The test in this case, as in each case that comes before us on these issues, should be whether on the full record the substantiation constitutes a reasonable basis for the challenged claims. To the extent that the complaint in this matter sets forth a narrower standard, the complaint has too narrow a focus. However, it is our view that amendment of the complaint (so as to set forth the standard herein applied) and remand would not be appropriate here because, as outlined herein, the substantiation shown to underlie the challenged performance claims has satisfied us that a reasonable basis for them existed.

We believe the cases cited by counsel are inapposite. The complaint in this matter did not challenge respondents' performance claims directly on the grounds that they were false. If the truth or falsity of respondents' claims had been an issue in this proceeding and the claims proved to be false, we agree, good faith or lack of intent to deceive would be irrelevant. In this matter, however, we are concerned solely with the charge that respondents did not have adequate substantiation for their claims. We have held that the test applied to determine the adequacy of substantiation is whether or not it provides respondents with a reasonable basis for believing their claims are true. The issues thus raised under this test appropriately involved a consideration of the reasonableness of the advertiser's action and his good faith. *Pfizer, Inc.* Dkt. No. 8819 (July 11, 1972 [81 F.T.C. 23]).

Complaint counsel argue further, however, that respondents have not acted in good faith on the basis of these test reports. In support of this contention, counsel refer to the testimony of representatives of National Testing, Public Service, and Stillwell & Gladding laboratories, indicating that respondents were informed that these laboratories did not consider their tests, standing alone, were sufficiently detailed to substantiate cliams for advertising.[25] As further evidence of the lack of good faith, complaint counsel state that it was not until the Botco test was conducted, three years after the product was put on the market, that respondents had what purported to be a comprehensive test of the product.

In reviewing respondents' evidence, complaint counsel apparently relied on the theory that regardless of when the perform-

[25] The laboratory representatives who testified thought their tests were not "extensive enough" or were "preliminary in nature," and suggested, for these reasons, the reports were insufficient for advertising purposes. However, each witness considered his test to be scientifically valid and supportive of conclusions reached concerning the merits of the product (Tr. 2042; Tr. 1646–47; Tr. 2004, 2007, 2013).

ance claims were made, they were unsubstantiated as alleged in the complaint because respondents' tests were not competent scientific tests or authenticated, controlled or duly recorded user tests. At trial, complaint counsel relied on that standard and did not establish the period of time during which specific advertising claims were made in relation to the substantiation which then existed to support such claims. Thus, the record fails to show whether adequate substantiation existed prior to the time particular performance claims were made.[26] For purposes of our review, therefore, it must be assumed that the substantiation was relied upon by respondents before the claims were made; and we have considered all of respondents' tests to determine whether individually or in the aggregate such substantiation otherwise provides a reasonable basis for the claims.

1. Expert Evaluation of Respondents' Tests

Respondents' test reports were reviewed by two experts on the subject of lead-acid storage batteries. Dr. Walter J. Hamer, a consultant in the Electricity Division of the National Bureau of Standards, and Dr. Joseph C. White,[27] director of the Electric Chemistry Branch, Chemistry Division, Naval Research Laboratory, were called upon by complaint counsel to determine the validity of the foregoing tests. Both experts detected numerous defects and deficiencies apparent on the face of each of respondents' test reports.

With respect to the Botco report, Dr. Hamer noted an absence of essential data to support a number of conclusions in the report; he commented on the imprecise expression of measurements such as temperature ranges; he took issue with certain test procedures and pointed out that certain statements in the report were contrary to known scientific observations.[28] Dr. Hamer also found inconclusive the observation by National Testing that VX–6 "permits the batteries to perform satisfactory at below freezing temperatures as well as under extreme heat conditions." In his opinion, a mechanically sound battery without VX–6 will operate under the

[26] Respondents' tests were performed during the period 1957–1967. The record shows that the challenged advertising claims were disseminated during the period between 1965–1969 (Tr. 323–342). It is not clear from the record whether these claims were made prior to 1965 and, if so, whether a particular claim was supported by tests previously conducted.

[27] The testimony of Dr. White was stipulated by counsel (Tr. 4191).

