

upon reports of actual tests conducted by a competent testing laboratory. (1-23351, Mar. 25, 1952.)

8256. **Fountain Pens and Mechanical Pencils—Foreign Origin and Prices.**—Peerless Fountain Pen and Pencil Co., Inc., a New York corporation with its place of business located in New York, N. Y., engaged in the business of offering for sale and selling in commerce, fountain pens and mechanical pencils, entered into an agreement in connection with the offering for sale, sale and distribution of said merchandise to cease and desist from:

(1) Offering for sale and selling mechanical pencils, the mechanisms, actions or movements of which are of foreign origin, without affirmatively and clearly disclosing thereon, or in immediate connection therewith, the country of origin of such pencils or the mechanisms, actions or movements thereof;

(2) Supplying customers or purchasers of fountain pens and mechanical pencils, in sets or otherwise, with price tags or stickers therefor bearing prices which are, in fact, in excess of the prices at which such article or articles are usually and customarily offered for sale and sold in the usual course of business, or otherwise representing that such article or articles are sold for amounts in excess of their usual and customary selling prices. (1-24183, Mar. 25, 1952.)

8257. **Home Permanent Waving Preparation—Unique Qualities.**—Beaute Vues Corp., a California corporation, with its principal place of business located in Hollywood, Calif., engaged in the business of offering for sale and selling in commerce, a home permanent-waving preparation designated "Nutri-Tonic," entered into an agreement that in the dissemination of advertising of that preparation or any other preparation of substantially the same composition, it will cease and desist from representing directly or by implication that said preparation is the only home permanent-waving solution containing an oil cream or cream oil base. (1-23393, Mar. 27, 1952.)

8258. **Dental Plate Reliner—Effectiveness and Safety.**—Alexander R. Gordon and Estelle Gloss, copartners trading as Perma-Fit Co., with their office and principal place of business located in Chicago, Ill., engaged in the business of offering for sale and selling in commerce, a plastic material for relining dental plates known as "Perma-Fit," entered into an agreement to cease and desist from disseminating or causing to be disseminated, any advertisement for that product or any other product of substantially the same composition or possessing substantially the same properties, which represents directly or by implication:

(1) That application of this preparation—

(a) Will accomplish permanent results in the refitting or tightening of dental plates;

(b) Will assure permanent comfort;

- (c) Will insure against denture breath; and  
(2) That the preparation does not contain any ingredient which could harm the denture. (1-23451, Mar. 27, 1952.)

8259. Medicinal Preparation—Therapeutic Qualities.—Nu-Way Corp., a Michigan corporation trading as Citru-Mix Co., and Citru-Mix Division, with its principal place of business located in Grand Rapids, Mich., engaged in the business of offering for sale and selling in commerce, a product designated “Citru-Mix,” entered into an agreement to cease and desist from disseminating or causing to be disseminated, any advertisement for that product or any other product of substantially the same composition or possessing substantially the same properties, which represents directly or by implication:

(a) That the product is a treatment for or that it will correct or prevent the progress of rheumatism, neuritis, arthritis, lumbago, sciatica, bursitis, gout or conditions similar thereto;

(b) That the product will afford any relief from rheumatism, neuritis, arthritis, lumbago, sciatica, bursitis, gout or similar conditions or have any therapeutic effect upon any of the symptoms or manifestations thereof in excess of affording temporary relief of minor aches and pains. (1-21977, Apr. 1, 1952.)

8260. Lemon Juice Product—Nature.—Realemon-Puritan Co., the amended name of a corporation organized under the laws of the State of Illinois as Puritan Co. of America, with its principal place of business in Chicago, Ill., engaged in the business of offering for sale and selling in commerce a lemon-juice product, unsweetened, and made by reconstituting lemon juice concentrate, designated on its label as ReaLemon Brand Reconstituted Lemon Juice, entered into an agreement in connection with the offering for sale, sale and distribution of that product, it will cease and desist in its advertising of such product from:

(1) Designating its reconstituted lemon juice as “ReaLemon” without stating conspicuously and prominently that said product is reconstituted;

(2) Using the terms “ReaLemon Brand Lemon Juice,” “lemon juice,” or any similar term in describing its reconstituted lemon juice without using conspicuously and prominently the term “reconstituted” as an adjacent modifying descriptive word;

(3) Representing that its reconstituted lemon juice is the juice of tree-ripened lemons. (1-23281, Apr. 1, 1952.)

8261. Medicinal Preparation—Therapeutic Qualities.—Zerbst Pharmaceutical Co., a Missouri corporation, with its principal place of business in St. Joseph, Mo., engaged in offering for sale and selling in commerce a medicinal preparation designated “Zerbst’s Capsules,” entered into an agreement to cease and desist from disseminating or causing to be disseminated, any advertisement for that preparation or

any other preparation of substantially the same composition or possessing substantially the same properties which :

- (1) Represents directly or by implication that the said product will :
  - (a) Prevent or aid in preventing the development of a cold ;
  - (b) Shorten the course or duration of a cold or cure a cold ;
  - (c) Have any effect in treating any symptoms of a cold beyond providing temporary relief from aches or pains which are associated therewith ;
  - (d) Reduce fever or induce perspiration ;
  - (e) Cause circulatory stimulation in the blood stream ;
  - (f) Have a rest-inducing effect ;
  - (g) Have any effect on the condition known as nasal stuffiness ;
- (2) Fails to reveal that the taker shall "Follow the label—avoid excessive use." (1-10695, Apr. 3, 1952.)

8262. **Women's Coats—Misbranding as to Wool Content.**—Versailles Garment, Inc., a New York corporation, with its office and principal place of business located in New York, N. Y., and Joseph Weinstein and Benjamin Kovner, individually and as officers thereof, engaged in the offering for sale, sale and distribution in commerce, of women's coats and other garments, entered into an agreement that in connection with the offering for sale, sale, transportation, delivery for transportation or distribution of coats or any other wool products, to cease and desist from misbranding such products by :

- (1) Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers therein ;

- (2) Failing to securely affix to or place on such products a stamp, tag, label or other means of identification showing in a clear and conspicuous manner :

- (a) the percentage of the total fiber weight of such wool products, exclusive of ornamentation not exceeding 5 percent of said total fiber weight of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentages by weight of such fiber is 5 percent or more and (5) the aggregate of all other fibers ;

- (b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling or adulterating matter ;

- (c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, transportation, distribution or delivering for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939 ;

- (3) Failing to separately set forth on the required stamps, tags, labels or other means of identification the character and amount of the constituent fibers present in the outer shell as well as the linings

and interlinings contained in coats or other wool products, as provided in Rule 24 of the Rules and Regulations promulgated under the act. (1-24223, Apr. 3, 1952.)

8263. **Rust Inhibitor—Effectiveness.**—Thompson-Long Co., an Illinois corporation, with its principal office and place of business located in Chicago, Ill., engaged in the business of offering for sale and selling in commerce, a product designated “R-10-X,” entered into an agreement in connection with the offering for sale, sale and distribution of that product to cease and desist from representing directly or by implication:

(a) That by use of the product it is possible to undo the damage already effected by rust;

(b) That the product affords better protection where the rust deposit is heavier;

(c) That the product of itself stops the formation of rust or further damage from rust or that it affords any material aid in that respect unless the surface is also promptly painted after the product has been applied. (1-23467, Apr. 3, 1952.)

8264. **Course in Hypnotism—Results.**—John R. Olney, Jr., an individual trading as Olney School of Hypnotism, with his principal place of business located in Philadelphia, Pa., engaged in the business of offering for sale and selling in commerce, a mimeographed publication entitled “Olney Simplified Course in Rapid Hypnotism,” entered into an agreement in connection with the offering for sale, sale and distribution of that publication or any similar publication, that he will cease and desist from using phrases such as:

“World’s Fastest Hypnotist Will Teach You His Methods of Hypnotizing New Subjects in 5 Seconds,” “May Be Learned by Anyone,” “Learn Hypnotism One-Night Course,” or in any other manner, from exaggerating the ease or speed with which readers of the aforesaid publication will be enabled to learn or practice hypnotism. (1-22115, Apr. 8, 1952.)

8265. **Shampoo—Operation.**—Marlene’s, Inc., an Illinois corporation, with its principal place of business located in Chicago, Ill., engaged in the business of offering for sale and selling in commerce, a product designated “Marlene’s Hair Waving Shampoo,” entered into an agreement that it will cease and desist from disseminating or causing to be disseminated any advertisement for that product or any other product of substantially the same composition or possessing substantially the same properties, which represents directly or by implication:

(a) That the product curls or waves hair while it washes;

(b) That the product is an instant hair curling product;

(c) That the hair waving effects of the product are different from the hair waving effects of the conventional type of wave set. (1-23775, Apr. 8, 1952.)

8266. Home Veterinary Course—Facilities and Plant, Staff, Job and Employment Opportunities, etc.—Dr. David Roberts Practical Home Veterinary School, Inc., a Wisconsin corporation, with its principal place of business located in Waukesha, Wis.; Frank Roberts and Howard Haines, individuals and officers thereof, engaged in the offering for sale and selling in commerce, a correspondence course in veterinary training, entered into an agreement that in connection with the offering for sale, sale and distribution of the Dr. David Roberts Practical Home Veterinary Course, they will cease and desist from:

(1) Representing pictorially, or otherwise, that they own a goat dairy when such is not the fact;

(2) Representing pictorially, or otherwise, that the physical plant owned, used or occupied by the school is greater than is the fact;

(3) Representing that the purchase and study of such course of instruction will enable subscribers thereto to become livestock experts, to diagnose and successfully treat all or most of the diseases, nutritional deficiencies or injuries that livestock have;

(4) Representing that large profits and good jobs are available to those completing the course;

(5) Using the word "free" or any other word of similar meaning, in advertising, to designate, describe, or refer to any article of merchandise which is not in fact a gift or gratuity or which is not given without requiring the purchase of other merchandise or the performance of some service inuring directly or indirectly to the benefit of the respondents;

(6) Representing that Dr. David Roberts is living and giving personal attention to the business of the school;

(7) Representing that a staff of veterinarians is maintained when such is not the fact;

(8) Representing that the course is being offered at a reduced price when such is not the fact. (1-24174, Apr. 10, 1952.)

8267. Food Product—Therapeutic Qualities, etc.—Jack G. Pavo and Lawrence J. Audette, copartners doing business as The Pavo Co., Pavo's and Pavo Dietary Foods, with their principal office in Minneapolis, Minn., engaged in the business of offering for sale and selling in commerce, a product designated "Pavo Food," entered into an agreement to cease and desist from disseminating or causing to be disseminated, any advertisement for that product or any other product of substantially the same composition or possessing substantially the same properties, whether sold under that name or any other name, which represents directly or by implication:

(a) That the product has a beneficial or a therapeutic effect in cases of allergy or on hay fever, sinus, asthma, catarrh, hives, eczema, arthritis, colitis, inflamed gall bladder, liver disorders, stomach disorders, intestinal disorders or any other disease or disorder;

(b) That the product has a beneficial or a therapeutic effect on the blood;

(c) That the product will rid the body of excess toxins;

(d) That all of the ingredients contained in the product are easily digested or assimilated;

(e) That the product will be valuable or beneficial to everyone;

(f) That the product is for practical purposes a complete food product. (1-22548, Apr. 15, 1952.)

8268. **Books, Etc.—Comparative Merits, Nature, Etc.**—Wm. H. Wise & Co., Inc., and National Educational Alliance, Inc., New York corporations, and John J. Crawley, president of both corporations, engaged in offering for sale and selling in commerce, various books and other publications, entered into an agreement in connection with the offering for sale, sale and distribution thereof, they, and each of them, will cease and desist, with respect thereto, from representing:

(a) That the New Modern Encyclopedia is America's most up-to-date encyclopedia, or the most up-to-the-minute encyclopedia in existence, unless such representation is in fact true and correct;

(b) That any book or books contain a complete history of any episode or event unless all of the essential features of said episode or event, substantially to the time of disseminating such representation, are included.

It is also agreed by Wm. H. Wise & Co., Inc., National Educational Alliance, Inc., and John J. Crawley, that in connection with the offering for sale, sale and distribution in commerce, of a set of books designated "Popular Educator Library," or any other book or books dealing with academic subjects commonly studied in educational institutions, they, and each of them will cease and desist from:

(c) Representing directly or by implication that a university education is being offered through such books, and from using in connection with the name "National Educational Alliance, Inc.," any representation directly or impliedly to the effect that an alliance or association of educators is offering through such books any course or courses of instruction, unless such representation is in fact true and correct. (1-18647, Apr. 15, 1952.)

8269. **Hearing Aid Devices—Guarantee, Comparative Merits and Costs, etc.**—The Microtone Co., a Minnesota corporation, with its principal place of business located in Minneapolis, Minn., and S. C. Ryan, individually and as an officer thereof, engaged in the business of offering for sale and selling in commerce, hearing aid devices, entered into an agreement that they will cease and desist from disseminating or causing to be disseminated, any advertisement for hearing aid devices which represents directly or by implication:

(1) That said devices will endure and afford satisfactory service during the lifetime of the purchaser, or that their "Lifetime Service

Policy" insures the devices against all service expense incident to the maintenance thereof during the purchaser's lifetime; provided, however, that this inhibition does not proscribe the use of the trade name "Lifetime" if such trade name, whenever used, is accompanied by a statement, equally conspicuous, to the effect that component parts of said devices may become defective and that replacement thereof after one year has expired will be made only at the expense of the purchaser;

(2) That a greater overall economy is effected by purchasing said devices than by purchasing a competitive device at a price of \$75 or any approximation thereof;

(3) That by using said devices in lieu of competitive devices, purchasers will effect a saving in battery costs comparable to the purchase price of the devices;

(4) That the battery expense incident to the normal operation of said devices is any definitely stated amount per month or any definitely stated percentage less than that of competitive devices, when such definitely stated amount or percentage is not consistent with the facts;

(5) That the four tube Microtone Lifetime is the most powerful 22-volt instrument on the market today;

(6) Through the use of such words, terms and phrases as "hide your deafness," "no one need know you wear a hearing aid," "no button in the ear to spoil your secret," "no one need know you're hard of hearing," "practically invisible," "unnoticed even by closest friends," "even your most intimate friends need not know you're hard of hearing," "hear in secret," or otherwise, that any device which is not completely concealed when worn by any user, is invisible or cannot be seen;

(7) Through the use of the phrase "no button in the ear" or otherwise, that any of their hearing aid devices which employ an ear mold or a tube include nothing worn in or leading to the ear;

(8) By failure to reveal pertinent facts, that their hearing aid devices are less noticeable than is actually the fact;

(9) That their hearing aid devices require less equipment than all parts essential to the functioning thereof;

(10) That the user of the said devices will have satisfactory hearing within a time less than is actually required to become habituated to their use;

(11) Through pictorial representations or otherwise, that the said devices, as used, can be worn without being visible unless the circumstances under which they can be so worn are clearly revealed. (1-20660, May 6, 1952.)

8270. Nylon Yard Goods—Government Source, Quality, and Prices.—Defender Textile Corp., a New York corporation, with its principal place of business located in New York, N. Y., engaged in the business of offering for sale and selling in commerce, nylon yard goods, nylon and silk parachutes and plastic auto covers, entered into an agreement

in connection with the offering for sale, sale and distribution thereof, it will cease and desist from:

(1) Using the name of the United States Government or any agency thereof in connection with the advertising or sale of nylon or any other fabric material which has not been procured from the United States Government, or the indicated agency thereof, unless such merchandise has been produced for the United States Government and unless the character of the merchandise, including the facts as to whether such articles constitute seconds, defective merchandise which has been rejected due to departures from Government specifications, or merchandise not accepted for other reasons by the Government, when such is the case, is conspicuously disclosed in immediate conjunction therewith;

(2) Using the name of the United States Government or any agency thereof in connection with the advertising or sale of any old, used, or secondhand parachutes which have been procured from the United States Government, or the indicated agency thereof, unless the character and condition of the merchandise, including the facts as to whether such articles constitute overage, used, condemned, scrap, or salvaged material, or merchandise otherwise found unfit for Government use, when such is the case, is conspicuously disclosed in immediate conjunction therewith;

(3) Representing as a customary or usual price of merchandise any price or value which is in fact in excess of the price at which such merchandise is usually and customarily sold by proposed respondent in the regular and normal course of business; or representing as a sale, special or reduced price any price which is in fact the price at which the merchandise in question is usually and customarily sold by proposed respondent in the regular and normal course of business. (1-24247, May 6, 1952.)

8271. **Woolen Stocks—Misbranding as to Wool Content.**—United Waste Co., Inc., is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its office and principal place of business located in East Dedham, Mass. Walter Gruken, Benjamin Seigel, and Israel Appleman are officers of the corporation and as such manage and control its affairs and policies. The corporation buys rags, clips and various other wastes composed of wool, rayon, cotton, nylon and silk, garnets and blends them into stock and sells the resulting products to mills throughout the country. The said corporation and individuals are engaged in the offering for sale, sale and distribution in commerce of woolen stocks, and causing the same, when sold, to be shipped from their place of business in Massachusetts into and through various other States of the United States to purchasers located in said other States.



Said woolen stocks were wool products, as the term "wool products" is defined in the Wool Products Labeling Act of 1939, being composed in whole or in part of wool, reprocessed wool or reused wool, as those terms are defined in the said Wool Products Labeling Act of 1939, and were subject to the provisions of said act and the rules and regulations promulgated thereunder.

In connection with and in the course of the sale, distribution and transportation of the aforesaid woolen stocks, said corporation and individuals in the year 1951 attached or caused to be attached to a quantity of woolen stocks which was composed of approximately 34 percent wool and 66 percent rayon, tags representing such wool products to be 50 percent wool and 50 percent rayon in violation of the provisions of the Wool Products Labeling Act of 1939. The information on these tags was based on results obtained by the so-called caustic soda boilout test, a testing method in general use throughout the industry. Because certain fibers other than wool are dissolved in whole or in part by caustic soda, the use of this test indicates a greater wool content than is actually present. When such a fact was brought to the attention of the respondents herein, steps were immediately taken by them to correct the faulty testing procedures in order to insure that their products are properly labeled as to wool content.

United Waste Co., Inc., and Walter Gruken, Benjamin Seigel, and Israel Appleman entered into an agreement in connection with the offering for sale, sale, transportation, delivery for transportation or distribution in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939 of wool stocks, or any other wool products within the meaning of said act, they and each of them will forthwith cease and desist from misbranding such products by:

(1) Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers therein.

(2) Failing to securely affix or to place on such products a stamp, tag, or other means of identification showing in a clear and conspicuous manner:

(a) the percentage of the total fiber weight of such wool products, exclusive of ornamentation not exceeding 5 percent of said total fiber weight of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is 5 percent or more and (5) the aggregate of all other fibers;

(b) the maximum percentage of the total weight of such wool product of any nonfibrous loading, filling or adulterating matter. (1-24190, May 1, 1952.)

8272. Germicidal Product—Effectiveness, etc.—E. Roy Knoppel, an individual trading as Knott Manufacturing Co., with his principal of-

office and place of business located in Philadelphia, Pa., engaged in offering for sale and selling in commerce, a product designated "White Cap Pine Oil," entered into an agreement in connection with the offering for sale, sale and distribution of said product, he will cease and desist from disseminating any advertisement in regard thereto which represents directly or by implication:

(a) That the product will completely remove offensive or unpleasant odors;

(b) That the use of the product alone is effective in protecting or safeguarding health;

(c) That the product will kill all pathogenic organisms or any pus forming organism;

(d) That the product will rid premises of cold germs or other germs;

(e) That the product is effective in the prevention of germs, pneumonia, colds or influenza;

(f) That the product is effective in removing grease from drain pipes;

(g) That the product is a new or a different product. (1-24240, May 1, 1952.)

8273. **Flexible Glass Substitutes—Qualities.**—Edward Warp and Margaret Warp, copartners doing business under the trade name Sol-O-Lite Manufacturing Co., with their office and principal place of business located in Chicago, Ill., engaged in the business of offering for sale and selling in commerce, flexible glass substitutes designated "Sol-O-Lite," "Glaz-Fabrik," "Nu-V-Glass" and "Glaz-Screen" entered into an agreement to cease and desist from disseminating or causing to be disseminated, any advertisement for Sol-O-Lite products or any other products of substantially the same composition, which represents directly or by implication:

(1) That such materials:

(a) are weatherproof, waterproof and vermin-proof;

(b) will not crack, break or chip;

(c) when used as a covering for plants, will result in the earlier maturity of such plants;

(d) will prevent rickets or other diseases, or will result in increased egg production or earlier maturity of chicks, unless such results are clearly and expressly limited to situations where a vitamin D deficiency exists and where such deficiency is adequately compensated for by the ultraviolet rays transmitted by said products;

(2) That Sol-O-Lite—

(a) holds heat in and cold out better than ordinary glass;

(b) is endorsed by leading agricultural colleges;

(3) That Nu-V-Glass—

- (a) is as clear as ordinary window glass;
- (b) permits a higher transmittance of ultraviolet rays than any similar product; and
- (4) That the 14 x 14 mesh Glaz-Screen transmits as much as 60 percent of solar ultraviolet radiation or any other amount of ultraviolet radiation not in accordance with the facts. (1-23006, May 1, 1952.)

8274. Bicycles, etc.—Order Conformance.—Standard Cycle Co., an Illinois corporation, with its principal place of business located in Chicago, Ill., engaged in the business of offering for sale and selling in commerce, bicycles and bicycle supplies and tricycles, including various accessory and repair parts, entered into an agreement in connection with the offering for sale, sale and distribution of its merchandise, it will cease and desist from:

Shipping any merchandise not identical in all respects with the merchandise ordered by any customer, except with the consent of such customer; provided, however, that this shall not be construed as an agreement not to ship, subject to the approval of the customer, other merchandise of equal grade and price when the merchandise ordered is unavailable and the customer has been placed on notice clearly and specifically that the Standard Cycle Co., Inc., reserves the right to ship such substitute merchandise unless the customer specifies otherwise and the customer has not so specified. (1-24006, May 13, 1952.)

8275. Vitamin Preparation—Therapeutic and Health Qualities.—Dwarfies Corp., an Iowa corporation, with its principal office and place of business located in Council Bluffs, Iowa, engaged in the business of offering for sale and selling in commerce, a vitamin preparation designated "Dwarfies 10 Vitamins," entered into an agreement in connection with the offering for sale, sale and distribution, of that preparation, or any other preparation of the same or similar composition, it will cease and desist from representing, directly or impliedly:

(1) That the said preparation contains all of the vitamins required in human nutrition or that all of the vitamins in the said preparation are known to be essential to human well-being;

(2) That use of the said preparation will:

- (a) be of any value in the prevention or correction of foot disorders;
- (b) beneficially affect the condition known as arthritis;
- (c) beneficially affect the condition known as undernourishment; or
- (d) beneficially affect the incidence or duration of common colds or increase resistance to infection.

(3) That use of the said preparation will correct symptoms or conditions such as fatigue, exhaustion, poor digestion, nervousness, nervous disorders, irritability, insomnia, "aches or pains," weakness, loss of pep or energy, night blindness or poor appetite.

(4) That conditions or symptoms known as "skin defects," "poor complexion," "eye troubles," "faulty vision," "poor digestion," "poor eyesight," "nervousness," "bad teeth," "irregularity," "loss of appetite" or "fatigue" are frequently or commonly due to vitamin deficiency or that use of the said preparation will avert the development of such conditions or symptoms.

(5) That vigor, vitality, increased energy, resistance or a feeling of general good health will result from the use of the said preparation.

(6) That the said preparation is effective in correcting any vitamin deficiency symptoms except those due solely to lack of sufficient vitamin D.

Dwarfies Corp. also agreed that it will cease and desist:

By use of phrases such as "a majority of Americans are said to be undernourished because they do not get enough of the various vitamins \* \* \*," "\* \* \* three out of four people need extra vitamins \* \* \*" or in any other manner from exaggerating the frequency of occurrence of vitamin deficiency or the necessity for the use of the said preparation. (1-22110, May 15, 1952.)

8276. "Silver-Plating" Product—Effectiveness, Operation, etc.—Silvaplate Corp., a New York corporation, with its principal place of business in New York, N. Y., and its officers, Alan L. Grey and Joan G. Grey, copartners, doing business under the firm names, Little Grey Fixit Shop, Little Grey Gift Shop and Orange Manufacturing Co., with their place of business in New York, N. Y., are engaged in the offering for sale, sale and distribution in commerce, of two products designated "Silvaplate" and "Wonder Silver Plate."

Prior to approximately the first of the year 1950, the said corporation and copartners engaged in the offering for sale, sale and distribution of a product known as "Quadruple Silvaplate" which contained silver cynaide. At that time the said product was discontinued but the name "Quadruple Silvaplate" was continued in use for several months as a brand name for the product above referred to as Silvaplate.

Silvaplate Corp., a corporation, and Alan L. Grey and Joan G. Grey, individually and as officers thereof, and as copartners trading as Little Grey Fixit Shop, Little Grey Gift Shop and Orange Manufacturing Co., entered into an agreement in connection with the offering for sale, sale and distribution of their products designated "Quadruple Silvaplate," "Silvaplate" and "Wonder Silver Plate" or any other products of the same or substantially the same composition, they and each of them will cease and desist from representing directly or by implication:

(a) That such products preserve or restore Sheffield or similar plated ware;

(b) That such products deposit a coating on silver or that they coat other than the worn areas of silverware where the base metal is exposed;

(c) That such products will save \$100 worth of plating or any other amount of commercial silver plating;

(d) That the coating deposited by such products will not rub off;

(e) That repeated applications of the products will cause the coating to build up or become thicker;

and from:

(f) Representing through the use of the brand name "Quadruple Silvaplate" or otherwise that such products deposit a coating equivalent in thickness to "quadruple plate." (1-23708, May 15, 1952.)

8277. Hearing Aid Devices—Size, Comparative Merits, Effectiveness, etc.—Belton Hearing Aid Co., an Illinois corporation, with its principal place of business located in Chicago, Ill., and Sam Posen and Fannie Posen, individually and as officers thereof, engaged in offering for sale and selling in commerce, hearing-aid devices, entered into an agreement that they and each of them, will cease and desist from disseminating or causing to be disseminated, any advertisement for hearing-aid devices which represents directly or by implication:

(1) The sizes or weights of their hearing-aid devices not in accordance with the facts;

(2) The size or weight of their hearing-aid devices in comparison with other hearing-aid devices when such comparisons are not true at the time made;

(3) Through the use of the phrase "no button shows in ear" or otherwise that any of its hearing-aid devices which employ an ear mold or a tube include nothing worn in or leading to the ear;

(4) That their hearing-aid devices give "full-tone hearing" or the "richest" or "clearest" hearing, or otherwise represents that said devices give full-tone hearing or the richest or clearest hearing;

(5) That their hearing-aid devices eliminate fading in and out;

(6) That their hearing-aid devices will enable the hopelessly deaf to hear again;

(7) That their hearing-aid devices embody new or different electronic principles from those found in other hearing-aid devices;

(8) Through the use of such words, terms, and phrases as "hides deafness," "conceals deafness," "even close friends won't know you're wearing a hearing aid" or otherwise, that any device which is not completely concealed when worn by any user is invisible or cannot be seen;

(9) That by means of their hearing-aid devices, a user can prevent his hearing loss from becoming progressively worse;

(10) By the use of depictions or otherwise that "Fashionear" constitutes the entire apparatus of their hearing-aid devices;

(11) That their hearing-aid devices require less equipment than all parts essential to the functioning thereof. (1-19075, May 15, 1952.)

8278. Hearing Aid Devices—Effectiveness, Operation, etc.—Dictograph Products, Inc., a New York corporation, with its principal place of business located in New York, N. Y., engaged in the business of offering for sale and selling in commerce, hearing aid devices, entered into an agreement to cease and desist from disseminating or causing to be disseminated, any advertisement for hearing aid devices, which represents directly or by implication:

1. That the devices designated “Wrist-Ear” and “Super-X-Ear”

(a) Employ a new or different principle which provides hearing aid without any equipment other than that worn on the wrist,

(b) Duplicate the functions of the human ear, or duplicate nature’s way to hear,

(c) Provide directional hearing or otherwise represents that such devices enable the user to identify the source of sound from all directions at once; provided, however, that this shall not be construed as an agreement not to represent that the device may aid the user to identify the source of a particular sound when the manner in which that is accomplished, is clearly disclosed,

(d) Enable one to hear again regardless of the cause of impaired hearing, unless such advertising excepts persons who have no residual hearing.

2. That the “Skin Receiver” does not require the use of visible equipment, unless conditions under which it can be concealed are clearly disclosed;

3. Through the use of such words, terms, and phrases as “completely concealed,” “invisible hearing,” “completely out of sight,” “hidden,” “no one will know you are hard of hearing,” “your hearing loss is your secret,” or otherwise, that any device, which is not completely concealed when worn by any user, is invisible or cannot be seen;

4a. Through the use of the phrase “no receiver button in the ear” or otherwise that any of its hearing aid devices which employ an ear mold or a tube include nothing worn in or leading to the ear;

4b. In connection with its “Skin Receiver,” that there is no button or receiver in the ear, unless it is clearly disclosed that the skin receiver is worn behind the ear;

5. By failure to reveal pertinent facts, that its hearing aids are less noticeable than is actually the fact;

6. That any of its hearing aid devices require less equipment than all parts essential to the functioning thereof;

7. That it conducts “hearing clinics” or employs “hearing specialists” or “hearing experts”;

8. That it conducts a “public education department”;

9. That its hearing aid devices employ no cords, unless it is clearly disclosed that the cord eliminated is the standard receiver cord and such representations are clearly limited to those devices worn completely on the head and it is clearly explained that in the use thereof a tube leading to the ear may be necessary. (1-18241, May 15, 1952.)

