Subparagraph 1(h) is amended to read: "Requiring or inducing any dealer or distributor to resell to respondent any unsold stock of respondent's products in the event that business relations between respondent and the distributor or dealer are terminated, provided that respondent shall not be prohibited from repurchasing such unsold stock at the request of a distributor or dealer or from obtaining an option from a distributor or dealer to repurchase such unsold stock in the event that the distributor or dealer is unable to meet his financial obligations to respondent."

Subparagraph 3(a) is amended to read: "Issuing franchises or licenses to dealers or distributors for a period of two years following the effective date of this order; or".

Subparagraph 3(b) is amended to read: "Circulating lists of dealers or distributors of its products to such dealers or distributors; or".

Subparagraph 3(c) is amended to read: "Affixing to its products numbers or other identifying marks which designate specific wrapped rolls or other commercially sized items sold as individual units to distributors or dealers; or".

Subparagraphs 3(d) and 3(e) are deleted from the order.

Subparagraphs 3(f) and 3(g) are renumbered 3(d) and 3(e), respectively.

It is further ordered, That the proposed order, as amended, be, and it hereby is, entered and adopted as the Final Order of the Commission.

By the Commission, Commissioner MacIntyre agreeing in part and dissenting in part from this order of the Commission in keeping with his dissenting opinion to the original order of the Commission in this case.

IN THE MATTER OF

CLAUDE I. WOOLWINE DOING BUSINESS AS UNIVERSAL TRAINING SERVICE ET AL.*

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

*Docket 8138. Complaint, Oct. 12, 1960**—Decision, Sept. 28, 1962*

Consent order requiring a San Francisco seller of a correspondence course purporting to prepare purchasers for U.S. Civil Service examinations and U.S. Government positions, to cease misrepresenting the availability of Government jobs and accompanying salaries, representing falsely connection with

* A desist order was issued against the other respondent, Grady L. Rushing doing business as Marcel Co., on Nov. 27, 1961, 59 F.T.C. 1182.

** Published in 59 F.T.C. 1182.

the U.S. Civil Service and prospective earnings of salesmen of the course, among other things, as set out in the order below.

Mr. Harry E. Middleton, Jr., for the Commission.
Mr. Allan L. Sapiro, of San Francisco, Calif., for the respondent.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

In a complaint issued October 12, 1960, the respondent, Claude I. Woolwine, an individual doing business under the firm name and style of Universal Training Service, located at 150 Powell Street, San Francisco, Calif., was charged with making misleading representations in connection with the sale and distribution in commerce of correspondence courses of study and instruction.

The respondent, by and with the advice of his attorney, and counsel supporting the complaint have entered into an agreement containing a consent order to cease and desist, thus disposing of all the issues involved in this proceeding.

In the agreement it is expressly provided that the signing thereof is for settlement purposes only and does not constitute an admission by the respondent that he has violated the law as in the complaint alleged.

By terms of the agreement, the respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

By the agreement, the respondent expressly waives any further procedural steps before the Hearing Examiner and the Commission; the making of findings of fact or conclusions of law; and all rights he may have to challenge or contest the validity of the order to cease and desist to be entered in accordance therewith.

Respondent further agrees that the order to cease and desist, to be issued in accordance with the agreement, shall have the same force and effect as if made after a full hearing.

It is further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order to be issued pursuant to said agreement; and that such order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The Hearing Examiner has considered the agreement and the order therein contained, and, it appearing that said agreement and order provide for an appropriate disposition of this proceeding, the same is hereby accepted and shall be filed upon becoming part of the Com-

mission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice.

Now, in consonance with the terms thereof, the Hearing Examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondent Claude I. Woolwine, doing business as Universal Training Service, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of his course of instruction, relating to United States Civil Service positions, or any other course of instruction, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Civil Service Examinations are imminent or had been announced for any of the positions listed in any particular area, unless such is the fact.

2. The completion of said course of instruction will enable a person to pass the Civil Service Examination for a selected job.

3. Their course of instruction provides training for Civil Service positions.

4. Qualifications are required in order to purchase the course.

5. Starting salaries for positions in Civil Service are in any amount that is not in accordance with the facts; or misrepresenting the amount of any salary for Civil Service positions.

6. Respondents will continue to instruct persons who have completed their courses of instruction until they are appointed to a Civil Service position; or misrepresenting in any manner the amount of instruction that they give to their purchasers.

It is further ordered, That respondent Claude I. Woolwine, trading as Universal Training Service, or under any other name, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation for salesmen to sell his course of instruction relating to United States Civil Service positions, or any other course of instruction, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the monthly earnings of salesmen selling his course of instruction average from $1200 to $1800; or average or amount to any sum that is in excess of the average or the amount actually earned.

2. Representing, directly or by implication, that persons selling said course operate a home study school.

ORDER WAIVING FILING OF NOTICE, DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come before the Commission upon the certification by the hearing examiner, under Section 4.13(c)(9) of the Rules of Practice, of the question of acceptance of a duly executed consent agreement between respondent Claude I. Woolwine and counsel supporting the complaint; and

It appearing from the moving papers that it was through inadvertence that respondent failed to file timely notice of his desire to dispose of the proceeding by entry of a consent order; and

The Commission having concluded that, in the circumstances presented, it should exercise its discretion and waive the requirement for more timely filing of notice:

It is ordered, That the provision of the Commission's Notice of July 14, 1961, requiring the filing of notice by September 1, 1961, be, and it hereby is, waived in this case.

It is further ordered, That the initial decision of the hearing examiner accepting the consent agreement executed by the parties be, and it hereby is, adopted as the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

DANNON MILK PRODUCTS, INC., ET AL.

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

Docket 8232. Complaint, Dec. 27, 1960—Decision, Sept. 28, 1962

Order requiring Long Island City, N.Y., sellers of "Dannon Yogurt" to cease advertising falsely in magazines, circulars, etc., and by radio broadcasts,

that their said product was "nature's perfect food", would correct poor eating habits, had reducing or antibiotic properties, or contained fewer calories than milk, except in the plain form.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Dannon Milk Products, Inc., a corporation, and Juan E. Metzger, Don L. Grantham, and John F. Hazelton, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Dannon Milk Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 22-11 38th Avenue, Long Island City 1, N.Y. Individual respondents Juan E. Metzger, Don L. Grantham, and John F. Hazelton are officers of said corporation. They formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. The respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of Yogurt which they sell under the name of Dannon Yogurt. Dannon Yogurt is a food product, as "food" is defined in the Federal Trade Commission Act. It is sold in plain, flavored and prune whip forms.

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

PAR. 4. In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, advertisements concerning the said product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in magazines, brochures, circulars and pamphlets, and by radio broadcasts, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and have caused the dissemination of, ad-

vertisements concerning the said product by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in said advertisements, disseminated and caused to be disseminated, as aforesaid, are the following:

Why yogurt is so healthful. Dannon is known as nature's perfect food that science made better.

How Dannon yogurt can help you to a new, more glamorous figure and a smoother complexion, you'll learn how to grow young gracefully with yogurt. . . .

Keep young with yogurt.

Sometimes it's the lure of the trim new waistline or perhaps it's a nicer complexion . . . or just that young, glad-to-be-alive feeling you get with Dannon Yogurt.

Tingling new fitness, a glowing new complexion, a trim waist line.

Try yogurt and in a few weeks your mirror will show a new, more attractive you. Slim, trim 'n terrific. . . . a nicer complexion. . . . The glamorous reflection of an inward glow of fitness. Grow young with Dannon Yogurt. Because there is magic in those Dannon cultures. . . . magical goodness that can work more wonders for you than all the lotions and creams on your vanity table.

* * * Has far less calories * * * than the same amount of milk.

Remarkably effective, as well, in control of . . . amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. The simple treatment for the usual case is one 8 ounce container of Dannon Prune Whip Yogurt at bedtime for a period of three weeks.

* * * * * * *

As a medicine . . . Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, obesity, in the correction of poor eating habits, and in chronic constipation (here try Dannon Prune Whip Yogurt for 30 days—it's dramatically effective.)

PAR. 5. By and through the statements made in said advertisements, disseminated and caused to be disseminated, as aforesaid, respondents represented, directly or by implication, that said product:

1. In all forms—

(a) Is nature's perfect food and is effective in the correction of poor eating habits.

(b) Is effective in maintaining youth, a youthful complexion, and in correcting skin disorders.

(c) Contains less calories than the same amount of milk.

(d) Has reducing properties.

(e) Is an adequate and effective treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition.

2. In prune whip form, is an adequate and effective treatment for

diarrhea, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis and chronic constipation.

PAR. 6. The advertisements containing the aforesaid statements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, said product:

1. In any form—

(a) Is not a perfect food, and is not effective in the correction of poor eating habits.

(b) Is not effective in maintaining youth, or a youthful complexion, or in correcting skin disorders.

(c) Has no reducing properties.

(d) Is not an adequate or effective treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerated colitis or salmonellosis and has no value in the treatment of chronic constipation except that the prune whip form provides temporary relief thereof.

2. Except as to the plain form does not contain less calories than the same quantity of milk.

PAR. 7. The dissemination by the respondents of the false advertisements, as aforesaid, constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson for the Commission.

Winston, Strawn, Smith & Patterson, by *Mr. Thomas A. Reynolds, Sr.*, *Mr. James L. Perkins*, and *Mr. Edward L. Foote*, of Chicago, Ill.; and *Mr. John P. Fox, Jr.*, of Chicago, Ill., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The hearing examiner finds and concludes from the evidence in this record that respondents' advertisements for Dannon Yogurt have a tendency and capacity to deceive as charged in the complaint filed herein on December 27, 1960. The representations in the advertisements violate the provisions of the Federal Trade Commission Act, as charged, and should be proscribed. They are so proscribed in the cease and desist order which is hereinafter entered. Counsel supporting the complaint have proven each and all of the material allegations of the complaint by reliable, probative, and substantial evidence. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.

Respondent Dannon Milk Products, Inc., a New York corporation, has its offices and place of business at 22–11 38th Avenue, Long Island

City, New York. It is engaged in the business of manufacturing, advertising and selling yogurt under its trademark "Dannon." It distributes and sells its product in Boston, Massachusetts; Philadelphia, Pennsylvania; Washington, D.C., and their surrounding areas and in the Greater New York area. Its business is substantial.

Respondents Juan E. Metzger, Don L. Grantham, and John F. Hazelton are officers of the corporate respondent and formulate, direct and control its policies and practices.

Dannon Yogurt is a food product as "food" is defined in the Federal Trade Commission Act. Respondents have disseminated advertisements in the United States mails and by radio transmission for the purpose of inducing the purchase of "Dannon Yogurt." The advertisements have interstate circulation, and respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

Yogurt is a semi-solid food produced by inoculating milk with specific bacteria cultures and by incubating it under controlled conditions until it achieves the desired consistency and properties. Consumption of yogurt as a human food can be traced back to Biblical times. Although the popularity is increasing in this country, the witnesses in this proceeding testified that yogurt is more popular in the Middle East and in European countries than it is in the United States at the present time.

Dannon Yogurt is made from homogenized, pasteurized cow's milk from which a substantial portion of the butterfat has been removed and replaced with milk protein. Lactobacillus Bulgaricus and Streptococcus thermaphilus bacteria cultures are added, causing the milk to ferment. Respondents testified that the processing takes place under atmospheric conditions which are "practically sterile." Respondents also produce and sell Dannon Yogurt which is flavored by adding vanilla, orange, strawberry, and pineapple preserves and flavoring, and prune whip to the basic yogurt. In the preparation of yogurt nothing happens to the fat content of the milk.[1] In other words, a person consuming an equal amount by weight of plain yogurt would be subjected to a slightly less caloric intake than if he consumed the same amount of milk by weight, but if the person were consuming any of the Dannon flavored yogurt he would be subjected to a slightly higher caloric intake.

The following statements, alleged in the complaint to be representative of those contained in respondents' advertisements, are excerpts from CX-1—12, 13 and 16:

[1] See testimony of Juan E. Metzger, p. 10.

Why yogurt is so healthful. Dannon is known as nature's perfect food that science made better.

How Dannon yogurt can help you to a new, more glamorous figure and a smooth complexion, you'll learn how to grow young gracefully with yogurt . . .

Keep young with yogurt.

Sometimes it's the lure of the trim new waistline or perhaps it's a nicer complexion . . . or just that young glad-to-be-alive feeling you get with Dannon Yogurt.

Tingling new fitness, a glowing new complexion, a trim new waist line.

Try yogurt and in a few weeks your mirror will show a new, more attractive you. Slim, trim 'n terrific . . . a nicer complexion. . . . The glamorous reflection of an inward glow of fitness. Grow young with Dannon Yogurt. Because there is magic in those Dannon cultures. . . . magical goodness that can work more wonders for you than all the lotions and creams on your vanity table.

* * * Has far less calories * * * than the same amount of milk.

Remarkably effective, as well, in control of . . . amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. The simple treatment for the usual case is one 8 ounce container of Dannon Prune Whip Yogurt at bedtime for a period of three weeks.

As a medicine . . . Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, obesity, in the correction of poor eating habits, and in chronic constipation (here try Dannon Prune Whip Yogurt for 30 days—it's dramatically effective.)

The United States Department of Agriculture states that yogurt contains all the nutritional value of the milk from which it is made (Home and Garden Bulletin No. 57, issued May 1957, RX–3, p. 8).

The greater part of the record in this proceeding consists of the opinion testimony of experts called by both sides. The experts who appeared on behalf of counsel supporting the complaint are:

Dr. Oral L. Kline, B.S., Ph. D., Director of the Division of Nutrition of the Food & Drug Administration of the Department of Health, Education, and Welfare. He is a member of the American Institute of Nutrition, American Clinical Society, American Association for the Advancement of Science, and American Public Health Association. His current Government employment requires that he supervise research in nutrition and review labels of food products.