[28] Observation number 4 of the Botco report states: "* * * the light red-brown of the peroxide was very clearly defined in the grids and was quite brittle" (CX 226–S). Dr. Hamer explained that peroxide is an oxide and is by nature a "soft, nice spongy substance," and that in 40 years as a scientist he has not seen brittle peroxide (Tr. 2489–90).

same conditions described in the report. Dr. Hamer had similar criticism of each test report, emphasizing the insufficiency of data and the failure to define controls or describe the test procedures adequately.[29]

In view of these deficiencies, both experts concluded that respondents' reports, either singly or in the aggregate, were not descriptive of competent scientific tests.[30] These conclusions, however, do not establish the invalidity of each underlying test. As Dr. Hamer pointed out, a test could be a scientific test although the report of a test which, for example, failed to define the controls clearly could not properly be described as a scientific report due to a failure to set forth completely all relevant test conditions.[31]

It is also of some importance that complaint counsel did not introduce in evidence nor did Drs. Hamer and White have access to the original test data or laboratory notebooks. They were, therefore, somewhat limited in their ability to evaluate the underlying tests.[32] The record reveals that the test reports were prepared by well-established independent testing laboratories.[33] Dr. Hamer testified that as far as he could tell from the reports, the people who prepared the reports were objective in reaching their con-

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[29] Dr. Hamer testified that the report issued by Electrical Testing Laboratories appeared to be descriptive of a scientific test, but the test had no relevance to the effect of VX–6 on the lead-acid storage battery, because silver nitrate was present in the test solution. Dr. Hamer pointed out that silver nitrate is "very detrimental" to a battery (Tr. 4023–24).

[30] I.D. 49 [p. 533 herein].

[31] Specifically, Dr. Hamer's testimony concerning the distinction between a scientific test and the report on that test was offered in response to questioning by respondents' counsel:

Q. If a report is not scientific because its content is not all it should be, does that automatically ipso facto mean that the test itself is not scientific just because the results were not put into the report, doctor?

A. It could be either way.

Q. It could be. It could be scientific and it could not?

A. A person could do a very good scientific test and do a very horrible job, sir, in reporting it.

Q. Would that mean the test is not scientific, doctor?

A. I couldn't tell.

Q. It could mean the test would still be scientific, doctor?

A. There is no way to answer that. (Tr. 2767–68, 2756–57, 2761, 2769.)

[32] Tr. 290–07, 3780.

[33] Stillwell & Gladding has been in existence for more than 100 years (Tr. 2039); Public Service Testing Laboratories has been in business for 25 years (Tr. 1601); and Electrical Testing Laboratories was specifically recognized by one of the Government's expert witnesses as a reputable laboratory that might have done some work on behalf of the National Bureau of Standards (Tr. 2833–34, 4037–38). Industrial Testing Laboratories has been in business since 1876, although it acquired new management in 1958 (Tr. 1846, 1858). National Testing Laboratories was organized in 1956 (Tr. 1939). The record is silent as to American Laboratories and Botco Laboratories which went out of business in 1962 upon the death of its owner (I.D. 48 [p. 531 herein]).

clusions.[34] Moreover, on cross-examination Dr. Hamer agreed with some of the reported conclusions and disagreed with others,[35] but he acknowledged that the instances of his disagreement, for the most part, represent honest differences of opinion between competent scientists.[36]

Although the deficiencies in respondents' test reports forewarned complaint counsels' expert witnesses to question the validity of the underlying tests, the record does not disclose respondents possessed the capacity or the scientific expertise in-house to undertake such technical evaluations. As laymen in the field of scientific evaluation, respondents not only relied upon conclusions in the test reports as scientific statements based upon competent scientific tests but actively sought the advice and assistance of independent commercial laboratories in determining the validity of these reports. On several occasions, respondents engaged independent laboratories to evaluate prior test reports. In each case the laboratory approved the prior report or reported, on basis of its own independent tests, results confirming conclusions previously reported. We find evidence that Industrial Testing Laboratories reviewed the report issued by Botco Laboratories and advised respondent Meyer that it was a valid report.[37] The evidence shows that National Testing Laboratories was requested to update the findings of PSTL and, based on the results of its independent tests, confirmed the findings of Public Service.[38] In addition, the Commission finds the test reports in evidence issued by six different laboratories, in the aggregate, tend to corroborate and support the conclusions reached by any single laboratory.