**8279. Hearing Aid Devices—Invisibility, Equipment, and Effectiveness.**—Sonotone Corp., a New York corporation, with its principal place of business located in Greenburgh, N. Y., engaged in the business of offering for sale and selling in commerce, hearing aid devices, entered into an agreement that it will cease and desist from disseminating or causing to be disseminated, any advertisement for hearing aid devices, which represents directly or by implication:

(1) Through the use of such words, terms, and phrases as "hidden," "nobody knows you're deaf," "invisible hearing," "out of sight," "invisibly" or otherwise, that any device which is not completely concealed when worn by any user is invisible or cannot be seen;

(2) Through the use of such phrases as "no button in the ear" and "nothing in the ear," or otherwise, that any of its hearing aid devices which employ an ear mold or a tube include nothing worn in or leading to the ear;

(3) In connection with its "Noband" receiver, that there is no button or receiver in the ear, unless it is clearly disclosed that the bone conduction receiver is worn behind the ear;

(4) That its hearing aid devices require less equipment than all parts essential to the functioning thereof;

(5) That the "Movable Ear" constitutes the entire apparatus of its hearing aid devices;

(6) That use of its hearing aid devices will benefit persons who have no residual hearing. (1-19518, May 15, 1952.)

**8280. Shoes—Corrective and Orthopedic Qualities.**—Connolly Shoe Co., a Minnesota corporation, with its principal place of business located in Stillwater, Minn., engaged in the business of offering for sale and selling in commerce, shoes designated "Connolly Shoes," "Connolly Corrective Arch Shoes" and "Connolly Shoes—Amplifit Last," entered into an agreement in connection with the offering for sale, sale and distribution of its shoes, it will cease and desist from representing directly or by implication:

(a) That the product now designated "Connolly Corrective Arch Shoes" (1) is a corrective shoe (2) will correct arch defects or (3) provides corrective support;

(b) That the metatarsal pad of the product now designated "Connolly Corrective Arch Shoes" (1) can be changed to meet any possible requirement or all individual requirements or (2) insures individual comfort or helpfulness;

(c) That the product now designated "Connolly Corrective Arch Shoes" or the product designated "Connolly Shoes—Amplifit Last" possess orthopedic features;

(d) That its shoes possess orthopedic heels;

(e) That the product designated "Connolly Shoes—Amplifit Last" gives balanced support or that it helps prevent pronation. (1-23896, June 3, 1952.)

8281. Resin Plasticizer—Effectiveness, Relevant Facts, etc.—Perma Starch, Inc., an Illinois corporation, with its principal place of business located at Illiopolis, Ill., engaged in the business of offering for sale and selling in commerce, a resin plasticizer designated and advertised as "Perma Starch," entered into an agreement in connection with the offering for sale, sale and distribution of said product it will cease and desist, with respect thereto, from representing, directly or by implication:

(1) That said product penetrates the individual fibers of yarns;

(2) That said product is effective in retarding mildewing of garments;

(3) That the use of said product will double the life of fabrics or increase the wearing life of fabrics by any definite length of time;

(4) That clothes starched with said product will be more crease-resistant or wrinkle-resistant than clothes treated with corn starch;

(5) That ordinary, or corn starches, merely coat the surface of fabrics. (1-22907, June 3, 1952.)

8282. Wool Ties—Misbranding as to Wool Content.—Harry Rosenberg is an individual doing business as Cardinal Neckwear with his office and principal place of business located in New York, N. Y. Harry Rosenberg is also doing business as Silk Wool Neckwear Co., with a tie factory located in Philadelphia, Pa. He is now, and for more than 1 year last past has been, engaged in the offering for sale, sale and distribution in commerce of men's ties, and causing the same, when sold, to be shipped from his places of business in New York and Pennsylvania into and through various other States of the United States to purchasers located in said other States.

Said men's ties were wool products, as the term "wool product" is defined in the Wool Products Labeling Act of 1939, being composed in whole or in part of wool, reprocessed wool or reused wool, as those terms are defined in the said Wool Products Labeling Act of 1939, and were subject to the provisions of said act and the rules and regulations promulgated thereunder.

In connection with and in the course of the sale, distribution, and transportation of the aforesaid ties in commerce, said Harry Rosenberg in the year 1951 attached or caused to be attached to a quantity of ties containing linings in two sections, one section of which was



100 percent wool, the other 50 percent wool and 50 percent rayon, stamped or printed representations that the tie linings were 100 percent wool in violation of the provisions of the Wool Products Labeling Act of 1939. By reason of such representations the exemption provided for in Section 4 (d) of the act was inapplicable. Other ties composed in whole or in part of wool were unlabeled as to fiber content.

Harry Rosenberg entered into an agreement in connection with the offering for sale, sale, transportation, delivery for transportation or distribution in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, of men's ties, or any other wool product within the meaning of said act, he will cease and desist from misbranding such products by:

(1) Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers therein;

(2) Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding 5 percent of said total fiber weight of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool if said percentage by weight of such fiber is 5 percent or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution, or delivering for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939. (1-24290, June 5, 1952.)

8283. **Woolen Piece Goods—Misbranding as to Wool Content.**—Glen Woolen Mills, Inc., is a corporation organized and existing under the laws of Connecticut, with its office and principal place of business located in Norwich, Conn. Herbert M. Hitchon is president and treasurer and W. G. Hitchon is vice president and secretary of said corporation and as such manage and control its affairs and policies. The corporation purchases fibers from various sources and blends, cards, spins, weaves and finishes the stock into yarn and piece goods. The said corporation and individuals are engaged in offering for sale, sale and distribution in commerce, of woolen piece goods.

Said woolen piece goods were wool products, as the term "wool product" is defined in the Wool Products Labeling Act of 1939, being composed in whole or in part of wool, reprocessed wool or reused

wool, as those terms are defined in the said Wool Products Labeling Act of 1939, and were subject to the provisions of said act and the rules and regulations promulgated thereunder.

In connection with and in the course of the sale, distribution and transportation of the aforesaid woolen piece goods in commerce, said corporation and individuals in the year 1951 attached or caused to be attached to a quantity of woolen piece goods which was composed of approximately 35 percent wool and 65 percent rayon, tags representing such wool products to be 50 percent wool and 50 percent rayon in violation of the provisions of the Wool Products Labeling Act of 1939. The designations on these tags were based on wool content information furnished by their suppliers of waste and on results obtained by the so-called caustic soda boil-out test, a testing method in general use throughout the industry. Because certain fibers other than wool are dissolved in whole or in part by caustic soda, the use of this test indicates a greater wool content than is actually present. When such a fact was brought to the attention of the respondents herein, steps were immediately taken by them to correct the faulty testing procedures in order to insure that their products are properly labeled as to wool content.

Glen Woolen Mills, Inc., and Herbert M. Hitchon and W. G. Hitchon, entered into an agreement that in connection with the offering for sale, sale, transportation, delivery for transportation or distribution in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, of woolen piece goods, or any other wool products within the meaning of said act, they and each of them will cease and desist from misbranding such products by:

(1) Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers therein;

(2) Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding 5 percent of said total fiber weight of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is 5 percent or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter. (1-24189, June 5, 1952.)

8284. Hair Coloring Preparation—Safety, Effectiveness, and Use.—Bymart-Tintair, Inc., a Delaware corporation, with its principal office and place of business located in New York, N. Y., and Martin L.

Straus II and Philip Kalech, individually and as corporate officers, engaged in the business of offering for sale and selling in commerce, a hair coloring preparation designated "Tintair," entered into an agreement that they will cease and desist from disseminating or causing to be disseminated, any advertisement for that product or any other product of substantially the same composition or possessing substantially the same properties, which represents directly or by implication:

(a) That the product is safe, without revealing the need of using it as directed by the caution on its label;

(b) That (1) no care is required in applying the product or (2) that there is no chance for error or mistake;

(c) That (1) the user is assured of perfect or satisfactory results, (2) the resulting hair color will be exactly the color the user selected from the Tintair color chart, (3) the product constitutes or is a professional treatment or (4) the product will satisfactorily color hair under any and all conditions;

(d) That the product (1) will make the hair young in texture (2) will give the hair more body or (3) will restore the original or youthful color to the hair;

(e) That any person uses the product or has used the product when such is not a fact. (1-23840, June 5, 1952.)

8285. **Shoe Dressings—Durability.**—John Pffingsten, an individual trading as Old Tanner, Milwaukee, Wis., engaged in the business of offering for sale and selling in commerce, shoe dressings of various colors made according to formulas created and owned by John Pffingsten, entered into an agreement in connection with the offering for sale, sale and distribution of such shoe dressing or of any product of substantially the same composition or possessing substantially the same properties, he will cease and desist from representing directly or by implication:

That such products are "Rub-Proof" or will not rub off; *Provided, however,* That nothing contained herein shall be construed as preventing any representation to the effect that said products will resist rubbing off. (1-24287, June 3, 1952.)

8286. **Shoes—Corrective and Orthopedic Qualities.**—Field and Flint Co., a Massachusetts corporation, with its principal office and place of business located in Brockton, Mass., engaged in the business of offering for sale and selling in commerce, among others, men's shoes designated "Dr. M. W. Locke Shoes" and "Anatomik Shoes," entered into an agreement in connection with the offering for sale, sale and distribution of the shoes, it will cease and desist from:

(a) Representing that through the use of Dr. M. W. Locke Shoes equalized weight distribution is effected or that the shoes balance the weight;

(b) Representing that Dr. M. W. Locke Shoes will keep the feet healthy;

(c) Representing that Dr. M. W. Locke Shoes or Anatomik Shoes are of aid in the treatment of all foot conditions or in relieving the pain or discomfort thereof;

(d) Representing that Dr. M. W. Locke Shoes will banish fatigue;

(e) Representing that Anatomik Shoes are orthopedic shoes or that they possess corrective features;

(f) Representing that Anatomik Shoes will correct, cure, or prevent foot ailments, disorders, or abnormalities;

(g) Representing that Anatomik Shoes will relieve callouses or abnormal foot conditions;

(h) Representing that Anatomik shoes provide suitable support for or will relieve weak arches generally or that they will relieve weak ankles generally;

(i) Representing that Anatomik Shoes provide suitable support for fallen arches or that they will relieve fallen arches or effect natural positioning of the arch;

(j) Representing that as a result of the wearing of Anatomik Shoes the ankles or arches will straighten of their own accord.

It is hereby agreed that Field and Flint Co. may apply to the Federal Trade Commission to have this stipulation amended at such time as it may deem advisable. (1-23619, June 10, 1952.)

8287. Paper Bound Books—Substitute Titles.—Astro Distributing Corp., Quarter Books, Inc., and Magazine Village, Inc., New York corporations, with their principal place of business in New York, N. Y., and Arthur Bernhard, individually and as an officer thereof, engaged in republishing paperbound books, entered into an agreement that in connection with the offering for sale, sale and distribution of books in commerce, they and each of them, will cease and desist from:

(a) Substituting a new title for the original title of a reprinted book or story unless whenever used—on the cover, on the title page, at the beginning of the story and elsewhere—such substitute title be immediately accompanied in equally conspicuous type, by the title under which such book or story was originally published;

(b) Using on or in connection with a reprinted book or story a copyright date, author's name or publisher's name different from that which appeared on the original, in such manner as to create or contribute to the impression that a republished book is being published for the first time. (1-24220, June 19, 1952.)

8288. Hearing Aid Devices—Invisibility, Size, and Composition.—Otarion, Inc., an Illinois corporation, with its principal place of business located in Chicago, Ill., engaged in the business of offering for sale and selling in commerce, hearing aid devices, entered into an agree-

ment that it will cease and desist from disseminating any advertisement for that commodity, which represents directly or by implication:

(1) Through the use of such words and phrases as "invisible hearing," or otherwise, that any device which is not completely concealed when worn by any user is invisible or cannot be seen;

(2) Through the use of such phrases as "no button shows in the ear," or otherwise, that any of its hearing aid devices which employ an ear mold or a tube include nothing worn in or leading to the ear;

(3) That its hearing aid devices are only half the size of most hearing aids;

(4) That the content of gold or silver in its hearing aid devices is greater than is actually the fact. (1-19080, June 17, 1952.)

8289. Medicinal Preparation—Therapeutic Qualities and Comparative Merits.—William Waite Keller and Charles Phellis Keller, copartners doing business under the name The Sorbol Co., with their principal place of business located in Mechanicsburg, Ohio, engaged in offering for sale and selling in commerce, a medicinal preparation designated "T-4-L Solution," entered into an agreement that they, and each of them, will cease and desist from disseminating any advertisement for that preparation or any other preparation of substantially the same composition or possessing substantially the same properties, which represents directly or by implication:

(1) That the product penetrates the skin or that it reaches or kills deeply imbedded athlete's foot infections;

(2) That the product reaches or kills more germs or is faster acting than remedies of similar composition;

(3) That the product has any healing qualities. (1-23717, June 17, 1952.)

8290. Hearing Aid Devices—Invisibility and History.—The Maico Co., Inc., a Minnesota corporation, with its principal place of business located in Minneapolis, Minn., engaged in the business of offering for sale and selling in commerce, hearing aid devices, entered into an agreement to cease and desist from disseminating any advertisement for that commodity which represents directly or by implication:

(1) Through the use of such words, terms, and phrases as "conceal your secret," "hidden hearing," "hear in secret," "no one will ever guess you wear a hearing aid," or otherwise, that any device which is not completely concealed when worn by any user is invisible or cannot be seen;

(2) Through the use of such phrases as "no button in the ear," "no unsightly cord dangling from your ear," "no unsightly dangling wire," or otherwise, that any of its hearing aid devices which employ an ear mold or a tube include nothing worn in or leading to the ear;

(3) That its hearing aid device is a "revolutionary invention." (1-23214, June 24, 1952.)

8291. Shoes—Orthopedic Qualities and Manufacture.—Simplex Shoe Manufacturing Co., a Wisconsin corporation, with its principal office and place of business located in Milwaukee, Wis., engaged in the business of offering for sale and selling in commerce, shoes designated “Simplex Flexies” and “Simplex-Flex-Eze,” entered into an agreement in connection with the offering for sale, sale and distribution in commerce, of the aforesaid shoes, it will cease and desist from representing directly or by implication:

(a) That the shoes are (1) health shoes, (2) orthopedic shoes, or (3) health protectors;

(b) That the shoes keep the feet (1) healthy, (2) young, (3) straight, or (4) strong;

(c) That the shoes (1) prevent the development of foot troubles (2) assist nature in developing a perfect arch or (3) fulfill nature’s requirements;

(d) That the shoes (1) are provided with a natural arch, (2) are in exact conformity with the contour of the foot, (3) correct or prevent pronation, heel rotation, toeing in, flat feet, or a pigeon-toed condition;

(e) That the shoes, (1) strengthen weak ankles, (2) promote or effect good posture, (3) bring the bones of the foot into alignment, or (4) promote or assure muscular development;

(f) That any shoe is hand sewn except such part or parts thereof as may be sewn by hand. (1-23354, June 24, 1952.)

8292. Feed Supplement for Livestock—Healthful and Preventive Qualities.—Magnatonic Products, Inc., an Ohio corporation, with its office and principal place of business located in New Knoxville, Ohio, engaged in the business of offering for sale and selling in commerce, feed supplements for farm animals designated “Magnatone Supplement for the Dairy Herd,” “Magnatone Supplement for Hogs,” and “Magnatone Supplement for Poultry,” entered into an agreement that it will cease and desist from disseminating any advertisement for the Magnatone Supplements herein mentioned or any other preparations of substantially the same composition or possessing substantially the same properties, which represents directly or by implication:

(1) That Magnatone Supplement for Dairy Herds—

(a) will improve, correct or maintain health in dairy herds;

(b) will be effective in the treatment or prevention of mastitis and infectious white scours in calves, or will overcome shy breeding;

(c) will increase the milk yield 16.35 percent or any other definitely stated amount;

(d) will revitalize the digestive and metabolic systems of animals;

(2) That Magnatone Supplement for Hogs—

(a) when added to the hog ration, provides all of the essential

mineral elements in sufficient amounts and proper balances to meet daily requirements;

(*b*) will result in better appetite, faster growth or better conditioning of growing pigs;

(*c*) will promote easy and normal farrowing;

(*d*) when fed to hogs, will prevent mastitis, milk fever or necroenteritis;

(3) That Magnatone Supplement for Poultry—

(*a*) when added to the poultry ration, provides all of the mineral elements in sufficient amount and proper balance to meet daily requirements;

(*b*) gives faster growth and greater vitality in the growing chicken and increased and sustained production of eggs. (1-22759, June 24, 1952.)

8293. Shoes—Orthopedic and Corrective Qualities.—The W. L. Kreider Sons Mfg. Co., Inc., a Pennsylvania corporation, with its principal office and place of business located at Palmyra, Pa., engaged in the business of offering for sale and selling in commerce, shoes, entered into an agreement that in connection with the offering for sale, sale and distribution of the shoes, it will cease and desist from representing directly or by implication:

(*a*) That the shoes now designated "Orthopedic Foot Traits" (1) are orthopedic shoes, (2) are corrective shoes, (3) are health shoes, (4) possess an orthopedic heel, an orthopedic counter or an orthopedic shank or (5) that they are orthopedically correct;

(*b*) That the shoes now designated "Orthopedic Foot Traits" correct or prevent (1) toeing in, (2) bow legs, (3) flat feet, (4) weak ankles, (5) poor posture or (6) poor walking habits;

(*c*) That the shoes now designated "Orthopedic Foot Traits" (1) keep the feet growing normally, (2) help children's feet to grow normally, (3) prevent the development of abnormal foot conditions or (4) that the box toe or any other feature of the shoes assures comfort;

(*d*) That the shoes designated "Corset Boot Foot Traits" (1) are corrective shoes, (2) correct or prevent weak ankles, bow legs or knock knees, (3) effect good posture, (4) strengthen weak ankles, (5) help a child to walk properly, (6) aid a child in learning to walk, (7) cause feet to grow straight or strong, (8) provide the proper amount of wedging in the heel or (9) that their plastic stays represent an orthopedic feature. (1-23342, June 24, 1952.)

8294. Flavoring Products—Nature and Free Goods.—Marion-Kay Products Co., Inc., an Indiana corporation, with its principal place of business located in Brownstown, Ind., engaged in the business of offering for sale and selling in commerce, three flavoring products

designated "Standard Vanilla," "Vanilla Supreme" and "Super Vanilla," entered into an agreement that in connection with the dissemination of advertising the aforesaid preparations, or any other preparations of substantially the same properties, it will cease and desist from disseminating any advertisement which—

(1) Uses the word "Vanilla" or any other word or term of similar import to designate or describe said preparations, unless such word or term is qualified in a clear and conspicuous manner to show that:

(a) The preparation known as "Standard Vanilla" is an imitation mixed flavor; and

(b) The preparations known as "Vanilla Supreme" and "Super Vanilla" are mixed flavors;

(2) Represents in any manner and by any means that said preparations are vanilla, extract of vanilla or vanilla flavoring;

(3) Represents that any of said preparations is superior to extract of vanilla;

(4) Uses the word "free," or any other word or words of similar import or meaning, to designate, describe or refer to merchandise which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of any of said preparations or of any other merchandise, or requiring the performance of some service inuring directly or indirectly to the benefit of Marion-Kay Products Co., Inc. (1-23426, June 26, 1952.)

8295. Hearing Aid Devices—Invisibility, Comparative Merits, Size, etc.—American Sound Products, Inc., an Illinois corporation, with its principal place of business located in Chicago, Ill., engaged in the business of offering for sale and selling in commerce, hearing aid devices, entered into an agreement that it will cease and desist from disseminating any advertisement for that commodity, which represents directly or by implication:

(1) Through the use of such words, terms, and phrases as "hear again in secret," "you can hide your hearing defect so completely that even your friends can't tell," "hidden hearing," "out of sight," or otherwise, that any device which is not completely concealed when worn by any user is invisible or cannot be seen;

(2) Through the use of such phrases as "no button to wear in ear," "no button to show in ear," or otherwise, that any of its hearing aid devices which employ an ear mold or a tube include nothing worn in or leading to the ear;

(3) By pictorial representation, the use of the statement "this one tiny unit is all you wear," or otherwise, that its hearing aid devices require less equipment than all parts essential to the functioning thereof;

(4) By the use of depictions, or otherwise, that the case, containing



the microphone, transmitter and batteries, constitutes the entire apparatus of its hearing aid devices;

(5) That its hearing aid devices are smaller or more powerful than all other hearing aid devices;

(6) That many other hearing aid devices are 2 or 3 times as large as its hearing aid devices. (1-20424, June 26, 1952.)

8296. Binoculars—Preparation and Foreign Source.—L. J. Thomas, an individual trading as United Products Co., with his principal place of business located in Chicago, Ill., conducting a mail order business through which he offers for sale and sells in commerce, binoculars, entered into an agreement in connection with the offering for sale, sale and distribution of binoculars, that he will cease and desist:

(1) From representing directly or by implication that all lenses in such products are coated when some lenses are not coated.

And further, with respect to binoculars imported from Japan or Germany or any other foreign country and sold by mail, he will forthwith cease and desist:

(2) From failing to disclose in all advertising the country of origin of such products. (1-24199, June 26, 1952.)

## DECISIONS OF THE COURTS

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### RHODES PHARMACAL CO., INC., ET AL. v. FEDERAL TRADE COMMISSION<sup>1</sup>

No. 10375—F. T. C. Docket 5691

(Court of Appeals, Seventh Circuit. July 5, 1951)

#### PRELIMINARY INJUNCTIONS—TRIAL COURT ACTION—APPELLATE PRACTICE

Appellate court will not ordinarily interfere with action of trial court either in granting or withholding preliminary injunction and will not reverse order unless it appears there was palpable misapplication of well-settled rules of law, but it will reverse for failure to apply appropriate equitable and legal principles to the facts.

#### PRELIMINARY INJUNCTIONS—WHERE STATUTORY AUTHORIZATION IN PUBLIC INTEREST—IF STATUTORY CONDITIONS SATISFIED

Where preliminary injunction is authorized by statute as involving public interest, injunction should be granted on mere satisfaction of conditions of statute, even though equities of complaint are fully and explicitly met by denial under oath.

#### METHODS, ACTS AND PRACTICES—MISREPRESENTATION—IN GENERAL—PROTECTION OF PUBLIC—COMMISSION ACTION—AS IN PUBLIC INTEREST

Federal Trade Commission, in endeavoring to protect purchasing public against deceptive methods and misrepresentations by which they are deceived, acts in the public interest.

#### COMMISSION PROCEEDINGS—WHETHER IN PUBLIC INTEREST

Federal Trade Commission has broad discretion in determining whether or not a proceeding brought by it is in the public interest.

#### FEDERAL TRADE COMMISSION ACT—FALSE ADVERTISING OF DRUG PRODUCT—INJUNCTIVE PROCEEDINGS—“PROPER SHOWING”

Under statute providing that where Federal Trade Commission has reason to believe that a party is engaged in dissemination of false advertisements of a drug and that it would be to the interest of the public to enjoin such, commission can bring injunction suit, and that upon proper showing a temporary injunction shall be granted, to make a “proper showing”, commission would only have to show a justifiable basis for believing, derived

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<sup>1</sup> Reported in 191 F. (2d) 744. For memorandum opinion and decision of court below on Feb. 21, 1951 (not reported in Federal Reporter), see 47 F. T. C. 806. For subsequent temporary injunction granted by District Court on Sept. 25, 1951, see *infra*, at p. 1803. For imposition of fine in criminal information suit on Dec. 11, 1951, by the D. C. for the E. D. of Pennsylvania, see p. 1807.

from reasonable inquiry or other credible information, that such state of facts probably existed as reasonably would lead commission to believe that defendants were engaged in dissemination of false advertisements of a drug.

PRELIMINARY INJUNCTIONS—TRIAL COURT ACTION—FALSE ADVERTISING OF DRUG PRODUCT—IF PRODUCT ALLEGEDLY FALSELY ADVERTISED AS EFFECTIVE REMEDY OR TREATMENT AND DENIAL BASED ON DEBATABLE QUESTIONS PRESENTED BY VERIFIED PLEADINGS AND SUPPORTING AFFIDAVITS—AS ERROR

In action by Federal Trade Commission for temporary injunction restraining dissemination of false advertisements representing that defendants' drug product was an effective remedy or treatment for arthritis and other diseases, pending final disposition of an administrative proceeding against defendants, district court had only to resolve whether there was reasonable cause to believe that alleged violation had taken place, and denial of injunction on ground that verified pleadings and affidavits presented debatable questions which were not resolved by supporting affidavits, was error.

(The syllabus, with substituted captions, is taken from 191 F.  
(2d) 744)

On appeal from District Court's denial of temporary injunction restraining false advertising of drug product, reversed and remanded with directions.

*Mr. William T. Kelley*, Chief Counsel, *Mr. James W. Cassidy*, Associate General Counsel, Federal Trade Commission, Washington, D. C. for appellant.

*Mr. Frank E. Gettleman*, *Mr. Arthur Gettleman*, *Mr. Edward Brodkey*, Chicago, Ill., for appellees.

Before MAJOR, Chief Judge, KERNER, and FINNEGAN, Circuit Judges.

KERNER, Circuit Judge:

This is an appeal from a judgment dismissing an action brought under section 13 (a) of the Federal Trade Commission Act (15 U. S. C. sec. 53) to restrain defendants from the further dissemination of false advertisements representing that a certain proprietary drug product manufactured and sold by defendants is an effective remedy or treatment for arthritis and other diseases.

The complaint, after alleging that the Commission had issued an administrative complaint against defendants charging [746] them with having violated section 12 of the act, averred that defendants have disseminated, and since issuance of the administrative complaint have persisted in disseminating, in interstate commerce, false advertisements in newspapers of general circulation, national in scope, to induce the purchase of "Imdrin"; that these advertisements are false and misleading in that they represent that "Imdrin" is a remarkable, amazing, sensational new discovery of scientific research, and is an adequate, effective and reliable treatment for all kinds of arthritis and rheumatism, and will arrest the progress of, correct the underlying

causes of, and cure all kinds of arthritis and rheumatism, and will afford complete and immediate relief from the aches, pains, and discomforts thereof.

The complaint further alleged that in fact "Imdrin," however taken, is not an adequate, effective or reliable treatment for, will not arrest the progress of, correct the underlying causes of, or cure any kind of arthritis or rheumatism, and will not afford complete or immediate relief from the aches, pains and discomforts thereof; that any effect of "Imdrin," when used by one suffering from any of the ailments mentioned, is due solely to the acetylsalicylic acid (commonly known as aspirin) and the manganese silicylate content in the preparation; that there are many cases of arthritis which may be cured completely if proper diagnosis and adequate treatment are received promptly; that the further dissemination of such false advertisements may cause immediate and irreparable injury to the public in that persons induced by such false advertisements to purchase "Imdrin" may delay proper treatments, and thereby suffer permanent and irreparable crippling; that various unavoidable delays in the proceedings before the Commission have been encountered, and that until a cease and desist order issued by the Commission becomes final, the dissemination of defendants' false advertising can be halted only by the granting of a temporary injunction.

The complaint was supported by affidavits of medical experts, distinguished members of the medical profession, specializing in the diagnosis, treatment and study of arthritis and related diseases. The affiants in these affidavits averred that they were in daily contact with people who suffer from arthritis, rheumatism, and other similar ailments; they stated that they had had many conversations with different patients in which they were told of the various advertisements of proprietary medicines and what the patients understood from such advertisements, and were in a position to know what advertisements of so-called remedies for arthritis and rheumatism mean to persons suffering from diseases of this nature; that they had examined the advertisements here involved, and that such advertisements would mean to persons afflicted with various kinds of arthritis that "Imdrin" is a cure for such an ailment.

Defendants' answer, supported by affidavits of five physicians, denied that the advertisements were false. Additional affidavits were filed by the Commission, purporting to discredit the qualifications of the physicians whose affidavits the defendants had annexed to their answer.

The trial judge denied the injunction and dismissed the complaint because he was of the opinion that the verified pleadings and affidavits presented debatable questions which were not resolved by the support-

ing affidavits, and adjudged that "[W]here the equities of the complaint are fully and explicitly met by denial under oath, a preliminary injunction will not be granted." While that may be the rule in private disputes which do not involve the public interest, we think that in the instant case the court failed to apply the proper applicable legal principles.

It is true, of course, that an appellate court will not ordinarily interfere with the action of a trial court either in granting or withholding an injunction, *Hecht Co. v. Bowles*, 321 U. S. 321, and *Bowles v. Huff*, 146 F. (2d) 428, and will not reverse such an order unless it appears that there was a palpable misapplication of well-settled rules of law on the part of the trial [747] judge, *City of Chicago v. Fox Film Corp.*, 251 Fed. 883, and *Walling v. National Ice & Fuel Corp.*, 158 F. (2d) 28. It will, however, reverse for failure to apply appropriate equitable and legal principles to the facts, *Creedon v. Warner Holding Co.*, 162 F. (2d) 115, and where an injunction is authorized by statute, it is enough if the statutory conditions are satisfied. *Henderson v. Burd*, 133 F. (2d) 515; *Shadid v. Fleming*, 160 F. (2d) 752.

In such cases courts go much further to give relief than they are accustomed to go when only private interests are involved. This is so because "\* \* \* the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief. \* \* \*" *Hecht Co. v. Bowles*, 321 U. S. 321, 331.

At this point it is well to note that there is no question as to the component elements of "Imdrin," and no significant dispute exists as to what "Imdrin" will actually accomplish. It is clear from the affidavits filed by the Commission that a dose of "Imdrin" is the equivalent of one and one-half 5-grain aspirin tablets; that aspirin is the common name of a substance which is described chemically as acetylsalicylic acid, and that the action of manganese salicylate is essentially the same as aspirin since both depend for their action upon their salicylate content, and that these ingredients are limited in their effect to such temporary and partial relief of pain and fever as may be afforded in the individual case; that the other ingredients, calcium succinate, thiamin chloride and caffeine, which are present in "Imdrin," are not considered to be of any therapeutic value in the treatment of or in relieving the symptoms and manifestations of any kind of arthritis or related condition. It is also worthy of note that the medical affidavits of the defendants do not in any material respect challenge the facts alleged in the affidavits submitted by the Commission. In fact, defendants' affiant, Dr. Weisberg, stated: "The preparation Imdrin includes in its formula acetylsalicylic acid and manganese salicylate and these products may be regarded as its most active ingredients, and those which confer on it analgesic properties."