Dr. Naomi M. Kanof, B.A., M.D., Assistant Clinical Professor in Dermatology, George Washington University. Dr. Kanof is certified by the Board of Dermatology and is engaged in the practice of her profession. She is editor of the Journal of Investigative Dermatology and the author of several scientific articles relating to dermatology.

Dr. Irving B. Brick, A.B., M.D., Associate Professor of Medicine, and Chief, Division of Gastroenterology at Georgetown University Hospital. Dr. Brick is certified by the American Board of Internal Medicine and is a member of the American Gastroenterological Associ-

ation, American College of Physicians, and American Foundation of Clinical Research. He is the author of several scientific articles in the area of his specialty.

Respondents offered the testimony of a nutritionist and four medical doctors. They are:

Dr. Bernard L. Oser, B.S., M.S., Ph.D., President and Director of the Food & Drug Research Laboratories, Inc., which is a private, profit-making corporation engaging in consultation, research and evaluation of food, drugs and related products for private business, and in a few instances, for the U.S. Government. Dr. Oser is a Diplomate, certified in human nutrition by the American Board of Nutrition, and is the author of several scientific articles in his field.

Dr. Harry Seneca, M.D., M.S. (Med.), Assistant Professor, College of Physicians and Surgeons, Columbia University. Dr. Seneca specializes in gastroenterology, is a Diplomate of the American Board of Internal Medicine and a Fellow of the American College of Physicians. He has served on the faculties of medical schools and engages in medical research. He is the author of a substantial number of scientific articles, including a majority of the printed opinion testimony proffered by respondents.

Dr. Frederic Damrau, M.D., had not been in the active practice of medicine since 1925 (Tr. 280). He might be characterized as an entrepreneur in the field of new food and medical products who seeks out products to exploit and sell and capital with which to do it. CX–18 and CX–19 contain advertisements which Dr. Damrau had run in publications of recent date. CX–18 contains an ad reading:

MEDICAL CONSULTATIONS: Regarding your labels and advertising, in order to avoid FDA and FTC troubles. Legitimate claims are substantiated and objectionable points corrected. Also, ghost writing service for busy doctors who want publicity in medical journals is available. Full details are offered by Frederic Damrau, M.D., Medical Consultant, 2 Tudor City Pl., New York 17, N.Y.

In CX–19, Dr. Damrau advertised for some person to help him exploit and market what he characterized as "New Remedy for Athlete's Foot" and "New Remedy for Peptic Ulcer." The examiner finds that Dr. Damrau's appearance did not buttress the professional stature of respondents' witnesses as a group.

Dr. Shepard Shapiro, M.D., who had recently retired after 25 years in the general practice of medicine in New York City, had been on the staffs of Goldwater Memorial, Lincoln, and University Hospitals and had written medical articles. He was produced as a witness in this case in order to have his article on yogurt, RX–9–A through D, admitted in evidence. This exhibit which purports to

be a medically scientific article contains also this statement: "Yogurt used in this study supplied as *Dannon Yogurt* by Dannon Milk Products, Inc., 22-11 38th Avenue, Long Island City, N.Y." Dr. Shapiro's article alludes to Dr. Seneca's articles which are in evidence. The most that can be concluded from Dr. Shapiro's testimony and article is that he found in the observation of a very small number of patients that if they took yogurt at the time antibiotics are being administered this may tend to offset the side effects which some patients experience in the gastrointestinal tract as a result of the antibiotics. There is nothing in the record to show that yogurt's limited control of antibiotic side effects in the gastrointestinal tract would not be as easily accomplished by an equal portion of milk.

Dr. Francis P. Ferrer, M.D., Instructor in Medicine, New York Medical College, had and was engaged in the practice of medicine, specializing in internal medicine. Dr. Ferrer is on the staff of several New York hospitals and a member of the American Geriatrics Society, the American College of Gastroenterology, and the American Diabetes Association.

The fact that counsel supporting the complaint has only called three experts to testify whereas respondents had five expert witnesses is not necessarily related to the question of the weight and probative value of the evidence. The hearing examiner heard and observed the witnesses in the hearing room and on the stand. He observed their demeanor and their manner of answering questions. He was able to, and did, form an opinion as to their reliability, credibility, and knowledge of the subject, their background, education, professional experience, and qualifications, and the weight to be attached to the opinions which they expressed. The hearing examiner has formed a judgment as to the bias and prejudice of the witnesses and their personal interests in the outcome of this litigation. He was able to, and did, form a judgment as to the weight and probative value of the testimony of each.

The findings and conclusions incorporated in and made a part of this opinion are based upon an application of all these principles just stated to the expert testimony in this record.

Respondents supplemented the opinion testimony of their experts by RX-4A to I, RX-5A to D, RX6-A to D, RX-7, RX-8 and RX-9.

The RX-4 series represents a collection in one place by respondents' witness, Dr. Seneca, of the opinion testimony which he had collected in 1950 by examining the articles on yogurt of other authors. The authors who made the original studies were not produced for cross-examination by counsel supporting the complaint. Dr. Seneca's

testimony at page 245, *et seq.*, reveals further that the article which he claims was responsible for his original interest in the properties of yogurt, RX-4, is based upon *in vitro* experiments with yogurt. In simple words this means that the findings in Dr. Seneca's basic article, RX-4, are not based upon observations of the effect of yogurt on human beings but merely upon test tube observations. RX-5A to D is also a Seneca production. RX-6A to D is also a Seneca production. RX-7 is also a Seneca production. RX-8 is one of Dr. Damrau's articles and RX-9A to D is an article by Dr. Shapiro. CX-17A to D is a report of a study made by Dr. Ferrer on the effect of Dannon Yogurt with Prune Whip on 194 patients suffering from constipation.

It is a fair inference from Dr. Ferrer's testimony and other evidence in the record that prunes or products made therefrom have a tendency to alleviate constipation, without any yogurt whatsoever being added to the prunes or prune whip.

Dr. Seneca's answers on cross-examination, at page 244, *et seq.*, cast serious doubts upon the reliability of the conclusions which he was willing to state in his published articles, about the antibiotic properties of yogurt. Dr. Seneca evaded answering the question of how many quarts of yogurt would be required to equate the minimum dosage of penicillin. Out of the evasion in which Dr. Seneca indulged, it would appear that it would take approximately *twenty quarts* of yogurt to equate *one* minimum dosage of penicillin. The record does not contain the doctors' opinions as to what other effects would be produced in a person eating twenty quarts of yogurt at one sitting. It is, and would be, potentially dangerous to allow the public to gather the impression from respondents' advertising that yogurt can be substituted for antibiotics as a medicine. However, the examiner finds that respondents intended to convey the impression in their advertisements that Dannon Yogurt may be so substituted. This deception is proscribed by the Federal Trade Commission Act.

The hearing examiner adopts the cullings from the reported cases which respondents state on pages 5 and 6 of their proposed findings, to wit,

(W)hatever statements are made, must be taken with and accepted in their ordinary sense. *DeForest's Training, Inc.* v. *FTC*, 134 F. 2d 819, 821 (7th Cir. 1943). Words mean what they are intended and understood to mean. *Bennett, et al.* v. *FTC*, 200 F. 2d 362, 363 (D.C. Cir. 1952). The Commission cannot interpolate language into advertising that is not there in order to construe it as misleading. *International Parts Corp.* v. *FTC*, 133 F. 2d 883, 888 (7th Cir. 1943). Advertisements must be considered in their entirety. *Aronberg* v. *FTC*, 132 F. 2d 165, 167 (7th Cir. 1942). The important question to be resolved

is the impression given by the advertisement as a whole. *Rhodes Pharmacal Co.* v. *FTC*, 208 F. 2d 382, 387 (7th Cir. 1953), and authorities cited. Advertisements must be considered as they would be read by those to whom they appeal. *Aronberg* v. *FTC*, 132 F. 2d 165, 167 (7th Cir. 1942); *FTC* v. *National Health Aids*, 108 F. Supp. 340 (D.C. Md. 1952).

To those excerpts from the above decisions, the examiner should like to add the following: It is in the public interest to prevent the sales of commodities by the use of false, and misleading statements and representations.[2] Capacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act.[3] To tell less than the whole truth is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.[4] "A statement may be deceptive even if the words may be literally or technically construed so as to not constitute a misrepresentation. . . . The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser."[5] Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance.[6]

In *Bristol-Myers Co.* v. *FTC*, 185 F.2d 58, 62, the court said:

. . . Opinion evidence based on the general medical and pharmacological knowledge of qualified experts has often been held to constitute substantial evidence, even if the experts have had no personal experience with the product. Goodwin v. United States, 6 Cir., 2 F.2d 200, 201; Dr. W. B. Caldwell, Inc. v. F.T.C., 7 Cir., 111 F.2d 889, 891; and this has been done even where witnesses who had personally observed the effects of the product testified to the contrary. (Citing cases)

Additionally, where one of two meanings conveyed by an advertisement is false the advertisement is misleading. *Rhodes Pharmacal Co., Inc.* v. *FTC*, 208 F.2d 382 (7th Cir. 1953); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438 (1924).

The hearing examiner rejects respondents' contention, which has not been seriously pressed, that some of the statements made were in fact mere puffing statements. Respondents have not defended this

---

[2] *Parke, Austin & Lipscomb* v. *FTC*, 142 F. 2d 437, citing *L. & E. Mayer Co.* v. *FTC*, 97 F. 2d 365, 367.

[3] *Goodman* v. *FTC*, 244 F. 2d 584, 604 (C.A. 9th 1957).

[4] *P. Lorillard Co.* v. *FTC*, 186 F. 2d 52, 58 (C.A. 4th 1950).

[5] *Kalwajtys* v. *FTC*, 237 F. 2d 654, *cert. den.* 352 U.S. 1025.

[6] *Ward Laboratories, Inc., et al.* v. *FTC*, 276 F. 2d 952, 954 (C.A. 2d 1960).

action on that theory but have introduced evidence for the purpose of showing that the nutritional, dietary, cosmetic, and medical claims for Dannon Yogurt are justified by expert medical testimony. The examiner finds that such claims are not supported by the expert medical testimony.

The hearing examiner also rejects respondents' contention that because their advertising which makes most of the medicinal claims for Dannon Yogurt is mailed chiefly to a list of people who have been represented to respondents as doctors it is therefore proper for respondents to make such medical claims. There is no showing in the record that the medicinal claims for Dannon Yogurt actually reach only the eyes and ears of M.D.'s who are qualified to pass upon the validity of the claims, or that the nutritional claims reach only the eyes and ears of nutritionists, or that the cosmetic claims reach only the eyes and ears of dermatologists. The record makes it abundantly clear that respondents' advertisements are of such a character, in such form, and disseminated in such a general and all-inclusive manner that if they contain any deception at all the public interest will be injured within the intent and meaning of the Federal Trade Commission Act.

The hearing examiner specifically rejects respondents' proposal on page 45 of its Proposed Findings that "respondents' representations, as made, are representations of opinions as to the therapeutic value of yogurt, and not statements of fact." Without intending any reflection whatsoever upon counsel, the examiner finds that the reasoning based upon *Koch* v. *FTC*, 206 F. 2d 311 (6th Cir. 1953) is specious and contrary to the facts proven in this record and the law applicable to these facts. If the product which respondents are advertising were opinion, it is possible that the rationale of *Scientific Manufacturing Co.* v. *FTC*, 124 F. 2d 640, might have some validity. However, even in *Scientific*, the court concluded by stating:

> . . . Surely Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's business of voicing opinion. The same opinion, however, may become material to the jurisdiction of the Federal Trade Commission and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public or to harm a competitor. (citing cases)

These respondents are not in the "business of voicing opinion." They are in the business of selling Dannon Yogurt.

It is interesting that Dr. Seneca's article, RX-6, in at least one place equates yogurt with buttermilk. The article, "A New Approach to the Etiology and Management of Constipation" says "promising results were obtained by using a combined antibacterial (phthalylsulfaceta-

mide) and yogurt *or buttermilk* therapy through the reduction and/or modification of the intestinal flora." (Emphasis supplied; Resp. Fdgs. p. 52)

The representations made in respondents' advertisements are intended to convey and do convey to the prospective purchaser the impression that Dannon Yogurt has special therapeutic properties. And the entire defense of respondents to this charge in the complaint was for the purpose of showing that Dannon Yogurt does have special therapeutic value which is not proven in the record.

The statements made in respondents' advertisements for Dannon Yogurt disseminated and caused to be disseminated respondents' representations, directly or by implication, that Dannon Yogurt in all forms:

(1) Is nature's perfect food and is effective in the correction of poor eating habits;

(2) Is effective in maintaining youth, a youthful complexion, and in correcting skin disorders;

(3) Contains less calories than the same amount of milk;

(4) Has reducing properties;

(5) Is an adequate and effective treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition. In prune whip form, is an adequate and effective treatment for diarrhea, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis and chronic constipation.

The hearing examiner hereby finds and concludes as a matter of law and of fact that each and all of these representations in respondents' advertisements as to Dannon Yogurt are false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act and the decisions adjudicating the same. Such deception should be proscribed in the public interest.

The findings of fact and conclusions of law stated in this opinion are based upon the entire record including the exhibits which have been received. Any findings or conclusions proposed by the parties which have not heretofore been made in the precise form in which they were proposed, or in substantially that form, hereby are rejected. The fact that no finding or conclusion in this opinion summarizes the evidence or the law in the manner in which any of the parties have requested such facts and law to be summarized does not mean that the hearing examiner has not considered such evidence and law. It means merely that the examiner deems that the evidence which has been summarized as stated in the facts in this opinion is sufficiently probative, substantial and material to dispose of the issues.