The judge found that there was insufficient evidence in the record to establish that the laboratory tests were competent scientific tests. Nevertheless, on the facts of this case, we believe the question is whether individual laboratory test reports, which were reviewed by independent laboratories and corroborated by several independent tests, could, in themselves, provide a reasonable basis for respondents' claims. On this point, we find with respect to respondents' reliance on the test reports, as distinguished from the underlying tests, the evidence supports the judge's conclusion that respondents, by relying upon the advice and test reports of six

[34] Tr. 3776–77 ; 3798–99.
[35] Tr. 3780–84.
[36] Tr. 3798–3800, 3810–11.
[37] Tr. 1868–70.
[38] Tr. 1955, 2015.

independent laboratories, in the circumstances of this case,[39] acted upon information which would satisfy a reasonably prudent businessman that claims covered by the test reports are supported.

2. Adequacy of Substantiation—Effectiveness Claims

Having found that respondents were justified in relying upon the tests which were run, any advertising claims reasonably covered by the test reports should be deemed to be adequately substantiated in this proceeding.

In this regard, both Dr. Hamer and Dr. White evaluated the adequacy of respondents' tests in relation to the advertising claims made for VX–6. Their testimony, as summarized by the judge, is essentially that:

> * * * assuming the validity of all the test reports and the corrrectness of their conclusions, the tests substantiated all of the ten performance claims *specifically* challenged by the complaint * * * (I.D. 59 [p. 540 herein]) (Hamer 4112–4148) (White, Stip. 4191–92).

On appeal, complaint counsel do not seriously contend that respondents' tests fail to cover those claims which relate to the properties or effectiveness of the product.[40] We believe the evidence simply fails to support a finding that the test reports in respondents' possession are inadequate in scope or substance and do not substantiate those performance claims which relate to the effectiveness of VX–6.

3. Duration-of-Effect Claims

The judge found that performance claims relating to duration-of-effect, although clearly unsubstantiated by respondents' tests, would not warrant the issuance of an order.[41] In the judge's opinion, claims such as:

1) Ends battery trouble *forever.*
2) Assures like-new operation of batteries *for the life of the car.*
3) Makes new batteries trouble free *for five years or more.*
4) Reserve power is *endless.*

are in the "nature of puffing," but might nevertheless be subject to an order had it been established directly that the claims were false. The judge further questioned whether these representations were

[39] See discussion relating to the issue of prior substantiation on page 9–10 [pp. 553–54 herein].

[40] CC App. Br. 61.

[41] I.D. 61 [p. 542 herein].

close enough to the "technical claims" listed in the complaint to warrant an order singling them out for prohibition.

A. *Notice of Claims in Issue*

We find no basis in the record for reading out of the complaint all performance claims except those couched in "technical" language or those which used "battery terminology." The complaint in this matter specifically placed in issue the question of substantiation for all of respondents' performance claims, including those listed in the complaint and claims similar thereto. At pretrial, complaint counsel listed duration claims among those which they intended to prove contain implied representations of testing; and both counsel questioned witnesses concerning the "duration" claims.[12] We, therefore, find respondents were accorded fair notice of all performance claims in issue, including those relating to the duration-of-effect of the product.

B. *Claims in the Nature of Puffing*

We also agree with complaint counsel that the judge erroneously considered all of respondents' "duration" claims to be in the nature of "puffing." Duration claims such as "Makes new batteries trouble-free *for five years or more*" and "VX–6 prevents sulphation from forming for the *life of the car*" appear credible, are capable of objective measurement, and certainly have a tendency or capacity to lead a significant number of viewers to expect trouble-free battery operation for a specific duration. Similarly, the duration claim "Ends battery trouble forever," while certainly an exaggeration, nevertheless implies that one may expect trouble-free performance from his battery for some significant period of time; and we believe a significant number of consumers would interpret this time period as being the life of the car. This representation, and respondents' other duration-of-effect performance representations, we find, impliedly represent that the respondents had a reasonable basis for believing the product would work effectively over the period of time expressly claimed or reasonably implied.