To protect the purchasing public against deceptive methods and misrepresentations by which purchasers are deceived, is in the public interest, *International Art Co. v. Federal Trade Commission*, 109 F. (2d) 393 [30 F. T. C. 1635, 3 S. & D. 188]. In determining whether a proceeding is in the public interest, the Commission exercises a broad discretion, *Federal Trade Commission v. Klesner*, 280 U. S. 19, 29 [13 F. T. C. 581; 1 S. & D. 1166], and each case must be determined on its own facts, *Federal Trade Commission v. Beech-Nut Co.*, 257 U. S. 441 [4 F. T. C. 583; 1 S. & D. 170]. The Commission acts solely in the public interest, and the steps required for invoking the jurisdiction of the District Court, in an effort to protect the public from false advertisements of drugs and foods for the period during which the Commission's administrative proceedings are in progress, are described in section 13 (a) of the act, which this court has held was a necessary part of the plan to prevent fraud and fraudulent commerce through fraudulent advertisements, and was written for the purpose of preventing the ineffectuality of proceedings before the Commission due to the offender's collecting the spoils incident to improper practices. *Federal Trade Commission v. Thomsen-King & Co.*, 109 F. (2d) 516. [30 F. T. C. 1642; 3 S. & D. 658.] That section empowers the Commission to bring suit for an injunction "whenever the Commission has reason to believe" (1) that any person, partnership, or corporation is engaged in the dissemination of any false advertisement of a drug in violation of section 12, and (2) that it would be "to the interest of the public" to enjoin such dissemination pending final disposition of an administrative proceeding pursuant to the provisions of section 5, and it provides that "Upon proper showing a temporary injunction or restraining order shall be granted without bond."

It is true that there is nothing in the act or in its legislative history to indicate what should be considered as a "proper showing." We think, however, that it is fair to say that all the Commission had to show was a justifiable basis [748] for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged in the dissemination of false advertisements of a drug in violation of the act. *Le Baron v. Los Angeles Building & Construction Trades Council*, 84 F. Supp. 629. See also *Federal Trade Commission v. Koch* [34 F. T. C. 1870; 3 S. & D. 720]. The District Court was not required to find the charges made to be true, but to find reasonable cause to believe them to be true. *Shore v. Building & Construction Trades Council*, 173 F. (2d) 678, 682. This is to say, in the instant case, the court had only to resolve the narrow issue of whether there was "reasonable cause" to believe that the alleged violation had taken place. Compare *Bowles v. Montgomery Ward &*

*Co.*, 143 F. (2d) 38, 42. The judgment must be reversed and the cause remanded to the District Court for that determination. It is so ordered.

MAJOR, *C. J.*, dissenting:

I would affirm the order under attack. Admittedly, the District Court was vested with a discretion as to the allowance or denial of the injunction and, in my view, it cannot be said that there was a manifest abuse of such discretion. The statute which authorizes the Commission to apply for an injunction contains a limitation not found, so far as I am aware, in any statutory provision relating to other administrative agencies. Under section 13 (a) (15 U. S. C. A. sec. 53), two conditions are attached: first, the Commission is entitled to seek an injunction only when it "has reason to believe," and second, it is entitled to the issuance of an injunction only upon a "proper showing." Compliance with the first condition seems to be jurisdictional because in its absence the Commission is not entitled to assert its claim to an injunction. The court in the instant case evidently recognized that the Commission had complied with this condition because it took jurisdiction of the cause and had a hearing upon the complaint for an injunction and defendants' answer thereto.

As pointed out in the majority opinion, we are in the dark as to what is meant by a "proper showing," but evidently the terminology vests in the court a discretion subject to review only for manifest abuse. In the exercise of that discretion the court had a right to take into consideration that admittedly the involved product had no harmful or deleterious effect on those who used it. Also, there was pending before the Commission a proceeding under section 5 of the Federal Trade Commission Act, wherein the contentions of the respective parties after a full hearing could be decided on their merits. In fact, this hearing had progressed to the point where a decision by the Commission could be made at an early date. As the District Court stated, "The Commission has concluded its case and the court is advised that in a matter of 6 weeks, the case will be concluded. It appears therefore, that if diligently prosecuted, there will be an early determination of the merits." Furthermore, at the time of argument of the instant matter in this court, the hearing before the Commission had been concluded. Thus, the matter on its merits awaits a decision by the Commission. The complaint in the instant matter was not filed until almost two years after the proceeding was instituted before the Commission. I have serious doubt if the statute contemplates the issuance of an injunction under such circumstances and, in any event, the long delay in making application for an injunction and the fact that a decision by the Commission on the merits could shortly be expected,

were matters which the District Court might properly and evidently did take into consideration in the exercise of its discretion to deny the same.

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MINNEAPOLIS-HONEYWELL REGULATOR CO. v. FEDERAL TRADE COMMISSION<sup>1</sup>

No. 9584—F. T. C. Docket 4920

(Court of Appeals, Seventh Circuit. July 5, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—EXAMINATION OF RECORD—EXAMINER'S REPORT

**[787]** In proceeding to review an order of Federal Trade Commission, it is duty of Court of Appeals to examine record as a whole, including report of examiner, in order to determine whether evidence supporting commission's order is substantial.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—COMPETITOR COMPETITION—EXAMINER'S REPORT—IF FINDING SUPPORTED BY RECORD

In proceeding to review a cease and desist order of Federal Trade Commission, record supported trial examiner's finding that competitor competition was not injured by petitioner's pricing system.

PROCEEDINGS BEFORE COMMISSION—EXAMINER'S REPORT—IF FINDINGS SUPPORTED BY PREPONDERANCE OF EVIDENCE AND REJECTED BY COMMISSION

Where it appears from record that findings of an examiner of Federal Trade Commission are supported by a preponderance of evidence, action of commission in rejecting them is arbitrary.

PROCEEDINGS BEFORE COMMISSION—UNFAIR COMPETITION PROCEEDING—WHETHER INJURY TO COMPETITION ABSENT—BURDEN OF PROOF

In proceeding before Federal Trade Commission on a complaint of unfair competition, burden of proving absence of injury to competition falls on accused.

PROCEEDINGS BEFORE COMMISSION—ROBINSON-PATMAN PRICE DISCRIMINATION ACT—VIOLATION—WHETHER MERE POSSIBILITY OF INJURY SUFFICIENT TO SUSTAIN CHARGE OF

A mere possibility of injury is insufficient to sustain a charge of violation of price discrimination act.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—PRICE DISCRIMINATION—CUSTOMER COMPETITION—WHETHER INJURED BY

In proceeding to review a cease and desist order of Federal Trade Commission, evidence failed to support finding of commission that petitioner's

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<sup>1</sup> Reported in 191 F. (2d) 786. For case before Commission see 44 F. T. C. 351.



practices of different price brackets for its products injured customer competition.

(The syllabus, with substituted captions, is taken from 191 F. (2d) 786)

On petition to review order of Commission, order reversed in part. *Mr. R. L. Gilpatric*, New York City, *Mr. Will Freeman*, Chicago, Ill., *Mr. Donald C. Swatland*, *Mr. Murray W. McEniry*, New York City, of counsel for petitioner.

*Mr. William T. Kelley*, Chief Counsel, *Mr. James W. Cassidy*, *Mr. John W. Carter, Jr.*, Associate General Counsel and assistant, Federal Trade Commission, all of Washington, D. C., for respondent.

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges*.

KERNER, *Circuit Judge*:

This is a proceeding to review Part III of an order of the Federal Trade Commission entered on Count III of a complaint filed by the Commission on February 23, 1943, charging in three counts violation by petitioner of section 5 of the Federal Trade Commission Act, section 3 of the Clayton Act, and section 2 of the Clayton Act as amended by the Robinson-Patman Act. We shall refer to petitioner as M-H. Since M-H does not challenge parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them.

Following hearings before a trial examiner extending from August 12, 1943 to February 14, 1946, that officer rendered his report recommending dismissal of the charges contained in Count III on the ground that it did not appear that M-H had violated section 2 of the Clayton Act as amended. The Commission rendered findings of fact and conclusions of law contrary to the report of the examiner and based its cease and desist order thereon. One member dissented.

The alleged violations of section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13(a) and (b)) relate to M-H's practices in connection with the sale of automatic temperature controls to oil burner manufacturers for use in oil burners of the gun or pressure type and the rotary type, both for domestic heating plants. With respect to this the complaint charged price discriminations arising out of M-H's quantity discount pricing system, the effect of which "has been or may be substantially to lessen competition in the line of commerce in which respondent [M-H] is engaged and to injure, destroy and prevent competition between the respondent and its competitors, and to injure, destroy and prevent [788] competition between the customers of said respondent \* \* \*."

Part III of the order hereunder review provides:

*"It is further ordered,* That respondent \* \* \* directly or through any corporate or other device in the sale of automatic temperature controls or other furnace controls in commerce \* \* \* cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls—

"1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered."

For a proper understanding of the case it is necessary to look to the history of M-H as related to the industry in which it became a dominant factor in its early days. M-H is the successor of two corporations, the Minneapolis Heat Regulator Co. which began making heat regulating devices in 1885, and the Honeywell Heating Specialties Co., established in 1906. The two were consolidated in 1927. About 80 percent of its business is devoted to the manufacture of automatic temperature controls. Its principal competitors during the period here involved were the Mercoid Corp. which had made automatic controls for domestic oil burners since 1922, the Penn Electric Switch Co. which started to manufacture and sell such controls in 1932, and the Perfex Corp. which began to sell one of the controls in 1936 and a complete line in 1937.

The process of manufacturing oil burners is one of fabrication in the sense that the manufacturer assembles and puts together the various parts including controls, motors, pumps, fans and transformers, which parts are generally purchased from different sources. Three controls are usually used in each burner, and these three are customarily dealt in as sets, with prices quoted for the sets rather than the individual units.

The examiner found that M-H "has always \* \* \* been a leader in the field \* \* \* and in the development \* \* \* of new and better controls, and \* \* \* throughout the years has spent extensive sums of money in engineering and development work, not only creative engineering of new devices, but in the constant redesigning and improving of its products, and in the lowering of costs." It has also advertised its products very extensively and has maintained 39 branch and district offices equipped with a complete line of its products as well as service personnel trained by M-H to service those products. The examiner also found that as a result of its advertising and the

reputation of its controls for performance and efficiency in operation, there had been developed a large customer demand for and public acceptance of its controls which had for a number of years sold at higher prices than controls of other makes. This public demand enabled dealers to obtain higher prices for burners equipped with M-H controls than with those of its competitors, and there was evidence that there were some dealers who would not purchase burners without M-H controls.

The pricing system which the Commission found was a violation of the act was a standard quantity discount system. M-H published list prices with discounts or net prices regularly allowed to its various customers according to the trade channels in which they were engaged. These were classified as oil-burner manufacturers who ordinarily use them in the fabrication of their burners, and wholesalers or jobbers and dealers who ordinarily handle them for repair, replacement or auxiliary equipment. Most of its business was with manufacturers who had to purchase at least 50 sets annually in order to qualify as such. M-H usually made contracts with such manufacturers at the beginning of the year, providing for quantity or bracket prices based upon either the number of controls purchased the previous year or, in some cases, the average for 2 years, or the estimated quantity the manufacturer expected to use [789] during the contract year. If the manufacturer failed to purchase sufficient sets to entitle him to the bracket price allowed, M-H did not require additional payment. However, if he purchased a greater number he was allowed the larger quantity bracket price for the entire year with a credit or refund for the difference in price already paid. The brackets varied somewhat from year to year as to number of sets and prices. The bracket setup for 1941 is shown in table I.<sup>1</sup>

The Commission found that this system had the capacity and tendency to induce the purchase of M-H controls by various manufacturers and tended to and did divert trade to M-H from its competitors and had had a substantial injurious effect on competition in the sale and distribution of controls. With respect to the effect on customer competition it found that by this system M-H discriminated in price in

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TABLE I

Bracket	Annual volume (sets)	Net price scale
1.....	50— 349	\$17.35
2.....	350— 999	16.45
3.....	1,000— 2,499	15.90
3A.....	2,500— 4,999	15.35
4.....	5,000— 7,499	14.90
4A.....	7,500— 9,999	14.25
5.....	10,000—up	13.75

favor of customers buying in larger quantities as against those buying in smaller quantities; that changes in the price of controls to oil-burner manufacturers resulted in many instances in corresponding changes in the price of completed oil burners and necessarily affected sales and profits; and that in some instances customers of M-H lost business to certain of their competitors who enjoyed lower control prices from M-H. Since it further found that the discriminatory differentials were justified by cost differentials only as to the prices in the first four brackets which were applicable to less than 45 percent of its manufacturer business, leaving over 55 percent of the business in the three lowest cost price brackets not subject to that defense, and that M-H had not established that any customer in those three brackets had received a lower price to meet an equally low price of a competitor, it concluded that the discriminations constituted violations of the act. In reaching this conclusion it stated that the examiner was in error in his conclusion that the price discriminations given by M-H had not tended to substantially lessen, injure, prevent, or destroy competition.

Under the rule of *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 496, it is the duty of this court to examine the record as a whole, including the report of the examiner, in order to determine whether the evidence supporting the Commission's order is substantial. As the Court there observed, "\* \* \* evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony." And we think the evidence supporting the conclusion may become even less substantial when it fails to persuade an experienced member of the Commission who dissents from its findings and conclusions.

With this general test of substantiality in mind we turn to a study of the evidence as it relates to the issue whether M-H discriminations in fact did or might tend to injure or prevent competition as between itself and its competitors or as between its customers. We deem this the primary issue here involved. Unless its discriminations do or may tend to injure competition there is no need for M-H to justify them. From our examination of the record as a whole we are convinced that the findings [790] of the examiner were supported by very substantial evidence, considerable of which the Commission rejected because, it stated, it found it immaterial or uncorroborated.

Among the various undisputed facts as to the effect of M-H's practices on competitor competition, as summarized by M-H, are

(a) that the prices charged for controls by M-H's competitors were

generally lower than those of M-H and that there is no evidence of any undercutting of its competitors' prices by M-H;

(b) that throughout the complaint period there existed the keenest kind of price competition among control manufacturers;

(c) that the total business of M-H's competitors increased, and the three new concerns which entered the industry after 1932 have enjoyed a steady growth in sales volume;

(d) that M-H's share of the available control business was reduced from 73 percent in 1937-1938 to only 60 percent in 1941;

(e) that in 1941 M-H lost to its competitors 53 percent of the control business of 31 customers who previously had standardized on M-H's controls; and

(f) that in that same year, 126 of M-H's other oil burner manufacturer-customers also purchased competitive controls.

The foregoing facts fully established the examiner's finding that competitor competition was not injured, a finding concurred in by the dissenting member of the Commission, and they outweigh the facts relied upon by the Commission in reaching the opposite conclusion. And while the findings of an examiner are not "as unassailable as a master's" (*Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474, 492), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary. *Folds v. Federal Trade Commission*, 187 F. (2d) 658, 661 [47 F. T. C. 1815]. M-H was entitled to meet the competition built up in its field, and even if it did succeed in retaining or diverting some business which might otherwise have gone to some of its competitors, where those competitors were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices, we think it cannot be said that the effect of those practices was substantially to injure competition. And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate. Even though we assume that the burden of proving absence of injury to competition falls on the accused (see *Samuel H. Moss v. Federal Trade Commission*, 148 F. (2d) 378 [40 F. T. C. 885; 4 S. & D. 324]; *Federal Trade Commission v. Standard Brands, Inc.* [47 F. T. C. 1831], decided by the Second Circuit March 30, 1951, modified June 4, 1951), we think M-H has met that burden with respect to its competitor competition.

With respect to the question of customer competition a somewhat different problem is presented. The Commission based its conclusion that M-H's practices injured that competition on the general finding that because the price of the control represented the largest single item of cost among the various parts of the finished burner, changes in the price of controls to manufacturers resulted in corresponding changes in the price of completed burners and necessarily

affected sales and profits. It further found generally that "oil-burner manufacturers testified that the question of price was important in the purchase of automatic temperature controls and that they had lost business to certain competitors, including Quiet Heet, who enjoyed lower control prices from respondent, although the exact volume of such lost business could not be calculated."

The absence of causal connection between the price of controls and the price of the finished products generally is demonstrated by the stipulation entered into prior to the hearing:

"Some manufacturers paying higher prices for respondent's automatic temperature controls were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying lower prices for respondent's \* \* \* controls sold their oil burners.

"Some manufacturers paying lower prices for respondent's \* \* \* controls [791] were able to, and often did, sell their oil burners complete with controls at prices below those which other similar manufacturers paying higher prices for respondent's \* \* \* controls sold their oil burners."

Even though some manufacturers did testify that "the question of price was important \* \* \* and that they had lost business to certain competitors who enjoyed lower control prices \* \* \*" we think it is equally significant that other manufacturers who paid the higher prices testified that they did not lose business as a result of paying such higher control prices, and that they considered other factors of far greater importance in determining the price of the completed burner. They referred to such matters as manufacturing methods, overhead, distribution costs, service, advertising, as having an important bearing on comparative prices in addition to the costs of the component parts.

In further proof of its contention that the price of controls was not the vital factor in arriving at burner prices and in fact had very little relation to it, M-H submitted a table derived from the findings of a nation-wide survey showing the range of prices charged by its customers in each price bracket for the year 1941.<sup>2</sup> From this survey, it

2:

TABLE II

	Prices charged oil burner manufacturers by M-H for controls	Range of prices charged wholesalers by oil burner manufacturers for burners	
		Low	High
Bracket 1.....	\$17.35	\$50.00	\$111.00
Bracket 2.....	16.45	45.00	96.20
Bracket 3.....	15.90	47.50	102.00
Bracket 3A.....	15.35	52.50	89.00
Bracket 4.....	14.90	61.70	100.00
Bracket 4A.....	14.25	55.00	101.25
Bracket 5.....	13.75	45.00	114.50

will be noted that the highest price charged for burners, \$114.50, was by a customer having the advantage of the lowest price bracket for M-H controls, and that a customer in the next-to-highest price bracket sold its burner for the lowest price, \$45. Many variations can be made from these facts. All seem to add up to the one fact that there is little, if any, relationship between the prices of the controls and the prices of the burners into which the controls are built, hence that the evidence does not support the Commission's finding that "changes in the price of \* \* \* controls resulted in corresponding changes in the price of completed burners."

Reference was made in the general finding quoted above to Quiet Heet as one of the manufacturers enjoying lower control prices to which other manufacturers lost an undetermined volume of business. There is no question on this record but that Quiet Heet, entering the field in 1936, very soon became the largest producer in the industry, and by 1941 was able to sell its burners at the lowest price. The Commission attributed this to the fact that it bought its controls from M-H for the lowest price. We think this is to ignore the vast discrepancy between the range of prices for controls and that for the finished burners. The fact was, as established by the evidence, that Quiet Heet entered the field with entirely different theories of production and distribution from those of its already established competitors. Its proprietor testified that he "started out to merchandise it on a volume basis, effecting certain economies, making a few shortcuts here and there and trimming down my overhead and operating costs to the minimum." Among those economies were the elimination of all field service which was one of the heavy items of expense of the higher price manufacturers, reduction of advertising costs to a minimum by its own use of printed postcards to the trade and by charging dealers for all advertising matter furnished to them, and adoption of cheaper packaging methods and materials. It [792] was this type of economies that enabled Quiet Heet to sell its burner in 1941 for \$68.50 less than its highest price competitor who paid the same price for the control, and for \$66 less than its next highest price competitor who paid only \$3.60 more for its controls, as shown in table II, footnote 2.

Part of the fallacy of the Commission's position lies in its analysis of the competitive situation between the various manufacturers. This is reflected in its order where it refers to manufacturers "who in fact compete in the sale and distribution of such furnace controls," as if the controls themselves were the article of merchandise they dealt in instead of the burners of which the controls were only one part. It may be true that if the manufacturers were generally selling con-

trols as such, a differential of 2 or 3 dollars in the price they paid for them would have a substantial effect on the price obtained. Under such circumstances a finding that a competitive advantage in purchase price paid would necessarily give rise to a competitive advantage in sale price would perhaps be justified. But where the controls were used in the manufacture of burners, the cost of which was determined by many other factors—cost of other materials and parts, service, advertising, to mention only a few—it cannot be said that discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so. Cf. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 738, 742 [40 F. T. C. 892, 4 S. & D. 331]. *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 46 [44 F. T. C. 1499]. And a mere possibility of such injury is insufficient to sustain a charge of violation of the act. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 742 [40 F. T. C. 892, 4 S. & D. 331].

We are convinced that here “the inferences on which the \* \* \* findings were based were so overborne by evidence calling for contrary inferences that the findings \* \* \* could not on the consideration of the whole record, be deemed to be supported by ‘substantial’ evidence.” (*National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498, 502.)

Since we have concluded that the Commission was in error in finding that the effect of M-H’s practices was to substantially lessen or prevent competition between either it and its competitors or its customers we do not reach the question whether M-H justified those practices by an adequate showing that its differentials in the lowest price brackets which it did not contend were justified by cost differentials were made in good faith to meet an equally low price of a competitor.

Part III of the order must be reversed and Count III of the complaint upon which it is based, dismissed. It is so ordered.

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RUBEROID CO. v. FEDERAL TRADE COMMISSION<sup>1</sup>

No. 149—F. T. C. Docket 5017

(Court of Appeals, Second Circuit. Aug. 14, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—CLAYTON ACT—VIOLATION SHOWING AS PREREQUISITE

<sup>1</sup> Reported in 191 F. (2d) 294. For prior opinion and decision, see 189 F. (2d) 893, 47 F. T. C. 1838. For subsequent decision of the Supreme Court affirming the judgment in the instant matter on May 26, 1952, see 343 U. S. 470, and *infra*, at page 1771. For case before Commission see 46 F. T. C. 379.



The Federal Trade Commission cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—CLAYTON ACT—VIOLATION SHOWING AS PREREQUISITE—AFFIRMING DECREES

Decree affirming order of Federal Trade Commission and directing enforcement thereof would be modified by striking out enforcement portion where Federal Trade Commission had failed to show a violation of its order or that such violation was imminent.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—PETITIONS AND CROSS-PETITIONS—CLAYTON ACT—VIOLATION SHOWING AS PREREQUISITE

Requirement that Federal Trade Commission show a violation of its order or threatened violation thereof to obtain decree directing enforcement of order, is applicable whether Federal Trade Commission files petition for enforcement or files cross petition for enforcement.

(The syllabus, with substituted captions, is taken from 191 F. (2d) 294.)

On rehearing of petition to review order of Commission, enforcement portion of original mandate stricken.

*Mr. Cyrus Austin*, of New York City (*Austin & Malkan*, of New York City, on the brief), for petitioner.

*Mr. John W. Carter, Jr.*, Atty., Federal Trade Commission, of Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, and *Mr. James W. Cassidy*, Assistant General Counsel, Federal Trade Commission, of Washington, D. C., on the brief), for respondent.

Before L. HAND, AUGUSTUS N. HAND, and CLARK, *Circuit Judges*.<sup>1</sup>

PER CURIAM:

When this appeal was first decided, our mandate was "Order affirmed; enforcement granted." Petitioner now seeks to have us amend our mandate by striking therefrom any reference to enforcement. In the original appeal, petitioner sought, as provided by 15 U. S. C. A. section 21, to have us modify an order of the Federal Trade Commission ("FTC") by limiting its scope and by inserting therein certain defenses provided by the Clayton Act as amended. 15 U. S. C. A. section 13 *et seq.* The order, based upon violations of the Clayton Act, *supra*, had been entered after a hearing at which petitioner introduced no evidence. Though affirming the order, we attempted to set at rest any doubts petitioner had that, in a subsequent proceeding based upon an asserted violation of the order, if it should

<sup>1</sup> On written submission.

arise under different circumstances from those that originally caused the FTC to issue the order, the petitioner would be unable to introduce in its defense evidence that the conduct complained of was permitted by exceptions contained in the Clayton Act [295] itself as amended. This, as we understood its position, was substantially all petitioner desired. The FTC, at the close of its brief on appeal, asked that the order be affirmed and that enforcement be granted, citing as authority for the latter request 15 U. S. C. A. section 45 (c) which directs such a mandate if a petitioner seeks review of an order based on a violation of the FTC Act, 15 U. S. C. A. section 41 *et seq.*, and fails to have such order set aside. Not only is no such provision found in 15 U. S. C. A. section 21 which permits a petitioner to seek review of an order of the FTC based on a violation of the Clayton Act, as amended, but it is settled that the FTC cannot obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent, *F. T. C. v. Herzog*, 2 Cir., 150 F. (2d) 450 [41 F. T. C. 426, 4 S. & D. 399]; *F. T. C. v. Balme*, 2 Cir., 23 F. (2d) 615, cert. den., 277 U. S. 598 [11 F. T. C. 717, 1 S. & D. 606]; *F. T. C. v. Standard Brands*, 2 Cir., 189 F. (2d) 510 [47 F. T. C. 1831]. Respondent asks that we treat the closing paragraph of its brief as a cross petition for enforcement of its order. Accepting *arguendo* the propriety of such a manoeuvre, we find unconvincing the FTC's reasons why, upon a cross-petition, it is not required to make the same showing of a threatened violation of its order as it must had it petitioned for enforcement. True, various cases have been cited to us where the courts have granted enforcement of an order when a petitioner has failed in its attempt to have the order set aside but, in no case prior to the one before us, so far as we can determine, has the petitioner objected to such a mandate. As we have indicated, the present petitioner did not deny that its original conduct violated the Act and there was uncontradicted evidence that the practice has been abandoned on which the FTC has not made a finding. Under such circumstances so much of our mandate as directed enforcement of the order was premature and should be stricken.

So ordered.

CLARK, *Circuit Judge* (dissenting):

I regret the modification now ordered in our previous opinion at the request, or afterthought, of the petitioner on rehearing; for it tends to fragmentize and confuse decision and postpone ultimate adjudication to the actual gain of no one. Delay in enforcement was a reason for the reforms of the Federal Trade Commission Act

of 1938, of which a chief one was direct and immediate effectiveness of orders where review was not sought and immediate enforcement, on affirmance, of orders brought before the court for review. 15 U. S. C. section 45 (c), (g), and (1). Through some mischance this was not carried over in terms to cases under the Sherman Act where the Commission itself sought enforcement, 15 U. S. C. section 21; and we have thought the more ancient law there applicable. *F. T. C. v. Herzog*, 2 Cir., 150 F. (2d) 450 [41 F. T. C. 426, 4 S. & D. 399]; *cf. F. T. C. v. Standard Brands*, 2 Cir., 189 F. (2d) 510 [47 F. T. C. 1831], where there is no discussion of the issue. The *Herzog* case appears not to have won definitive support outside the circuit and possibly the point deserves reexamination in the light of the cases hereinafter cited.<sup>1</sup> But beyond the substantial difference in the statutory wording as to the two forms of proceeding,<sup>2</sup> [296] there is a certain logical difference (whatever the practical realities) between the case where the Commission affirmatively seeks action against a delinquent and where a respondent petitions for review, thus affirming the validity of his own conduct and the invalidity of the Commission action. So the cases have consistently ruled that in the latter case the matter is ripe for full decision, and that two bites at the same cherry are not necessary before a violator of a duly affirmed order can be punished.

The cases in support of this proposition are too many and too important to be dismissed on the ground that we think their discussion of the issue perchance inadequate. The principle appears to apply also whether the Commission has cross-petitioned for enforcement, as in the cases cited in Group 1 hereinafter, or whether it has not, as in the cases cited in Group 2. See, *e. g.*, the following cases in Group 1: *Elizabeth Arden, Inc., v. F. T. C.*, 2 Cir., 156 F. (2d) 132 [42 F. T. C. 916, 4 S. & D. 490] certiorari

<sup>1</sup> Lack of extra-circuit support may perhaps be connected with the changing trend, from an early heavy burden upon the Commission to show violation of its order, *F. T. C. v. Standard Education Society*, 7 Cir., 14 F. (2d) 947, down through various cases, even before the amendment of 1938, which in substance placed a burden on the respondent to show that he no longer was doing the questioned acts or asserting the right to do so. See, *e. g.*, *National Silver Co. v. F. T. C.*, 2 Cir., 88 F. (2d) 425, 428 [24 F. T. C. 1627, 2 S. & D. 399]; *F. T. C. v. Wallace*, 8 Cir., 75 F. (2d) 733 [20 F. T. C. 713, 2 S. & D. 280]; *F. T. C. v. Goodgrape Co.*, 6 Cir., 45 F. (2d) 70 [14 F. T. C. 695, 2 S. & D. 95]; *F. T. C. v. Baltimore Paint & Color Works*, 4 Cir., 41 F. (2d) 474 [14 F. T. C. 675, 2 S. & D. 75]; *F. T. C. v. Morrissey*, 7 Cir., 47 F. (2d) 101 [14 F. T. C. 710, 2 S. & D. 113]; *cf. Butterick Co. v. F. T. C.*, 2 Cir., 4 F. (2d) 910, 913 [8 F. T. C. 602, 2 S. & D. 359]. Under such a rule what the petitioner can hope to obtain by the present maneuver is little indeed.