The citation of legal authorities has been chiefly confined to a restatement of the criteria for determining whether advertising is false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act. The statement of the criteria by which the examiner has determined the weight to be ascribed to the expert testimony is Hornbook law. In this case the examiner finds not only that the opinion testimony of respondents' witnesses does not justify respondents' advertising claims but he further finds that each and all of respondents' witnesses have a bias and prejudice resulting from a personal interest in the outcome of this litigation. The officials of the corporate respondent are naturally determined to attempt to support their advertising claims. The doctors who testified did not possess that degree of medical, scientific objectivity which would justify giving great weight to their testimony. Some of the so-called "studies" of yogurt were obviously made by Doctors Seneca, Shapiro, and Ferrer for the purpose of supplying respondents with a "medically scientific" basis for their advertising claims. The articles failed to do this. A careful analysis of the nature of the articles and of the publications in which they appeared created the impression in the mind of the hearing examiner that this was a thinly disguised effort by Dannon to pull themselves up by their own bootstraps, so to speak. This they have not succeeded in doing. Respondents' documentary evidence is, in most instances, hearsay and of little probative value particularly since adequate opportunity was not afforded counsel supporting the complaint to probe the details of the alleged observations. For instance, it would be deceptive to conclude that yogurt with prune whip can be used in the treatment of constipation without running a control test to observe what prune whip *without* yogurt would do.

All motions made by the parties which have not previously been ruled upon or which are not herein specifically ruled upon hereby are overruled and denied.

The examiner has no doubt that yogurt, including Dannon Yogurt, is an acceptable food product. It probably has beneficial effects upon certain classes of people when purchased as a food, consumed as a food, and considered as a food. Respondents' self-serving efforts to ascribe to Dannon Yogurt rejuvenative qualities which only an endocrinologist is competent to judge, cosmetic benefits which only a dermatologist is competent to evaluate, nutritional value which far exceeds the actual fact, gastrointestinal effects which are not substantiated by reliable and dependable scientific evidence, and antibiotic qualities which should be confined within the area of the pharmaceutical producers

of ethical drugs simply borrow trouble for the respondents. They easily could have avoided this difficulty by keeping their advertising claims within the bounds of well-accepted scientific fact and known medical findings.

Respondents' advertisements will not be analyzed as respondents suggest. "The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser." Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance. See *Kalwajtys* and *Ward Laboratories*, *supra.* As the court said in *Associated Laboratories, Inc.* v. *FTC*, 150 F.2d 629:

> . . . The company claimed that its tablets would serve to cure a number of human deficiencies and ailments. The Commission's experts testified that the vitamins and minerals which they contained were too small in quantity to restore such deficiencies or to cure such ailments; and the only issue was whether that was true. The company offered evidence to prove that the tablets were a 'dietary supplement'; that is, that they contained some quantities of those substances which are necessary to a well balanced ration, and which, had they been in greater quantity, might have been restorative or curative, as the company asserted. . . . The company had not advertised its tablets as useful adjuncts to a proper diet; it had claimed for them powers which they did not possess, and which it really did not try to prove that they possessed.
>
> The appeal is entirely devoid of merit; the company represented the tablets as a panacea, and the Commission showed that they would cure nothing; it was to protect the public from precisely this kind of unscrupulous exploitation to which it so easily succumbs, that the Commission was in substantial part created.

In view of the examiner's findings and conclusions that respondents' advertisements for Dannon Yogurt are false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act; that counsel supporting the complaint has proven each and all of the material allegations of the complaint by reliable, probative and substantial evidence in the record; and that this proceeding is in the public interest.

It is ordered, That respondents Dannon Milk Products, Inc., a corporation, and its officers, and Juan E. Metzger, Don L. Grantham, and John P. Hazelton, individually and as officers of said corporation, their representatives, agents and employees directly or through any corporate or other device, in connection with the sale of their product "Dannon Yogurt," including the plain, flavored and prune whip forms, or any other product containing substantially the same in-

728-122—65——55

gredients, or possessing substantially the same properties, whether sold under the same or any other name, do forthwith cease and desist from:

1. Representing directly or by implication in their advertisements or otherwise that "Dannon Yogurt," or any other product containing substantially the same ingredients or substantially the same properties:

(a) Is nature's perfect food; or

(b) Will correct poor eating habits; or

(c) Is effective in maintaining youth; or

(d) Possesses dermatological and cosmetic values and properties; or

(e) Except in the plain form contains less calories than the same quantity of milk by volume and weight; or

(f) Has properties which make it uniquely effective in helping human beings to reduce their body weight; or

(g) Is a preventative treatment or a cure for gastrointestinal disorders, including but not limited to diarrhea, autointoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis or salmonellosis, or chronic constipation; or

(h) Has antibiotic properties and qualities as the term "antibiotic" is generally understood; and

2. Misrepresenting in any manner, by advertising or otherwise, any of respondents' products.

Opinion of the Commission

By Kern, *Commissioner:*

This matter is before the Commission upon respondents' appeal from the hearing examiner's initial decision filed October 12, 1961, holding that respondents violated the Federal Trade Commission Act, as charged, by disseminating false advertisements in connection with the sale of yogurt. The examiner ordered respondents to cease and desist the practices so found to be unlawful.

The questions respondents raise on their appeal are:

(1) Is there substantial, probative evidence to support the examiner's findings that they have falsely represented "Dannon Yogurt" as charged?

(2) Is paragraph 2 of the order too broad?

(3) Did the examiner err in including in his order respondents Hazelton and Grantham in their individual capacities?

Respondents do not challenge all provisions of the order.

Respondent Dannon Milk Products, Inc., is a New York corporation, with offices in Long Island City, New York. The individual respondents, Juan E. Metzger, Don L. Grantham and John F. Hazelton, are officers in the corporation . The respondents advertise and sell in commerce the product yogurt under the trade name Dannon Yogurt, a food as defined in the Federal Trade Commission Act.

The complaint alleges that respondents in their advertising falsely represented their Dannon Yogurt, as follows: that the product is nature's perfect food and is effective in the correction of poor eating habits; that it is effective in maintaining youth, a youthful complexion and in correcting skin disorders; that it contains less calories than the same amount of milk; that it has reducing properties; and that it is an adequate and effective treatment in all forms for certain named disorders and in the prune whip form for other disorders. In addition, during the proceeding an issue was raised concerning respondents' representation that their product has antibiotic properties and qualities.

The hearing examiner uncritically adopted the complaint allegations as to the representations made and he found, in a conclusionary finding, that such were false, misleading and deceptive. He failed to mention the large amount of evidence adduced by complaint counsel to support the charges. The examiner ruled that respondents' experts "have a bias and prejudice" and that the testimony of the doctors called by respondents did not possess that degree of medical, scientific objectivity which would justify giving it great weight. This, however, does not make an affirmative case. The examiner neglected one of his basic and principal functions, i.e., to make appropriate findings of fact.

The greater part of the record in this proceeding consists of the opinion testimony of experts called by both parties. Counsel supporting the complaint called Dr. Oral L. Kline, B.S., Ph.D., Director of the Division of Nutrition, Food & Drug Administration of the Department of Health, Education and Welfare; Dr. Naomi M. Kanof, B.A., M.D., Assistant Clinical Professor in Dermatology, George Washington University; and Dr. Irving B. Brick, A.B., M.D., Associate Professor of Medicine, and Chief, Division of Gastroenterology at Georgetown University Hospital.

Respondents' expert witnesses were: Dr. Bernard L. Oser, B.S., M.S., Ph.D., a nutritionist, President and Director of the Food & Drug Research Laboratories, Inc.; Dr. Harry Seneca, M.D., M.S., a specialist in gastroenterology, Assistant Professor, College of Physicians and Surgeons, Columbia University; Dr. Frederic Damrau,

M.D., not active in the practice of medicine; Dr. Shepard Shapiro, M.D., retired from general practice of medicine; and Dr. Francis P. Ferrer, M.D., Instructor in Medicine, New York Medical College. In addition to such testimony, respondents put in evidence various articles or papers prepared by certain of these witnesses and other persons.

We have considered all the evidence of record and conclude that the allegations of the complaint, with the exceptions noted below, are supported by substantial, probative evidence. Comment on questions raised as to the various alleged misrepresentations will follow.

The complaint alleges that statements such as " . . . Dannon is known as nature's perfect food that science made better" and "As a medicine . . . Dannon Yogurt is valuable . . . in the correction of poor eating habits . . . " represent that Dannon Yogurt is nature's perfect food and is effective in the correction of poor eating habits.

Dr. Oral L. Kline, expert witness and a specialist in nutrition who testified for the complaint, stated that he regarded a perfect food as "one which would supply all of the nutrients essential for maintenance of life, growth, development and so on." This is a view we believe likely to be held by many consumers. He further testified that yogurt was lacking in certain well-defined nutrients and that a person consuming yogurt over a period of time as a sole item of diet would not be able to maintain his nutritional status adequately. Respondents offered no expert witness on this issue. They adduced testimony that the World Book Encyclopedia refers to milk as the most *nearly* perfect food, but this hardly justifies a claim that yogurt is a perfect food.

Respondents argue that the perfect food representation is mere puffing, citing *Carlay Co., et al.* v. *Federal Trade Commission*, 153 F. 2d 493, 496 (7th Cir. 1946), and *Kidder Oil Co.* v. *Federal Trade Commission*, 117 F. 2d 892, 901 (7th Cir. 1941). With present day emphasis on dieting and the importance of nutritional values, to make a claim that a food is perfect (a claim which concerns nutrition), is more than mere puffing or an exaggeration of qualities; it is a misrepresentation as to a material fact. We conclude that the representation is false and deceptive.

As to the representation on poor eating habits, Dr. Irving B. Brick, expert medical witness for the complaint, testified that he did not think one ingredient or one medication was going to correct the eating habits of anybody or make a poor diet sufficient. We believe the evidence sufficient to sustain the charge on this representation.

The next charge in the complaint is that respondents have falsely

represented that Dannon Yogurt is effective in maintaining youth, a youthful complexion and in correcting skin disorders. Among the statements upon which this charge apparently is based are the following:

> How Dannon Yogurt can help you to a
> . . . smooth complexion, you'll
> learn to grow young gracefully with
> yogurt . . . .
>
> * * * * * * *
>
> Keep young with yogurt.

The evidence adduced by counsel supporting the complaint on the question of the effectiveness of Dannon Yogurt in the areas covered by this charge was limited to the testimony of one witness, Dr. Naomi M. Kanof, a dermatologist. Except to testify to the effect that yogurt would not give a person a "new" complexion, in the sense that a dermatologist uses the term "complexion", Dr. Kanof's testimony on direct examination failed to support the aforementioned charges. On cross-examination, relative to complexion, Dr. Kanof testified that what a person eats is a significant part of what the skin will look like. No other evidence was adduced in support of the allegations as to youth, complexion and skin disorders. In this state of the record, we conclude that the charges on these issues have not been sustained. The circumstances, including the nature of the statements made, do not in our opinion justify a remand of the matter on such questions.

Respondents' next challenge is to paragraph (f) of the order prohibiting the representation that their product has properties which make it uniquely effective in helping human beings to reduce their body weight. They claim they never so represented. The complaint alleges specifically that respondents falsely represented that their yogurt has "reducing properties". This was treated in the course of the hearing as meaning "intrinsic reducing properties", i.e., properties inherent in the product aside from a low butter fat content in relation to milk. An example of such representation is as follows:

> As a medicine . . . Dannon Yogurt is
> valuable, both prophylactically and
> therapeutically, in a variety of
> indications, including . . . obesity
> . . . .

This suggests, in our opinion, that respondents' yogurt has reducing properties inherent in the product. Dr. Brick testified that yogurt has no intrinsic reducing properties. This and other evidence supports the charges in the complaint on the question. The provision

of the order covering weight reduction will be modified to conform to findings supported by the record, i.e., it will prohibit representations as to intrinsic reducing properties.

Respondents appeal from paragraph (g) of the order, but only insofar as it, assertedly, (1) prohibits them from representing that Dannon Yogurt is an appropriate dietary supplement or adjuvant in the treatment of gastrointestinal disorders, and (2) prohibits them from representing that such product has therapeutic value in the treatment of nonorganic diarrhea and constipation. They propose that said paragraph (g) be modified to read:

(g) Is an exclusive or complete treatment or cure for gastrointestinal disorders, including but not limited to organic diarrhea, auto-intoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis or chronic, organic constipation.

This form of order as proposed would not be justified by the showing in this record.

Dr. Brick, expert medical witness for the complaint, testified specifically that yogurt would not be effective in cases of salmonellosis, shigellosis, colitis, amebic dysentery and chronic constipation. In fact, on colitis, he testified that the use of yogurt cultures might be dangerous, particularly if used to the exclusion of more specific medication. He also indicated that yogurt lacked value in other instances of gastrointestinal disorders. While he testified that yogurt "might be helpful" for post antibiotic diarrhea, he made it clear that he was not referring to such use as a treatment. The substance of Dr. Brick's testimony, taken as a whole, is that yogurt, including Dannon Yogurt, will not prevent and is ineffective as a cure or a treatment for gastrointestinal disorders, including those referred to in this proceeding.

Dr. Harry Seneca, possibly the most highly qualified of the experts which respondents put on the stand, testified as to the use of yogurt in certain cases of constipation and diarrhea. It is significant, however, that he refused to characterize yogurt even as a "treatment" for such gastrointestinal disorders. He testified: ". . . No, we don't propose, as I said in the morning—we don't use yogurt to treat disease. Its a supplement, a dietary supplement for the management of certain disturbances of the intestinal tract."

We believe there is substantial, probative evidence to support a finding that yogurt will not prevent and is ineffective as a cure or a treatment of intestinal tract disorders, and, therefore, we reject respondents' proposal to exempt from the order representations that yogurt is a dietary supplement or adjuvant in the *treatment* of such disorders.

Their second proposal, which is to limit the order so as to include for diarrhea and constipation only representations relating to organic diarrhea and organic constipation, is also rejected. Where, as in this case, the relief or benefit, if any, is that which results from an improved diet, statements of medical or therapeutic value are unjustified. As mentioned above, even respondents' witness, Dr. Seneca, would not characterize the use of yogurt as a "treatment". We believe, therefore, that regarding gastrointestinal disorders, all therapeutic as well as prophylactic claims should be prohibited. The form of order proposed by respondents is rejected.