C. *Adequacy of Substantiation*

Dr. White reviewed the laboratory tests relied upon by respondents and, in his opinion, the duration-of-effect claims were unsubstantiated by these tests.[13] A fair reading of Dr. Hamer's testi-

[12] Tr. 811–18, 832–33.
[13] Tr. 4191–92.

mony in its entirety indicates he also believed the duration claims to be unsubstantiated, although he did express the view that assuming the additive could do all of the things which the test reports indicate, it would have an effect on battery life.[14]

Dr. Hamer was of the opinion, however, that an appropriate scientific test to determine whether a battery additive added to or subtracted from the useful life of a battery would be to run an extended, controlled "life cycle test" (a cycle consists of charging a battery to a state of full charge and discharging it). He further pointed out that none of respondents' test reports described a specifically controlled test for the effect of VX–6 on the life of a battery.

Complaint counsel contend that respondents' duration claims impliedly represent that respondents have competent scientific tests or authenticated, controlled and duly recorded user tests to substantiate such claims. Since a "life cycle test" was not performed on the product, complaint counsel argue that respondents' duration claims are unsubstantiated.

The Commission does not believe that such an implied representation can reasonably be found in respondents' advertising. On the record before us, we believe these duration claims implied that respondents had a reasonable basis for such claims; and complaint counsel have not shown that these claims can be reasonably supported only through such a precise type of substantiation as scientific tests. Certainly, a controlled "life cycle test" as described by Dr. Hamer would provide adequate substantiation for respondents' duration claims. It may not however, be the only support which would provide a reasonable basis for such claims.

In Dr. Hamer's opinion, for example, sufficient evidence is found in the laboratory reports to conclude VX–6 has some lasting effects. Although we do not believe this extrapolated conclusion would provide a reasonable basis to support the specific duration claims made by respondents, it does raise a question as to whether scientific studies relating to products with ingredients similar to VX–6 or scientific literature generally would support a conclusion that the effects produced by the introduction of an additive into a battery electrolyte would continue for so long as the additive is present in the solution.[15]

[14] Tr. 4121–25; 4137–38.

[15] There is evidence that respondents' employees consulted numerous sources of information on battery additives; however, the record does not develop the extent to which such sources were relied upon, if indeed they were used at all, by respondents to substantiate their claims (Tr. 719–20).

Although complaint counsel have established, as alleged in the complaint, that respondents failed to substantiate the duration-of-effect claims with competent scientific tests, we believe, on the basis of this record, that the complaint did not set forth the correct standard for evaluating the substantiation for these claims. As a result, the record evidence is inconclusive as to whether the absence of competent scientific tests is equivalent to finding that respondents lacked a reasonable basis for their claims.

D. *Respondents' Implied "Fully Tested" Claim*

Complaint counsel also appeal the judge's dismissal of Paragraph 6(6) of the complaint alleging as false and deceptive respondents' representation of laboratories and certain users as having "fully tested" VX–6. Complaint counsel refer to advertisements which represent the product as tested by laboratories and then list in the same advertisement the performance attributes claimed for the product. These ads, complaint counsel argue, impliedly represent that the laboratories have "fully tested" the product at least with respect to the performance claims made in the advertisements.[46]

The Commission is of the view that advertisements which expressly or impliedly represent the product as laboratory tested, without qualification,[47] and then proceed to describe the performance characteristics of the product, have a tendency and capacity to lead the public to believe that the laboratories have fully tested the product for each of the performance attributes claimed in the advertisement. The administrative law judge, essentially, reached the same conclusion; [48] and respondents' counsel virtually conceded such advertisements represent that the performance claims are based on the laboratory tests.[49]

Advertising for VX–6 represents that the test performed by National Testing Laboratories "proves and certifies that VX–6 battery additive * * * extends the life of a battery!" Respondents have also represented by implication, through the unqualified use of laboratory seals,[50] that independent testing laboratories have

[46] CC App. Br. 2.