<sup>2</sup> Compare 15 U. S. C. § 21, 3d paragraph, "*If such person fails or neglects to obey such order*" (italics supplied) the Commission may apply to a court of appeals for enforcement of its order, with the 4th paragraph, beginning, "Any party required by such order of the Commission \* \* \* to cease and desist from a violation charged" may obtain a court review by filing its petition, and continuing that upon the filing of a transcript of the record by the Commission "the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission \* \* \* as in the case of an application by the Commission \* \* \* for the enforcement of its order."

denied 331 U. S. 806; *Southgate Brokerage Co. v. F. T. C.*, 4 Cir., 150 F. (2d) 607 [41 F. T. C. 430, 4 S. & D. 403] certiorari denied 326 U. S. 774; *Modern Marketing Service v. F. T. C.*, 7 Cir. 149 F. (2d) 970 [40 F. T. C. 938, 4 S. & D. 379]; *Signode Steel Strapping Co. v. F. T. C.*, 4 Cir., 132 F. (2d) 48 [35 F. T. C. 960, 3 S. & D. 511]; *Webb-Crawford Co. v. F. T. C.*, 5 Cir., 109 F. (2d) 268 [30 F. T. C. 1630, 3 S. & D. 184]; certiorari denied 310 U. S. 638; *Oliver Bros. v. F. T. C.*, 4 Cir., 102 F. (2d) 763 [28 F. T. C. 1936, 3 S. & D. 86]. And the following cases in Group 2: *E. B. Muller & Co. v. F. T. C.*, 6 Cir., 142 F. (2d) 511 [38 F. T. C. 868, 4 S. & D. 151]; *Quality Bakers of America v. F. T. C.*, 1 Cir., 114 F. (2d) 393 [31 F. T. C. 1858, 3 S. & D. 287]; *Carter Carburetor Corp. v. F. T. C.*, 8 Cir., 112 F. (2d) 722 [31 F. T. C. 1793, 3 S. & D. 232]; *Great Atlantic & Pacific Tea Co. v. F. T. C.*, 3 Cir., 106 F. (2d) 667 [29 F. T. C. 1591, 3 S. & D. 146], certiorari denied 308 U. S. 625. Moreover, the Supreme Court itself has granted enforcement under like circumstances, both on cross-petition, *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 760 [40 F. T. C. 906, 4 S. & D. 346] (*cf. below, A. E. Staley Mfg. Co. v. F. T. C.*, 7 Cir., 144 F. (2d) 221, 222 [40 F. T. C. 906, 4 S. & D. 346]) or, so far as appears, without such petition. *F. T. C. v. Cement Institute*, 33 U. S. 683, 730 [44 F. T. C. 1460, 4 S. & D. 676].

In view of this number and weight of authority, petitioner had indeed hardihood to raise the issue; and our decision herein must promote confusion in view of our earlier rulings.<sup>3</sup> At the very least, since the Act is at most ambiguous on our exact point, we have a choice permitting us to follow the cases in the newer and more direct procedure, rather than choosing to tie up commission practice with merely repetitious hearings which can do even the petitioner no good except for the everlasting hope of mischance from a surfeit of judicial proceedings.<sup>4</sup> I would deny the petition.

<sup>3</sup> Although I do not view it as in any way determinative, I do feel that the opinion is seriously in error in the suggestion of uncontradicted evidence "that the petitioner's practice had been abandoned." This is violently controverted by the Commission. As I read the evidence, it was to the effect that while the war did bring about "radical changes" yet at the time of the hearing in 1946 there was still discount to "wholesalers" and "applicators" in New Orleans, claimed to be "because of Competitive conditions"—a point obviously productive of dispute until and unless settled by supportable findings.

<sup>4</sup> One may indeed wonder how much of practical usable law the petitioner has secured. The Commission has referred us to several unreported decisions of ours where we have upheld contempt proceedings without enforcement on top of affirmance, and the wisdom of venturing a violation for lack of Pelion on Ossa might well seem doubtful. A court even moderately jealous of its own dignity might well gag at overlooking planned violation of its own order of affirmance merely because the latter lacked the two mystic words: "Enforcement granted."

CONSOLIDATED ROYAL CHEMICAL CORP. v. FEDERAL  
TRADE COMMISSION<sup>1</sup>

No. 10297—F. T. C. Docket 5302

(Court of Appeals, Seventh Circuit. Oct. 22, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—FINDING OF COMMISSION—IF COMMISSION  
CONFRONTED WITH TWO POSSIBLE REASONABLE

Though Court of Appeals is required, in reviewing action of the Federal Trade Commission in entering a cease and desist order, to examine and consider the record as a whole, Court of Appeals is not required to substitute its view for the view of the Commission when the Commission was confronted with two possible reasonable findings.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—MISREPRESENTATION—  
FALSE AND MISLEADING ADVERTISING—QUALITIES OF PRODUCT—MEDICINAL AND  
THERAPEUTIC

Evidence sustained order of the Federal Trade Commission directing that manufacturer of medical preparations cease and desist from disseminating any advertisement that would represent that preparation would build resistance to cold, prevent cold, shorten duration of cold or have any therapeutic value in treatment of cold or that preparation would have any value in relieving symptoms or discomforts of cold in excess of its expectorant qualities, or that preparation would assist in building up strength or energy, except as it might increase appetite and supply some iron.

CEASE AND DESIST ORDERS—ABANDONMENT OR DISCONTINUANCE OF PRACTICE—  
FALSE AND MISLEADING ADVERTISING

Federal Trade Commission could issue order requiring manufacturer of medical preparation to cease and desist from certain advertising, even if manufacturer had already desisted from using such advertising.

CEASE AND DESIST ORDERS—CLARITY—FALSE AND MISLEADING ADVERTISING—  
QUALITIES OF PRODUCT—MEDICINAL AND THERAPEUTIC

Provisions of cease and desist order of Federal Trade Commission ordering manufacturer of medical preparation to cease and desist from disseminating any advertisement that would represent that preparation had any therapeutic value in relieving symptoms or discomforts of cold in excess of its expectorant qualities, and that preparation would assist in building up strength, energy, or vigor, except that use might increase appetite and might supply some iron, were not so vague as to make understanding and compliance impossible.

CEASE AND DESIST ORDERS—PHRASING, IN GENERAL

The choice by Federal Trade Commission of words in phrasing of a cease and desist order are within the discretion of the Federal Trade Commission.

CEASE AND DESIST ORDERS—PRIOR ORDERS—IF ORDER IN OTHER CASE INSUFFICIENT

Alleged fact that Federal Trade Commission had issued an insufficient order in former case involving manufacturer of medical preparations, would not excuse manufacturer from failing to meet requirements of the Federal Trade Commission Act.

<sup>1</sup> Reported in 191 F. (2d) 896. For case before Commission see 47 F. T. C. 177.

(The syllabus, with substituted captions, is taken from 191 F. (2d) 896)

On petition for review of an order of the Federal Trade Commission, order held valid and enforcement ordered.

*Mr. John A. Nash*, of Chicago, Ill., and *Mr. Harlan W. Kelley*, of Baraboo, Wis., for petitioner.

*Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassidy*, Ass't General Counsel and *Mr. J. B. Truly*, Attorney, Federal Trade Commission, all of Washington, D. C., for respondent.

Before KERNER, LINDLEY, and SWAIM, *Circuit Judges*.

SWAIM, *Circuit Judge*:

The petitioner herein, Consolidated Royal Chemical Corp., is engaged in manufacturing and selling in interstate commerce a medical preparation known as "New Peruna" or "New Peruna Tonic." The Federal Trade Commission, hereinafter referred to as the "Commission," on September 21, 1950, under authority of the Federal Trade Commission Act, 15 U. S. C. A., section 41 *et seq.*, hereinafter referred to as the "Act," ordered the petitioner to cease and desist from disseminating any advertisement that would represent directly or by implication:

"a. that said preparation will build resistance to a cold, prevent a cold, shorten the duration of a cold; or have any therapeutic value in the treatment of a cold;

"b. that said preparation will have any therapeutic value in relieving the symptoms or discomforts of a cold in excess of its expectorant qualities, which tend in a slight degree to increase the exudate from the mucous membranes, thereby making it more liquid and more easily removed by coughing;

"c. that said preparation will assist in building up strength, energy, or vigor, except and to the extent that its use may (1) increase the appetite and thereby tend to increase the consumption of food, and (2) by supplying some iron, aid in a slight degree to correct iron deficiency, if taken over a long period of time."

The matter was tried before a trial examiner appointed by the Commission. From the cease and desist order later issued by the Commission this appeal was prosecuted. The cease and desist order was made on the finding that such prohibited advertising was false and likely to induce the purchase of said preparation in interstate commerce.

The petitioner attacked the validity of the cease and desist order contending that the findings and order of the Commission (1), were made in disregard of the provisions of the Federal Administrative Procedure Act and of due process of law; (2) were not supported by sufficient evidence; (3) constituted a determination of moot issues; (4) were not sufficiently definite to enable the petitioner to comply

therewith; and (5) were discriminatory, contrary to precedent and unwarranted.

Petitioner's chief complaint as to the procedure followed by the Commission was based on the Commission's refusal to grant petitioner's motion that the complaint be withdrawn and held in abeyance, and the case be returned to the Commission itself for its "determination as to whether it may not be disposed of on a satisfactory showing of compliance with the stipulations" which petitioner and its predecessor corporation had theretofore filed with the Commission.<sup>1</sup>

The stipulations referred to were written stipulations filed with and approved by the Commission, the first filed by the petitioner's predecessor corporation in 1934 and the second filed by the petitioner in 1944. The stipulation filed in 1934 recited that the Commission had then ordered a complaint issued against the petitioner's predecessor corporation charging it with using certain "exaggerated and misleading" advertising as therein described; that the predecessor corporation would discontinue the use of the advertising therein described; and that if it should ever resume such advertising or indulge in any practices violative of the provisions of the agreement the stipulation, as to the facts, might be used in evidence against the company "in the trial of the complaint which the Commission may issue"; and that it was tendered to the Commission for its consideration and approval and "upon its acceptance is to be entered of record for the purpose of terminating the proceedings against the respondent now pending before the Commission \* \* \*."

The 1944 stipulation recited that the Commission, pursuant to additional investigation, then had reason to believe that the petitioner had been and was using unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act, 15 U. S. C. A., section 45 (c); that the petitioner was willing to discontinue said acts and practices and the Commission was willing to accept this agreement "without prejudice to its right to issue a complaint and institute formal proceedings against" the petitioner. The stipulation then described the false advertising that the petitioner had been doing, advertising that was similar to that described in the 1934 stipulation, and provided that if the petitioner again resorted to such practices the stipulation might be used against it.

These stipulations show that on two former occasions the petitioner and its predecessor corporation, both owned and operated by the same persons, had been permitted to come before the Commission, admit that they had been guilty of false advertising and quietly agree to refrain from such practices. There is certainly nothing in law which requires the Commission to continue to accept confessions and promises to refrain in the future rather than to issue a complaint for the pur-

<sup>1</sup> See 19 F. T. C. 560, and 38 F. T. C. 817.

pose of securing an enforceable order to cease and desist from such unfair practices.

The act, 15 U. S. C. A., section 45 (a), declares deceptive acts or practices in commerce unlawful. 15 U. S. C. A., section 52 declares that dissemination of false advertisement in commerce for the purpose of inducing purchase of drugs shall be unlawful and shall constitute "unfair or deceptive act or practice in commerce" under section 45 of 15 U. S. C. A. Section 45 (a) then empowers and directs the Commission "to prevent persons, partnerships or corporations \* \* \* from using unfair methods of competition in [899] commerce and unfair or deceptive acts or practices in commerce." The act, 15 U. S. C. A., section 45 (b), provides further that whenever the Commission shall have reason to believe that such unfair or deceptive acts or practices have been or are being used and "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public," it shall issue a complaint which shall state the charges, fix the time (at least 30 days after notice) and the place of the hearing. The same section of the act provides that the accused shall have the right to appear and show cause why a cease and desist order should not be entered. It is also provided that the accused shall have a right to appeal to the United States Court of Appeals from such an order. This section of the act also gives the accused the right to apply to the United States Court of Appeals for leave to adduce additional evidence and the court may order additional evidence taken before the Commission. The provisions of the act and the rules of practice adopted by the Commission, 15 U. S. C. A., post section 46, set up the procedure for giving the accused a fair trial and for the protection of the rights of the accused. Here there was no intimation by the petitioner that the trial examiner who conducted the proceedings was prejudiced.

In this case the petitioner failed to take advantage of the many safeguards against the possibility of an unfair trial which the rules of practice of the Commission provide. Petitioner objects to the action of the trial examiner in excluding certain evidence, yet no appeal as to such rulings was taken to the Commission as provided for in rule 20. The petitioner filed no proposed findings and conclusions pursuant to rule 21, although the record shows that the trial examiner expressly invited the filing of such proposed findings and conclusions. The record shows no attempt by the petitioner to have the trial examiner reopen the case for the acceptance of further evidence under the provisions of rule 22 nor any attempt by the petitioner to secure an order of the court for the taking of further evidence. Nor did petitioner file any exceptions to the trial examiner's recommended decision under rule 23 of the Commission's rules of practice.



Throughout this proceeding the petitioner was represented by competent counsel—the same counsel who represented the petitioner before this court.

The petitioner cannot contend that it was not given sufficient time for any step considered necessary for its protection. The hearings on the complaint were commenced in Chicago on January 5, 1948. Additional hearings were held in February in Washington, D. C., and in Baltimore, Maryland. Thereafter hearings were held for 3 days in Columbus, Ohio, and again on June 7 and 8 in Chicago and they were concluded on June 30, 1948, in Washington, D. C. Prior to the close of the hearing the trial examiner stated that either party wishing to secure further hearings should promptly contact him. On November 30, 1948, the proceedings before the trial examiner were formally closed. On December 16, 1948, the trial examiner filed and served on the parties his findings, conclusions and recommended decision. The findings, conclusions and order of the Commission were not issued until September 21, 1950, almost 2 years later. In view of the manner in which the hearings were held, the petitioner cannot now be heard to say that it was not given every opportunity to present its case fully. Nothing in these proceedings even suggests a failure to accord to the petitioner due process.

Petitioner also contends that the findings and order of the Commission are “arbitrary and capricious” because they are “not based upon substantial and material evidence.” On this point the petitioner relies chiefly on *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474. In the instant case the evidence was given by many lay and expert witnesses. The evidence was conflicting as to the possible effect of the petitioner’s preparation. The trial examiner and the Commission both found the evidence sufficient to sustain the findings and order. The act, 15 U. S. C. A., section 45 (c), states that “the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.” While the rule [900] laid down in the *Universal Camera* case requires us, in reviewing the action of an agency, to examine and consider the record as a whole, we are not required to substitute our view for the view of the Commission when the Commission was confronted by two possible reasonable findings. In the *Universal Camera* case the court said at page 490: “The Board’s findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals *clearly* precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.” (Our emphasis.)

In the instant case we certainly cannot say from an examination of the whole record that the decision of the Commission was *clearly*

wrong. Instead we think it was right. In such a case the choice and decision of the Commission is binding on this court.

The petitioner's contention that the findings and order of the Commission are invalid, because they were based on the decision of moot questions which could not properly be considered by the Commission, is also untenable. The petitioner argues that part of the prohibited advertising had been discontinued and had never been used since the 1944 stipulation was filed and approved but an examination of the petitioner's recent advertising casts considerable doubt on this contention. However, even if this contention were true, the act, 15 U. S. C. A., section 45 (b), expressly gives the Commission the right to file a complaint where the accused "*has been or is*" using false advertising. (Our emphasis.) The Supreme Court has also recognized the propriety of courts enforcing agency's orders even after the conduct complained of has ceased. In *National Labor Relations Board v. Mexia Textile Mills, Inc.*, 339 U. S. 563, the Supreme Court said at page 567:

"We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court. \* \* \* A board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." See also *Galter v. Federal Trade Commission* (7th Cir.), 186 F. (2d) 810, 813 [47 F. T. C. 1797] and *Federal Trade Commission v. Goodyear*, 304 U. S. 257 [26 F. T. C. 1521; 2 S. & D. 456].

The petitioner's contention that the order of the Commission is invalid as being so vague as to make understanding and compliance impossible, is also without merit. This complaint is addressed to paragraphs b. and c. which prohibit advertising which would indicate that the preparation would do more than "aid in a slight degree." The prohibitions containing this phrase seem quite clear and were based on expert testimony. If the preparation will only aid *in a slight degree*, the petitioner's advertising was properly limited to such a claim. While this may considerably hamper the style of petitioner's advertising department, that is the fault of petitioner's preparation and not of the Commission's order.

Finally, petitioner contends that paragraph 1. c (2) of the Commission's order "is out of harmony with its own prior holdings and therefore discriminatory." This is based on the fact that in two earlier cases, involving other products and respondents, the Commission's cease and desist order had been differently worded. The choice of words and the phrasing of an order are within the discretion of the Commission. The fact, if it were a fact, that the Commission had

issued an insufficient order in a former case could not excuse it for failing to meet the requirements of the act in the present case.

We are of the opinion that the cease and desist order of the Commission in this case was valid and its enforcement is ordered.

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ALEXANDER FILM CO. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

No. 4212—F. T. C. Docket 5496

(Court of Appeals, Tenth Circuit. Oct. 25, 1951)

Dismissal, on motion of petitioner, of petition to review Commission's order of October 17, 1950, 47 F. T. C. 345 at 357, prohibiting respondent corporation from entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled, or operated by such exhibitors when the term of such contracts extends for a period in excess of 1 year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

*Mr. Thomas M. Burgess*, Colorado Springs, Colo., for petitioner.  
*Mr. W. T. Kelley*, General Counsel, and *Mr. James W. Cassidy*, Assistant General Counsel, Federal Trade Commission, Washington, D. C., for the Commission.

Before PHILLIPS, *Chief Judge*, and PICKETT, *Circuit Judge*.

PER CURIAM:

Petition to review dismissed on motion of petitioner.

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EUGENE D. PETREY, TRADING AS REMBRANDT STUDIO  
AND GOLDCRAFT PORTRAIT STUDIO v. FEDERAL  
TRADE COMMISSION

No. 13531—F. T. C. Docket 5222

(Court of Appeals, Fifth Circuit. Oct. 23, 1951)

Order dismissing, for lack of prosecution, petition to review order of November 9, 1950, 47 F. T. C. 540, prohibiting misrepresentations as to sample and order conformance, prices and so-called "free" goods, made chiefly by house-to-house salesmen orally and by statements on "advertising" coupons they sold, in connection with the sale of plain and colored photographs and enlargements and reductions thereof.

*Mr. Abe Fitterman* and *Mr. Gilbert Cohen*, Atlanta, Ga., attorneys for petitioner.

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<sup>1</sup> Reported in 193 F. (2d) 495. For case before Commission, see 47 F. T. C. 345.

*Mr. James W. Cassidy*, Assistant General Counsel, Washington, D. C., for Federal Trade Commission.

JUDGMENT OF DISMISSAL

On Consideration of the motion filed by the respondent, Federal Trade Commission, to dismiss the petition filed by Eugene D. Petrey, trading as Rembrandt Studio and Goldcraft Portrait Studio, for a review and to set aside the order of the Federal Trade Commission entered November 9, 1950, in the above entitled and numbered cause for want of prosecution;

It is now here ordered by the court that the said petition for review in the above entitled and numbered cause be, and the same is hereby dismissed for want of prosecution.

L. HELLER & SON, INC. ET AL. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

No. 10292—F. T. C. Dockets 5358, 5349, 5371, 5374, 5395

(Court of Appeals, Seventh Circuit. Oct. 30, 1951)

METHODS, ACTS AND PRACTICES—MISREPRESENTATION—NONDISCLOSURE

Federal Trade Commission may require affirmative disclosures where necessary to prevent deception, and failure to disclose by mark or label material facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether to purchase, is an unfair trade practice violative of Federal Trade Commission Act.

STATUTES AND STATUTORY CONSTRUCTION—WHERE TWO STATUTES DEAL WITH SAME SUBJECT MATTER

In considering provisions of two statutes dealing with same subject matter, one general in scope and language, and the other specifically concerned with a particular portion of subject matter, statute containing specific terms must prevail over general language of the other statute.

STATUTES AND STATUTORY CONSTRUCTION—LEGISLATIVE INTENT

In construing meaning and scope of statutory provisions in order to determine legislative intent or purpose, entire legislative subject should be examined and every effort made to construe legislation so it will be consistent with other expressions of legislative intent and purpose.

<sup>1</sup> Reported in 191 F. (2d) 954. For case before Commission see 47 F. T. C. 34. The four respondents in the other cases before the Commission, which joined the named petitioner in the instant case, were L. Lisner & Co., D. 5349, Colonial Bead Co., Inc., D. 5371, Royal Bead Novelty Co., D. 5374, and Coro, Inc., D. 5395, reported in 47 F. T. C. at pages 67, 75, 83, and 93.

STATUTES AND STATUTORY CONSTRUCTION—EXISTING POWERS OF FEDERAL GOVERNMENT—LIMITATIONS ON

Limitations on existing powers of Federal Government must be clearly manifested by an Act of Congress.

STATUTES AND STATUTORY CONSTRUCTION—EXISTING POWERS OF FEDERAL GOVERNMENT—REPEAL

Repeal of existing powers of Federal Government requires a clear expression of that purpose.

STATUTES AND STATUTORY CONSTRUCTION—REPEALS BY IMPLICATION

Repeals by implications are not favored.

STATUTES AND STATUTORY CONSTRUCTION—WHERE TWO STATUTES DEALING WITH SAME SUBJECT MATTER—PRIORITY—WHEN DECISIVE

Only where two laws are clearly repugnant to each other and both cannot be carried into effect does the later of the two laws prevail.

STATUTES AND STATUTORY CONSTRUCTION—AMENDED TARIFF ACT OF 1938 AND FEDERAL TRADE COMMISSION ACT—MARKING OF FOREIGN ORIGIN AND SECTION 5 OF LATTER ACT.

Amended Tariff Act of 1938 requiring that every article of foreign origin imported into United States shall be marked so as to indicate to ultimate purchaser in United States the English name of the country of origin of the article, and authorizing Secretary of the Treasury to regulate such marking, did not repeal statutory provision directing Federal Trade Commission to prevent use of unfair methods of com[955]petition in commerce and unfair or deceptive acts or practices in commerce.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—MISREPRESENTATION—NONDISCLOSURE—FOREIGN ORIGIN

Federal Trade Commission had authority to require petitioners to cease and desist from offering for sale or selling necklaces consisting of imitation pearls manufactured in foreign country, without marks to disclose foreign origin of the imitation pearls, and Congress by enactment of statute requiring that every article of foreign origin imported into United States shall be marked so as to indicate to ultimate purchaser in United States the English name of country of origin of the article, and authorizing Secretary of the Treasury to regulate such marking, did not withdraw from the Commission jurisdiction or authority to regulate such marking.

(The syllabus, with substituted captions, is taken from 191 F. (2d) 954)

On petition to review and set aside orders of Commission, orders enforced.

*Mr. James T. Welch, Mr. C. Robert Mathis*, Washington, D. C., *Mr. L. M. McBride*, Chicago, Ill., *McBride & Baker*, Chicago, Ill., *Davies, Richberg, Tydings, Beebe & Landa*, Washington, D. C., of counsel, for petitioner.

*Mr. James W. Cassidy*, Assistant General Counsel, *Mr. Alan B.*

*Hobbes*, Attorney, Federal Trade Commission, Washington, D. C.,  
*Mr. W. T. Kelley*, General Counsel, Washington, D. C., for respondent.

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges*.

KERNER, *Chief Judge*:

Petitioners ask us to review and set aside five cease and desist orders of the Federal Trade Commission. The orders were based upon separate complaints charging petitioners with engaging in unfair and deceptive acts and practices in violation of section 5 (a) of the Federal Trade Commission Act, 15 U. S. C. A., section 45 (a). By stipulation the cases were consolidated for the hearing, taking of testimony, and other purposes, and for the purpose of this review.

Petitioners import imitation pearls from foreign countries, either on strings, graduated or ungraduated as to sizes, or in bulk, marked with tags or labels either on the strings or the containers so as to disclose the name of the country in which they originated. After the pearls are received in the United States petitioners remove the tags or labels, fabricate the pearls into necklaces and other articles of jewelry, and distribute and sell them in interstate commerce without any tag or label indicating that the imitation pearls are of foreign origin, and cause the products to be sold to the public without revealing the fact of their foreign origin.

A substantial portion of the purchasing public has a general preference for products produced in the United States by American labor and containing domestic materials, where other considerations such as style and quality are equal, and has a prejudice against imported products. Imitation pearls produced in the United States are not generally distinguishable in quality and appearance from imported imitation pearls, and both are used for the same purpose in the production of jewelry. And the purchasing public, in the absence of a tag, mark, or other identification thereon by which foreign origin is indicated, understands and believes that necklaces of imported imitation pearls offered for sale and sold in the United States, are products of domestic manufacture.

The Commission found that the selling and distributing of the imported imitation pearls without any labeling or other mark to indicate the foreign source or origin of such pearls have the capacity and tendency to mislead and deceive purchasers and prospective purchasers into the false and erroneous belief that such jewelry products are wholly of domestic manufacture, and places in the hands of retailers of such jewelry products a means and instrumentality by which members of the purchasing public may be misled and deceived into the false and erroneous belief that such products are wholly of domestic origin. In its opinion the Commission stated: [956] “\* \* \* imitation pearls

which have been fully manufactured in foreign countries are imported by [petitioners] \* \* \* and incorporated in necklaces and other articles of jewelry, which are then resold without marks to disclose the foreign origin of the imitation pearls. When such imitation pearls are used in necklaces they represent the principal component and the part which makes the necklaces valuable to the consumer. The consumer purchases an imitation-pearl necklace not because of the string which holds the pearls together or the clasp which joins its ends, but because of the imitation pearls which are thus assembled and made useful as ornaments. The same is true of other articles of jewelry composed in substantial part of imitation pearls. Their only utility is for ornamentation and for that purpose imported imitation pearls require only proper assembling after being brought into this country. After such assembling, however, they still retain their essential characteristics as products of foreign manufacture."

Based upon these facts, the Commission ordered petitioners to cease and desist from "Offering for sale or selling said products without affirmatively and clearly disclosing thereon, or in immediate connection therewith, the country of origin of such imported imitation pearls."

In this court petitioners contend that the Commission was without jurisdiction or authority to prohibit the practices interdicted by the cease and desist orders entered herein. The argument is that Congress, by the enactment of the Tariff Act of 1930, as amended in 1938 (52 Stat. 1077, 19 U. S. C. A., sec. 1304), requiring that every article of foreign origin imported into the United States shall be marked so as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article, and authorizing the Secretary of the Treasury to regulate such marking, withdrew from the Commission jurisdiction or authority to regulate such marking.

We commence our study of the instant case with the knowledge that the Commission may require affirmative disclosures where necessary to prevent deception, and that failure to disclose by mark or label material facts concerning merchandise, which, if known to prospective purchasers, would influence their decisions of whether or not to purchase, is an unfair trade practice violative of section 5 of the Federal Trade Commission Act, *Haskelite Manufacturing Co. v. Federal Trade Commission*, 127 F. (2d) 765 [34 F. T. C. 1855; 3 S. & D. 485] and that when violation of section 5 has been shown, there is no necessity of considering whether a provision of the tariff act is similarly applicable. *Segal v. Federal Trade Commission*, 142 F. (2d) 255 [38 F. T. C. 867; 4 S. & D. 150].

Petitioners admit that section 5 of the act vests broad authority

in the Commission to determine what constitutes and to prevent unfair or deceptive acts and practices in commerce. However, they say that the act "is a general statute using broad terms which could cover all types of deceptive acts and practices in commerce." They insist that the tariff act as amended is a specific statute concerned particularly with the problem of deceptive misrepresentations to the ultimate purchaser through the failure to use, or the insufficient use of, marks of origin on imported goods. They make the point that in considering provisions of two statutes dealing with the same subject matter, one general in scope and language, and the other specifically concerned with a particular portion of the subject matter, the statute containing the specific terms covering the given subject matter must prevail over the general language of the other statute, *Kepner v. United States*, 195 U. S. 100. And since Congress has expressly delegated authority over marks of origin to the Secretary of the Treasury, it necessarily withdrew regulatory jurisdiction over this subject from the Commission. Thus, the problem we are asked to solve is whether the Commission had jurisdiction to prohibit the practices herein involved.

It is true that in construing the meaning and scope of statutory provisions in order to determine the legislative intent or purpose, the entire legislative subject should be examined and every effort made to construe legislation so it will be consistent with other expressions of legislative intent and purpose, yet the law is that limitations on existing powers of the Federal Government must be clearly manifested by an Act of Congress, *United States v. United Mine Workers of America*, 330 U. S. 258, 272, and repeal of those powers requires a clear expression of that purpose. Furthermore, repeals by implications are not favored, and may not be readily drawn from the language of the statute, or its legislative history. It is only where two laws are clearly repugnant to each other and both cannot be carried into effect that the later of the two laws will prevail. *Posadas v. National City Bank*, 296 U. S. 497, and *United States v. Borden Company*, 308 U. S. 188.

As we have already observed, the Federal Trade Commission Act is a broad statute forbidding "unfair methods of competition" and "unfair or deceptive acts or practices" in interstate commerce. The tariff act is a limited statute on an entirely different subject—the conditions under which foreign goods shall enter the United States. It authorizes the Secretary of the Treasury to require that imported articles, under certain conditions, show the country of origin. In determining whether the amended Tariff Act of 1938 curtailed the then existing powers and authority of the Commission, it is important to consider what was before Congress at the time of the adoption of section 1304. In our opinion Congress, at the time it was considering



the 1938 amendment to the tariff act, was concerned solely with the extent to which the Treasury Department, incidentally to its collection of customs duties, should regulate the labeling of imported goods. Our examination of the amended tariff act discloses no language expressing an intention on the part of Congress to repeal section 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices, and since there exists no repugnancy between the two acts, we are impelled to the conclusion that the Commission had jurisdiction and authority to prohibit the practices herein involved.

A decree will be entered for enforcement of the orders to cease and desist. It is so ordered.