Respondents further contest the breadth of the order in that it forbids respondents to misrepresent "in any manner, by advertising or otherwise, any of respondents' products". We believe this is too sweeping and that any such provision should be limited to misrepresentations as to the quality, properties and merits of respondents' product. Since Section 12 of the Federal Trade Commission Act is involved in this proceeding, the order will also be modified to conform to the provisions of that Section.

Respondents last challenge the inclusion of respondents Hazelton and Grantham in the order in their individual capacities. Respondents cite *Kay Jewelry Stores, Inc., et al.*, 54 F.T.C. 548 (1957), in which matter admissions in the answer that individual respondents were officers and directors of the corporations and formulated, directed and controlled the policies, acts and practices of the corporations, were held not sufficient justification for including the officers in the order in their individual capacities. The individuals named in this proceeding admit not only that they formulate, direct and control the policies of the corporate respondent, they admit that they have engaged in advertising, offering for sale, and the sale of Dannon Yogurt, that they have caused the product to be transported in commerce, and that they have disseminated and caused to be disseminated advertisements in commerce to promote the sale of Dannon Yogurt. Such advertisements contained the representations challenged in the complaint. This is much more than was admitted or shown in the *Kay Jewelry* case. We believe it demonstrates direct participation in the practices alleged and found to be unlawful. Accordingly, the mentioned individuals were correctly named in the order in their individual capacities. See *Trans-Continental Clearing House, Inc., et al.*, 56 F.T.C. 390 (1959), and court cases cited therein.

The appeal of respondents is granted in part and denied in part. The initial decision is vacated and set aside, and the Commission, in conformity with the views expressed in this opinion, will make its

own findings of fact, conclusions and proposed order in lieu of those contained in the initial decision.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND PROPOSED ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 27, 1960, issued and subsequently served its complaint in this proceeding upon respondents, charging them with violations of the Federal Trade Commission Act. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. The hearing examiner, in his initial decision filed October 12, 1961, found that the charges of the complaint were sustained and he entered an order against respondents to cease and desist the practices so found to be unlawful. Respondents have appealed.

The Commission having considered said appeal and the briefs and oral argument in support thereof and in opposition thereto, and the entire record herein, and having granted in part and denied in part the appeal, and having vacated and set aside the initial decision, now makes this its findings as to the facts, conclusions drawn therefrom and proposed order, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent Dannon Milk Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 22–11 38th Avenue, Long Island City 1, N.Y. Individual respondents Juan E. Metzger, Don L. Grantham, and John F. Hazelton are officers of said corporation. They formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.

2. The respondents are now, and have been, engaged in the advertising, offering for sale and sale of Yogurt which they sell under the name of Dannon Yogurt. Dannon Yogurt is a food product, as "food" is defined in the Federal Trade Commission Act. It is sold in plain, flavored and prune whip forms.

3. Respondents cause and have caused said product, when sold, to be transported from their place of business in the State of New York to purchasers therof located in various other states of the United States. Respondents maintain, and have maintained, a course of

trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, advertisements concerning the said product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in magazines, brochures, circulars and pamphlets, and by radio broadcasts, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and have caused the dissemination of, advertisements concerning the said products by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Among and typical of the statements contained in said advertisements, disseminated and caused to be disseminated, as aforesaid, are the following:

Why yogurt is so healthful. Dannon is known as nature's perfect food that science made better.

How Dannon yogurt can help you to a new, more glamorous figure and a smooth complexion, you'll learn how to grow young gracefully with yogurt . . .

Keep young with yogurt.

Sometimes it's the lure of the trim new waistline or perhaps it's a nicer complexion . . . or just that young, glad-to-be-alive feeling you get with Dannon Yogurt.

Tingling new fitness, a glowing new complexion, a trim new waist line.

Try yogurt and in a few weeks your mirror will show a new, more attractive you. Slim, trim 'n terrific. . . . a nicer complexion. . . . The glamorous reflection of an inward glow of fitness. Grow young with Dannon Yogurt. Because there is magic in those Dannon cultures. . . . magical goodness that can work more wonders for you than all the lotions and creams on your vanity table.

* * * Has far less calories * * * than the same amount of milk.

Dannon Prune Whip Yogurt. . . . . Remarkably effective, as well, in control of . . . amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. The simple treatment for the usual case is one 8 ounce container of Dannon Prune Whip Yogurt at bedtime for a period of three weeks.

* * * * * * *

As a medicine . . . Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, obesity, in the correction of poor eating habits, and in chronic constipation (here try Dannon Prune Whip Yogurt for 30 days—it's dramatically effective).

Yogurt cultures are capable of destroying most disease producing bacteria, thus helping restore normal intestinal function in many disturbances of the system.

And yogurt helps overcome those harmful bacteria in the system which may cause you to feel below par.

* * * * * * *

6. By and through the statements made in said advertisements, disseminated and caused to be disseminated, as aforesaid, respondents represented, directly or by implication, that said product:

1. In all forms—

(a) Is nature's perfect food and is effective in the correction of poor eating habits.

(b) Is effective in maintaining youth, a youthful complexion, and in correcting skin disorders.

(c) Contains less calories than the same amount of milk.

(d) Has reducing properties.

(e) Is an adequate and effective treatment, cure and preventive for gastrointestinal disorders, diarrhea, autointoxication, flatulence, suboptimal nutrition.

(f) Has antibiotic properties and qualities.

2. In prune whip form, is an adequate and effective treatment and cure for diarrhea, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis and chronic constipation.

7. Representation that Dannon Yogurt is nature's perfect food.

Dr. Oral L. Kline, a specialist in nutrition, testifying for the complaint, stated that he regarded a perfect food as "one which would supply all the nutrients essential for the maintenance of life, growth, development and so on." He further testified that yogurt lacks certain well-defined nutrients and that a person consuming yogurt over a period of time as a sole item of diet would not be able to maintain his nutritional status adequately. There is no contrary expert testimony on the question whether yogurt contains all essential nutrients. Accordingly, the finding is that yogurt is not a perfect food and that such representation of respondents is false and deceptive and misleading in a material respect.

8. Representation that Dannon Yogurt is effective in the correction of poor eating habits.

Dr. Irving B. Brick, expert medical witness called by counsel supporting the complaint, testified that he did not think one ingredient or one medication would correct the eating habits of anybody or make a poor diet sufficient; accordingly, the finding is that respondents' product will not correct poor eating habits and that this representation is false and deceptive and misleading in a material respect.

9. Representations that Dannon Yogurt is effective in maintaining youth, a youthful complexion, or in correcting skin disorders.

The record does not contain substantial evidence to sustain these allegations.

10. Representation that Dannon Yogurt contains less calories than the same amount of milk.

Respondents' charts as to the calories contained in the several kinds of Dannon Yogurt show the following:

Flavor:	*Calories per 8 oz. Cup*
Plain yogurt	120
Orange yogurt	170
Vanilla yogurt	170
Prune Whip yogurt	220
Strawberry yogurt	220
Pineapple yogurt	220

(Commission Exhibit 16, page 31.)

The calories in one cup of whole milk (8 oz.) are stated to be 165. (Commission Exhibit 16, page 21.) Except for the plain flavor, Dannon Yogurt contains more calories than the same amount of milk, and, accordingly, the representation that Dannon Yogurt has less calories, which representation includes all flavors, is false. This representation is misleading in a material respect.

11. Representation that Dannon Yogurt has intrinsic reducing properties.

The complaint alleges that respondents falsely represented that their yogurt has "reducing properties", and this was treated in the course of the hearing as meaning "intrinsic reducing properties", i.e., properties inherent in the product aside from a low butter fat content in relation to milk. For example, respondents have represented as follows: "As a medicine, Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including . . . obesity. . . ." Since this advertises the product as a medicine for obesity, it clearly suggests that it has intrinsic reducing properties. Dr. Irving B. Brick, expert medical witness for the complaint, testified that yogurt has no intrinsic reducing properties. The finding is, therefore, that Dannon Yogurt has no intrinsic reducing properties and that the representation as to such properties is false and deceptive and misleading in a material respect.

12. Representation that Dannon Yogurt is an adequate and effective preventive, treatment and cure in all forms for certain named disorders and effective as a treatment and cure in the prune whip form for others.

Respondents have represented that their product in all forms is a preventive, cure and treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, chronic constipation, and sub-optimal nutrition, and in the prune whip form is a treatment and a cure for chronic diarrhea, amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. Each of the specific disorders listed is considered herein as a gastrointestinal disorder.

Dr. Irving B. Brick, expert medical witness for the complaint, testified specifically that yogurt would not be effective in cases of salmonellosis, shigellosis, colitis, amebic dysentery and chronic constipation. In fact, on colitis, he testified that the use of yogurt cultures might be dangerous, particularly if used to the exclusion of more specific medication. He also indicated that yogurt lacked value in other gastrointestinal disorders mentioned herein. The substance of Dr. Brick's testimony, taken as a whole, is that yogurt, including Dannon Yogurt, will not prevent and is ineffective as a cure or a treatment for gastrointestinal disorders, including those referred to in this proceeding. Dr. Harry Seneca, possibly the most highly qualified of the experts which respondents put on the stand, testified as to the use of yogurt in certain cases of constipation and diarrhea. It is significant, however, that he refused to characterize yogurt even as a "treatment" for such gastrointestinal disorders. He testified: ". . . No, we don't propose, as I said in the morning—we don't use yogurt to treat disease. It's a supplement, a dietary supplement for the management of certain disturbances of the intestinal tract." The finding is that respondents' product will not prevent and is ineffective as a treatment or cure for gastrointestinal disorders, including diarrhea, autointoxication, flatulence, chronic constipation, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, and salmonellosis. Such representations by the respondents, therefore, are false and deceptive and misleading in a material respect.

13. Representation as to antibiotic properties and qualities.

This representation, while not detailed in the complaint, is covered generally in allegations therein as to false advertisements and clearly was put in issue during the course of the hearings. Respondents made representations as follows:

> Yogurt cultures are capable of destroying most disease producing bacteria, thus helping to restore normal intestinal function in many disturbances of the system. (Commission Exhibit 16, page 25; footnotes omitted.)
>
> And Yogurt helps overcome those harmful bacteria in the system which may cause you to feel below par. (Commission Exhibit 13, page 7.)

Such would suggest to many people that yogurt has antibiotic qualities and properties, similar to substances such as penicillin.

Dr. Irving Brick testified that the consumption of yogurt will change the bacterial flora in the intestine but that, to his knowledge, this would not kill any pathogenic bacteria causing disease. Dr. Harry Seneca, respondents' witness, testified that as far as the curative effect of yogurt is concerned, it is "not anything that approaches the therapeutic level."

The finding is that Dannon Yogurt will not destroy disease producing bacteria, and that it does not have antibiotic properties and qualities. Therefore, such representation by respondents is false and deceptive and misleading in a material respect.

CONCLUSIONS

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

2. The proceeding is in the public interest.

3. The advertisements herein found to be disseminated and caused to be disseminated by respondents and found to be misleading in material respects constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

4. The dissemination and the causing to be disseminated of the false advertisements, as aforesaid, constituted and now constitute unfair and deceptive acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

PROPOSED ORDER*

It is ordered, That respondents, Dannon Milk Products, a corporation, and its officers, and Juan E. Metzger, Don L. Grantham, and John F. Hazelton, individually and as officers of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of their product "Dannon Yogurt", including the plain, flavored and prune whip forms, or any other product containing substantially the same ingredients, or possessing substantially the same properties, whether sold under the same or any other name, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that said product:

(a) Is nature's perfect food;

(b) Will correct poor eating habits;

*Issued July 23, 1962.

(c) Except in the plain form contains less calories than the same quantity of milk;

(d) Has intrinsic reducing properties;

(e) Has therapeutic or prophylactic value or is an adequate or effective treatment or cure for gastrointestinal disorders, including but not limited to diarrhea, autointoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis, or chronic constipation.

(f) Has any antibiotic properties and qualities.

2. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as commerce is defined in the Federal Trade Commission Act, which advertisement misrepresents in any manner, directly or by implication, the quality, properties or merits of such product.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said product, any advertisement whicch contains any of the representations or misrepresentations prohibited in paragraphs 1 and 2 of this order.

Final Order

Respondents having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed an answer to said exceptions, opposing them in part and supporting them in part; and

The Commission having determined that the said proposed order to cease and desist should be modified and, as so modified, entered and adopted as the Final Order of the Commission:

It is ordered, That the proposed order issued in this proceeding, on July 23, 1962, be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Dannon Milk Products, a corporation, and its officers, and Juan E. Metzger, Don L. Grantham, and John F. Hazelton, individually and as officers of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of their product "Dannon Yogurt", including the plain, flavored and prune whip forms, or any other product containing substantially the same ingredi-

ents, or possessing substantially the same properties, whether sold under the same or any other name, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that said product:

(a) Is nature's perfect food;

(b) Will correct poor eating habits;

(c) Except in the plain form contains less calories than the same quantity of milk;

(d) Has intrinsic reducing properties;

(e) Has therapeutic or prophylactic value or is an adequate or effective treatment or cure for gastrointestinal disorders, including but not limited to diarrhea, autointoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis, or chronic constipation, except that nothing herein shall apply to representations:

(1) as to the relief of post antibiotic diarrhea, or

(2) as to the temporary relief of chronic constipation provided by Dannon Yogurt in the prune whip form;

(f) Has any antibiotic properties and qualities.

2. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement misrepresents in any manner, directly or by implication, the quality, properties or merits of such product.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said product, any advertisement which contains any of the representations or misrepresentations prohibited in Paragraphs 1 and 2 of this order.

It is further ordered, That the proposed order as modified be, and it hereby is, entered and adopted as the Final Order of the Commission.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in

which they have complied with the order to cease and desist as set forth herein.