[47] Respondents' product was tested by Underwriters' Laboratories. The Underwriters' seal used by respondents in advertising, however, was qualified for fire hazard only. Other laboratory testing claims were not qualified as to the product characteristics or attributes tested.

[48] I.D. 35 [p. 521 herein].

[49] Tr. 254–55 ; 4408–09.

[50] The impression created by the use of laboratory seals in advertising is described by respondents in literature provided to VX–6 distributors: "These seals must be earned, deserved and justified, and everyone who sees them understands this fact. These seals back you up in your claims and explanations, provide the stamp of authority for the whole VX–6 Sales Story." (CX–31(E), 112(C)).

substantiated such claims as VX–6 provides "27 battery starts a day for the life of the car" and other similar duration claims.[51]

Mr. Felix Konstandt, president and technical director of National Testing, testified that there were no procedures in any of his tests which would determine how long the effects of VX–6 last.[52] Similarly, both Dr. Hamer and Dr. White were of the opinion, assuming the validity of respondents' tests and the correctness of the conclusions, the laboratory test reports in respondents' possession do not support respondents' specific duration-of-effect claims.

We believe this evidence demonstrates that the independent laboratories engaged by respondents to test VX–6 did not determine the duration-of-effect of the product. Accordingly, we find that respondents' use of laboratory seals or claims of laboratory testing in advertisements which also represent the duration-of-effect of VX–6 is a misleading and deceptive practice in violation of Section 5 of the Federal Trade Commission Act.

E. *Respondents' "User Tested" Claim*

Complaint counsel argue on appeal that respondents, by expressly claiming VX–6 had been subjected to user tests, thereby impliedly represented such tests were "authenticated, controlled, and duly recorded." In support of this argument, complaint counsel called Dr. Charles S. Goodman, an expert in marketing, to testify concerning the validity of respondents' user tests.

On *voir dire* examination, Dr. Goodman testified that he was not familiar with any accepted industry or business definition for the term "authenticated, controlled and duly recorded." Nor was he aware of any industry association, professional association, or governmental authority which has promulgated standards for authenticated, controlled and duly recorded user tests.[53] In Dr. Goodman's opinion, a valid user test should conform to standards recognized by the scientific community as applicable to any kind of scientific study or investigation, but he was unable to state that the scientific community recognizes as valid only those user tests which are "authenticated, controlled and duly recorded user test" as alleged in the complaint.

On the basis of this testimony, the judge ruled that there are no established standards for "authenticated, controlled and duly recorded user test;" and, therefore, except testimony was not proper

[51] CX 39 A ; CX 49 A–D ; CX 114.
[52] Tr. 1969.
[53] Tr. 3387–88.

or necessary to a determination of the validity of respondents' user tests.[54] In his initial decision, however, the judge did not decide whether respondents' tests were authenticated, controlled, and duly recorded, finding instead that respondents had not represented that their advertising claims were substantiated by authenticated, controlled and duly recorded user tests. Two grounds led him to this conclusion: first, he found no evidence of any public understanding that user tests meet the specifications contained in the complaint, and, second, he thought it significant that no such standard was applied either by the judge or the Commission for the user testimony in *Pioneers, Inc.*[55]

1. User Testimony Relating to Product Efficacy

In *Pioneers,* the Commission relied on the testimony of numerous consumers to resolve a conflict in the scientific evidence relating to a question of whether or not a battery additive performed as represented. Such testimony was found to be relevant and probative even though the witnesses had not conducted authenticated, controlled and duly recorded user tests.

We believe the judge's reliance on the *Pioneers* case was misplaced. The issue in *Pioneers* for which consumers were called to testify was whether a battery additive worked as represented. Such testimony, of course, may be relevant to the issue of product efficacy; and although it is far from conclusive, it may be entitled to some weight.

The user in *Pioneers,* however, did not testify as to whether advertisements for the product made representations of testing and, if so, what these representations were. Since the testimony of the consumer witnesses in *Pioneers* did not concern the meaning of the advertisements, that decision is not applicable to the issue in this proceeding.