**R. J. REYNOLDS TOBACCO CO. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>**

No. 10184—F. T. C. Docket 4795

(Court of Appeals, Seventh Circuit. Nov. 1, 1951)

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—MISREPRESENTATION—FALSE AND MISLEADING ADVERTISING—COMPARATIVE DATA, QUALITIES, AND SCIENTIFIC OR RELEVANT FACTS

Evidence sustained portion of cease and desist order of Federal Trade Commission requiring that cigarette company desist from representing that smoking of its cigarettes aided digestion, relieved fatigue, did not impair the wind or physical condition of athletes, that cigarettes will not harm the throat, or leave an aftertaste, that smoke is comforting to the nerves, that company's [536] cigarettes differed in any of such respects from other leading brands of cigarettes, and that its cigarettes contained less nicotine than cigarettes or smoke of other leading brands.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—TO CEASE REPRESENTATIONS  
"WHICH ARE NOT FACTUALLY TRUE IN ALL RESPECTS"

Portion of cease and desist order of the Federal Trade Commission requiring cigarette company to desist from making any representations, "which are not factually true in all respects" was invalid because it went too far and was too broad.

CEASE AND DESIST ORDERS—PARTIES—CORPORATE OFFICERS, ETC., UNNAMED

The Federal Trade Commission in its cease and desist order against cigarette company requiring it to desist from making certain representations with respect to its cigarettes, had no authority to include in the order the company's "officers, agents, representatives and employees".

(The syllabus, with substituted captions, is taken from 192 F.  
(2d) 535)

<sup>1</sup> Reported in 192 F. (2d) 535. For case before the Commission see 46 F. T. C. 706.

On petition for review of an order of the Federal Trade Commission, petition denied and order modified and, as modified, affirmed, and enforcement decree entered.

*Mr. L. M. McBride*, Chicago, Ill., *Mr. Donald R. Richberg*, *Mr. Raymond N. Beebe*, Washington, D. C. (*Davies*, *Richberg*, *Tydings*, *Beebe & Landa*, Washington, D. C., *McBride & Baker*, Chicago, Ill., of counsel), for petitioner.

*Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, *Mr. James E. Corkey*, Federal Trade Commission, all of Washington, D. C. for respondent.

Before MAJOR, *Chief Judge*, KERNER and FINNEGAN, *Circuit Judges*.

MAJOR, *Chief Judge*:

This case is here on petition to review an order of the Federal Trade Commission (hereinafter referred to as the Commission), issued March 31, 1950. The proceeding before the Commission was on an amended complaint charging unfair methods of competition and unfair and deceptive acts and practices, in violation of section 5 of the Federal Trade Commission Act (15 U. S. C. A., sec. 45). The alleged unfair methods of competition consisted of the dissemination of false, misleading and deceptive statements, representations and testimonials in connection with the sale in interstate commerce of "Camel" cigarettes.

Petitioner answered the complaint with a general denial of its allegations but admitted jurisdictional facts and the dissemination of the representations, with certain minor exceptions, and the use of testimonials in its advertisements, as charged. A hearing was held before a trial examiner who made his report to the Commission. After the submission of briefs and the hearing of oral argument by counsel for the respective parties, the Commission made its findings as to the facts and concluded that the acts and practices of the petitioner, as found, were in violation of the Federal Trade Commission Act and, predicated thereon, issued the cease and desist order presently under review.

The portion of the order here under attack is as follows:

*"It is ordered*, That the respondent, R. J. Reynolds Tobacco Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of its 'Camel' brand of cigarettes; do forthwith cease and desist from representing, directly or by implication:

"1. That the smoking of such cigarettes encourages the flow of digestive fluids or increases the alkalinity of the digestive tract, or that it aids digestion in any respect.

"2. That the smoking of such cigarettes relieves fatigue, or that it creates, restores, renews, gives, or releases bodily energy.

"3. That the smoking of such cigarettes does not affect or impair the 'wind' or physical condition of athletes.

"4. That such cigarettes or the smoke therefrom will never harm or irritate the throat, nor leave an aftertaste.

"5. That the smoke from such cigarettes is soothing, restful or comforting to the [537] nerves, or that it protects one against nerve strain.

"6. That Camel cigarettes differ in any of the foregoing respects from other leading brands of cigarettes on the market.

"7. That Camel cigarettes or the smoke therefrom contains less nicotine than do the cigarettes or the smoke therefrom of any of the four other largest selling brands of cigarettes.

*"It is further ordered,* That said respondent, and its officers, agents, representatives, and employees, in connection with the offering for sale, sale or distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of its 'Camel' brand of cigarettes, do forthwith cease and desist from using in any advertising media testimonials of users or purported users of said cigarettes which contain any of the representations prohibited in the foregoing paragraph of this order or which are not factually true in all respects.

The Commission contends that each of the seven inhibitions contained in the order is based upon adequate findings and that such findings are substantially and adequately supported by the evidence and that the findings and inhibitions are in conformity with the allegations of the complaint. On the other hand, petitioner contends that the inhibitions either exceed the scope of the complaint, are not supported by the findings or are based upon findings not supported by the record as a whole. In addition, it is argued by petitioner that the Commission has exceeded its jurisdiction in material respects.

Petitioner in its brief has discussed separately and in much detail the findings and evidence which relate to each of the inhibitions in the order, and the Commission in its brief has answered in similar fashion. Any attempt on our part to proceed similarly would result in an opinion of unjustifiable length and in the end could serve no good purpose.

We have read all the expert testimony offered before the Commission by both parties and we are much impressed with the qualifications and learning exhibited in the testimony of the medical, scientific and other expert witnesses. Contrary to what is so often our experience in considering the testimony of expert witnesses, we found a perusal of their testimony quite interesting. This is so because it deals with a subject which is of almost universal interest, that is, the effect which

the use of tobacco, and particularly the smoking of cigarettes, has upon the human system. As might be expected, there is considerable contrariety of opinion but there is scarcely any dispute on this record but that in general it has a deleterious effect, the extent of which is dependent upon the number of cigarettes smoked and, to a lesser extent perhaps, upon the physique and condition of the smoker.

As to the representations made by the petitioner in the sale or offering for sale of their "Camel" cigarettes, the Commission found, on a record undisputed in the main, that such representations were general in their nature, were made alike to all persons irrespective of their physical condition or the quantity of cigarettes smoked, and that by means of such representations petitioner had represented to the public, directly or by implication: "\* \* \* that the smoking of Camel cigarettes, during, after, or between meals, irrespective of what, where or when one eats, is good for, advantageous to and aids digestion, in that it renews and encourages the flow of digestive fluids and increases the alkalinity of the digestive tract; that the smoking of such cigarettes relieves fatigue and creates, restores, renews and releases a new flow of body energy giving needed bodily strength and vigor, and that this is 'a basic discovery of a famous research laboratory and throws new light on the subject of cigarette smoking'; that the 'wind' and physical condition of athletes will not be affected or impaired in any way by the smoking of as many Camel cigarettes as they desire; that Camel cigarettes, unlike other brands of cigarettes, are always gentle to and never harm or irritate even a sensitive throat, nor leave an after taste; that the smoking of such cigarettes is soothing, restful and comforting to the nerves, and protects one against becoming 'jittery' or 'unsure' when subjected to intense nerve strain; that one with healthy nerves may smoke as many Camel cigarettes as he or [538] she likes without the risk of keyed-up, jangled or frazzled nerves, and that Camels are in these respects different from all other brands of cigarettes; and that the smoke of Camel cigarettes contains less nicotine than does the smoke of any of the four other largest selling brands of cigarettes."

The Commission found that all such representations were false in that the tobacco constituents of "Camel" cigarettes are like those of other leading brands of cigarettes; that the tobacco smoke of such cigarettes includes generally carbon dioxide, carbon monoxide, particles of carbon—partially oxidized tobacco products that carry over with the smoke, together with volatilized nicotine, other nitrogenous substances, aldehydes, including furfural, and formaldehyde, ammonia, water vapor and tarry and oily materials; that smoking cannot be considered under any circumstances as beneficial to any of the bodily systems; that nicotine is not a therapeutic agent for any pur-

pose; that it is a poison and a killing poison; that nicotine stimulates the nerves of the involuntary or autonomic nervous system which in turn affects the heart; that as a result of this stimulation it also affects the adrenal glands, which increases their action and causes a rise in blood pressure and a constriction of the small tubes of the lungs; that carbon monoxide in concentrated form is deadly and, like nicotine, is absorbed by the blood, affects the red blood cells and decreases the capacity of the blood to carry oxygen; that in the process of smoking the body is also invaded by other constituent elements of a cigarette, causing local irritation of the mouth, throat and lungs.

The Commission recognized in its findings that under certain limited circumstances and conditions smoking produces no appreciable harmful effects but that this is limited to persons in normal health, accustomed to smoking, who smoke in moderation, who are not hypersensitive to tobacco and who have no existing pathology of any of the bodily systems; that while in some cases a habituated person may become tense and nervous when deprived of a cigarette and that a smoke under such conditions might have a psychological tendency to relieve the tension, nevertheless the smoking of cigarettes will not under any condition be physiologically beneficial to any of the bodily systems.

What we have said is merely a brief resume of the Commission's findings in general. It made detailed findings upon which rest each of the seven inhibitions contained in the order. We see no occasion to set forth the findings in detail as they relate to each of these inhibitions notwithstanding, as noted, that petitioner argues separately the findings upon which each is predicated and the evidence or lack of evidence to support such findings. It is sufficient, we think, that we have carefully examined the record and find petitioner's contention in the main to be devoid of merit. The record not only substantially but abundantly supports the findings as made by the Commission and the findings furnish a sufficient basis for the inhibitions contained in the order. And we are satisfied that the findings and conclusions of the Commission, together with its order, do not exceed its jurisdiction, as asserted by petitioner, because the matters treated, considered and decided were not placed in issue by the complaint.

There is a single exception to the views expressed. The eighth inhibition orders petitioner to cease and desist from: "\* \* \* using in any advertising media testimonials of users or purported users of said cigarettes which contain any of the representations prohibited in the foregoing paragraph of this order *or which are not factually true in all respects.*" (Italics ours.)

Petitioner objects to the italicized portion of this inhibition. It seems to us that this all-inclusive language is too broad and goes beyond any concern of the Commission. A testimonial, for instance,

might not be "factually true in all respects" but still immaterial to the subject matter of the instant proceeding in that it bore no relation to the public interest, and it would virtually make petitioner an insurer of the truthfulness of every statement contained in a testimonial, no matter how immaterial or beside the issue in controversy it might be. We think this clause should be eliminated from the order. [539]

Lastly, we come to petitioner's contention that the Commission exceeded its jurisdiction by including as parties to the order, in addition to the petitioner (the sole respondent below), "its officers, agents, representatives and employees." If this were a matter of first impression, we would have no hesitancy in concluding that a cease and desist order should not be directed at parties other than those named in the complaint. We can see no logical basis for the indiscriminate inclusion, in an order directed against a corporation, of all persons connected with it, from the president down to the most humble employee. But the question is not entirely of first impression and we turn to the authorities.

The Commission, in support of its position, cites only three cases. *Federal Trade Commission v. Standard Education Society et al.*, 302 U. S. 112 [25 F. T. C. 1715; 2 S. & D. 429]; *Steelco Stainless Steel, Inc. et al. v. Federal Trade Commission*, 187 F. (2d) 693 [47 F. T. C. 1809], and *Sebrone Co. et al. v. Federal Trade Commission*, 135 F. (2d) 676 [36 F. T. C. 1142; 3 S. & D. 570]. These three cases (the last two, decisions of this court) when taken together furnish little, if any, support for the Commission's position.

In the *Standard Education Society* case, the officials of the corporation were not only named in the complaint and made parties to the proceeding, but the Commission made a finding, as disclosed by the Supreme Court opinion (page 119), "that this corporation was organized by the individual respondent[s] for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent the Standard Education Society." On the same page the Court stated:

"Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order."

And on the following page the Court stated:

"In this management these three respondents acted with practically the same freedom as though no corporation had existed. So far as corporate action was concerned, these three were the actors. Under the circumstances of this proceeding, the Commission was justified in reaching the conclusion that it was necessary to include respondents Stanford, Ward, and Greener in each part of its order if it was to be

fully effective in preventing the unfair competitive practices which the Commission had found to exist."

The situation before the Supreme Court in that case bears no resemblance to that of the instant case. And we think it may be assumed that the court there would have reached a different result, in the absence of a record in which the individual respondents were named and particularly in the absence of a finding as to the part which they took in the unlawful activities found against the corporate respondent. In the instant case, not only was there a failure to name individual respondents but there is no proof and no finding as to which of the "officers, agents, representatives and employees" were responsible for the unlawful activities of the corporate respondent.

The *Steelco Stainless Steel* case presents a similar situation. There, the corporation and its president were named as respondents and we held that the order of the Commission was properly directed to both. In so doing we stated (page 697) :

"The record unmistakably discloses that the management, direction and activities of the corporation were those of Carr. \* \* \* In our view, he as an individual occupies precisely the same position as does the corporation."

The *Sebrone* case (page 678) supports the Board's position, but insofar as the opinion discloses the question received scant consideration. The court cited in support of its conclusion *Southport Petroleum Co. v. Labor Board*, 315 U. S. 100.

It is true that similar provisions have been approved in Labor Board cases, the most recent of which is *Regal Knitwear Co. v. National Labor Relations Board*, 324 U. S. 9, wherein the court approved the inclusion of the words, "its officers, agents, successors and assigns." It is apparent from a reading of [540] this opinion that the court did not regard the question as of any great importance and that its approval of the words in controversy rested upon the premise that its enforcement was lodged with a court of equity, which had ample facilities on a citation for contempt for protecting a person or party improperly brought before the court. No mention was made of the court's previous decision in the *Standard Education Society* case (302 U. S. 112) [25 F. T. C. 1715, 2 S. & D. 429] where the court was concerned with an order of the Federal Trade Commission.

We think there is a fundamental difference between an order by the Labor Board and one by the Federal Trade Commission, which suggests a different result as to the orders of the two agencies in the respect under discussion. No remedy is lodged in the former for the enforcement of its cease and desist order other than to petition an appropriate court for enforcement (Title 29 U. S. C. A., sec. 160 (e)), and when an enforcement decree is obtained, it is that of the court, a violation of

which subjects the offender to a proceeding for contempt. And as pointed out by the court in the *Regal Knitwear Company* case (page 15), it would be within the sound discretion of the court to clarify its decree in the interest of fair play.

An order by the Federal Trade Commission, however, is of far wider scope. It is authorized in a procedure similar to that applicable to the Labor Board to seek an enforcement decree in an appropriate court, but when its order becomes final, either by nonaction by the parties or by court approval, it has a further remedy not granted to the Labor Board. Sec. 45. (1) of the act provides: "Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Thus, the unnamed "officers, agents, representatives and employees" are not only subject to a contempt proceeding for the violation of a court's enforcement decree where equitable considerations prevail, but they are likewise subject to a severe penalty, to be recovered in a civil action. Thus, we think there is a more urgent reason for naming individual respondents in an order of the Commission, predicated upon a finding that such individuals were responsible for the corporate violation, than there is in an order of the Labor Board.

While under the cases there may be room for differences of opinion, it is our view and we so hold that the Commission is without authority to include in its order, "officers, agents, representatives and employees," in the absence of any finding other than those directed solely at the corporation.

The petition to review and set aside the Commission's order is denied and the order, modified in conformity with the views herein expressed, is affirmed, and an enforcement decree will be entered.

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FEDERAL TRADE COMMISSION v. WHITNEY & CO. ET AL.<sup>1</sup>

No. 12700—F. T. C. Docket 5279

(Court of Appeals, Ninth Circuit. Nov. 1, 1951)

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—CLAYTON ACT—IF VALIDITY ADMITTED BUT FAILURE TO OBEY, DENIED

Where Federal Trade Commission found that defendants were violating the Clayton Act and issued an order requiring such persons to cease and

<sup>1</sup> Reported in 192 F. (2d) 746. For case before Commission, see 42 F. T. C. 138.



desist from such violations, and, on application by Commission for decree affirming and enforcing its order, defendants answered denying they had failed to obey or neglect order, but admitting validity of order, Commission was entitled to affirmance of order, but on issue whether defendants had failed or neglected to obey order defendants were entitled to a hearing with an opportunity to submit evidence.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—ENFORCEMENT—IF INDIVIDUAL RESPONDENT ALLEGEDLY NO LONGER OFFICER AND STOCKHOLDER OF CORPORATION—ISSUE ON MOTION TO DISMISS AS TO

Where individual defendant moved for dismissal of enforcement proceeding brought by Federal Trade Commission as to him on ground that, although he was alleged and found by Commission to be an official and stockholder of corporation found by Commission to be violating Clayton Act, the defendant was no longer an officer and stockholder, and no useful purpose would be served by retention of him as party to proceeding, issue raised or attempted to be raised by individual defendant could be raised before Commission and defendant's motion to dismiss enforcement proceeding as to himself would be denied without prejudice.

(The syllabus, with substituted captions, is taken from 192 F. (2d) 746)

On Commission's petition for enforcement, order affirmed and proceeding referred to Commission with directions.

[747] *Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassidy*, Assistant General Counsel, *Mr. John W. Carter, Jr.*, Attorney, Federal Trade Commission, Washington, D. C., for petitioner.

*Bogle, Bogle & Gates*, *Mr. Robert W. Graham* and *Mr. J. Kenneth Brody*, Seattle, Wash., for respondent.

Before MATHEWS, BONE and POPE, *Circuit Judges*.

MATHEWS, *Circuit Judge*:

Under Section 11 of the Clayton Act, as amended, 15 U. S. C. A., Section 21, the Federal Trade Commission, on February 12, 1945, issued a complaint charging that Whitney & Co., James R. O'Brien and others had violated and were violating the provisions of Section 2 (c) of the Act, as amended, 15 U. S. C. A., Section 13 (c). The complaint was served on the persons complained of (Whitney & Co., O'Brien, and others) on February 14, 1945. It contained a notice of hearing. Said persons appeared, and a hearing was had. Thereupon, being of the opinion that said persons had violated and were violating the provisions of Section 2 (c), the Commission, on March 25, 1946, made a report in writing, stating its findings as to the facts, and issued an order requiring said persons to cease and desist from such violations. The order was served on April 1, 1946, and has been in effect ever since.

On September 29, 1950, the Commission, alleging that Whitney & Co. and O'Brien had failed and neglected to obey the order, applied

to this court under Section 11 for a decree affirming the order and enforcing it as to Whitney & Co. and O'Brien.<sup>2</sup> Whitney & Co. and O'Brien, answering the application, denied that they had failed or neglected to obey the order, but they have not challenged the validity of the order. Instead, they have admitted its validity. The Commission is therefore entitled to an affirmance of the order.<sup>3</sup> However, on the issue raised by their answer—whether or not they have failed or neglected to obey the order—Whitney & Co. and O'Brien are entitled to a hearing, with an opportunity to submit evidence.<sup>4</sup>

O'Brien has moved this court to dismiss the enforcement proceeding as to him on the ground that, although he was alleged and found by the Commission to be an official and stockholder of Whitney & Co., he is no longer such, and that no useful purpose would be served by his retention as a party to the proceeding. The issue thus raised or attempted to be raised may, if O'Brien so desires, be raised before the Commission.

Accordingly, the order is affirmed; the proceeding is referred to the Commission, with directions to hear evidence on the issues mentioned above and to report its conclusions to this court; and O'Brien's motion is denied without prejudice.

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GLOBE CARDBOARD NOVELTY CO., INC. ET AL. v.  
FEDERAL TRADE COMMISSION<sup>1</sup>

No. 10424—F. T. C. Docket 4808

(Court of Appeals, Third Circuit. Nov. 16, 1951)

METHODS, ACTS, AND PRACTICES—LOTTERY MERCHANDISING—AS UNFAIR METHOD  
OF COMPETITION

The sale of merchandise by lottery methods constitutes an unfair method of competition under provision of Federal Trade Commission Act making unlawful certain unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.

METHODS, ACTS, AND PRACTICES—IN GENERAL—IF INIMICAL TO PUBLIC INTEREST—  
RESTRAINT OF—WHETHER ESTABLISHMENT OF COMPETITION PREREQUISITE

In order to restrain certain business practices, the Federal Trade Com-

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<sup>2</sup> Enforcement was not sought as to the other persons complained of.

<sup>3</sup> *Federal Trade Commission v. Hertzog*, 2 Cir., 150 F. (2d) 450 [41 F. T. C. 426; 4 S. & D. 399]. See, also *Federal Trade Commission v. Balme*, 2 Cir., 23 F. (2d) 615 [11 F. T. C. 717; 1 S. & D. 666], *Federal Trade Commission v. Baltimore Paint & Color Works*, 4 Cir., 41 F. (2d) 474 [14 F. T. C. 675; 2 S. & D. 75], *Federal Trade Commission v. Standard Education Society*, 2 Cir., 86 F. (2d) 692 [24 F. T. C. 1591; 2 S. & D. 366], (reversed on other grounds in 302 U. S. 112).

<sup>4</sup> See cases cited in footnote 3.

<sup>1</sup> Reported in 192 F. (2d) 444. For case before the Commission see 47 F. T. C. 781.

mission need show only that there is an act or practice in commerce inimical to public interest, and there is no necessity of proving competition.

**METHODS, ACTS, AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICE SELLING**

A manufacturer, who sold push cards and punchboards to retailers, who in turn utilized products as sales promotional devices, committed unfair acts and practices in commerce within meaning of Federal Trade Commission Act.

**AIDING AND ABETTING UNFAIR OF UNLAWFUL ACT OR PRACTICE—IN GENERAL**

**[445]** One who furnishes another with means of consummating a fraud is himself a wrongdoer.

**CEASE AND DESIST ORDERS—SCOPE AND EXTENT—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICE SELLING—SELLING, ETC., WHICH ARE TO BE USED "OR MAY BE USED", ETC.—WHETHER TOO BROAD**

Where order of Federal Trade Commission directed manufacturer to cease and desist from selling or distributing in commerce push cards, punchboards or other lottery devices which are to be used, "or may be used," in the sale or distribution of merchandise to public by means of a game of chance, gift enterprise or lottery scheme, the inclusion of the quoted phrase did not render order of Commission too broad, since the order as a whole prohibited only the distribution of lottery devices which were designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods.

(The syllabus, with substituted captions, is taken from 192 F. (2d) 444)

On petition to review order of Federal Trade Commission, order affirmed.

*Mr. Michael von Moschzisker*, Philadelphia, Pa. (*Mr. Nathan Lavine*, *Mr. Alexander B. Adelman*, Philadelphia, Pa., on the brief), for petitioners.

*Mr. John W. Carter, Jr.*, Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassedy*, Assistant Gen. Counsel, Washington, D. C., on the brief), for Federal Trade Commission.

Before McLAUGHLIN, STALEY and HASTIE, *Circuit Judges*.

STALEY, *Circuit Judge*:

We are asked to review a cease and desist order entered by the Federal Trade Commission against petitioners.

The Commission instituted this proceeding by a complaint issued on August 10, 1942. An answer was duly filed and hearings were subsequently held. On April 21, 1950, petitioners filed a substituted answer in which they admitted all the material allegations of fact set forth in the complaint and waived all intervening procedure and further hearing as to the facts. The Commission rendered findings of

fact based on the allegations of the complaint. The salient facts so found are that petitioners manufacture and sell in interstate commerce push cards and punchboards. Some of their products are sold to manufacturers, wholesalers, and jobbers of candy, cigarettes and other articles of merchandise, who, in turn, pack the push cards and punchboards with their merchandise and sell the assortments in interstate commerce to retailers. Petitioners also sell directly to retailers. Thus, all petitioners' devices flow either directly or indirectly into the hands of retailers, who utilize petitioners' products as sales promotional devices. The Commission found that the sale of merchandise to the public by means of these devices involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail prices, thereby encouraging members of the public to gamble. The Commission further found that consumers are induced to deal with those retailers who utilize lottery methods to the detriment of retailers who refrain from using such sales promotional schemes. At the manufacturers' and wholesalers' levels, the same forces are at work: trade is diverted from manufacturers and wholesalers who do not pack lottery devices with their merchandise. The Commission concluded that, by placing in the hands of others the means of conducting lotteries in the sale of merchandise, petitioners had committed unfair acts and practices in commerce within the meaning of section 5 of the Federal Trade Commission Act.<sup>2</sup>

The order of the Commission, issued December 29, 1950, directed petitioners to cease and desist from "selling or distributing in commerce, as 'commerce' is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are to be used, or may be used, in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme."

[446] Petitioners attack the order of the Commission on the ground that their sales of lottery devices do not constitute unfair practices in commerce within the contemplation of section 5 of the Federal Trade Commission Act. They argue that they compete fairly with their competitors in the punchboard business; that any unfairness is committed by their vendees who utilize lottery methods to distribute their merchandise. Thus, we are urged to hold that petitioners' activities are beyond the jurisdiction of the Commission.

Since the decision of the Supreme Court in *Federal Trade Comm. v. Keppel & Bro.*, 291 U. S. 304 (1934), [18 F. T. C. 684; 2 S. & D. 259] it has been settled law that the sale of merchandise by lottery methods

<sup>2</sup>"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. \* \* \*" Act of Sept. 26, 1914, c. 311, § 5, 38 Stat. 719, as amended by the Act of Mar. 21, 1938, c. 49, § 3, 52 Stat. 111, 15 U. S. C. A. § 45 (a).

constitutes an unfair method of competition under section 5 of the Federal Trade Commission Act. Thus, we accept as our starting point the proposition that it is contrary to the public policy of the United States for sellers to market their goods by taking advantage of the consumer's propensity to take a chance. Petitioners actively aid and abet others to commit such unfair practices. They manufacture and sell devices the sole function of which is to sell merchandise by lottery methods. Does this render petitioners' interstate sales of lottery devices unfair? We are in agreement with the Commission's affirmative answer.

The instant proceeding no doubt would have been beyond the jurisdiction of the Commission under the unamended Federal Trade Commission Act, as interpreted by the Supreme Court in *Federal Trade Comm. v. Raladam Co.*, 283 U. S. 643 (1931) [15 F. T. C. 598; 2 S. & D. 116]. The Wheeler-Lea amendment,<sup>3</sup> however, effectively broadened the scope of the Commission's powers. Not only unfair methods of competition in commerce were restrainable, but section 5 was expanded to embrace unfair and deceptive practices in commerce as well. It has generally been agreed that the purpose of the amendment was to eliminate the necessity of proving competition. All the Commission need show now is that there is an act or practice in commerce inimical to the public interest. *Perloff v. Federal Trade Comm.*, 150 F. (2d) 757, 759 (C. A. 3, 1945) [40 F. T. C. 878; 4 S. & D. 316]; *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. (2d) 103, 105 (C. A. 7, 1946) [42 F. T. C. 882; 4 S. & D. 455]<sup>4</sup> Hence, the fact that petitioners are not unfair toward other manufacturers of lottery devices does not preclude the Commission from assuming jurisdiction.

The exact issue with which we are faced has been raised on petition for review in only one prior case. In *Charles A. Brewer & Sons. v. Federal Trade Comm.*, 158 F. (2d) 74 (C. A. 6, 1946) [43 F. T. C. 1182; 4 S. & D. 588], the Court of Appeals for the Sixth Circuit affirmed an identical cease and desist order.<sup>5</sup> The fact situation in the Brewer case is, in all material respects, the same as that in the case at bar. That court concluded that the petitioners there had aided, abetted, and induced manufacturers and wholesale and retail dealers in merchandise to use unfair or deceptive acts or practices and unfair methods of competition. In so doing, the court found that petitioners

<sup>3</sup> Act of March 21, 1938. c. 49, § 3. 52 Stat. 111. 15 U. S. C. A. § 45 (a).

<sup>4</sup> Of course, the courts must be the final arbiter of what trade practices are to be deemed unfair, even though the determination of the Commission is entitled to considerable weight. *Federal Trade Comm. v. Keppel & Bro.*, 291 U. S. 304 (1934) [18 F. T. C. 684; 2 S. & D. 259].

<sup>5</sup> Compare the facts in *Modernistic Candies v. Federal Trade Comm.*, 145 F. (2d) 454 (C. A. 7, 1944) [39 F. T. C. 709; 4 S. & D. 288], where an order of the Commission was affirmed.

themselves had committed unfair practices. We think the decision in the Brewer case is a sound one and in harmony with the congressional intent behind the Wheeler-Lea amendment.

The opinion in the Brewer case relies in part on the common law rule of unfair competition that one who furnishes another with the means of consummating a fraud is himself a wrongdoer. See *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed. 720 (C. A. 6, 1912); see also *Federal Trade Comm. v. Winsted Co.*, 258 U. S. 483 (1922) [4 F. T. C. 610; 1 S. & D. 198]. We agree that the above-stated rule can be applied as an apt analogy here.

Petitioners argue that the Brewer case was wrongly decided and is contrary to the [447] decision of this court in *Scientific Mfg. Co. v. Federal Trade Comm.*, 124 F. (2d) 640 (C. A. 3, 1941) [34 F. T. C. 1793; 3 S. & D. 430]. A careful study of these two cases, however, has convinced us that they are not contradictory. The Scientific Mfg. Co., which was in fact the *alter ego* of one Force, was engaged in the publication and sale of pamphlets. Force, a chemist and pharmacist, held unorthodox beliefs about the dangers inherent in the use of aluminum cooking utensils. In fact, he attributed to the use of aluminum utensils practically all the ills which beset mankind. These ideas he incorporated into pamphlets which were sold in interstate commerce. While the pamphlets were sold generally to the public, certain manufacturers and distributors of nonaluminum cooking utensils displayed an especial interest in Force's theories. About 20 percent of these pamphlets came into the hands of these manufacturers and distributors who made use of the pamphlets to stimulate sales of their products. The Commission found that the representations made in the pamphlets were false, misleading, and disparaging, and that through their sale Force was supplying an instrumentality by means of which uninformed and unscrupulous manufacturers and distributors were able to deceive members of the public, thereby inducing them to purchase nonaluminum utensils. The Commission concluded that the sale of Force's pamphlets constituted unfair and deceptive acts and practices in commerce, and a cease and desist order was issued. Upon petition for review, this court set aside the order of the Commission, holding such order to be beyond the powers granted it under the act.