IN THE MATTER OF

MORTON PHARMACEUTICALS, INC.

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

Docket 8322. Complaint, Mar. 14, 1961—Decision, Sept. 28, 1962

Order dismissing for failure of proof complaint charging a Memphis, Tenn., distributor of drugs and pharmaceuticals with offering fictitiously priced merchandise as premiums to purchasers of stated amounts of said products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Morton Pharmaceuticals, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Morton Pharmaceuticals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at 1625-39 N. Highland in the city of Memphis, State of Tennessee.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of drugs and pharmaceuticals to wholesalers, to retailers for resale to the public and direct to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Tennessee to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the purchase of its said products, the respondent

offered certain fictitiously priced merchandise as premiums to the purchasers of stated amounts of respondent's said products. Said offers were made in circulars and other advertising media sent through the mails to prospective purchasers of respondent's products.

Among the representations made by respondent, as aforesaid, are the following:

World Famous HELBROS Watches * * * BERING * * * Retail $65.00 (Men's watch pictured with price tag of $65.00)

ELECTRA * * * Retail $71.50 (Ladies' watch pictured with price tag of $71.50)

* * * we propose to ship you 100 Vials * * * and INCLUDE THE $65.00 BERING FREE OF EXTRA CHARGE.

BANQUET—America's Most Beautiful Fry Pan RETAIL $24.95

9 piece Sheffield Carving & Steak Knife Set $49.95 Suggested Promotional Price

PAR. 5. By and through the use of the aforesaid representations, the respondent represented, directly or by implication, that said amounts were the usual and customary retail prices of said premium products in the trade areas where the representations were made.

PAR. 6. The aforesaid representations were false, misleading and deceptive. In truth and in fact, the amounts set out in said representations were fictitious and greatly in excess of the prices at which said premium products were actually sold at retail in the trade areas where the representations were made.

PAR. 7. The fictitiously priced merchandise which respondent offered as premiums to purchasers of stated amounts of respondent's drugs and pharmaceuticals, as described in paragraph 4 hereof, likewise was shipped by respondent from his place of business in Memphis, Tennessee, to said purchasers located in various states of the United States.

PAR. 8. In the conduct of its business at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of drugs and pharmaceuticals of the same general kind and nature as that sold by respondent.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being unfairly diverted to respond-

728-122—65——56

ent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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

Mr. DeWitt T. Puckett for the Commission.
Mr. Eulyse M. Smith, of Memphis, Tenn., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondent with the use of fictitiously priced premiums to promote the sale of its products, in violation of the Federal Trade Commission Act. At a hearing held on December 21, 1961, a stipulation as to the facts was entered into by counsel on the record. Proposed findings and conclusions have been submitted on behalf of both parties, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. The respondent, Morton Pharmaceuticals, Inc., is a Tennessee corporation, with its place of business in Memphis, Tennessee. It is engaged in the sale of drugs and pharmaceuticals, the products being sold to wholesale and retail dealers and also to physicians direct. In the sale of its products respondent is engaged in interstate commerce and is in competition in such commerce with other sellers of drug products. While its annual volume of business is substantial, respondent is a relatively small company, its volume of business representing only a small fraction of the total volume of interstate drug business in the United States.

3. This is an unusual "fictitious pricing" case in that the charges have nothing to do with the products sold by respondent, that is, drugs and pharmaceuticals; the charges relate only to merchandise offered by respondent as premiums to promote the sale of its own products. Respondent employs no traveling salesmen and solicits business only through the use of circulars and other advertising material, the material being distributed among prospective purchasers by means of the United States mail. Among the representations made in some of this advertising were the following:

World Famous HELBROS Watches * * * BERING * * * Retail $65.00 (Men's watch pictured with price tag of $65.00)

ELECTRA * * * Retail $71.50 (Ladies' watch pictured with price tag of $71.50)

* * * we propose to ship you 100 Vials * * * and INCLUDE THE $65.00 BERING FREE OF EXTRA CHARGE.

BANQUET—America's Most Beautiful Fry Pan RETAIL $24.95

9 piece Sheffield Carving & Steak Knife Set $49.95 Suggested Promotional Price

4. None of the representations as to the prices of the premiums originated with respondent; respondent simply passed along to its own customers and prospective customers the representations made to it by the respective manufacturers or suppliers of the premiums. Insofar as respondent's liability under the Federal Trade Commission Act is concerned, this would seem to be immaterial. If the premiums were in fact fictitiously priced, respondent would be responsible under the Act for passing along the misrepresentations. Nor would the fact that apparently respondent had no knowledge of the actual retail prices of the premiums absolve it from responsibility, the presence of knowledge or wrongful intent not being an essential element in a proceeding under the Act.

5. Were the prices shown in connection with the premiums fictitious? As for the last two items mentioned in the advertising excerpts quoted above—the "Fry Pan" and the "Carving & Steak Knife Set"—the record is wholly silent.

6. In connection with the Helbros watches, referred to in the first three excerpts, counsel included in their stipulation of facts a provision to the effect that the hearing examiner might consider as evidence in the present case the testimony as to fictitious pricing given by witnesses who testified in the Helbros Watch Company case, Docket No. 6807, as summarized in the hearing examiner's initial decision in that case (affirmed by the Commission on December 26, 1961) [59 F.T.C. 1377]. That is, it was stipulated that if the witness in question were called in the present case their testimony would be the same as that given by them in the Helbros case.

7. The testimony in the Helbros case (pages 1386–1387 of the initial decision) was to the effect that in three trade areas, Newark, New Jersey; Detroit, Michigan; and Louisville, Kentucky (including nearby New Albany, Indiana)—certain Helbros watches were sold at retail for substantially less than the prices indicated on tickets supplied by Helbros and attached to the watches.

8. The record in the present case does not disclose whether any of respondent's drug products have been sold in these trade areas, nor whether any of the watches, or any representations regarding

them, have been distributed in the areas. Respondent, as already stated, is engaged in interstate commerce, but the only stipulation as to whether its products have been sold, or the premiums offered, in these three areas is that they "could have been".

9. If no representations regarding the watches have been made by respondent in any of these three trade areas, it seems clear that the evidence in the Helbros case as to fictitious pricing of Helbros watches in the areas serves no real purpose in the present case.

10. Even more serious is the failure of the record to identify the watches offered as premiums by respondent with those referred to by the witnesses in the Helbros case. Stated differently, there is nothing to show that the particular watches offered by respondent were fictitiously priced—that the watches were customarily sold at retail in the trade areas in question at prices less than the prices mentioned in respondent's advertising material.

11. In his initial decision in the Helbros case [59 F.T.C. 1386], the hearing examiner found:

> 6. Respondents sell different lines of watches, at different prices, to their catalog distributors, to house-to-house canvassers, and to jewelers. The watches all bear the Helbros trade name, but some of them contain additional name designations such as Carla, Aida, Lord Philip, Barnett, etc. Not only are the prices different for each of the lines, but there are different prices within each line.

From the above it is evident that Helbros sold many different kinds of watches at many different prices. The fact that certain watches referred to by the witnesses in the Helbros case were fictitiously priced does not establish that all Helbros watches, nor those involved in the present case, were so priced.

12. In summary, the record fails to establish: (1) that any representations regarding the watches were made by respondent in any of the trade areas covered by the testimony in the Helbros case; and (2) that the particular watches offered by respondent were fictitiously priced. As these points are essential to the Government's case, it follows that the complaint has not been sustained.

ORDER

It is ordered, That the complaint be, and it hereby is, dismissed.

ORDER DISMISSING COMPLAINT

This matter having been heard by the Commission upon exceptions to the initial decision dismissing the complaint and brief in support thereof, filed by counsel supporting the complaint, and upon oral argument, and the Commission having considered said exceptions and the opposition thereto presented by respondent; and

It appearing that the complaint charges that respondent has engaged in unfair methods of competition and unfair acts and practices in commerce in connection with the sale and distribution of drugs and pharmaceuticals, in that in advertising certain premium products for the purpose of inducing the purchase of said drugs and pharmaceuticals, respondent has falsely and deceptively represented that certain amounts are the usual and customary prices of said premium products in the trade areas in which said offers were made; and

The Commission, upon review of all evidence adduced in support of said complaint, having concluded that although the record shows that the advertised prices of certain of said premium products are in excess of the prices at which such products are usually and customarily sold in some trade areas, counsel supporting the complaint has failed to introduce evidence to establish that respondent's offers were made in those particular trade areas and that, therefore, insofar as the initial decision is based upon this failure of proof, it must be affirmed and adopted by the Commission; and

The Commission having further concluded that the circumstances herein are such that the public interest will best be served by continued close scrutiny of respondent's future operations and that, accordingly, remand of this proceeding is not warranted.

It is ordered, That the exceptions of counsel supporting the complaint to the initial decision be, and they hereby are, denied.

It is further ordered, That the initial decision be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

By the Commission, Commissioner MacIntyre dissenting.

IN THE MATTER OF

FAIRBANKS WARD INDUSTRIES, INC., ET AL.

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

Docket C-244. Complaint, Sept. 28, 1962—Decision, Sept. 28, 1962

Consent order requiring Chicago distributors to cease supplying retail dealers selling their merchandise with advertising mats to be published over the retailers' names which misrepresented the usual prices, availability, source, quality, etc., of their merchandise, as in the order below indicated.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fairbanks Ward Industries, Inc., a corporation, and Michael Wolfson and Harry Zaidler, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fairbanks Ward Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 666 North Lake Shore Drive in the city of Chicago, State of Illinois.

Respondents Michael Wolfson and Harry Zaidler are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of promoting the sale of and causing to be distributed various merchandise to retailers.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped to purchasers thereof located in states other than the state in which said merchandise is, or had been, manufactured or in which the respondents purchased the same. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents compose or cause to be composed, advertising promoting the sale of their said merchandise which advertising they cause to be made into mats, which mats are furnished by them to retail dealers selling their merchandise. Respondents induce the said retail dealers to publish the said advertising composed by them over the retail dealer's name. The respondents, in their said advertising mats and their forms of advertising furnished to and used by their said retail dealers, make many statements of which the following are typical but not all inclusive:

Now . . Half Price
11 Piece Lifetime Guaranteed
CAST ALUMINUM
Cook Set . . .

Special Mill Purchase Saves You ½

5 in 1 Gossip Desk
Not $39.50—Not $29.50—
NOW at a Big Saving!
$19.98

NOW FOR THE FIRST TIME! 2 SETS FOR THE PRICE OF 1
INCLUDED at no Extra Cost
ALL-PURPOSE HEAVY-DUTY
80 Watt SOLDERING IRON KIT

One Year Guarantee

Lifetime Guaranteed

Included Free
Of Extra Cost

2 Full Years of Eastman
Kodachrome Color Film Processing Free

Lowest Price Ever
None Sold Dealers

Only One Set to a Customer

Royal Swedana
Genuine Import
Stainless Steel

All 102 Pieces
Not $59.50 Not $39.50 But
$19.98 None Sold to Dealers

Complete 113 Pieces
Chrome Alloy Steel
SOCKET WRENCH and TOOL SET
Precision Made by Master Craftsmen
Not $99 . . Not $79 . . Not $59, BUT
$39.98. None Sold to Dealers.

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

1. Respondents' merchandise is being offered for sale at a reduced price by which the purchasing public can effect a substantial saving.

2. Certain prices, set out in juxtaposition with a lower price, are the generally prevailing prices at which the designated merchandise is sold at retail in the trade area or areas where the representations are made.

3. The prices at which certain merchandise is being offered for sale are special prices which are lower than the generally prevailing prices at which said merchandise is sold at retail in the trade area or areas where the representations are made.

4. Respondents are offering two sets of certain merchandise for the usual price of one of the sets of said merchandise.

5. Only a limited quantity of certain merchandise is available and because of the scarcity of the same, purchasers must order immediately to obtain the said merchandise.

6. Certain goods and services are a gift or gratuity given without cost to the recipient.

7. Respondents' stainless steel flatware is imported from Sweden.

8. The wrenches and tools in the set depicted are all manufactured of chrome alloy steel.

9. The merchandise offered for sale is unconditionally guaranteed for a certain specified period or a lifetime.

PAR. 6. In truth and in fact:

1. The merchandise is not being offered for sale at a reduced price through which the purchasing public can effect a substantial saving.

2. The prices set out in juxtaposition with a lower price are not the generally prevailing prices at which the merchandise is sold at retail in the trade area or areas where the representations are made.

3. The prices at which said merchandise is being offered for sale are not special prices and are not lower than the generally prevailing prices at which the merchandise is sold at retail in the trade area or areas where the representations are made.

4. Two sets of merchandise are not being offered for the usual price of one set of merchandise.

5. The supply or quantity of the advertised merchandise is not limited. Adequate quantities are available, and prospective purchasers need not place their orders immediately to obtain the said merchandise.

6. The goods and services represented as being free are not a gift or gratuity, or without cost to the recipient. In some cases, the recipient is required to purchase other merchandise as a prerequisite to receiving and retaining the article represented as being free, and this prerequisite is not clearly and conspicuously disclosed in close conjunction with the representation that the article is free. In other cases, the price which the recipient pays for the other merchandise, the purchase of which is prerequisite to receiving and retaining the article or service represented as being free, exceeds the usual selling price for said merchandise by an amount which includes a charge for the article or service which is represented as being free.

7. The merchandise represented as being imported from Sweden is imported from Japan.

8. Not all of the wrenches and tools represented as being of chrome alloy steel are made of that material. Substantial numbers of the wrenches and tools in the set are made of carbon steel and not of chrome or other alloy steel.

9. Respondents' guarantees of merchandise are subject to limitations and conditions which are not revealed in their advertising of said guarantees.

Therefore, the statements and representations referred to in paragraphs 4 and 5 are false, misleading and deceptive.