2. Validity of User Tests

In claiming that their product has been user tested, we believe respondents impliedly represent that their tests are valid scientific tests, but our consideration of the facts reveals no evidence to support complaint counsels' contention that a user test is scientifically

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[54] The administrative law judge also expressed the view that to allow expert testimony with respect to each of respondents' so-called user tests would unduly extend the hearing and the record (Tr. 3408).

[55] 52 FTC 1315 (1956).

valid only when it is authenticated, controlled and duly recorded. Thus, we find the record fails to provide a nexus between the representation that a product has been user tested and the implied representation that such tests meet the standard complaint counsel urge us to adopt. Accordingly, we affirm the judge's conclusion that no liability was established.

III. Issues of Relief

A. *Earnings Claims*

Both counsel supporting the complaint and counsel for respondents appeal from the judge's order provision which prohibits respondents from making representations of sales agent's past profits or earnings unless the earnings represented are those of a substantial number of purchasers and accurately reflect the average earnings of such purchasers. Respondents contend this provision is unduly restrictive and beyond the Commission's authority to the extent truthful but qualified representations would be prohibited. Respondents believe their representations of past earnings of VX–6 distributors should be permitted, even if exceptional, so long as the representations are true and disclosure is made as to whether the earnings represented are those of a substantial number of purchasers and accurately reflect the average earnings of such purchasers under circumstances similar to those of the purchaser to whom the representation is made.

Complaint counsel, on the other hand, believe the judge's order, while adequately covering claims relating to past earnings of VX–6 distributors, fails to deal adequately with instances where respondents' earnings claims are not related to specific distributors. It is argued, for example, that claims which represent: "You can earn $12,000 a year" selling VX–6 when in fact $12,000 a year is earned by very few of respondents' distributors, would not be covered. Complaint counsel would also require respondents to keep records which substantiate the accuracy and representativeness of any claims relating to sales or profits earned by their distributors.

The parties stipulated that of 12,000 distributors who purchased VX–6 from respondents during the calendar year 1969, not more than 60 distributors, or one-half of one percent of the total number of distributors, "made profits in excess of $10,000 through the resale of * * * VX–6;" that of these 60, not more than 20 made profits in excess of $15,000; that not more than 5 made profits in excess of $25,000; and that no distributor made profits in excess

of $75,000.[56] Respondents' advertising on the other hand attributed earnings to named VX–6 distributors of:

$1554 one week
$148 one day
$2316.96 one week
$1028 one month [57]

The uncontested finding of the judge was that claims such as these have the capacity and tendency to lead members of the public to believe that a substantial number of distributors of VX–6 will regularly earn such amounts; and this representation is false, misleading and deceptive. Although respondents do not challenge this finding, they argue that representations relating to the earnings of specific distributors are literally true and if qualified would not be misleading. We do not agree.

Even if qualified, respondents' repeated references to the extraordinary earnings of a few individuals would have a capacity and tendency to mislead prospective distributors into believeing that such earnings ordinarily may be expected by VX–6 distributors. We believe the implication conveyed to the public by the heavy emphasis respondents' advertisements place on extraordinary earnings would substantially contradict the qualifying disclosure as to the average earnings of VX–6 distributors which respondents urge the Commission to accept.

The general theme of the challenged ads conveys a net impression that distributing VX–6 is the road to making "the *Biggest, Easiest Money of your Life,*" [58] far in excess of the amount ordinarily earned by VX–6 distributors. Considering respondents' advertisements in their entirety as they would be read by those to whom they are directed, we do not believe the qualifications urged by respondents would change the net impression of advertising claims found unlawful.[59]

We also believe that earnings claims which are unrelated to the past or present earnings of VX–6 distributors should be covered specifically by the order. Respondents represented that:

IT'S NOT TOO LATE! What do you want to make of your life? * * * An independent business of your own? * * * An income of $15,000 to

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[56] I.D. 24, 25 [pp. 512–13 herein] ; Tr. 172–73.