We think the Scientific case is readily distinguishable from the Brewer case. In fact, the two cases illustrate very clearly some of the bounds of the Commission's power. In the former case Force was in the business of disseminating ideas. His ideas, while unorthodox and no doubt false, were sincerely held by him. He did not intend that his pamphlets be used to sell cooking utensils or any other product. The function of his pamphlets was merely to disseminate his opinions—not to sell merchandise. The use of the pamphlet for

the sale of merchandise was a clear perversion of its primary function. In the instant case, however, petitioners' punchboards and push cards were designed for the specific purpose of selling merchandise by lottery. This is their sole function. The Commission's finding on this point is as follows: "*The only use to be made of said push card and punchboard devices and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove described.*" (Emphasis supplied.)

Petitioners press upon us the contention that even if they did violate section 5 of the Federal Trade Commission Act, the order issued by the Commission is too broad. They assert that the order should be modified so as to delete the words "and may be used." Petitioners are concerned that, should this order be affirmed without modification, even the dealer who sold paper to them might be subject to a cease and desist order of the Commission. There is, of course, no basis for petitioners' concern. The paper distributors who supply petitioners do not furnish a product specifically designed for the purpose of selling merchandise by gambling. The primary function of paper is hardly that of incorporation into lottery devices. But petitioners have fabricated from these raw materials a specialized product the primary function of which is the sale of goods by lottery.

In proceedings against manufacturers and distributors of candy by lottery methods, several courts have narrowed orders of the Commission in a fashion somewhat similar to that urged by petitioners. See *Sweets Co. of America v. Federal Trade Comm.*, 109 F. (2d) 296 (C. A. 2, 1940) [30 F. T. C. 1625; 3 S. & D. 180]; *Helen Ardelle, Inc. v. Federal Trade Comm.*, 101 F. (2d) 718 (C. A. 9, 1939) [28 F. T. C. 1894; 38 S. & D. 59]. Other courts have refused to modify orders of the Commission. *Hill v. Federal Trade Comm.*, 124 F. (2d) 104 (C. A. 5, 1941) [34 F. T. C. 1800; 3 S. & D. 436]; *Ostler Candy Co. v. Federal Trade Comm.*, 106 F. (2d) 962 (C. A. 10, 1939) [29 F. T. C. 1584; 3 S. & D. 139], cert. denied 309 U. S. 675. A careful study of those cases reveals, however, that the only disagreement is one of semantics. The courts which modified the language of the Com[448]mission were concerned lest the words "or may be used" would be construed to prevent manufacturers from selling candy which any person might thereafter sell by means of a lottery, even though such sale was not designed or intended by the manufacturers. We do not so interpret the order of the Commission. We construe it to prohibit only the distribution in interstate commerce of any push card, punchboard or other device which is designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods.

The order of the Commission will be affirmed.

WALTER W. GRAMER v. FEDERAL TRADE COMMISSION 1731

JOSEPH AND SADIE ROSENBLUM DOING BUSINESS AS  
MODERN MANNER CLOTHES v. FEDERAL TRADE COM-  
MISSION<sup>1</sup>

No. 13, Docket 21959—F. T. C. Docket 5263

(Court of Appeals, Second Circuit. Nov. 29, 1951)

Decision per curiam, affirming order of the Commission dated December 19, 1950, 47 F. T. C. 712, which prohibited use of the word "free" in connection with advertising for agents to sell merchandise to the public.

On appeal from cease and desist order of the Commission, order affirmed.

*Mr. Copal Mintz, New York City*, for petitioners.

*Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, and *Mr. Alan B. Hobbes*, all of Washington, D. C., for the Federal Trade Commission.

Before AUGUSTUS N. HAND, CHASE and CLARK, *Circuit Judges*.

PER CURIAM:

Affirmed on authority of *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 58 S. Ct. 113, 82 L. Ed. 141 [25 F. T. C. 1715; 2 S. & D. 429]; *Progress Tailoring Co. v. Federal Trade Commission*, 7 Cir., 153 F. (2d) 103 [42 F. T. C. 882; 4 S. & D. 455]; and *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 2d Cir., 143 F. (2d) 676 [39 F. T. C. 657; 4 S. & D. 226].

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WALTER W. GRAMER v. FEDERAL TRADE COMMISSION<sup>2</sup>

No. 13073—F. T. C. Docket 5746

(Court of Appeals, Ninth Circuit. Dec. 31, 1951)

Dismissal, for lack of prosecution, of petition for review of the Commission's order of June 21, 1951, 47 F. T. C. 1421, which required respondent individual, in connection with the offer etc., of his medicinal preparation "Sulgly-Minol", to cease and desist from disseminating any advertisement, etc., which represents, directly or indirectly, that said preparation is a cure, remedy or competent treatment for athlete's foot, for any type of arthritis, including pain, stiffness and soreness thereof, or for boils or acne.

*Todd, Hokanson & White* and *Mr. Richard S. White*, of Seattle, Wash., for petitioners.

*Mr. W. T. Kelley*, General Counsel, *Mr. Jas. W. Cassedy*, Assist-

<sup>1</sup> Reported in 192 F. (2d) 392. For case before Commission see 47 F. T. C. 712.

<sup>2</sup> Not reported in Federal Reporter. For case before Commission, see 47 F. T. C. 1421.



ant General Counsel and *Mr. Jno. W. Carter, Jr.*, Attorney, all of Washington, D. C., for Federal Trade Commission.

ORDER DISMISSING PETITION TO REVIEW

Upon petition to review and set aside an order of the Federal Trade Commission.

This cause came on to be heard on the transcript of record on petition of Walter W. Gramer to review and set aside an order of the Federal Trade Commission, and on the suggestion of the clerk of this court of the default of the petitioner in failing to prosecute petition as required by Rule 19 of the Rules of this Court, and petitioner not responding to the notice that his default would be called to the attention of this Court.

*It is ordered*, That the petition to review and set aside the order of the Federal Trade Commission of June 21, 1951 be, and hereby is, dismissed for failure of petitioner to prosecute such petition.

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JACOB COLON ET AL. DOING BUSINESS AS E. & J. DISTRIBUTING CO.<sup>1</sup> v. FEDERAL TRADE COMMISSION

No. 10, Docket 21723—F. T. C. Docket 5368

(Court of Appeals, Second Circuit. Jan. 3, 1952)

Affirmance per curiam, of Commission's order of May 15, 1950, 46 F. T. C. 808, requiring petitioners to cease and desist from selling or distributing merchandise in commerce by means of a game of chance, gift enterprise, or lottery scheme; and from shipping, mailing, transporting to, or supplying others with pull cards or other devices which are, or may be, used for that purpose.

On petition to review order of Commission, order affirmed.

*Mr. Arthur D. Herrick*, of New York City, for petitioners.

*Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassidy*, Assistant General Counsel, and *Mr. John W. Carter, Jr.*, Attorney, all of Washington, D. C., for Federal Trade Commission.

Before CHASE, CLARK and FRANK, *Circuit Judges*.

PER CURIAM:

The findings are shown by the record to have been supported by substantial evidence and the order is affirmed on the authority of *Wolf v. Federal Trade Commission*, 7 Cir., 135 F. (2d) 564 [36 F. T. C. 1135; 3 S. & D. 564].

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<sup>1</sup> Reported in 193 F. (2d) 179. For case before the Commission, see 46 F. T. C. 808.

AUTOMATIC CANTEEN CO. OF AMERICA v. FEDERAL  
TRADE COMMISSION<sup>1</sup>

No. 10239—F. T. C. Docket 4933

(Court of Appeals, Seventh Circuit. Jan. 18, 1952)

PROCEEDINGS BEFORE COMMISSION—PARTIES—LESSEES IN EXCLUSIVE DEALING  
CONTRACTS

Where leases of automatic vending machines provided that lessor could terminate contract on default by lessee of any condition therein, and provided that on termination of lease lessee should not engage in distribution of any merchandise in territory by means of vending machines for period of 5 years, lessees were not indispensable or even necessary parties to proceedings before Federal Trade Commission involving alleged violations by lessor of the Clayton Act.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DEALING ON EXCLUSIVE AND TYING BASIS—EXCLUSIVE AND TYING LEASES—IF COMPETITION RESTRAINED—WHETHER LESSOR'S RIGHTS INFRINGED

Where leases of automatic vending machines provided for exclusive use of lessor's canteens, provided for exclusive purchase of canteen merchandise from lessor and on termination of lease lessee was prohibited from distribution of any merchandise in territory by means of vending machines for period of 5 years, and as result thereof competitive jobbers and wholesalers could not sell to lessees who operated over 200,000 of lessor's vending machines and manufacturers who did not sell to lessor were also shut out of competition, that constituted a substantial interference with competition and cease and desist order of Federal Trade Commission forbidding enforcement of exclusive dealing contracts did not constitute interference with lessor's rights in view of ample safeguards for protection of petitioner's good will and right to compensation for use of its machines.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—IF PRICE DIFFERENTIAL TENDING TO LESSEN COMPETITION, ETC., ESTABLISHED—JUSTIFICATION—BURDEN OF

In a proceeding under the Clayton Act, once the Federal Trade Commission has established the fact of a price differential in the sale of like products in commerce tending to lessen competition or create a monopoly, burden rests on seller of such products to justify discrimination by means provided in the act.

STATUTORY JUSTIFICATIONS OR EXEMPTIONS—BURDEN OF PROOF

Burden of proving justification or exemption under a special exemption to prohibitions of a statute generally rest on one who claims its benefits.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—KNOWINGLY INDUCING OR RECEIVING—IF KNOWING INDUCEMENT OR RECEIPT ESTABLISHED—COST JUSTIFICATION—WHETHER PROOF OF LACK OF REQUIRED

Clayton Act provision that it shall be unlawful for any person "engaged in commerce, in course of such commerce, knowingly to induce or receive a

<sup>1</sup> Petition for rehearing and motion to adduce additional evidence denied March 3, 1952. Reported in 194 F. (2d) 433. For case before Commission, see 46 F. T. C. 861.

discrimination in price which is prohibited" by the act makes it unlawful for a buyer to know[434]ingly induce or receive any discrimination prohibited by the act and places precisely the same burden of proving cost justification on buyer, once the Commission establishes knowing inducement or receipt of price discrimination otherwise illegal, as is placed on a seller by another section, and therefore for Commission to prove its charges against a buyer it was not required to prove absence of cost justification.

APPELLATE PROCEDURE AND PROCEEDINGS—PRICE DISCRIMINATION—COST JUSTIFICATION AND BURDEN OF PROOF—VALIDITY AND DUE PROCESS—IF PETITIONER'S ONLY ANSWER, BEFORE COMMISSION, GENERAL DENIAL, AND, AFTER COMMISSION'S CASE, MOTION TO DISMISS

Where petitioner's only answer to charge by Federal Trade Commission of violations of Clayton Act relating to receipt of price discriminations was of general denial and, at close of Commission's case, a motion to dismiss, petitioner laid no foundation for its assertion before Court of Appeals that cost justification was impossible of proof and that a construction of Clayton Act requiring a buyer to sustain burden of proof of cost justification would be a violation of due process, and when petitioner chose not to produce any evidence it could not say that defense allowed by the Clayton Act was useless or impossible of proof.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—KNOWINGLY INDUCING OR RECEIVING—COST JUSTIFICATION AND BURDEN OF PROOF—DUE PROCESS

It is not unreasonable or arbitrary to expect a buyer who induces or knows that he is receiving prices substantially lower than his competitors to make some good faith effort to ascertain that such lower prices are justified by lower costs in sales to him and it cannot be assumed that Federal Trade Commission will be so arbitrary or unreasonable as to quantum of proof required of buyer in a proceeding under Clayton Act provision that it shall be unlawful for any such person engaged in commerce, in course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited, as to deprive him of due process.

METHODS, ACTS AND PRACTICES—DISCRIMINATING IN PRICE—KNOWINGLY INDUCING OR RECEIVING—ESTABLISHMENT OF—IF PROSPECTIVE SUPPLIERS INFORMED OF ACCEPTABLE PRICES AND TERMS WITHOUT CONSIDERATION OF COSTS, ETC.

Findings of Federal Trade Commission in proceeding against lessor of automatic vending machines for violation of Clayton Act provisions prohibiting receiving of price discriminations not based on cost justification, that lessor informed prospective buyers of prices and terms which would be acceptable to it without consideration of costs and that it knew that many of prices paid by competitors were higher than those it sought to induce and did receive in so far as that meant knowledge of net prices actually paid by competitors, were supported by substantial evidence.

APPELLATE PROCEDURE AND PROCEEDINGS—PETITIONS FOR REVIEW AND CROSS-PETITIONS FOR ENFORCEMENT

Court of Appeals has jurisdiction and duty to order enforcement of order of Federal Trade Commission on cross-petition of Commission filed in a proceeding by party who seeks review of an order of the Commission.

## PROCEEDINGS BEFORE COMMISSION—EVIDENCE—WHETHER PETITIONER ENTITLED TO LEAVE TO ADDUCE ADDITIONAL, AFTER ADVERSE DECISION—PRICE DISCRIMINATION—COST JUSTIFICATION—BURDEN OF PROOF—IF NO EVIDENCE INTRODUCED ON THEORY BURDEN OF SHOWING ABSENCE OF, ON COMMISSION

Where petitioner tried his case before Federal Trade Commission on theory that Commission had burden of proving absence of cost justification in receipt of price discriminations and contended that Commission failed to sustain that burden and for that reason petitioner refrained from introducing any evidence in defense, after an adverse decision and review of all issues raised on record, petitioner was not entitled to leave to adduce additional evidence before Commission for purpose of showing that if Robinson-Patman Act requires buyer to prove its seller's cost justification, statute imposes so heavy a burden on it as to amount to deprivation of due process.

(The syllabus with substituted captions, is taken from 194 F. (2d) 433)

On petition for review of an order of Commission, order affirmed and enforced.

*Mr. Harold F. Baker, Mr. L. A. Gravelle, Mr. Edward Howrey*, of Washington, D. C., and *Mr. J. Arthur Friedlund, Mr. Emil N. Levin*, and *Mr. Elmer M. Leesman*, of Chicago, Ill., for petitioner.

*Mr. William T. Kelley*, Chief Counsel, *Mr. James W. Cassedy*, Asst. Gen. Counsel, and *Mr. James E. Corkey*, Sp. Atty., Federal Trade Commission, all of Washington, D. C., for respondent.

*Mr. John C. Butler*, of Chicago, Ill., *Mr. H. Thomas Austern*, *Mr. Stanley L. Temko*, and *Mr. William A. Quinlan*, of Washington, D. C., *Mr. Thomas R. Mulroy*, of Chicago, Ill. (*Mr. Richard F. Wilkins*, of Washington, D. C., *Hopkins, Sutter, Halls, DeWolfe & Owen*, of Chicago, Ill., of counsel), for *amici curiae*.

Before KERNER, DUFFY, and LINDLEY, *Circuit Judges*.

KERNER, *Circuit Judge*:

Petitioner is engaged in the twofold business of developing and leasing automatic vending machines and in the purchase of candy, gum, nuts and other confectionery products for resale to its distributors who in turn distribute them to the public by means of the vending machines. It seeks review of an order of the Federal Trade Commission directing it to cease and desist from certain discriminatory practices related to both aspects of its business. The Federal Trade Commission, by cross petition, seeks affirmance and enforcement of the order.

The complaint was in two counts. Count I charged violation of section 3 of the Clayton Act, 15 U. S. C., section 14, by the use of exclusive-dealing contracts in the leasing of the vending machines. Count II charged violation of section 2 (f) of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C., section 13 (f), by knowingly inducing and knowingly receiving price discriminations in connection with its purchases of gum, nuts and confectionery prod-

ucts in the course of commerce. Petitioner's only answer was a general denial of any violation of the Act as charged in either count. At the close of the Commission's case it moved to dismiss the complaint and, upon denial of its motion, it offered no evidence in response.

The Commission found that petitioner had been for nearly 20 years engaged in purchasing nationally known candy and other products of standard weight and quality from many manufacturers and producers throughout the country and in reselling them, principally as a wholesaler, to lessees of its automatic, coin-operated vending machines. It had also been engaged in the development of such machines, called canteens, although it did not manufacture them. Its system was to lease the machines to "distributors" who became its sole customers for the confectionery products in which it dealt. The machines were generally located in offices, factories, and other commercial establishments. As of January 1946, it owned 230,150 machines which were leased to 83 distributors located in 112 separate territories in 33 states and the District of Columbia. Under the terms of the lease contracts the distributors bound themselves not to use any vending machines other than those of petitioner during the term of the contract and for 5 years after termination, not to sell in the machines any products other than those purchased from petitioner, and not to sell any such products except in the machines.

The Commission found that the effect of petitioner's exclusive-dealing contracts had been to substantially lessen competition or tend to create a monopoly in both lines of commerce in which it was engaged, namely, the sale and purchase of packaged merchandise suitable for distribution in automatic vending machines, and the dealing in the machines. Thus competition was substantially lessened between petitioner's suppliers and their competitors who were unable to sell to petitioner, between petitioner and its competitors, and between its distributors and their competitors, and this, in turn, tended to create a monopoly in petitioner, its distributors, and certain manufacturers and processors. The contracts had a similar effect as between petitioner and vending machine manufacturers.

The Commission found that petitioner had knowingly induced and knowingly received lower prices from its suppliers than the prices paid by its competitors for [436] similar products; that the prices paid by petitioner were from 1.2 percent to 33 percent lower than those paid by its competitors; and that it received such differentials from about 80 of its 115 suppliers. Petitioner made no attempt to show cost justification as to any of these differentials. The Commission further found that petitioner had attained a dominant position in the sale and distribution of the products it dealt in through and by means of the vending machines, with sales through the ma-

chines expanding from \$1,937,117 in 1936 to \$14,253,547 in 1944, which expansion the Commission attributed largely to its exclusive-dealing contracts and its reception of lower prices in the purchase of its goods.

The Commission concluded that petitioner was guilty of the violation charged and accordingly entered its order that petitioner cease and desist:

1. From entering into, enforcing or continuing in operation the exclusive-dealing contracts described, "Provided, however, that nothing contained in the preceding paragraphs \* \* \* shall be construed as prohibiting respondent from entering into any contract \* \* \* with any lessee \* \* \* which provides for payment to the respondent of such compensation as it may desire for the use of its automatic vending machines, \* \* \* for protection of quality and salability of products sold through its said vending machines, or provides for protection of respondent's franchise territories and distribution, of its good will and trade name, of its rental and additional income, of the development and retention of its business in its distributors' territory, and of the public, when none of such provisions are in conflict with the prohibitions set forth herein."

2. In connection with the purchase of confectionery products, gum, and nuts, "From knowingly inducing or knowingly receiving \* \* \* any discrimination in the price of such products, by directly or indirectly inducing [or] receiving \* \* \* a net price from any seller known by respondent or its representatives to be below the net price at which said products of like grade and quality are being sold by such seller to other customers, where the seller is competing with any other seller for respondent's business, or where respondent is competing with other customers of the seller; provided, however, that the foregoing shall not be construed to preclude the respondent from defending any alleged violation of this order by showing that a lower net price received or accepted from any seller makes only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are by such seller sold or delivered to respondent."

Petitioner challenges the order as to count I on the grounds: That it is defective for failure to join petitioner's lessees as parties, thus destroying valuable contractual rights in their absence; and that the condition that the lessees use only petitioner's merchandise in the canteens is a lawful one.

Petitioner analyzes the offending contracts as providing for (1) nominal rental, (2) exclusive territory for distributors, (3) exclusive use of petitioner's canteens, and (4) exclusive purchases of merchandise from petitioner for use in the canteens, and it contends that destruction of (3) and (4) destroys the mutuality of the contracts,

thereby destroying the contracts and thus stripping the lessees of valuable contract rights and injuriously affecting them in their absence. On this point petitioner relies on two decisions of this court, *Fruit Growers' Express Inc. v. Federal Trade Commission*, 274 Fed. 205 [3 F. T. C. 628; 1 S. & D. 134] (certiorari granted, 257 U. S. 627, and dismissed by stipulation on motion of the Solicitor General, 261 U. S. 629), and *Sinclair Refining Co. v. Federal Trade Commission* [4 F. T. C. 552; 1 S. & D. 145], 276 Fed. 686, affirmed, 261 U. S. 463 [6 F. T. C. 587; 1 S. & D. 306]. While the cases do appear to furnish authority for petitioner's contention on this point, we do not feel impelled to follow them in view of the difference in the factors which appear to have impressed this court in annulling the orders there involved. Moreover, we note that Petitioner's analysis omits reference to other important provisions of the contract which favor the [437] lessor, namely, the guarantee by the lessee of an average monthly sales volume comparable to the national average sales volume for the same month, and the right of lessor to terminate the contract upon default by the lessee in any condition therein, and a covenant that, upon termination of the lease, the lessee shall not engage in the distribution of any merchandise in the territory by means of vending machines for a period of 5 years. Under the rule in *United Shoe Machinery Corp. v. U. S.*, 258 U. S. 451, 456, the lessees were not indispensable or even necessary parties to the proceedings. "The covenants enjoined were inserted for the benefit of the lessor, and were of such restrictive character that no right of the lessee could be injuriously affected by the injunction." Petitioner seeks to distinguish this case on the basis of the total absence of any mutuality of consideration. We find no merit in this attempted distinction. And we note that this case was decided after the two decisions of this court, hence not available to it on the question of parties.

With respect to the asserted legality of the condition, petitioner again refers to the *Sinclair* case as affirmed, 261 U. S. 463. However, we think the distinction between the elements of the contract considered controlling by the Supreme Court there (see 261 U. S. 463 at 474) and those of the contract here involved, including those omitted by petitioner, make it better authority for upholding the order than for setting it aside. See also *Standard Oil Co. v. United States*, 337 U. S. 293; *International Salt Co. v. United States*, 332 U. S. 392. And there certainly can be no question on this record but that the actual effect of the conditions was to foreclose competitors from a substantial share of the market as to both lines of petitioner's business. As the Commission pointed out, with respect to the products distributed, competitive jobbers and wholesalers cannot sell to these lessees who operate over 200,000 of petitioner's vending machines, and manufac-

turers who do not sell to petitioner but might sell to its lessees are also shut out of the competition with petitioner. This constitutes a very substantial interference with competition. Moreover, we are convinced that this portion of the order does not constitute an interference with petitioner's rights in view of the fact that its provisos furnish ample safeguard for the protection of petitioner's goodwill and right to compensation.

We are informed by counsel that the petition to review the count II portion of the order presents the first court test of a buyer's liability under section 2 (f) of the act, although there have been numerous proceedings thereunder before the Commission. The principal question raised relates to the burden of proof. Petitioner contends that the Robinson-Patman Act which permits price differentials based on cost differences does not require a buyer to prove his seller's cost justification, and if it be construed to do so, such construction imposes so heavy a burden on the buyer as to amount to a deprivation of due process as well as eliminating cost justification from the act.

For a proper understanding of the issues it is necessary to read subsections (a), (b), and (f) of section 2 together.

Section 2 (a) makes it unlawful for any person engaged in commerce, in the course of such commerce, to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition, provided that nothing contained therein shall prevent differentials which make only due allowance for differences in cost of manufacture, sale or delivery resulting from differing methods or quantities in sale or delivery.

Section 2 (b) provides that upon proof of a discrimination the burden of rebutting the prima facie case thus made by showing justification "shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing contained in sections 12, 13 \* \* \* of the title shall prevent a seller rebutting the [438] prima facie case thus made by showing that his lower price \* \* \* to any purchaser \* \* \* was made in good faith to meet an equally low price of a competitor \* \* \*."

Section 2 (f) provides that it shall be unlawful for any person "engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

We find no basis in the language of the three subsections for a distinction in their scope as between buyers and sellers. It has now been established that in a proceeding under the act, once the Commis-



sion has established the fact of a price differential in the sale of like products in commerce tending to lessen competition or create a monopoly, the burden rests upon the seller of such products to justify the discrimination by the means provided in subsection (a) or (b). In other words, section 2 (a) prohibits the discriminations unless they can be justified, and, as the Court pointed out in *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 44 [44 F. T. C. 1499; 4 S. & D. 716] "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof under the proviso of section 2 (a)." Petitioner concedes, as it must, that "in a proceeding against a seller under section 2 (a), the seller has the burden of proof to show that he comes within the proviso." But section 2 (f) makes it equally unlawful for a buyer to knowingly induce or receive any discrimination prohibited by the section, and we see no escape from the conclusion that this places precisely the same burden of proving cost justification upon the buyer, once the Commission establishes *knowing* inducement or receipt of a price discrimination otherwise illegal. "The two sections are in all respects parallel. \* \* \* The discrimination in price which it is unlawful for a seller to grant under section 2 (a) is the same discrimination in price which it is unlawful for a buyer knowingly to receive under section 2 (f) \* \* \*." Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act*, American Law Institute (1950), pages 150, 151.

This construction of the section is further borne out by the language of subsection (b) imposing the burden of rebutting the prima facie case by showing justification, not upon the *seller*, but upon the *person charged with violation of the section*, although it further provides that the *seller* may rebut by showing that the lower price was made in good faith to meet a competitive low price. Petitioner cannot say that this apparently careful choice of language was meaningless, as it would be under its theory. Hence we cannot agree that in order to sustain its charges under Section 2 (f) the Commission was required to prove the absence of cost justification.

Petitioner further contends that such a construction of the section constitutes a denial of due process by imposing an impossible burden of proof upon it. However, we think that defense is not available to petitioner on the record in this case. Its only answer to the charge was a general denial and, at the close of the Commission's case, a motion to dismiss. It thus laid no foundation for its assertion before this court that cost justification was impossible of proof by a buyer and that a construction of Section 2 (f) requiring a buyer to sustain the burden of such proof would be a violation of due process. It is not enough just to assert that proof is not available, or is impossible.

*Tennessee Consolidated Coal Co. v. Comm.*, 117 F. (2d) 452. As the Court said in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 352, 353, "Impossibility of proof may not be assumed. \* \* \* Whether or not any such impossibility of determination will exist is a question which properly should await the ascertainment of the facts." And when petitioner chose not to introduce any evidence as to the facts it may not now say that the defense allowed by the act is useless or impossible of proof [439]. It is no doubt true that it is more difficult for a buyer to establish his seller's cost justification than it is for the seller from whom he bought. But we cannot say that it is unreasonable or arbitrary to except a buyer who induces or knows that he is receiving prices substantially lower than his competitors to make some good faith effort to ascertain that such lower prices are justified by lower costs in the sales to him. Nor can we assume that the Commission will be so arbitrary or unreasonable as to the quantum of proof required of the buyer in a proceeding under Section 2 (f) as to deprive him of due process.

Petitioner also contends that two findings of the Commission are not supported by substantial evidence: (1) That it informed prospective suppliers of the prices and terms which would be acceptable to it without consideration of costs; and (2) that it knew that many of the prices paid by competitors were higher than those it sought to induce and did receive in so far as that meant knowledge of *net* prices actually paid by competitors. We have examined the record and find that it supports both findings.

One further question remains, raised by petitioner for the first time in its reply brief, whether the Commission is entitled to an enforcement order on cross petition to petitioner's petition to review, in the absence of a showing that violation of the order has occurred or is imminent. The Court of Appeals for the Second Circuit recently decided this question adversely to the Commission. *Ruberoid Co. v. Federal Trade Commission*, 191 F. (2d) 294 [48 F. T. C. 1699]. We regret that we cannot agree with the reasoning and conclusion of that eminent court in denying enforcement. We are in accord with the conclusion of Judge Clark, dissenting, and the reasons stated by him, that the court of appeals does have the jurisdiction and the duty to order enforcement on the cross petition of the Commission. We deem it unnecessary to restate or amplify those reasons.

Order affirmed; enforcement granted.

ON PETITION FOR REHEARING AND MOTION FOR LEAVE TO ADDUCE  
ADDITIONAL EVIDENCE

After the entry of our decision affirming the order of the Federal Trade Commission and granting its cross petition to enforce, petitioner

filed petition for rehearing and a motion for leave to adduce additional evidence under section 11 of the Clayton Act, 15 U. S. C. A., section 21.

Section 11 authorizes the court to order such additional evidence to be taken before the Commission if the movant "shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission."

The evidence petitioner now seeks to add to the record is intended to show that if the Robinson-Patman Act requires a buyer to prove its seller's cost justification, the statute imposes so heavy a burden on it as to amount to a deprivation of due process because such proof is not available or is impossible.

As grounds for its motion petitioner asserts that (1) the evidence is material in that this court held that the defense of lack of due process was not available to petitioner because it failed to come forward with evidence pertaining thereto; and (2) that there were reasonable grounds for failure to adduce it because it proceeded on the theory that there was no rational connection between the proven fact of receipt of price differentials and the presumption that (a) such differentials were unlawful and (b) petitioner knew this fact.

We find no merit in petitioner's motion. It tried its case before the Commission on the theory that the Commission had the burden of proving absence of cost justification, and it contended that the Commission failed to sustain that burden, hence that it failed to prove its case, and for that reason petitioner simply refrained from introducing any evidence in defense. What it is now asking for is, in effect, to have the entire proceeding reopened in order to enable it to have a new hearing on a new theory of defense after it has had an adverse [440] decision as to the theory originally relied upon in full and fair hearing before the Commission, and review of all issues raised on the record as made in that hearing. We think section 11 was not intended for any such purpose. This was not the "mere omission of some step, which has escaped the attention of both parties" referred to in *Kelly v. U. S.*, 300 U. S. 50, 54, cited by petitioner. There is considerable difference between the failure to authenticate a record, the situation in that case, and the failure to offer any evidence, relying upon a theory of defense subsequently held to be without merit. We find no such "reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission" as would justify the granting of the motion.

With respect to the petition for rehearing, we find that it presents no questions which were not fully considered by us in our original review of the petition and cross petition.

Petition for rehearing and motion to adduce additional evidence denied.