PAR. 7. The respondents by and through the use of the aforesaid acts and practices place in the hands of retailers the means and instrumentalities whereby said retailers may mislead and deceive the public in the manner herein alleged.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the sale of like and similar merchandise.

PAR. 9. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by re-

spondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fairbanks Ward Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 666 North Lake Shore Drive, in the city of Chicago, State of Illinois.

Respondents Michael Wolfson and Harry Zaidler are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Fairbanks Ward Industries, Inc., a corporation, and its officers, and Michael Wolfson and Harry Zaidler, individually and as officers of said corporate respondent, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the promotion or offering for sale, sale or distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or indirectly, that:

1. Any amount is the usual and customary retail price of respondents' merchandise when such amount is in excess of the price at which respondents' merchandise is usually and customarily sold at retail.

2. Any amount is the usual and customary retail price of merchandise when it is in excess of the generally prevailing price or prices at which the merchandise is sold at retail in the trade area or areas where the representation is made.

3. Any price is a "sale" or special price, unless such price constitutes a reduction from the generally prevailing price or prices at which the merchandise is sold at retail in the trade area or areas where the representation is made.

4. Two sets of any merchandise are being offered for the usual price of one set, unless the sales price for the two sets is respondents' usual and customary retail price for the single set in the recent, regular course of their business.

5. The supply of merchandise offered for sale by respondents is limited, when adequate quantities are available.

6. Offers of merchandise must be accepted at once or within a limited time.

7. Merchandise or service is free or is given as a gift or gratuity without cost to the recipient (a) when all the conditions, obligations, or other prerequisites to the receipt and retention of the free merchandise or service are not clearly and conspicuously disclosed at the outset so as to leave no reasonable probability that the terms of the advertisment or offer might be misunderstood; or (b) when the respondents' price for the article required to be purchased in order to obtain the merchandise or service represented to be free exceeds the usual price of said article by an amount which includes a charge for the merchandise or service represented to be free.

8. The country of origin of merchandise is any other than that in which the merchandise was produced.

9. Any tool or wrench made of carbon steel is made of chrome alloy steel or other alloy steel.

10. Any merchandise offered for sale is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

B. Misrepresenting, directly or indirectly, the composition, quality, usual price, or availability of their merchandise.

C. Misrepresenting in any manner the savings available to purchasers of respondents' merchandise or the amount by which the price of merchandise has been reduced from the price at which it is customarily sold by respondents or their competitors in the usual course of business in the trade area or areas where the representations are made.

D. Furnishing or otherwise placing in the hands of retailers, or others, the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the

Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GREAT EASTERN FOODS CORPORATION TRADING AS HOME FOOD BUYERS SERVICE, ETC., ET AL.

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

Docket C-245. Complaint, Sept. 28, 1962—Decision, Sept. 28, 1962

Consent order requiring Baltimore sellers of freezers and foods by means of a so-called "freezer food plan," to cease representing falsely, through salesmen or otherwise, that purchasers of their said plan would receive the same amount of food and a freezer for the same or less money than they had been paying for food alone.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Great Eastern Foods Corporation, a corporation trading and doing business as Home Food Buyer Service, Home Frozen Foods Service and Better Food Service, and Leroy S. Girson and William S. Ledbetter, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Great Eastern Foods Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Maryland with its principal office and place of business located at 3323 Keswick Road, Baltimore, Md., where it is trading and doing business as Home Food Buyers Service, Home Frozen Foods Service and Better Food Service.

Respondents Leroy S. Girson and William S. Ledbetter are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the act and practice hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of freezers and food by means of a so-called freezer food plan.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, freezers and food, when sold, to be shipped from their place of business in the State of Maryland to purchasers thereof located in various other states of the United States, and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said freezers and food in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of freezers, food and freezer food plans.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the sale of their freezer food plan, respondents' salesmen, representatives and agents have made certain representations. Typical and illustrative of the foregoing is the following:

> That purchasers of respondents' freezer food plan will receive the same amount of food and a freezer for the same or less money than they have been paying for food alone.

PAR. 6. In truth and in fact:

Purchasers of respondents' freezer food plan do not receive a freezer and the same quantity of food for the same or less money than they have been paying for food alone.

Therefore, the representation referred to in paragraph 5 was and is false, misleading and deceptive.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive representation and practice has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representation was and is true and into the purchase of substantial quantities of freezers, food and freezer food plans from the respondents by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid act and practice of respondents, as herein alleged, was, and is, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitutes, an unfair method of competition in commerce and unfair and deceptive act and practice in commerce, within the intent and meaning of the Federal Trade Commission Act, and in violation of Section 5 of said Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Great Eastern Foods Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 3323 Keswick Road, in the city of Baltimore, State of Maryland.

Respondents Leroy S. Girson and William S. Ledbetter are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Great Eastern Foods Corporation, a corporation, trading and doing business as Home Food Buyers Service, Home Frozen Foods Service or Better Food Service, or any other name, and its officers and Leroy S. Girson and William S. Ledbetter, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of freezers, food or a freezer food plan in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication that purchasers of respondents' freezer food plan will receive the same or any amount of food and a freezer for the same or less money than they have been paying for food alone.

2. Misrepresenting in any manner the savings realized by the purchasers of a freezer food plan, freezer, or food.

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

IN THE MATTER OF

NATIONAL BUSINESS SERVICE, INC., ET AL.

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

Docket C-246. Complaint, Sept. 28, 1962—Decision, Sept 28, 1962

Consent order requiring a collection agency in Elizabeth, N.J., to cease, in efforts to obtain information as to the current addresses, etc., of delinquent debtors, using such misleading questionnaire forms as those stating falsely that "money will be sent you if you will complete this questionnaire . . . within 10 days", or which bore the words "Official Questionnaire". "Please send me 'Free Post Paid' GIFT Reg. No. ____", or simulated a card used in an IBM key punch machine and purported to be "Current Employment Records" forms.

COMPLAINT

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

PARAGRAPH 1. Respondent, National Business Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 208 Broad Street, Elizabeth, N.J.

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

PAR. 2. Respondents are now, and for some time last past have been engaged in the operation of a collection agency and in collecting debts owed to others, upon a commission basis, contingent upon collection.

PAR. 3. In the course and conduct of their business, respondents are now, and for some time last past have been, receiving accounts for collection from persons, firms and corporations located outside the State of New Jersey and have been referring accounts which they have received for collection to persons, firms and corporations in other states than New Jersey and have been collecting accounts owed by persons, firms and corporations who are located outside the State of New Jersey. In addition thereto respondents have caused certain forms, hereinafter referred to, to be transported from their place of business in the State of New Jersey to other states in the United States and have sent and received, by means of the United States mail, letters, checks and documents to and from states other than the State of New Jersey and maintained, and at all times herein mentioned have maintained, a substantial course of trade in said business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents frequently desire to obtain information as to the current addresses, places of employment and other pertinent information as to persons whose delinquent accounts the respondents are seeking to collect. For this purpose they use, and have used, certain printed forms. These are principally of four types or kinds. Typical but not all inclusive of said forms are the following:

1. "American Information Service" form. This form consists of a single sheet of paper with printing thereon, by which the recipient is told that money will be sent if the questionnaire is completed and returned within ten days. The form is as follows:

American Information Service
21 BROADWAY
HAMMONTON, N.J.

Money will be sent to you if you will complete this questionnaire and return to this office within 10 days. Enclosed is a self addressed envelope for your convenience.

PLEASE TYPE OR PRINT ALL INFORMATION

Name ____________________
Address ____________________
City____________________ State____________________
Occupation____________________ Date of Birth____________________
Employed by____________________
Employer's Address____________________
Bank ____________________
Husband's or Wife's name____________________
Employed by____________________
Address ____________________
Nearest Phone____________________ Business Phone____________________
No ____________________

Said form is mailed in a white window envelope, the return address being "American Information Service, 21 Broadway, Hammonton, N.J." Also enclosed is a return envelope with the same address.

2. "Official Questionnaire" form. This form consists of a yellow, official appearing card, which is as follows:

(Side One)

OFFICIAL QUESTIONNAIRE

1536 ATLANTIC AVE., ATLANTIC CITY, N.J.

AMOUNT OF CLAIM TO BE DETERMINED

Fill in the Reverse Side of this form for identification of this claim.

DO NOT PIN, FOLD OR MUTILATE

FINAL NOTICE

RETURN AT ONCE

ANSWER ALL QUESTIONS ON REVERSE SIDE OF THIS FORM

728-122—65——57

(Side Two)

OFFICIAL QUESTIONNAIRE

Name ________________ Spouse's Name ________________
Address ________________
City ________________
Date of Birth ________________ Nearest Phone ________________
IMPORTANT All questions are accurate as of 195 IMPORTANT

Whom do you Bank with ________________
Bank's Address or Branch Name ________________
City ________________ State ________________
What Kind of Banking Do You Do—Checking ☐ Savings ☐ Loan ☐
Current Employer's Name ________________
Current Employer's Address ________________
City ________________ State ________________

Said form is mailed in a white window envelope with a return address of "Official Questionnaire, 1536 Atlantic Avenue, Atlantic City, N.J." Also enclosed is a brown envelope with the above address printed thereon.

3. "Mr. Q" form. This form used by the respondents consists of a card which is printed as follows:

Please mail me "Free Post Paid"
GIFT Reg. No.
Name ________________
Print or type name in full
Address ________________
Print or type
City or Post Office ________________
And State ________________
Nearest Phone ________________
Employed by ________________
Give complete name of employer
Address ________________
City and State ________________
Husband's or Wife's First Name ________________
Bank ________________
Print or type name in full
Address ________________
Print or type
Checking ☐ Savings ☐ Loan ☐
Own Home? ________________ Rent? ________________

Said form is mailed in a white envelope with a return address of "Mr. Q, 1267 N. Vermont Ave., Los Angeles 28, California." Printed on the reverse side of this form is the same address as on the envelope.

4. "Current Employment Records" form. This form consists of a card with small numbers printed on one side to simulate a card used

in an IBM key punch machine. The appearance of the other side is as follows:

Return This Form Within Five (5) Days

748 WASHINGTON BLDG.
WASHINGTON, D.C.
FILE NO. AX249
Report your new employer, Employers address, city and state on lines A, B, and C.

SOCIAL SECURITY
NUMBER

____

____

1961–62

A. ___________________________

B. ___________________________

C. ___________________________

OCCUPATION

____

____

STATE OF NEW JERSEY
STATUTES

Section 43–21–16 of Chap. 21 (Unemployment Compensation) provides—That whoever makes a false statement or representation, knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under the Unemployment Compensation Law, either for himself or for any other person, shall be liable to a fine of not less than $20.00 nor more than $50.00
The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with any state or the United States Government.

NJ–2

Said form is mailed in a brown, official appearing envelope with a return address of "748 Washington Building, Washington 25, D.C." Also enclosed is a return business reply envelope addressed to "Current Employment Records, 748 Washington Building, Washington 25, D.C."

Each of these forms, stamped and addressed, is mailed in bulk to the respective return address, from where they are mailed to the addressees.

If any of the above forms are returned by the respective addressees they are mailed in bulk to the respondents without being opened.

Through the use of the name "American Information Service" and the statement "Money will be sent to you if you will complete this questionnaire and return to this office within ten days" and by other words on the first form, respondents represent, directly or by implication, to those to whom the form is mailed that a substantial sum of money is being held for that person by the respondents. In truth

and in fact, no substantial sum of money is being held by the respondents but instead respondents send to each person who returns the form the sum of 10¢.

From the use of the designation "Official Questionnaire" and by other words and by the general format of the second form, respondents represent, directly or by implication, to those to whom the form is mailed that the respondents are communicating with the addressee in some official capacity and that the information is required for official purposes. In truth and in fact, respondents are not acting in any official capacity but desire the information solely for the purpose of locating the person to whom it is addressed.

By the form and wording on the third form, which promises a free gift, respondents represent, directly or by implication, that the return of the postal card will result in the receipt by the addressee of a valuable gift. In truth and in fact, the respondents have no valuable gift for the addressee but to everyone who returns the card the respondents send an inexpensive key chain.

By the use of the name "Current Employment Records" and the words on the fourth form and the general format thereof, respondents represent that they desire the information requested for some official purpose. In truth and in fact, the respondents have no official or governmental capacity and desire the information solely for the purpose of locating the person to whom the form is addressed.

The sole purpose of each of said forms is to locate delinquent debtors by subterfuge. This practice constitutes a scheme to mislead and conceal the purpose for which the information is sought.

Therefore, the aforesaid statements and representations were, and are, false, misleading and deceptive.

PAR. 5. The use, as hereinbefore set forth, of said forms has had, and now has, the tendency and capacity to mislead and deceive persons to whom said forms are sent into the erroneous and mistaken belief that said representations and implications are true and induce the recipients thereof to supply information which they otherwise would not have supplied.

PAR. 6. The aforesaid acts and practices of the respondent as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with

violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, National Business Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 208 Broad Street, in the city of Elizabeth, State of New Jersey.

Respondent Eli Levine is an officer of said corporation and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That National Business Service, Inc., a corporation, and its officers, and respondent Eli Levine, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the collection of, or attempting to collect, delinquent accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, or placing in the hands of others for use, any form, questionnaire or other material, printed or written, which does not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning alleged delinquent debtors.

2. Representing, or placing in the hands of others, any means by which they may represent, directly or by implication, that money or a free gift or any other thing of value, is being held

for the person from whom information is sought, unless respondents have in their possession a substantial sum of money or a gift of substantial value which will be sent to such person and then only when the exact sum of money or the exact nature of the gift or other thing of value is clearly and expressly disclosed and described.

3. Representing, or placing in hands of others any means by which they may represent, directly or by implication, that they have any official capacity or that any information requested is to be used for official purposes.

4. Using post cards, form letters or other material which represent, directly or by implication, that respondents' business is other than that of collecting delinquent accounts for themselves and for others.