[57] CX 2 A–D.

[58] CX 18(A).

[59] CX 1 (A and B) ; CX 2 (A–D) ; CX 4 (A and B) ; CX 6 (A–D) ; CX 6 (C) ; CX 8 (B and C) ; CX 11 (A and B) ; CX 14 (A–B) ; CX 18 (A–B) ; CX 30 ; CX 31 (A–D) ; CX 36 (A and B) ; CX 109 (A–B) ; CX 110 (A) ; CX 113 (A). *Koch* v. *FTC*, 206 F.2d 311 (6th Cir. 1953) ; *Kalwajtys* v. *FTC*, 237 F.2d 654 (7th Cir. 1956) *cert. denied*, 352 U.S. 1025.

$50,000 per year? * * * Part-time earnings of $10, $15, $20 per hour? Money for a bigger or better home, a second car, college for your children, retirement for yourself and your wife? * * * These dreams can be a reality once you get on the job as an authorized VX–6 Distributor! [60]

The judge found such representations misleading and deceptive, and we agree. These representations, like those relating to earnings of specific distributors, constitute a significant part of respondents' advertising and far exceed the earnings normally received by dealers in VX–6. We have, therefore, modified the judge's order so that it will specifically cover such claims.

Complaint counsel also recommend an additional order provision which would require respondents to keep records which substantiate the accuracy and representativeness of any advertised earnings claims. Respondents vigorously oppose this requirement. First, they believe it improper for complaint counsel to propose on appeal a relief provision which did not appear in the notice order and which was not recommended for consideration by the judge. In addition, respondents view this provision as an unlawful attempt to shift the burden of substantiating earnings claims in future advertising. We find neither of respondents' arguments persuasive.

The record herein reflects that respondents extensively represented the earnings of no more than one-half of one percent of the distributors as the earnings which one could normally expect as a VX–6 distributor. Having found these representations to be misleading and deceptive, it is incumbent upon us to insure that such deception does not continue.

Respondents view any record-keeping provision as an unlawful shifting of the burden of substantiating their earnings claims. This contention is without merit. The Commission may require respondents to maintain records to support their earnings claims in order to protect the public against a continuation of their unlawful practices. The record-keeping requirement is reasonably related to the violation and is necessary to prevent repetition of the wrong. It is, therefore, a lawful provision and will be included in our order.[61]

B. *Testimonials*

Complaint counsel further object to the judge's order relating to the use of testimonials. The judge's order would require re-

[60] CX 36 B.

[61] *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970).

spondents to obtain express authorization in writing before using or referring to a testimonial; and, in addition, respondents must have good reason to believe that at the time of such use, publication or reference, the person or organization named subscribes to the facts or opinions therein contained. Complaint counsel contend this provision does not adequately protect the public interest because respondents would not be required to date the testimonials appearing in advertising or to ascertain that they are genuine "in all respects."

Respondents were charged in the complaint with using testimonials which appeared to contain the statements of persons who were using respondents' product at the time the testimonials were published and that respondents had not been given permission to publish such statements. The evidence demonstrated that respondents published testimonial letters without the authorization of the writers and continued to publish such testimonials for several years after the writers had discontinued using the product and no longer endorsed it.[62]

The Commission is of the view that statements of fact in testimonials should not be used in advertising where such facts are untrue or misleading with respect to the performance characteristics of the product. In this proceeding, however, the complaint did not challenge the truth of factual statements in the testimonials. Thus, on the record before us, the judge's order appropriately requires respondents to obtain from the author of a testimonial written authorization to use his testimonial in advertising. Once such authorization is obtained, the testimonial may be published so long as respondent has good reason to believe, at the time it is being used, the author subscribes to the views therein contained. In these respects, the judge's order provision is reasonable and it is affirmed.

C. *Distribution of the Order*

Finally, respondents challenge the provision of the judge's order requiring them to deliver a copy of the order to all present and future salesmen and to obtain a statement acknowledging receipt of the order. This provision appeared in the notice order, but respondents did not contest it before the judge. Nevertheless, the question was fully briefed by the parties and we think it appropriate to consider on appeal.