HAMILTON MANUFACTURING CO. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

Docket No. 10833—F. T. C. Docket 3944

(Court of Appeals, District of Columbia Circuit. Jan. 24, 1952)

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—AIDING AND ABETTING UNFAIR  
OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICE SELLING—SELLING, ETC.  
WHICH ARE TO BE USED “OR MAY BE USED” ETC.—WHETHER TOO BROAD

On petition to review order of Federal Trade Commission directing petitioner to cease and desist from selling or distributing in commerce push cards, punchboards, or other lottery devices which are to be used or may be used in sale or distribution of merchandise to public by means of a game of chance, gift enterprise or lottery scheme, court would modify order in accordance with admittedly clear and accurate statement as to intended meaning of order rather than construe the ambiguous phrase, “may be used”.

(The syllabus, with substituted captions, is taken from 194 F. (2d)  
346)

On petition to review order of Commission, order modified and affirmed.

*Mr. J. Bond Smith* and *Mr. Warren W. Grimes*, of Washington, D. C., for petitioner.

*Mr. Donovan Divet*, Special Attorney, with whom *Mr. William T. Kelley*, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, and *Mr. Alan B. Hobbes*, Attorney, Federal Trade Commission, all of Washington, D. C., were on the brief, for respondent.

Before CLARK, PRETTYMAN, and PROCTOR, *Circuit Judges*.

PRETTYMAN, *Circuit Judge*:

This is a petition to review an order of the Federal Trade Commission issued under authority of section 5 of the Federal Trade Commission Act.<sup>2</sup>

Petitioner company manufactures and sells in interstate commerce punchboards and push cards. Some of these articles are designed in such fashion as to indicate their intended use in the sale of merchandise. Others are not so designed.

The order of the Commission directed the company to cease and desist from “selling or distributing in commerce, as ‘commerce’ is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices, which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.”

The objection of the company goes to the phrase “or may be used”.

<sup>1</sup> Reported in 194 F. (2d) 346. For case before Commission see 47 F. T. C. 116.

<sup>2</sup> 38 Stat. 719 (1914), as amended, 15 U. S. C. A. § 45.

It insists that the clause in which that phrase appears should read "which are specially designed and intended to be used in the sale or distribution of merchandise", etc.

In its brief the Commission says, among other things: "It is possible to construe the words 'may be' as expressing either possibility or probability. The phrase is to be construed with reference to the situation \* \* \* To construe the words 'may be used' as employed in this order as meaning any device which can possibly be used as a lottery or game of chance would render the order absurd and ridiculous and contrary to the public interest \* \* \* When the phrase 'may be used' is applied to gambling devices, it means not any device which may possibly be used for gambling, but devices which stimulate the gambling instinct and are normally and commonly used for gambling \* \* \* The Commission's order applies only to 'other lottery devices' which are of such a nature as to incite the gambling instinct and are normally and commonly used in the sale or distribution of merchandise to the purchasing public by means of a game of chance, gift enterprise, or lottery scheme."

The United States Court of Appeals for the Third Circuit had before it in *Globe Cardboard Novelty Company, Inc., et al. v. Federal Trade Commission*, 192 F. (2d) 444 [48 F. T. C. 1725], the opinion in which case was filed November 16, 1951, an order similar to the one now before us. That court declined to modify the order but limited its meaning by construction, saying, "We construe it to prohibit only the distribution in interstate commerce of any push card, punchboard or other device which is designed to serve as an instrumentality for the sale of articles of merchandise by lottery methods." The Courts of Appeals for the Fifth and Tenth Circuits have followed the same course.<sup>3</sup> The Courts of Appeals for the First, Second, and Ninth Circuits have modified orders of the Commission somewhat along the lines now urged by the petitioner.<sup>4</sup>

Upon the oral argument counsel for the Commission declined to acquiesce affirmatively in a modification of the order, but he conceded, indeed asserted, that the intended scope of the order was accurately described by the amended phraseology suggested by the Company, except for the word "specially."

It seems to us to be better procedure, in that it will eliminate confusion and possible misunderstanding, to modify the order in [348]

<sup>3</sup> *Hill v. Federal Trade Commission*, 124 F. (2d) 104 (5th Cir. 1941) [34 F. T. C. 1800; 3 S. & D. 436]; *Ostler Candy Co. v. Federal Trade Commission*, 106 F. (2d) 962 (10th Cir. 1939) [29 F. T. C. 1584; 3 S. & D. 139], *cert. denied*, 309 U. S. 675, 84 L. Ed. 1020, 60 S. Ct. 712, 713 (1940).

<sup>4</sup> *Federal Trade Commission v. Charles N. Miller Co.*, 97 F. (2d) 563 (1st Cir. 1938) [27 F. T. C. 1678; 2 S. & D. 464]; *Sweets Co. of America v. Federal Trade Commission*, 109 F. (2d) 296 (2d Cir. 1940); *Helen Ardelle, Inc., v. Federal Trade Commission*, 101 F. (2d) 718 (9th Cir. 1939) [28 F. T. C. 1894; 3 S. & D. 59].

accordance with a clear statement of its intended meaning, rather than to construe an admittedly ambiguous phrase. Therefore, the order of the Commission will be modified so that the paragraph in question will require the company to cease and desist from "Selling or distributing in commerce as 'commerce' is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme." As thus modified the order will be affirmed.

Modified and affirmed.

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OREGON-WASHINGTON PLYWOOD COMPANY v. FEDERAL TRADE COMMISSION<sup>1</sup>

Nos. 12774, 12791-12793, 12798-12800, 12802, 12788-12790, 12797, 12801—F. T. C. Dockets 5528 and 5529

(Court of Appeals, Ninth Circuit. Jan. 24, 1952)

PROCEEDINGS BEFORE COMMISSION—PLEADING AND PRACTICE—ADMISSION ANSWERS—AS BRACKETING FACTS ADMITTED, ABSENT FURTHER EVIDENCE IN SUPPORT OF OTHER ALLEGATIONS, DENIED BY ANSWER; AND PRECLUDING FINDINGS CONTRA TO

Where complaint of Federal Trade Commission charged defendants with engaging jointly in acts hindering and restraining competition in interstate commerce in certain lumber products, and answer admitted that acts charged had occurred within certain specified period, but denied all other material allegations, when commission came forward with no evidence in support of other allegations of its complaint, it accepted admission answers as bracketing facts, and could not thereafter presume that activities charged continued beyond alleged termination date, and finding to such effect could not be sustained.

CEASE AND DESIST ORDERS—DISCONTINUANCE OF PRACTICE—EFFECT—CRITERIA

Discontinuance of practice which is illegal under Federal Trade Commission Act does not of itself render inappropriate the entry of cease and desist order by commission, but propriety of such order must depend on consideration of all surrounding facts and circumstances, including consideration whether activities charged have been discontinued, elements of time, volition, and general attitude of parties in respect to cessation.

CEASE AND DESIST ORDERS—DISCONTINUANCE OF PRACTICE—WHERE ACTS TERMINATED NEARLY SEVEN YEARS PRIOR TO COMMISSION COMPLAINT, AND RESUMPTION APPARENTLY UNLIKELY

Where parties who had engaged in acts hindering and restraining competition in interstate commerce in lumber products had terminated such prac-

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<sup>1</sup> Reported in 194 F. (2d) 48. For cases before Commission, see *Fir Door Institute, et al.*, 47 F. T. C. 395, and *Douglas Fir Plywood Assn. et al.*, 47 F. T. C. 416.

tices nearly seven years prior to complaint of Federal Trade Commission, in absence of circumstances suggesting likelihood that illegal acts would be resumed, order of commission directing such parties to cease and desist was improper.

FEDERAL TRADE COMMISSION—POWERS—CEASE AND DESIST ORDERS—AS BASED ON REASONED AND NOT ARBITRARY DISCRETION

The discretion residing in Federal Trade Commission in connection with cease and desist orders is reasoned and not arbitrary discretion.

(The syllabus, with substituted captions, is taken from 194 F. (2d) 48)

On petitions to review orders of Commission, orders set aside.

*Mr. George J. Perkins*, of Portland, Oreg., *Mr. E. N. Eisenhower*, *Mr. Chas. D. Hunter, Jr.*, *Mr. James V. Ramsdell*, *Mr. Henry C. Perkins*, all of Tacoma, Wash., *Skeel, McKelvy, Henke, Evenson & Uhlmann, McMicken, Rupp & Schweppe*, *Mr. Alfred J. Schweppe*, *Mr. M. A. Marquis*, *Mr. John N. Rupp*, all of Seattle, Wash., *Krause, Hirsch, Levin & Heilpern* and *Mr. Raymond T. Heilpern*, all of New York City, *Mr. J. E. Nolan*, of Tacoma, Wash., *Briggs, Gilbert, Morton, Kyle & Macartney* and *Mr. J. Neil Morton*, all of St. Paul, Minn., *Sabin & Marlarky*, *Mr. Robert L. Sabin*, and *Mr. Howard H. Campbell*, all of Portland, Oreg., and *Mr. Owen P. Hughes and Neal, Bonneville & Hughes*, all of Tacoma, Wash., for petitioners.

[49] *Mr. W. T. Kelly*, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, *Mr. Alan B. Hobbes*, Attorney, Federal Trade Commission, all of Washington, D. C., for respondent.

Before STEPHENS, HEALY, and BONE, *Circuit Judges*.

HEALY, *Circuit Judge*:

This matter is before us upon petitions to review and set aside cease and desist orders issued in proceedings by the Federal Trade Commission on complaints charging petitioners with engaging jointly in acts hindering and restraining competition in interstate commerce in certain lumber products, in violation of Section 5 of the Federal Trade Commission Act, 15 U. S. C. A. Section 45 (a). Before the Commission there were two groups, against whom separate complaints were lodged, one referred to as the "Plywood" group, the other as the "Door" group, the members of which operate in the State of Oregon or Washington or both. So far as material here the Commission complaints were the same in each case, and the answers interposed by the two groups were substantially identical.

The complaint as against the members of the Plywood group was initiated March 1, 1948, and was amended May 19, 1949. That, as against the Door group was issued February 26, 1948, and was amended August 8, 1949. Details of the complaints need not be gone into. They alleged in paragraph 7 thereof that the parties named had

jointly engaged in the unlawful activities charged "since prior to January 1936," in the *Plywood* case, and "since January 1938" in the *Door* case, down to the date of the complaint.

Shortly subsequent to the issuance of the amended complaints in 1949, the petitioners filed their answers. These recite that in order to expedite the proceeding and to prevent disorganization consequent upon litigation, etc., the petitioners, answering the amended complaint, "state that they admit all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned course of action alleged in paragraph 7 of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May 1935, to August 1, 1941, and not otherwise, and except to the extent of such admission, deny all of the material allegations of fact set forth in the complaint, and waive all intervening procedure and further hearing as to the said facts.

"Any and all admissions of fact made by respondents herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted." [The above is from the answer of the Plywood group. The verbiage is the same in the answer of the Door group save as to the period of time covered by the admitted violations. This is alleged to have been "from January 1, 1938, to November 29, 1941."]

No evidence was taken in the proceedings. On September 30, 1949, after the filing of the answers, the trial examiner entered an "order closing reception of evidence and all other proceedings before trial examiner." Thereafter briefs were filed and oral argument had before the Commission. In October 1950 the Commission made findings and entered the cease and desist orders in question.

The position of the petitioners is simply that no cease and desist order of any kind should have been entered against them in view of their uncoerced discontinuance of the illegal activities long prior to the initiation of the complaints. In each instance the period is in excess of 6 years. The Commission, on the other hand, declines to concede that the activities were discontinued. It relies on the rule that a conspiracy once shown to exist is presumed to continue



until its abandonment is shown, and it says that, in the absence of affirmative proof to the contrary, it is to be presumed that the petitioners have continued to pursue the objectionable practices they admit once having followed. Whether this is a valid argument in the state of the record is a matter we will consider in a moment.

The Commission did not in terms find that the unlawful combination or practices had persisted beyond the period admitted. To the contrary paragraph 7 of the findings, in conformity with the answers, states that the illegal activities existed, in the *Plywood* case, "during a substantial part of the period of time between May 1935, and August 1, 1941," and, in the *Door* case, that they persisted "during a substantial part of the period of time between January 1, 1938, and November 29, 1941." However, paragraph 9 of the findings in the *Plywood* case reads:

"The capacity, tendency and results of the aforesaid understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done thereunder and pursuant thereto, by the respondents, as hereinbefore set forth, have been *and now are*: (a) To interfere with and curtail" production, etc. [Emphasis supplied]

The cognate finding in the *Door* case, while differing somewhat in detail, is in substance the same.

In respect of the italicized phrase importing a presently operative interference with commerce, namely, the phrase "and now are," petitioners say that the finding has no support whatever in the record. Whether or not it has evidentiary support depends necessarily on the validity of the Commission's argument that the conspiracy among the petitioners is presumed to have continued.

Resolution of this question requires a consideration of the state of the pleadings, there having been nothing else in the way of evidentiary matter before the Commission. The procedure followed by that body of entering an order based upon the complaint as admitted in part and denied in part appears analogous to a motion for judgment on the pleadings, where denials and allegations of the answer which are well pleaded are to be taken as true. *Beal v. Missouri Pacific R. Corp.*, 312 U. S. 45, 51. The Commission does not appear to dispute this. It undertakes to outflank the point by interpreting the answers as constituting no more than a statement of what the answering parties admit, not as putting in issue the allegations of the complaint. We are unable to agree that this is a permissible interpretation. The admissions are so couched as clearly to negative any contrary state of facts. Even if this were not so the answers, "except to the extent of such admission, deny all of the material allegations of fact set forth in the complaint." The Commission came forward with no evidence

in support of the challenged allegations of its complaint, being content apparently to accept the admission answers as bracketing the facts.<sup>2</sup> Having elected to follow this procedure the Commission may not now presume that the group activities charged continued beyond the termination date alleged in the answers. Accordingly nothing appears in the record to support finding number 9 so far as it relates to the present.

Assuming that its construction of the answers is wrong, the Commission argues that nevertheless the entry of a cease and desist order was not improper. We turn to this contention.

It is of course well settled that discontinuance of an illegal practice does not of itself render inappropriate the entry of a cease and desist order. The propriety of such an order in any particular case must depend on a consideration of all the surrounding facts and circumstances; and where the activities charged have been [51] discontinued, the elements of time, volition, and general attitude of the respondents in respect of the cessation are necessarily factors of prime importance. Parties who have abandoned their challenged practices only after proceedings are brought against them are in no position to complain of a cease and desist order. In such a case the discontinuance can hardly be thought voluntary. Nor may those be heard to complain of an order who insist that they have the right to pursue a given practice notwithstanding they no longer follow it. *Galter v. Federal Trade Commission*, 7 Cir., 186 F. (2d) 810, 813 [47 F. T. C. 1797]. Again, voluntary discontinuance a relatively short time before the institution of proceedings may be thought not to afford satisfactory assurance that the practice will not be resumed.

Only a handful of cases have been cited in which the point is directly discussed. It is said in *Eugene Dietzgen Co. v. Federal Trade Commission*, 7 Cir., 142 F. (2d) 321, 331 [38 F. T. C. 840, 4 S. & D. 117] that "The object of the proceeding is to *stop* the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate." In the *Galter* case, *supra*, the court observed that "in determining whether the Commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the court is concerned largely not with the period of time which has elapsed between the cessation and the entry of the order but with the time from the date of cessation to the date of issuance of the complaint." The Commission itself in

<sup>2</sup> Rule 18 (a) of the Rules of Practice of the Federal Trade Commission, 15 U. S. C. A., following section 45, puts on counsel supporting the complaint the burden of proving the factual propositions put forward in it.

a recent decision dismissing a complaint,<sup>3</sup> has stressed the probable lack of a present public interest in respect of practices discontinued long prior to the institution of proceedings. There the original complaint issued in June 1944, and the acts claimed to show an unlawful purpose on the part of the respondents took place between January 1938 and February 1940. Commissioner Mason, who concurred specially in the dismissal, commented on the purpose of reaching in their incipency combinations leading to undesirable trade restraints, and remarked that in the case in question the Commission appears to have "tackled this problem at the tomb instead of at the womb."

The record here is silent as regards the existence of any special circumstances suggesting a likelihood that the petitioners will resume the practices discontinued so many years prior to the issuance of the complaints. It seems, indeed, doubtful that the orders in question would have been entered had not the commission erroneously indulged the presumption that the activities continued. The discretion residing in the Commission is a reasoned discretion, not an arbitrary one, and we are unable to see any substantial ground for inferring that the present public interest is served by the Commission's action.

The cease and desist orders are accordingly set aside.

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LICHTENSTEIN ET AL. v. FEDERAL TRADE COMMISSION<sup>1</sup>

No. 12666—F. T. C. Docket 4879

(Court of Appeals, Ninth Circuit. Feb. 5, 1952)

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—LOTTERY MERCHANDISING

"Where punch boards were shipped with petitioner's merchandise to be sold to ultimate consumer in a gambling sale, Federal Trade Commission was justified in entering order that petitioner cease and desist from supplying lottery devices with merchandise or separately for use of selling merchandise to public or selling or distributing merchandise, sales of which were to be made to public or could be made because of manner in which merchandise was packaged and assembled by means of game of chance, gift enterprise, or lottery scheme.

METHODS, ACTS AND PRACTICES—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICE SELLING

Under provision of Federal Trade Commission Act that unfair methods of competition in commerce and unfair or deceptive acts or practices in

<sup>3</sup> *Grocery Distributors Association of Northern California, etc.*, 44 Federal Trade Commission Decisions 1200.

<sup>1</sup> Reported in 194 F. (2d) 607. Rehearing denied Feb. 27, 1952. For case before Commission see 46 F. T. C. 984.

LICHTENSTEIN ET AL. v. FEDERAL TRADE COMMISSION 1751

commerce are declared unlawful, use of interstate commerce to ship gambling devices to be used in intrastate commerce in gambling disposition of merchandise to ultimate consumer was one of unfair practices in commerce subject to preventive control of Commission.

FEDERAL TRADE COMMISSION ACT—SCOPE—AS REMEDIAL AND PREVENTIVE

Object of Federal Trade Commission Act is to reach not merely in their fruition but also in their incipiency, trade practices deemed undesirable by the Congress.

METHODS, ACTS AND PRACTICES—LOTTERY MERCHANDISING—IN GENERAL

[608] Prevention by Federal Trade Commission of use of gambling devices in sale of merchandise to ultimate consumer is in public interest.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—AIDING AND ABETTING UNFAIR OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICE SELLING—SELLING, ETC., WHICH ARE TO BE USED "OR MAY BE USED," ETC.—WHETHER TOO BROAD

Where issue on which Federal Trade Commission considered case against dealer in gambling devices used to promote sales of merchandise was confined by amended complaint to push cards and punchboard devices only, and Board's finding distinguished punchboards and push card devices which were only used by ultimate purchaser in effecting sale of other merchandise from so-called money boards used solely for gambling, Board's order that petitioner cease from selling or distributing in commerce punchboards, push cards or other lottery devices which are to be used, "or may be used" in sale or distribution of merchandise to public by means of game of chance, gift enterprise or lottery scheme would be amended by striking therefrom words "or may be used" and as so amended order would be affirmed.

(The syllabus, with substituted captions, is taken from 194 F.  
(2d) 607)

On petition to set aside order of the Commission, order modified and, as modified, affirmed.

*Mr. F. W. James*, Evanston, Ill. (*Mr. George E. Lindelof, Jr.*, Los Angeles, Cal., of counsel), for petitioner.

*Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassidy*, Assistant General Counsel and *Mr. John W. Carter, Jr.*, Attorney, Federal Trade Commission, Washington, D. C., for respondent.

Before DENMAN, *Chief Judge*, and ORR and POPE, *Circuit Judges*.

DENMAN, *Chief Judge*:

Petitioner, a dealer in gambling devices used to promote sales of merchandise, seeks a review and our setting aside of two orders of the Federal Trade Commission. One of the orders provides:

"It is further ordered that said respondents and their agents, representatives and employees, directly or through any corporate or other

device, in connection with the offering for sale, sale or distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of cigarette chests or boxes, or other articles of merchandise, do forthwith cease and desist from:

"1. Supplying to or placing in the hands of others punchboards, pushcards, or other lottery devices, either with assortments of cigarette chests or boxes or other merchandise, or separately, which said punchboards, pushcards, or other lottery devices are to be used, or may be used, in selling or distributing such cigarette chests or boxes or other merchandise to the public.

"2. Selling or distributing cigarette chests or boxes, or other articles of merchandise, so packed or assembled that sales thereof to the public are to be made or, due to the manner in which such merchandise is packed or assembled at the time it is sold by the respondents, may be made by means of a game of chance, gift enterprise, or lottery scheme.

"3. Selling or otherwise disposing of any merchandise by means [means] of a game of chance, gift enterprise, or lottery scheme."

Since the gambling devices, the punchboards, were shipped with petitioner's merchandise to be sold to the ultimate consumer in a gambling sale, the order is clearly justified by *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304. This order of the Commission is affirmed.

The second order complained of reads as follows: It is ordered that respondents cease:

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

**[609]** The Commission's brief here admits concerning the place in which the gambling sales are consummated to the ultimate consumer that:

"It is true that the final sale to the ultimate purchaser by means of lottery of necessity, always occurs in intrastate commerce and is an intrastate transaction. The punching of the board or pushing of the card always occurs within the borders of some state."

The petitioner contends that since the gambling devices are not used in competitive sales in the course of their interstate transmission but only in competitive sales transactions in intrastate commerce after the interstate transmission is completed, no authority is given to the Commission to regulate such interstate transportation by section 5 (a) of the Federal Trade Commission Act providing:

"Sec. 5. (a) Unfair methods of competition in commerce, and unfair

or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships or corporations \* \* \* from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. 111-112; 15 U. S. C. 45 (a).

Upon a review of the history of section 5 (a) in connection with the decisions of the court thereon, we are of the opinion that the petitioner's use of interstate commerce to ship these devices to be used in intrastate commerce in the gambling disposition of merchandise to the ultimate consumer is one of the "unfair \* \* \* practices in commerce" subject to the preventive control of the Commission.

Prior to its amendment in 1938 the first sentence of section 5 (a) read:

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful."

The addition of the words "unfair or deceptive acts or practices in commerce," was the subject of discussion in the Congress and in the report<sup>2</sup> of the Conference Committee on the bill containing the additional words.

Prior to the introduction of the bill for amending section 5 (a), the Supreme Court had held in the case of *Federal Trade Commission v. Radadam Co.*, 283 U. S. 643, at page 646.

"By the plain words of the act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are *unfair*; (2) that they are methods of *competition* in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the *interest of the public*. We assume the existence of the first and third of these requisites; and pass at once to the consideration of the second."

It then proceeded to hold that the Commission had no power to issue an order to desist in that case because there was no competition in interstate commerce. In the discussions of the amendment to section 5 (a) in the Congress, there was agreement both in the House, where the bill was introduced by Congressman Lea, and in the Conference Committee that its purpose was to relieve the Federal Trade Commission of the necessity of showing injury to a competitor and to protect the ultimate consumer where there was no competition.<sup>3</sup> [610]

<sup>2</sup> 83 Congressional Record 3252 (1938).

<sup>3</sup> In the House, Congressman Lea, who proposed the bill adding the above quoted words, stated at 83 Cong. Rec. 391-92 (1938):

"The act as originally passed makes competition a necessary element to be established in order to proceed. It is not sufficient to show only an unfair practice. It must also be shown that this unfair practice is injurious to a competitor. One thing we propose in the

In the earlier case of *Federal Trade Commission v. Keppel & Bro.*, supra, page 310, et seq., the Supreme Court makes a similar review of the discussion in the Congress in determining the purpose of the enactment of section 5 (a) as originally drawn.

The object of the Federal Trade Commission Act is to reach not merely in their fruition but also in their incipiency trade practices deemed undesirable by the Congress. Cf. *Fashion Guild v. Trade Commission*, 312 U. S. 457, 466 [32 F. T. C. 1856; 3 S. & D. 345] and *Federal Trade Commission v. Raladam Co.*, 316 U. S. 149, 152 [34 F. T. C. 1843; 3 S. & D. 474].

The recent Third Circuit case of *Globe Cardboard Novelty Co. v. Federal Trade Commission*, 192 F. (2d) 444 (decided November 16, 1951), and the Sixth Circuit case of *Charles A. Brewer & Sons v. Federal Trade Commission*, 158 F. (2d) 74 [43 F. T. C. 1182; 4 S. & D. 588] both hold that the Federal Trade Commission has the power to prevent the shipment in interstate commerce of gambling devices to be used in intrastate sales. We agree with their reasoning, which is further supported by our above consideration of the legislative history of section 5 (a).

The Brewer case came under the consideration of Congress in the course of the enactment of Public Law 906, 81st Cong., 2d Sess., approved January 2, 1951, forbidding the transportation of slot machines suitable for gambling in interstate commerce. Section 2 of the act provides, however, that shipments may be made to any state which has enacted a law exempting that state from the provisions of the act. Section 2 of the act then provides: "Nothing in this Act shall be construed to interfere with or reduce the authority or existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act as amended (15 U. S. C. 41-58)."

In explanation of this section 2, Senate Report No. 1482, 81st Cong., 2d Sess., page 4, cites the Brewer case in connection with the follow-

pending bill in this respect is that it is sufficient to establish the unfair practice without showing injury to a competitor in order to give the Commission jurisdiction.

"If this bill becomes law, one of the things it will do is to relieve the Federal Trade Commission of the necessity of showing injury to a competitor. That is one of the practical purposes of the legislation. This will save unnecessary time and expense in showing that an act is injurious to a competitor. Indeed, the principle of the act is carried further to protect the consumer as well as the competitor. In practice the main feature will be to relieve the Commission of this burden, but we go further and afford a protection to the consumers of the country that they have not heretofore enjoyed."

Lea was a senior House member of the Conference Committee on the bill. In the discussion in the Senate, Senator Wheeler, a senior member of the Conference Committee, referring to the action of the Supreme Court in the Raladam case, supra, stated at 83 Cong. Rec. 3255 (1938) :

"Section 5 of the present act is amended, first, by making unlawful 'unfair or deceptive acts or practices in commerce'. The present act makes unlawful 'unfair methods of competition,' and the Supreme Court has held that the Commission loses jurisdiction of a case where an actual or potential competitor is not involved. This amendment makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."

ing language: "A saving clause is included in this section to avoid any misunderstanding that the act, and particularly the proviso in section 2 permitting unbroken transportation of gambling devices into States where their use is legal, interferes with or reduces the authority which the Federal Trade Commission has exerted under section 5 of its constituent act (15 U. S. C. 45) to exclude from the channels of interstate commerce devices to be used in the sale or distribution of merchandise to the public, *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304 [18 F. T. C. 684; 2 S. & D. 259]; *Charles A. Brewer & Sons v. Federal Trade Commission*, 158 F. (2d) 74 [43 F. T. C. 1142, 4 S. & D. 588]."<sup>4</sup>

[611] Nothing in the criminal proceeding of *United States v. Perry Halseth*, 342 U. S. 277, decided January 7, 1952, questions this saving clause respecting such power of the Commission as was exercised in the civil case of *Brewer v. Federal Trade Commission*. Nowhere has the Commission claimed the power to prohibit the transmission of such lottery devices in interstate commerce as such. The cases construing similar cease and desist orders have all concerned the use of lotteries in merchandising. *Globe Cardboard Novelty Co. v. Federal Trade Commission*, 192 F. (2d) 444 (Cir. 3) [48 F. T. C. 1725] is similarly limited and should not be construed as conferring a general power over lotteries as such. The case of *Scientific Mfg. Co. v. Federal Trade Commission*, 124 F. (2d) 640 (Cir. 3) [34 F. T. C. 1793, 3 S. & D. 430] made it clear that trade practices were the sole concern of the Commission.

Petitioner further urges that the prevention of the use of its gambling devices in the sale of merchandise to the ultimate consumer is not in the public interest. We find no merit in this contention. The language of the Supreme Court in *Phalen v. Virginia*, 49 U. S. 163 (1850), as to the "pestilence" of lotteries which "enters every dwelling \* \* \* reaches every class \* \* \* and preys upon" and "plunders the ignorant and simple" applies with force many times multiplied to the spread of lottery methods into line after line of merchandise.

Petitioner further contends that if we hold the Commission's *second* order to be valid, the phrase, "or may be used," should be stricken from it. We agree. The issue upon which the Commission considered the case against the petitioner was confined by the amended complaint

<sup>4</sup>The report of the House Committee on Interstate and Foreign Commerce on the same bill (S. 3357) makes this policy equally certain:

"Section 2 further provides that nothing in this act shall be construed to interfere with or reduce the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended. It is the purpose of this provision to leave unaffected the powers of the Federal Trade Commission with respect to the use of lotteries, games of chance, or other gambling devices for the purpose of merchandising. Such use has been held to be an unfair trade practice in violation of the Federal Trade Commission Act as amended [Rept. No. 2769, 81st Cong., 2d Sess., pp. 9-10]."



to pushcards and punchboard devices the "only" use to be made of which was to enable the ultimate purchasers to sell or distribute other merchandise.<sup>5</sup>

On this allegation the board's finding distinguishes the punchboard and pushcard devices which are only used by the ultimate purchaser in effecting the sale of other merchandise from so-called money boards used solely for gambling.<sup>6</sup> We are not here confronted with a case where the petitioners were called upon to meet a tendered issue of punchboard and pushcard devices which "may be used" in the sale of merchandise. Cf. *Hamilton Mfg. Co. v. Federal Trade Commission*, 194 F. (2d) 346 (D. C. Cir.), decided January 24, 1952 [48 F. T. C. 1743], *Lee Boyer's Candy v. Federal Trade Commission*, 128 F. (2d) 261 [34 F. T. C. 1857; 3 S. & D. 487] and cases there cited.

The board's order second above considered is amended by striking out the words "or may be used" and as so amended is affirmed.