5. Using the name or appellation "American Information Service", "Official Questionnaire", "Mr. Q", "Current Employment Records", or any other name or names of similar import to describe or refer to respondents' business or otherwise misrepresenting the purpose for which information is sought by respondents.

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

In the Matter of

STANDARD STORES, INC., ET AL.

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

Docket 7267. Complaint, Oct. 1, 1958—Decision, Oct. 2, 1962

Order requiring two individuals in Dallas, Tex., to cease representing falsely in advertising that they were conducting a survey to select a pattern of flatware for their stainless steel table flatware club, and that an exaggerated amount was the regular price for their package of eight place settings and additional pieces; and to cease furnishing sales literature making the same deceptive claims to individuals selling the flatware in various states.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

Trade Commission having reason to believe that Standard Stores, Inc., a corporation, and Thomas L. Hall and Jo Ann Hall, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH. 1. Respondent Standard Stores, Inc., is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Texas. Said respondent Standard Stores, Inc., does business under the trade name and style of American Silver Club. Individual respondents Thomas L. Hall and Jo Ann Hall are president-secretary and vice president, respectively, of the said corporate respondent. These individuals formulate, direct, and control the acts, practices, and policies of the corporate respondent. All of said respondents have offices and a principal place of business at 4122 Commerce Street, Dallas, Texas.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the promotion, sale, and distribution, among other things, of stainless steel table flatware to customers and prospective customers located in various states of the United States and in the District of Columbia.

Respondents cause said table flatware, when offered for inspection and sale to be shipped from their said place of business in the State of Texas to the recipients thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' volume of business in the sale and distribution of said table flatware is and has been substantial.

PAR. 3. Respondents, in the promotion, sale and distribution of said table flatware, use and have used advertising in newspapers and magazines, various circulars, letters, post cards, and other printed material which are sent through the United States mails to various individuals throughout the United States. Included in said advertising matter is a contact letter which states that a survey is being made as to the acceptability of a specified pattern of table flatware for adoption by respondents for their club for sale to its membership and offering the recipient thereof a free gift if the recipient will agree to inspect either a place setting or eight place settings of the

special pattern of table flatware, and, in some instances, thereafter to return a filled-in questionnaire to respondents.

Typical, but not all inclusive, of the statements appearing in said advertising literature are the following which appear in the initial contact letter:

EXAMINATION INVITATION
WITHIN A FEW DAYS YOU WILL RECEIVE A
GORGEOUS TWO-PIECE PRINCESS KAREN
HOSTESS SET WITH OUR COMPLIMENTS.

* * * * * * *

WHERE WE GOT YOUR NAME—We asked our list broker to locate names of persons who could help us to determine if Princess Karen is the right pattern for our new stainless club. Before selecting specific lists, we tried to picture the type person we felt would use and appreciate finely crafted stainless flatware. A person with above average income—who more than likely has silver, likes casual living, and is used to nicer things. Your name was selected from a list which came within this bracket * * *.

* * * * * * *

WHY WE WANT TO GIVE YOU THIS HOSTESS SET—Before we make commitments in order to have this pattern *exclusively*, it is imperative to get a market analysis from the level of those to whom it will ultimately be offered. We will give you this Hostess Set, if you will help us determine if this should be our main pattern before we start a stainless club similar to our silver club.

So, before we make a final decision, I would like for individuals from these selected groups, which includes yourself, to accept our invitation to examine a Princess Karen service for eight, in your own home at my expense. The complete set I am going to send you is nationally advertised at $83.00 (That's $8.00 a place setting plus $10.00 for the container and $9.00 for the Hostess Set). But, you may have all eight place settings and the container, for only $29.50. * * *

PAR. 4. Through the use of the foregoing statements, and others of the same import not specifically set forth herein, respondents represented that they were conducting a survey to determine whether or not the named pattern of table flatware was one that should be adopted for their table flatware club and that the results from this survey would be the basis on which such a decision will be made; that the regular price of the eight place settings of table flatware, plus the container and Hostess Set was $83.00 and that the price of $29.50, at which said place settings and container was offered was a special, reduced price.

PAR. 5. Said representations were and are false, misleading and deceptive. In truth and in fact, respondents had selected, prior to sending out the aforesaid advertising literature, the pattern of table flatware that was to be used in connection with their table flatware club and the so-called survey had nothing to do with such selection.

The regular price of the eight place settings of table flatware, plus the container and Hostess Set, was substantially less than $83.00, and the price of $29.50 for the eight place settings and container was not a special or reduced price but was the regular and usual price at which said combination was offered for sale and sold by respondents.

PAR. 6. In addition to engaging in the above practices, respondents have entered into agreements with a large number of firms and individuals located in several states whereby respondents, in consideration of the payment of a percentage of the gross sales, have agreed to, and do, furnish to such firms and individuals advertising matter similar or identical to that used by respondents above referred to, and such firms and individuals have used, and are now using, such advertising matter in conducting businesses of the same nature as that of the respondents.

PAR. 7. Respondents in the course and conduct of their business are in direct and substantial competition in commerce with corporations, firms and individuals engaged in the sale of table flatware, including stainless steel table flatware.

PAR. 8. The use by respondents of the foregoing false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were and are true, and into the purchase of respondents' merchandise because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been, and is now being, unfairly diverted to respondents from their competitors, and substantial injury has been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Charles S. Cox supporting the complaint.

Mr. Sam Passman and *Mr. Robb Stewart*, of Dallas, Texas, for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

Standard Stores, Inc., a corporation, Thomas L. Hall and Jo Ann Hall, individually and as officers of said corporation, hereinafter

called respondents, are charged with false advertising in violation of the Federal Trade Commission Act. The named respondents answered and denied the principal allegations set forth in the complaint. After hearings were begun and before their conclusion, the corporate charter of Standard Stores, Inc., was amended and its name changed to Associate Import Corporation. Hearings have now been completed for the receipt of evidence and testimony in support of and in opposition to the allegations of the complaint.

Proposed findings of fact, conclusions of law and order have been filed by counsel for respondents within the time fixed by the hearing examiner in an order dated March 12, 1962, extending the time to file proposed findings of fact, conclusions of law and order, to and including March 19, 1962. Counsel supporting the complaint did not file proposed findings within the extended period. The hearing examiner denied Commission counsel's request for a further extension of approximately ten days from March 19, 1962. Counsel filed an appeal from this ruling to the Commission. By order dated March 29, 1962, the Commission denied the appeal. The matter is now before the hearing examiner for issuance of an initial decision. All findings of fact and conclusions of law proposed by counsel for respondents not found or concluded herein are rejected.

FINDINGS OF FACT

1. At the time of the filing of the complaint herein, the respondent Standard Stores, Inc., was a corporation, organized in June, 1950 under the laws of the State of Texas, with its office and place of business located in Dallas, Texas. Originally, following its incorporation, Standard Stores, Inc., was engaged in the retail business, selling sewing machines, vacuum cleaners and later, silverplate.

2. At the time of its incorporation, the individual respondent Thomas L. Hall was a minority stockholder in Standard Stores, Inc. In 1953 Mr. Hall purchased the majority of the stock and Standard Stores, Inc., then discontinued the retail business and began buying merchandise, including silverplated table flatware, on a wholesale or jobber basis and selling it to the individual respondent Thomas L. Hall, who about that time, began doing a mail order business under the name of "American Silver Club." Mr. Hall, d/b/a "American Silver Club," then resold and distributed the silverplated table flatware to his customers and prospective customers located in various states of the United States and the District of Columbia. Mr. Hall, d/b/a "American Silver Club," operated what he called a "Silver Club," through which customers purchased silverplated table flatware on a "place-setting-a-month" plan.

3. At the time Mr. Hall purchased the majority of the stock in Standard Stores, Inc., Mr. Hall became president-secretary, and his wife, Jo Ann Hall, became vice president of said corporate respondent. After becoming the majority stockholder in Standard Stores, Inc., Mr. Hall formulated, directed and controlled the acts, practices and policies of said corporate respondent. On some date subsequent to August 17, 1959, and prior to October 18, 1960, the corporate charter of Standard Stores, Inc., was amended and its name changed to Associate Import Corporation. Mr. Hall continued as president of the corporate respondent under the new name. Since the amendment of the charter and change of the corporate name, Associate Import Corporation has been engaged in the importation and sale of merchandise at wholesale. It does not make retail sales. Associate Import Corporation has not imported nor sold any silverplated or stainless steel flatware.

4. Between the time of its incorporation in June, 1950 and 1953, when Mr. Hall purchased the majority of its capital stock, Standard Stores, Inc., had established a good credit rating. For this reason, when Mr. Hall began doing business as an individual under the trade name of "American Silver Club," Standard Stores, Inc., purchased the silverplate in its name and resold the silverplate to Mr. Hall, doing business as "American Silver Club." Mr. Hall, d/b/a "American Silver Club," then paid the manufacturer or company from whom Standard Stores, Inc., had purchased the merchandise.

5. In 1956, while Mr. Hall was still trading as "American Silver Club," he began selling stainless steel table flatware on the "club" plan. This was a pattern of stainless steel flatware called "Princess Karen." Princess Karen was manufactured in Japan and imported into the United States by National Silver Company. Mr. Hall, trading as "American Silver Club," had exclusive sales rights on Princess Karen. As in the case of the silverplated table flatware, the Princess Karen stainless steel table flatware was also purchased by Standard Stores, Inc., from National Silver Company and then resold to Mr. Hall, trading as "American Silver Club," for sale and distribution to his so-called "club members." Mr. Hall, trading as "American Silver Club," then paid National Silver Company direct for the Princess Karen.

6. On September 24, 1957, Mr. Hall was instrumental in the incorporation of American Silver Club Inc., under the laws of the State of Texas. Mr. Hall became president of American Silver Club, Inc. After the incorporation of American Silver Club, Inc., Mr. Hall ceased doing business under the name of "American Silver Club" and the

corporation American Silver Club, Inc., took over the sale of Princess Karen stainless steel flatware and continued through 1957 and into 1958, as Mr. Hall had been doing. The corporation American Silver Club, Inc., continued to use the same letterhead "American Silver Club, . . . Dallas, Texas," which Mr. Hall had been using while he was doing business under the name of "American Silver Club." Some time in 1957, Mr. Hall decided to discontinue the promotion and sale of Princess Karen and begin selling stainless steel flatware manufactured in the United States. Mr. Hall discussed with International Silver Company, an American manufacturer, the possible purchase of stainless steel table flatware from that company as a substitute for the Princess Karen. However, both Mr. Hall and the manufacturer believed it advisable and necessary to select a pattern or design for the stainless steel table flatware to be sold before offering it for sale to the public. Mr. Hall desired a pattern similar to the popular Princess Karen. Accordingly, the International Silver Company designed a pattern of stainless steel table flatware which was somewhat similar in design to Princess Karen and employed the research facilities of Young & Rubican, an advertising agency, to make an initial potential acceptability survey of the pattern. Young & Rubican made the survey test (CX-21C-J). The test confirmed their belief in the acceptability of the pattern. They named the pattern "Creation." International Silver Company made its first delivery of "Creation" stainless steel early in 1958. By this time American Silver Club, Inc., had been formed and it took over the sale and distribution of "Creation." As in the case of the "Princess Karen" stainless steel, Standard Stores, Inc. purchased the "Creation" and then sold it to American Silver Club, Inc., for resale and distribution to its so-called "club members." However, since American Silver Club, Inc., is not a party respondent in this proceeding, no findings of fact will be made with respect to the sales by American Silver Club, Inc., of "Creation" stainless steel.

7. In the sale and distribution of said stainless steel table flatware, the individual respondent Thomas L. Hall, doing business under the trade name of "American Silver Club," and later the corporation American Silver Club, Inc., used advertising in newspapers and magazines, circulars, letters, postcards and other printed material which were sent through the United States mail to various individuals throughout the United States. It is this advertising which is the subject of the complaint herein. Included in the advertising complained about was a form letter on the letterhead of "American Silver Club," Dallas, Texas, addressed to persons whose names were obtained

from various commercial mailing lists, purporting to be signed by "Jo Ann," and with the picture of Jo Ann Hall in the upper left hand corner of the page. Mr. Hall identified this letter as an "examination invitation" (CX–1). Mr. Hall prepared this letter, not his wife, Jo Ann Hall, although her name was at the bottom thereof. This letter stated, among other things, that a survey was being made as to the acceptability of the "Princess Karen" pattern of stainless steel table flatware for adoption by "American Silver Club" for its membership and offering the recipient a *Hostess Set*, consisting of a *Cake Server* and *Salad Server* in the Princess Karen pattern, as a free gift if the recipient would agree to examine a Princess Karen service for eight in the recipient's home. In many instances CX–2 and CX–3 were enclosed and mailed in the same envelope with CX–1. CX–2 is a folder showing a picture of some of the pieces of the Princess Karen pattern and on the back, the open stock prices for the various pieces. CX–3 is an addressed, postage paid card which the recipient of the examination invitation was requested to sign and return, stating that the recipient would accept the two-piece "Princess Karen" *Hostess Set* and examine a Princess Karen service for eight.

8. As stated in paragraph 7 above, the "examination invitation," CX–1, is on the letterhead of "American Silver Club," purporting to be signed by "Jo Ann," substantially as follows:

American Silver Club
2825 Main Street—P.O. Box 1383
Dallas, Texas

EXAMINATION INVITATION

Within a few days you will receive a gorgeous two-piece Princess Karen Hostess Set with our compliments.

We will send you this nine dollar value as a free gift.

But first—would you like to know *where* we got your name and *why* we want to give you this Hostess Set as a free gift?

WHERE WE GOT YOUR NAME—We asked our list broker to locate names of people who could help us to determine if Princess Karen is the right pattern for our new stainless club. Before selecting specific lists, we tried to picture the type person we felt would use and appreciate finely crafted stainless flatware. A person with above average income—who more than likely has silver, likes casual living, and is used to nicer things.