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[62] I.D. 25–30 [pp. 513–17 herein].

Respondents object to this provision on the grounds that it is unnecessary and compliance would be unduly burdensome. Respondents claim all of their 12,000 distributors are independent contractors, mostly "part-time-opportunity seekers," and they anticipate a turnover rate of 100 percent annually in distributors. Based on this estimated turnover rate, respondents calculate the total cost of compliance with this requirement, including printing and mailing, would run to $24,000 per year. Respondents also point out that they produce and provide the distributors with all sales material; and they conclude, since their distributors produce absolutely no advertising material, there is no danger that unlawful advertising will reach the consumer from anyone other than respondents.

Respondents' objections to this provision are premised on the wholly-unsupported contention that each year there is a complete turnover of VX–6 distributors. We find this contention lacking any record support, and we believe it unwarranted to assume such a total and rapid turnover given the fact that respondents have approximately 12,000 distributors. Respondents concede they have placed in their distributors' possession all of the sales literature used to sell the product. Thus, it is reasonable to assume many of respondents' current distributors have relied and will continue to rely upon representations found unlawful in this proceeding unless they are informed of the Commission's order. In our judgement, it is necessary to inform these distributors of the Commission's order to provide adequate protection against the continuation of the deception made possible through respondents' dissemination of deceptive advertising literature.

Complaint counsel have not, however, persuaded us that it is necessary to require respondents to provide a copy of the order to all future distributors. We believe any further distribution by respondents of advertising material found unlawful in this proceeding is adequately covered by our order and would certainly include advertising material furnished to all new distributors.

For the reasons herein stated, the Commission has determined that the order entered by the administrative law judge should be modified in accordance with this opinion; and as modified, it is affirmed.

FINAL ORDER

Respondents and counsel supporting the complaint having filed cross-appeals from the initial decision of the administrative law

judge, and the matter having been heard upon briefs and oral argument; and

The Commission having rendered its decision determining that the initial decision issued by the judge should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking the order to cease and desist issued by the judge and substituting therefor the following:

ORDER

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive, VX–6, or of any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits or earnings; or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products unless in fact the past sales, or the profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made; or misrepresenting, in any manner, the past, present or future sales, profits or earnings from the resale of respondents' products.

2. Failing to maintain accurate records which substantiate that the past or present sales, profits or earnings represented are accurate and are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is being made.

3. Representing, directly or by implication, contrary to

fact, that any product has been approved by any laboratory or by any other organization or person.

4. Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited, the product tested, instruments used, test procedures, data, and results of such test.

5. Using, publishing, or referring to any testimonial or endorsement unless (1) such use, publication, or reference is expressly authorized in writing and unless (2) respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained.

6. Failing to deliver a copy of this order to cease and desist to all present salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

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

It is further ordered, That other allegations of the complaint as to practices not covered by this order be, and they hereby are, dismissed.

Commissioner MacIntyre concurred in the result but not in the opinion. Commissioner Jones dissented for the reasons set forth in her accompanying dissenting statement.

IN THE MATTER OF

UNIVERSAL CREDIT ACCEPTANCE CORPORATION, ET AL.

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

Docket 8821. Complaint, Oct. 6, 1970—Decision, Feb. 16, 1973.

Order requiring three California corporations engaged in the advertising and sale of franchises which authorize franchisees to sell memberships in a credit card program, among other things to cease deceptions and misrepresentations with respect to the "Honor All Credit Card" program. Respondents are further required to offer a 7-day cooling-off period for cancellation of future contracts with full refund rights. An individual respondent is further required to refund all payments for franchise fees within 90 days to everyone who became members of franchisees during the last seven years.

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 Universal Credit Acceptance Corporation, a corporation, Continental Credit Card Corporation, a corporation, and International Credit Card Corporation, a corporation, also trading as National Credit Service, and John Clifford Heater, individually and as an officer of Universal Credit Acceptance Corporation and International Credit Card Corporation, and Howard P. Gingold, individually and as an officer of Continental Credit Card Corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Universal Credit Acceptance Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with