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BORK MFG. CO., INC. ET AL. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

No. 12796—F. T. C. Docket 5525

(Court of Appeals, Ninth Circuit. Feb. 5, 1952)

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—AIDING AND ABETTING UNFAIR  
OR UNLAWFUL ACT OR PRACTICE—LOTTERY DEVICE SELLING—SELLING, ETC.,  
WHICH ARE TO BE USED "OR MAY BE USED" ETC.—WHETHER TOO BROAD

**[612]** Order of Federal Trade Commission against manufacturing company dealing in gambling devices that it cease and desist from selling and distributing in commerce punchboards, push cards, or other lottery devices which are to be used or may be used in sale or distribution of merchandise to public by means of game of chance, gift enterprise, or lottery scheme would be amended by striking therefrom words "or may be used" and as amended affirmed.

(The syllabus, with substituted captions, is taken from 194 F. (2d) 611)

On petition for review of order of Commission, order as amended affirmed.

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<sup>5</sup> The allegation is: "The only use to be made of said pushcard and punchboard devices, and the only manner in which they are used, by the ultimate purchasers thereof, is in combination with other merchandise so as to enable said ultimate purchasers to sell or distribute said other merchandise by means of lot or chance as hereinabove alleged."

<sup>6</sup> The finding is: "Except in the case of so-called money boards used solely for gambling, the only use to be made of said punchboard and pushcard devices and the only manner in which they are used by the ultimate purchaser thereof is in combination with other merchandise so as to enable said ultimate purchaser to sell or distribute the other merchandise by means of lot or chance."

<sup>1</sup> Reported in 194 F. (2d) 611. Rehearing denied Feb. 27, 1952. For case before Commission see 47 F. T. C. 518.

*Mr. F. W. James*, Evanston, Ill. (*Mr. George E. Lindelof, Jr.*, Los Angeles, Calif., of counsel) for petitioner.

*Mr. William T. Kelley*, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, and *Mr. John W. Carter, Jr.*, Attorney, Federal Trade Commission, Washington, D. C., for respondent.

Before DENMAN, *Chief Judge*, and ORR and POPE, *Circuit Judges*.

PER CURIAM:

Bork Manufacturing Co., dealing in gambling devices, petitions this court for review of a cease and desist order issued by the Federal Trade Commission against it. The order appealed from reads as follows:

"It is Ordered that respondent \* \* \* do forthwith cease and desist from:

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

The allegations of the complaint and the findings are the same in essential respects as those of the amended complaint and findings in *Lichtenstein v. Federal Trade Commission*, 9 Cir., 194 F. (2d) 607.

Petitioner admits that it had distributed in commerce the charged lottery devices but makes the same contentions as made in the *Lichtenstein* case.

For the reasons stated in that case, the order of the Federal Trade Commission is amended by striking therefrom the words "or may be used" and as so amended is affirmed.

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MARY MUFFET, INC., ET AL. v. FEDERAL TRADE  
COMMISSION<sup>1</sup>

No. 68, Docket 21976—F. T. C. Docket 5104

(Court of Appeals, Second Circuit. Feb. 7, 1952)

CEASE AND DESIST ORDERS—METHODS. ACTS AND PRACTICES—NONDISCLOSURE—  
NATURE OF PRODUCT

Where on substantial evidence Federal Trade Commission found that ladies purchasing dresses preferred silk and were not able to distinguish rayon therefrom, Commission was justified in finding the public interest involved to prevent the resulting misleading possible in sale of dress goods and in ordering manufacturers of women's clothing to label rayon products

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<sup>1</sup> Reported in 194 F. (2d) 504. For case before Commission see 47 F. T. C. 724. Respondents in five other cases, which joined with named petitioner, were Irene Karol, D. 5139, National Dress Goods, D. 5167, Daresh Garment, D. 5221, Frelich, D. 5223, and Wax Bros., D. 5276, etc., reported in 47 F. T. C. at pages 730, 736, 742, 748, and 754.

as rayon, thus preventing distributors from exercising a deception of which manufacturers themselves were not guilty.

CEASE AND DESIST ORDERS—AFFIRMATIVE DISCLOSURE—AS NOT BARRED UNDER SEC. 5 BY OTHER SPECIAL PROVISIONS OF FEDERAL TRADE COMMISSION ACT AND WOOL PRODUCTS LABELING ACT

Fact that specific statutory provisions require labeling of wool products and affirmative disclosure in advertising of foods, drugs, curative devices, and cosmetics does not preclude Federal Trade Commission from acting in public interest, as in ordering manufacturers of women's clothing to label their rayon products as rayon.

EVIDENCE—QUALITIES OF PRODUCT—IF TESTIMONY OF EXPERT DIRECTED AT GENERALLY—WHETHER PETITIONER—RESPONDENTS HARMED BY

In proceeding by manufacturers of women's clothing for review of order of Federal Trade Commission directing manufacturers to label their rayon products as rayon, where witness for Commission testified as to qualities of rayon yarns generally and showed their natural characteristics without limitation to specific named or otherwise described brands, in absence of showing by manufacturers that there was something unique about their product, manufacturers were not harmed by Commission's findings against them.

(The syllabus, with substituted captions, is taken from  
194 F. (2d) 504)

On petition for review of an order of the Commission, order affirmed and enforcement granted.

*Mr. Charles Sonnenreich*, New York City, for petitioners.

*Mr. Alan B. Hobbes*, Attorney, Federal Trade Commission, of Washington, D. C. (*Mr. W. T. Kelley*, General Counsel, and *Mr. James W. Cassidy*, Assistant General Counsel, Federal Trade Commission, both of Washington, D. C., on the brief), for respondent.

Before AUGUSTUS N. HAND and CLARK, *Circuit Judges* and BRENNAN, *District Judge*.

**[505] PER CURIAM:**

On substantial evidence the Commission found that ladies purchasing dresses preferred silk and were not able or found it difficult to distinguish rayon therefrom. This justified the Commission in finding the public interest involved to prevent the resulting misleading possible in the sale of dress goods and in ordering petitioners, manufacturers of women's clothing, to label their rayon products as rayon, thus preventing distributors from exercising a deception of which the petitioners themselves were not guilty. *L. Heller & Son v. F. T. C.*, 7 Cir., 191 F. (2d) 954; [48 F. T. C. 1711] *Hillman Periodicals v. F. T. C.*, 2 Cir., 174 F. (2d) 122; [45 F. T. C. 1103] *Segal v. F. T. C.*, 2 Cir., 142 F. (2d) 255; [38 F. T. C. 867, 4 S. & D. 266]. Specific statutory requirements for the labeling of wool products, 15 U. S. C.

§§ 68-68j, or affirmative disclosure in the advertising of foods, drugs, curative devices, and cosmetics, 15 U. S. C. §§ 52, 55 (a), do not tie the hands of the Commission from acting in the public interest in all other cases. *Fresh Grown Preserve Corp. v. F. T. C.*, 2 Cir., 125 F. (2d) 917, 919 [34 F. T. C. 1827; 3 S. & D. 460].

Among the witnesses for the Commission was an expert from the Rayon Division of the Rayon Department of E. I. duPont de Nemours & Co., Inc. In addition to describing the manufacture of rayon he testified to the difficulties, particularly of nontechnicians, in distinguishing it from silk, and illustrated his point by producing numerous samples of each which were introduced in evidence and used in the examination of later witnesses. Petitioners object that, since these exhibits were not their products, they and the evidence concerning them could not be used to prove the Commission's case. In the interest of a more clear-cut record, the Commission might well have had this technician, who appears to have been thoroughly qualified, specifically identify petitioners' rayon with the rayon fabrics he was discussing. But he testified as to the qualities of rayon yarns generally and showed their natural characteristics without limitation to specific named or otherwise described brands. Nor did petitioners offer any evidence to show that there was something unique about their products. As a matter of fact they had admitted in their answer that in the manufacture of wearing apparel they had used rayon "which has many characteristics in its texture and appearance which are similar to silk." Against this background we think that if petitioners' rayon products had peculiar qualities it was up to them to disclose the facts, and under the circumstances they were not harmed by the Commission's findings against them. *Mammoth Oil Co., v. United States*, 275 U. S. 13, 52; *Armstrong v. Belding Bros. & Co.*, 2 Cir., 297 Fed. 728, 730, certiorari denied *Belding Bros. & Co. v. Armstrong*, 265 U. S. 585. An enforcement order must therefore issue.

Order affirmed; enforcement granted.

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NEW STANDARD PUBLISHING CO., INC. ET AL v.  
FEDERAL TRADE COMMISSION<sup>1</sup>

No. 6319—F. T. C. Docket 4697

(Court of Appeals, Fourth Circuit. Feb. 9, 1952)

CEASE AND DESIST ORDERS—PROPRIETY—WHERE EXCESSIVE DELAY

Order of Federal Trade Commission which directed petitioner to cease and desist from certain deceptive and unfair trade practices and which was

<sup>1</sup> Reported in 194 F. (2d) 181. For case before Commission see 47 F. T. C. 1350.

entered 12 years after commencement of proceedings before Commission, more than 6 years after last evidence was taken, and 9 years after petitioner has ceased handling publication which was basis of practices charged, would be vacated on motion by petitioner.

CEASE AND DESIST ORDERS—SCOPE AND EXTENT—AS REMEDIAL AND PROSPECTIVE

Orders of Federal Trade Commission directing party to cease and desist from certain unfair trade practices are entered, not as punishment for past offenses, but for purpose of regulating present and future practices.

INJUNCTIVE DECREES OF COURTS—IN GENERAL

A court of equity will not enjoin person from doing what he is not attempting and does not intend to do.

APPELLATE PROCEDURE AND PROCEEDING—INJUNCTIVE DECREES OF COURTS—ADMINISTRATIVE ORDERS—ENFORCEMENT

Where injunctive power of court is exercised for enforcement of administrative order, order must be appropriate for present enforcement.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—EVIDENCE—IF TRANSACTIONS LONG SINCE PAST

Orders of an administrative agency must be based on evidence giving them reasonable support, and such support is not given for order relating to present and future unfair trade practices by evidence relating only to transactions which occurred many years before it was entered.

CEASE AND DESIST ORDERS—PROPRIETY—IF PRACTICE LONG DISCONTINUED AND NO REASON TO APPREHEND RENEWAL

Federal Trade Commission is without authority to enter cease and desist order relating to trade practices long discontinued, and as to which there is no reason to apprehend renewal.

(The syllabus, with substituted captions, is taken from 194 F. (2d) 181)

On petition to review order of Commission, order vacated.

*Mr. Henry Ward Beer*, New York City, (*Mr. Eli J. Blair*, New York City, on brief) for petitioners.

*Mr. Alan B. Hobbes*, Attorney, and *Mr. W. T. Kelley*, General Counsel, Federal Trade Commission, Washington, D. C. (*Mr. James W. Cassidy*, Assistant General Counsel, and *Mr. John W. Carter, Jr.*, Attorney, Federal Trade Commission, Washington, D. C., on brief) for respondent.

Before PARKER, *Chief Judge*, and SOPER and DOBIE, *Circuit Judges*.

PARKER, *Circuit Judge*:

This is a petition to review and set aside a cease and desist order of the Federal Trade Commission. Petitioners are the New Standard

Publishing Co., a corporation of Richmond, Va., engaged in selling books, and J. B. Lewis, who with his wife owns all the stock of the corporation and carries on its business. They were charged with Doubleday-Doran & Co. of having engaged in unfair and deceptive [182] trade practices in the sale of books, but that company was later dismissed from the proceeding by the commission. The cease and desist order was entered against petitioners May 25, 1951.

The proceeding against petitioners was originated by complaints filed with the commission in the year 1939 and an attorney examiner of the commission visited petitioners' place of business in May of that year. Sometime before that the corporate petitioner had become the distributor of an encyclopedia published by Doubleday-Doran and the complaints originated from sales methods used in selling that publication. In February 1941 two attorney examiners of the commission came to petitioners' place of business and asked to go through the petitioners' files, stating that the commission had the right to examine them and if permission to do so were denied, the attorneys would take the matter into court and obtain an order requiring that they be produced. Petitioners thereupon allowed the attorneys to proceed with the examination; and the attorneys obtained from the files letters which were subsequently offered in evidence before the commission and information which led to the procurement of witnesses who gave testimony against petitioners. The commission issued its formal complaint in 1942, and petitioners, both before the trial examiner and before the commission itself, moved to suppress this evidence and to dismiss the proceedings on the ground that the evidence had been unlawfully obtained. The commission denied these motions over the vigorous dissent of one of its members.<sup>2</sup>

At the argument in this court, petitioners filed a motion that the court declare the case moot and direct that the proceedings before the commission be vacated and dismissed, filing in support of the motion an affidavit of counsel that the case was moot for all purposes and that petitioners had abandoned the practices referred to in the commission's findings and order. The commission opposed the motion but admitted that there had been long delay in the case and said further in this regard, "\* \* \* there is, of course, a great public interest in ending litigation and it may be that the facts and circumstances attending this matter would not justify the long delay, particularly between the decision on the merits and the disposition of the matter or upon the findings of fact and order to cease and desist, and it may be that the public interest would be better served by disposition of a proceeding because of long delay, even though the decision would be otherwise if the matter was expeditiously handled;

<sup>2</sup> See 46 F. T. C. 1472 at 1474.

however this may be, that is a matter for this honorable court to decide, \* \* \*”.

We agree with the commission that there has been no such showing that the case is moot as would warrant us in so declaring and directing the dismissal of the proceedings. We think, however, as suggested by the commission, that the delay which has occurred in the case requires notice and that the order of the commission should not be enforced without the taking of additional evidence showing that its entry and enforcement is appropriate under present circumstances. It appears that the order before us was entered 12 years after the proceedings before the commission were commenced and more than 6 years after the last evidence was taken therein. It was entered more than 10 years after the transactions disclosed by the evidence which petitioners claim to have been obtained by unreasonable search and upon which the proceeding was largely based, and 9 years after petitioners had ceased handling the Doubleday-Doran publication, the sale of which was the occasion for most of the practices which the commission condemned. Petitioners do not seem to have been responsible for this inordinate delay. In July 1945 the trial examiner made his report to the commission, in which reference was made to the motion made by the petitioners to suppress the evidence alleged to have been improperly obtained. In May 1946 petitioners made an additional motion to that effect before the commission. Not until 4 years later, in 1950, however, did the commission deny the motion and not until a year after that, in 1951, did it enter the cease and desist order, based on transactions which were then more than 10 years old and which had arisen out of a relationship which had long since ceased to exist.

[183] Under these circumstances, we think it clear that the order of the commission should be vacated. Such orders are entered, not as punishment for past offenses, but for the purpose of regulating present and future practices. 15 U. S. C. A. 45 (a) (b); *American Chain & Cable Co. v. Federal Trade Com'n*, 4 Cir. 142 F. (2d) 909, 911 [38 F. T. C. 896; 4 S. & D. 186]. When an order of the commission is before us for review, the statute provides that to the extent that we do not modify it, we shall use our injunctive power to enforce it (15 U. S. C. A. 45 (c)); and it is elementary that a court of equity will not enjoin one from doing what he is not attempting and does not intend to do. *Blease v. Safety Transit Co.*, 4 Cir. 50 F. (2d) 852, and see *Hecht Co. v. Bowles*, 321 U. S. 321. Where the injunctive power of the court is exercised for the enforcement of an administrative order, the order must be appropriate for present enforcement. See *N. L. R. B. v. Eanet*, D. C. Cir. 179 F. (2d) 15, 21; *N. L. R. B. v.*

*Norfolk Shipbuilding and Dry Dock Co.*, 4 Cir. 172 F. (2d) 813, 815-816.

While an administrative agency is not a court of equity, its orders must be based on evidence giving them reasonable support, and such support is not given for an order relating to present and future practices by evidence relating only to transactions which occurred a decade before it was entered. It has accordingly been held by the Court of Appeals of the Sixth Circuit that "the commission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal". *Federal Trade Com'n v. Civil Service T. Bureau*, 6 Cir. 79 F. (2d) 113, 116 [21 F. T. C. 1197; 2 S. & D. 306]. No one would contend that a cease and desist order should be upheld, if all the evidence supporting it related to business practices which occurred ten years before the filing of the proceeding; but it can make no difference that the lapse of time has occurred after the proceeding was commenced if there is nothing to show that the practices have been continued.

We need not pass upon the troublesome questions presented by the motions to suppress evidence, in view of our holding that the order of the commission must be vacated because that evidence relates to transactions too remote in point of time to support it.

The order of the commission will accordingly be vacated, without prejudice, however, to the entry of such order as may be appropriate under present circumstances, should the commission see fit to pursue the case further.

Order vacated.

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MOTION PICTURE ADVERTISING SERVICE CO., INC. v.  
FEDERAL TRADE COMMISSION<sup>1</sup>

No. 13493—F. T. C. Docket 5498

(Court of Appeals, Fifth Circuit. Feb. 21, 1952)

METHODS, ACTS AND PRACTICES—DEALING ON EXCLUSIVE AND TYING BASIS—  
WHETHER COMPETITION SUBSTANTIALLY LESSENEED THEREBY, ETC.—AS QUESTION  
FOR ULTIMATE DETERMINATION OF COURT

Ultimate determination of what constitutes unfair competition is for court, not for Federal Trade Commission; and same rule applies when charge is that leases, sales, agreements, or understanding substantially lessen competition or tend to create a monopoly.

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<sup>1</sup> Reported in 194 F. (2d) 638. For case before Commission, see 47 F. T. C. 378.



APPELLATE PROCEDURE AND PROCEEDINGS—FINDINGS OF COMMISSION—IF SUPPORTED BY SUBSTANTIAL EVIDENCE—COURT LIMITATION

If substantial evidence sustains findings of Federal Trade Commission, findings are conclusive upon Court of Appeals.

APPELLATE PROCEDURE AND PROCEEDINGS—CEASE AND DESIST ORDERS—IF ADDITIONAL FINDINGS UNNECESSARY—COURT DUTY

As Federal Trade Commission Act grants jurisdiction to Court of Appeals to affirm, modify, or set aside any order of Federal Trade Commission, it is duty of Court to examine whole record; and if, from all facts as found by Commission, it clearly appears that no additional fact findings are necessary and that, in interest of justice, controversy should be decided without further delay, court has full power to decide case and to affirm, modify, or set aside order under review.

METHODS, ACTS AND PRACTICES—DEALING ON EXCLUSIVE AND TYING BASIS—EXCLUSIVE SCREENING AGREEMENTS FOR ADVERTISING FILM—WHERE IN EXCESS OF 1 YEAR—WHETHER UNFAIR, OR PROHIBITION IN PUBLIC INTEREST

In proceeding to review order of Federal Trade Commission declaring that exclusive screening agreements for advertising films in excess of term of 1 year were form of unfair competition, evidence was insufficient to sustain Commission's findings that such agreements were unfair or that their prohibition would be in public interest.

PROCEEDINGS BEFORE COMMISSION—PUBLIC INTEREST—IF FOUND LACKING IN COURSE OF—COMMISSION DUTY

**[634]** If it appears at any time in course of proceeding before Federal Trade Commission on charge of unfair competition that proceeding is not in public interest, Commission should dismiss complaint.

APPELLATE PROCEDURE AND PROCEEDINGS—PUBLIC INTEREST—IF COMPLAINT NOT THERETOFORE DISMISSED FOR LACK OF—COURT DUTY

If Federal Trade Commission improperly fails to dismiss complaint as not being in public interest, Court of Appeals should, without inquiry into merits, dismiss suit upon petition to review order.

FEDERAL TRADE COMMISSION ACT—SCOPE—PRIVATE RIGHTS AND UNFAIR METHODS, ETC. AS THERETOFORE DEFINED

Federal Trade Commission Act was not passed to protect private rights, and it did not enlarge or change definition of unfair methods of competition as laid down by courts prior to its enactment.

FEDERAL TRADE COMMISSION ACT—METHODS OF COMPETITION UNDER—IF MEANS OF CONDUCTING LEGITIMATE BUSINESS HONEST, REASONABLE AND NECESSARY, AND WITHOUT SUBSTANTIAL MONOPOLISTIC TENDENCY, ETC.

Let business be legitimate; let methods of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; then no means that are just, truthful, reasonable, and requisite to successful operation of business are unfair methods of competition in commerce in violation of Federal Trade Commission Act.

CEASE AND DESIST ORDERS—METHODS, ACTS AND PRACTICES—DEALING ON EXCLUSIVE AND TYING BASIS—EXCLUSIVE SCREENING AGREEMENTS FOR ADVERTISING FILM—WHERE IN EXCESS OF 1 YEAR—WHETHER UNFAIR, OR PROHIBITION IN PUBLIC INTEREST

Advertising company's method of soliciting and obtaining exclusive contracts with motion picture exhibitors for longer period than 1 year for display of advertising films was not unfair or unreasonable merely because of term of contract and therefore cease and desist order was unauthorized.

(The syllabus, with substituted captions, is taken from  
194 F. (2d) 633)

On petition to review an order of the Commission, order set aside; complaint dismissed.

*Mr. Louis L. Rosen*, New Orleans, La., for petitioner.

*Mr. J. B. Truly*, *Mr. Jno. W. Carter, Jr.*, Attorneys, *Mr. W. T. Kelley*, General Counsel, *Mr. James W. Cassedy*, Assistant General Counsel, Federal Trade Commission, Washington, D. C., for respondent.

Before HOLMES, BORAH, and STRUM, *Circuit Judges*.

HOLMES, *Circuit Judge*:

This is a proceeding under section 5 of the Federal Trade Commission Act, 15 U. S. C. 41, wherein the petitioner is charged with engaging in unfair methods of competition in commerce by entering into long-time exclusive screening agreements. The defense is, first a plea of *res judicata* and, second, a denial that the alleged exclusive agreements have a tendency or effect unduly to lessen, restrain, suppress, or injure, competition in the distribution or exhibition of advertising films in motion picture theaters. The plea of *res judicata* was overruled by the Commission, and the case tried upon its merits.

There is no charge in the complaint of any combination or conspiracy; the sole charge is that the petitioner, individually, has been guilty of an unfair method of competition within the intent and meaning of the act. The Commission found the petitioner guilty as charged, and ordered it to cease and desist in the future from entering into theater screening agreements for a term in excess of one year; and also to discontinue in operation or effect any exclusive theater screening provisions in existing contracts when the unexpired term thereof extended for a period of more than 1 year from the date of the service of the cease and desist order. Three separate and similar complaints were issued at the same time against three other corporations engaged in the same business. The cases were tried together under a stipulation that need not be fully stated here, but that was intended to avoid the necessity of having certain witnesses repeat their testimony.

Passing the question of *res judicata*, we proceed to a consideration and determination of the case on its merits. In the conduct of its

business, the respondent enters [635] into written screening agreements with exhibitors for a maximum period of 5 years, the majority being written for terms of 1 year or 2 years. About 25 percent of petitioner's screening agreements are for a period of 5 years. These agreements provide that the exhibitor shall properly display advertising films supplied by petitioner, return such films at the end of the screening period, and that the petitioner will pay the exhibitor each month for screening as designated in the contract. A substantial number of the contracts provide that the exhibitor will display only advertising films furnished by petitioner, except slides for charitable or governmental organizations or announcements of the theater's coming attractions. The available space for screening advertisements is limited, as only about 60 percent of the theaters accept film advertising; in addition, theater patrons resent the showing of too much of this character of advertising, and thus impose economic barriers on the amount that may be run. The time consumed that will be tolerated by the public is said to be from 3 to 6 minutes, or from 2 to 4 percent of the time consumed by the show.

The Commission concluded that an exclusive screening agreement for a period of 1 year was not an undue restraint on competition, but that such agreement for a longer period should be prohibited. The record shows that there is free and open competition among the distributors to secure such agreements, and that, from the beginning of the industry, distributors have sought and obtained exclusive screening agreements. The Commission having determined that exclusive agreements are not unfair or illegal *per se* but are necessary for the operation of the business, we are confronted with preponderating testimony that no prudent person could invest sufficient capital in the business without assurance of exclusive screening space for a longer period than 1 year; and that theaters themselves frequently demand guaranties for a longer period, or otherwise refuse to exhibit motion picture advertisements. As pointed out by the dissenting member of the Commission, the prohibition runs to the length of the lease rather than to its terms. We quote further from the dissent as follows:

"To understand the subject of this litigation one must know what trailer ads are because we are here concerned with the leasing of screen time in theaters for the exhibition of respondent's trailer ads \* \* \*. Generally, people believe any form of advertisement in a place of amusement is a bore and ought to be done away with. The small theater owner benefits from trailer ads. He is paid to show them. Features, newsreels, and shorts, cost him money. However, trailer ads actually reverse the flow of film money back into his own till.

"The order in this case prohibits the trailer ad maker from leasing

screen time from a theater owner for a greater period than 1 year. If we could do this, it might be a great favor to audiences. Unfortunately, the privilege of boring the public for pay is a theater owner's inalienable right, provided he doesn't carry the thing too far.

"People know trailer ads help eke out an existence for the small exhibitor. It's sort of a subsidy to keep the marginal operator alive. This is why audiences in small towns and communities sit quietly every night whilst the community theater parades a variety of commercial plugs across the screen.

"I do not believe we should prohibit a theater owner from leasing exclusive space in his lobby, his basement, his roof or even on his screen for as long as he wants, provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theater owners) may want to sell, namely a lease for more than 1 year. \* \* \* As I pointed out at the beginning, trailer ads are a source of income to small theaters. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small-business men. For them, it may be that portion of income which represents the difference between profit and loss. I think the question as to whether a long or short [636] lease is the better should be left to the judgment of the small-business man. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a 1-year lease was legal but that the same lease for a longer period was an unfair act or practice in commerce. \* \* \*

"When the Federal Trade Commission gets into determining how long an ad taker's lease shall run, we open up an astonishing new field of activity for us and one that we might well wish ourselves out of before we hear the end of it.

"On the one hand we have litigation against a can company doing a fifth of a billion dollars worth of business a year (the biggest in the world), and controlling over 46 percent of the 'competition' (if such it be) in the sale of cans. (*United States v. American Can Co.*, 87 Fed. Supp. 18.) The majority opinion written to apply to the four companies sued states: 'The total number of exclusive agreements held by respondents in the aggregate approximated 75 percent of total number.' To carry this reasoning a step further, if the F. T. C. had sued all the film ad companies we could justify antimonopoly orders against a tyro with 2 dollars worth of annual business on the grounds that he with all others approximated 100 percent of the total industry."

It is self-evident, we think, that the theater owner is entitled to choose his own distributor, and to sell, assign, lease, or give, his space

for any purpose that he sees fit, subject to the police power of the State or Federal Government. In the instant case, because a large number of these films are transported in interstate commerce, the constitutional power of the United States to regulate commerce, and the statutes enacted in pursuance thereof, govern our decision. The ultimate determination of what constitutes unfair competition is for the court, not for the Commission; and the same rule must apply when the charge is that leases, sales, agreements, or understandings, substantially lessen competition or tend to create a monopoly. *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568-580 [5 F. T. C. 599; 1 S. & D. 271].

The court must inquire whether the Commission's findings of fact are supported by substantial evidence; if so, they are conclusive; but as the statute grants jurisdiction to this court to affirm, modify, or set aside, any order of the Commission, it is our duty to examine the whole record; and, if from all the facts as found by the Commission, it clearly appears that no additional fact-findings are necessary and that, in the interest of justice, the controversy should be decided without further delay, the court has full power under the statute to decide the case and to affirm, modify, or set aside the order under review. 15 U. S. C. A. 45 (c). Cf. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

The petitioner's solicitation and obtaining of exclusive theater screening agreements are methods of competition in commerce, but the proof has failed to establish that they are unfair or that their prohibition would be in the public interest. Thus there are absent two distinct prerequisites to the power of the Commission to issue its order in this case to cease and desist. Cf. *Federal Trade Commission v. Raladam Company*, 283 U. S. 643, 646, 648 [15 F. T. C. 598; 2 S. & D. 116].

In another aspect, we have here a contract of agency, and our decision is governed by *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568 [5 F. T. C. 599; 1 S. & D. 271]. In a strict legal sense, the theatre owners and operators have not sold or leased the petitioner any screening space, nor granted it any easement thereto; they are not the lessors or vendors of anything; it is the distributor who furnishes the films by bailment to the exhibitor. It is different from an easement for an advertisement on a lot or building where the sign is erected by the advertiser, and the owner merely grants the right to put it there. Here the distributor has no right to enter the theatre and operate the machine or display the advertisements; he has a contract for personal services, which the exhibitor is obligated to perform. The [637] exhibitor agrees properly to display the advertisements at the rates and as provided in the screen-

ing agreement; and, with the exceptions stated, not to display any advertising films other than those furnished by the distributor. In other words, the exhibitor agrees to perform a specified service, for a stated period, at an agreed rate of compensation, and not to undertake the same service for any other distributor during the same period.

If it appears at any time in the course of a proceeding such as this that it is not in the public interest, the Commission should dismiss the complaint. If the Commission fails to do it, "the court should, without inquiry into the merits, dismiss the suit." *Federal Trade Commission v. Klesner*, 280 U. S. 19, 30, 68 A. L. R. 838, 846 [13 F. T. C. 581; 1 S. & D. 1166]. We have not exercised this power but have decided the case on its merits, though it does not appear to be in the public interest to increase the number or amount of advertisements of this character. The Federal Trade Commission Act was not passed to protect private rights, and it did not enlarge or change the definition of unfair methods of competition as laid down by the courts prior to its enactment. *Federal Trade Commission v. Klesner, supra*.

Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

Therefore, with available space and time for advertisements on the screen of motion-picture exhibitors severely limited, and with the business of distributors, by its nature, making it necessary that they have an assured outlet for a reasonable time for the screening of their prospective advertisements, we conclude that petitioner's method of soliciting and obtaining exclusive contracts with exhibitors for longer periods than 1 year was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management. Consequently, the cease and desist order of the Commission is set aside and the complaint dismissed. *Goldberg v. Tri-State Theatre Corp.*, 126 F. (2d) 26; *United States v. Western Union Telegraph Co.*, 53 Fed. Supp. 377; *State For Use of Independence County v. Tad Screen Advertising Co.*, 133 S. W. (2) 1.

It is so ordered.