Your name was selected from a list which came within this bracket—people who purchased gourmet foods by mail, private boat owners, members of higher grade civic clubs, those who have ordered custom-made sporting equipment, buyers of rare books and prints, carefully selected career and professional people on the executive level, educators, and people with a participating interest in nature conservation causes. This type of list selection was extremely difficult to compile because it is so limited numerically. But, it is this "carriage trade" that would insist their stainless be of the Princess Karen quality.

WHY WE WANT TO GIVE YOU THIS HOSTESS SET—Before we make commitments in order to have this pattern *exclusively*, it is imperative to get a market analysis from the level of those to whom it will ultimately be offered. We will give you this Hostess Set, if you will help us determine if this should be our main pattern before we start a stainless club similar to our silver club.

So, before we make a final decision, I would like for individuals from these selected groups, which includes yourself, to accept our invitation to examine a Princess Karen service for eight, in your own home at my expense. The complete set I am going to send you is nationally advertised at $83.00 (that's $8.00 a place setting plus $10.00 for the container and $9.00 for the *Hostess Set*). But, you may have all eight place settings and the container, for only $29.50. Of course, the *Hostess Set* (pictured on the back of this letter) is your *free gift*, whether you keep the set or not, if you will examine a set of Princess Karen at this time.

Frankly, I have compared Princess Karen with sets selling for $120.00 in the finest New York City and Dallas shops and I still believe it is the most beautiful and best finished pattern being offered today—but you must be the final judge. Time is of the essence, so please mail the enclosed card today—it requires no postage.

Very truly yours,

JO ANN

9. The statement in the penultimate paragraph of CX–1 to the effect that the complete set of Princess Karen "I am going to send you is nationally advertised at $83.00 (that's $8.00 a place setting plus $10.00 for the container and $9.00 for the *Hostess Set*)", refers to an advertisement by American Silver Club in the February, 1957 issue of *House Beautiful* magazine, CX–5. This advertisement, CX–5, contains a picture of a Princess Karen fork and also a picture of Jo Ann Hall. Among other things, the advertisement states the following:

JO ANN HALL
. . . Personal Shopper

I personally guarantee Princess Karen to be the most beautiful and best finished stainless flatware offered anywhere at any price. Let me send you a 5-piece setting for your inspection. Complete 40-piece service for eight with two serving pieces and packette—$83.00. Open stock available.

Jo Ann Hall, Personal Shopper

AMERICAN SILVER CLUB
2825 Main Street—Dept. A–1 Dallas, Texas

10. There were other "examination invitation" letters similar to CX–1, such as CX–10A, B, and C, and also "examination invitation" letters on the letterhead of American Silver Club soliciting the sale of the "Creation" pattern of stainless steel table flatware which was later sold by American Silver Club, Inc. These letters were addressed to persons whose names were obtained from various commercial mail-

ing lists, persons engaged in various businesses, trades, professions and categories. It is the contention of counsel supporting the complaint that, through the use of the foregoing statements in the "examination invitation" letters and other advertising material offered and received in evidence at the hearing, the respondents represented that they were conducting a survey to determine whether or not the "Princess Karen" pattern of stainless steel flatware was one that should be adopted for their stainless steel table flatware club and that the results from this survey would be the basis on which such a decision would be made; that the regular price of the eight-place-settings of "Princess Karen," plus the container and Hostess Set was $83.00 and that the price of $29.50, at which said place settings and container was offered was a special, reduced price. The complaint alleges that said representations were false, misleading and deceptive; that, in truth and in fact, Mr. Hall, d/b/a "American Silver Club," had selected, prior to sending out the aforesaid advertising literature, the "Princess Karen" pattern of stainless steel and the so-called survey had nothing to do with such selection; that the regular price of the eight-place settings of "Princess Karen" plus the container and Hostess Set was substantially less than $83.00 and the price of $29.50 for the eight-place-settings and container was not a special or reduced price but was the regular and usual price at which said combination was offered for sale and sold by respondents.

11. It is found that the substantial allegations of the complaint have been established by a preponderance of the evidence. By the use of the statements and representations in "examination invitation" letters, CX-1, 10A, B, and C, the individual respondents Thomas L. Hall and his wife Jo Ann Hall represented that American Silver Club was conducting a survey to determine whether the "Princess Karen" should be selected as the main pattern for their so-called stainless steel "Club," whereas, said representation was false, misleading and deceptive for the reason that the "Princess Karen" pattern had already been selected as the main pattern for the so-called stainless steel "Club." It is further found that the statement in *House Beautiful* (CX-5) . . . "Complete 40 piece service for eight with two serving pieces and packette—$83.00" was a representation that $83.00 was the regular price for the eight-place settings of "Princess Karen" plus the container and *Hostess Set*, whereas, in truth and in fact, $29.50 was the regular price at which American Silver Club sold this merchandise.

12. It is further found that Mr. Hall made agreements with individuals in various states of the United States whereby Mr. Hall furnished

these individuals with sales literature, similar to CX-1, 10A, B and C, for their use to assist them in the sale of stainless steel table flatware through the mails similar to the mail order business which Mr. Hall was conducting under the name of American Silver Club and later, American Silver Club, Inc. In consideration of the services and sales literature furnished by Mr. Hall, each of these various individuals agreed to pay Mr. Hall 1% of their gross revenues from the sale of stainless steel flatware. The evidence discloses that some of these individuals made numerous mailings of the sales literature furnished by Mr. Hall in an effort to sell the "Creation" stainless steel table flatware through the mail. However, their sales promotions were not financially successful and Mr. Hall has not received any financial remuneration from these individuals under the 1% agreements made with them.

13. The individual respondent Thomas L. Hall d/b/a American Silver Club, caused said stainless steel flatware to be shipped from his place of business in Dallas, Texas to recipients located in various states of the United States and the District of Columbia in direct and substantial competition in commerce with firms and individuals engaged in the sale of stainless steel table flatware and maintained a substantial course of trade in stainless steel table flatware in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business of the individual respondent Thomas L. Hall, trading as American Silver Club in the sale and distribution of stainless steel table flatware was and has been substantial.

14. The individual respondent Jo Ann Hall, wife of the respondent Thomas L. Hall, testified at the hearing that she did not write any of the letters complained about, such as CX-1, and did not participate in the formulation of the policies, practices or management of Standard Stores or American Silver Club. Nevertheless, her picture appeared on and her name purported to be signed to many of the advertising pieces complained about. This was with her knowledge and consent. Therefore, Mrs. Hall is legally responsible for the representations contained in these advertisements.

15. Although not affecting the outcome of this decision, it will be stated that the record shows that the merchandise advertised and sold by Mr. Hall, d/b/a American Silver Club was of good quality and compared favorably with competitive stainless steel table flatware which sold at a much higher retail price.

CONCLUSIONS

The use by respondents of the foregoing false, misleading and deceptive statements and representations has had the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were true and into the purchase of respondents' merchandise because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors, and substantial injury has been done to competition in commerce. Said acts and practices herein found were to the injury and prejudice of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That Associate Import Corporation, a corporation, whose name was Standard Stores, Inc., at the time of the issuance of the complaint herein, its officers, and respondents Thomas L. Hall and Jo Ann Hall, individually and as officers of said corporation, and respondents' representatives, agents and employees, under the name of American Silver Club or any other name, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of table flatware, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, that respondents are conducting a survey to select and adopt any specified pattern of table flatware for their table flatware club, unless such is a fact.

2. Representing, directly or by implication, that respondents are conducting a survey for any purpose or that the results of a survey will be tabulated for a specified purpose unless such is a fact.

3. Representing directly or by implication, that any price is the regular price of merchandise when it is in excess of the price at which said merchandise is regularly and customarily sold by respondents in the normal course of business.

4. Furnishing the means and instrumentalities to others, by or through which others may mislead the public with respect to any of the matters set out above.

Decision of the Commission and Order To File Report of Compliance

This matter having been placed on the Commission's docket for review; and

The Commission having determined that the initial decision should be modified:

It is ordered, That the following finding be inserted on page 900 of the initial decision after the sentence "Therefore, Mrs. Hall is legally responsible for the representations contained in these advertisements":

> The record does not sustain a finding that the corporate respondent, Associate Import Corporation, was responsible for the dissemination of the representations challenged in this proceeding.

It is further ordered, That the allegations of the complaint as to respondent Associate Import Corporation, formerly named Standard Stores, Inc., be, and they hereby are, dismissed.

It is further ordered, That the initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, Thomas L. Hall and Jo Ann Hall, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision.

In the Matter of

MOE OSHER TRADING AS RELIABLE HANDKERCHIEF CO.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8333. Complaint, Mar. 16, 1961—Decision, Oct. 3, 1962

Order requiring a New York City distributor to cease violating the Textile Fiber Products Identification Act by selling handkerchiefs which did not have affixed thereto labels showing the required information, and by furnishing false guaranties that such products were not misbranded.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission,

having reason to belief that Moe Osher, an individual, trading as Reliable Handkerchief Co., hereinafter referred to as respondent, has violated the provisions of such Acts and the Rules and Regulations under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Moe Osher is an individual trading as Reliable Handkerchief Co. and has his principal place of business at 47 Division Street, New York, N.Y.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondent has been and is now engaged in the introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and has sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which had been advertised or offered for sale in commerce; and has sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or which were made of other textile products so shipped in commerce, as the terms "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products, to wit: handkerchiefs were misbranded by respondent in that they were not stamped, tagged, or labeled with the information required under Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

PAR. 4. The respondent has furnished false guarantees that his textile fiber products were not misbranded in violation of Section 10 of the Textile Fiber Products Identification Act.

PAR. 5. The respondent, in the course and conduct of his business, as aforesaid, was and is in substantial competition with other corporations, firms and individuals likewise engaged in the manufacture and sale of textile fiber products, including handkerchiefs, in commerce.

PAR. 6. The acts and practices of respondent, as set forth herein, were in violation of the Textile Fiber Products Identification Act and the Rules and Regulations thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of

competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. De Witt T. Puckett and *Mr. Bernard Turiel* for the Commission.

Respondent not represented by counsel.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondent with violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and the Federal Trade Commission Act, in connection with the sale of handkerchiefs. No answer to the complaint was filed by the respondent. At a hearing held on November 13, 1961, evidence both in support of and in opposition to the complaint was received. Thereafter proposed findings and conclusions were submitted by Commission counsel (respondent having elected not to file such proposals) and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. The respondent Moe Osher is an individual trading as Reliable Handkerchief Co. with his principal place of business at 47 Division Street, New York, N.Y. Respondent is engaged in the sale and distribution of textile fiber products, including handkerchiefs, his sales being made principally to retail outlets. Some of respondent's handkerchiefs are purchased by him from the manufacturers thereof, and the remainder are manufactured for respondent under his own specifications on a contractual basis. His annual volume of business is substantial.

3. Respondent's products, when sold, are shipped by him from his place of business in the State of New York to purchasers located in various other states of the United States.

4. In the course and conduct of his business, respondent is in substantial competition with other individuals and with corporations and firms engaged in the interstate sale and distribution of handkerchiefs.

5. Certain of respondent's handkerchiefs transported in commerce were misbranded in that they were not stamped, tagged or labeled with the information required under Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under such Act.

6. There appears to be no evidence supporting the charge in paragraph 4 of the complaint that respondent has furnished false guarantees regarding his products, in violation of Section 10 of the Textile Fiber Products Identification Act. While the record (Comm. Ex. 11)

shows that a continuing guaranty was filed by respondent with the Federal Trade Commission, there is no evidence that respondent in invoices or otherwise has made any references to such guaranty in connection with the sale of his products. This charge in the complaint is therefore being dismissed.

CONCLUSION

The acts and practices of respondent as described above were in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. The proceeding is in the public interest.

ORDER

It is ordered, That respondent Moe Osher, an individual, trading as Reliable Handkerchief Co., and his representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States of textile fiber products; and in connection with selling, offering for sale, advertising, delivering, transporting, or causing to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and in connection with selling, offering for sale, advertising, delivering, transporting, and causing to be transported, after shipment in commerce, textile fiber products, either in their original state or which have been made of other textile fiber products shipped in commerce; as the term "commerce" is defined in the Textile Fiber Products Identification Act, of handkerchiefs or other "textile fiber products", as such products are defined in and subject to the Textile Fiber Products Identification Act, do forthwith cease and desist from:

Misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That the complaint be dismissed as to the charge that the respondent has furnished false guarantees in violation of Section 10 of the Textile Fiber Products Identification Act.

FINAL ORDER

The Commission on July 18, 1962, having issued its order providing for the filing of objections by the respondent to the proposed final order of the Commission in modification of the order to cease and desist contained in the hearing examiner's initial decision filed February 7, 1962; and

Respondent having been served with said order of July 18, 1962, and not having filed objections to the proposed final order of the Commission within the time granted in said order; and

The Commission having determined that its proposed final order should be adopted and entered as the final order of the Commission:

It is ordered, That the exceptions of counsel supporting the complaint to the initial decision be, and they hereby are, granted.

It is further ordered, That the initial decision be modified by striking therefrom finding number 6 on pages 904 and 905 thereof and substituting therefor the following:

6. Respondent on December 22, 1959, filed with the Commission a continuing guaranty in the form prescribed by the aforesaid Rules and Regulations, wherein he stated that he is engaged in the manufacturing, marketing or handling of textile fiber products and wherein he guaranteed that every such textile fiber product contained in each shipment, or other delivery, made by him will not be misbranded or falsely or deceptively invoiced or advertised within the meaning of the Textile Fiber Products Identification Act and the Rules and Regulations thereunder.

By the provisions of Section 10(a) of said Act, no person is guilty of an unlawful act under Section 3 thereof relating to misbranding and false advertising of textile fiber products if he relied on a continuing guaranty on file with the Commission which, by the Commission's Rules of Practice, is made of public record. It is not necessary for the guarantor to represent in writing to a person receiving textile fiber products from him that he has such a continuing guaranty on file in order for that person to be entitled to rely on such guaranty. The filing of such continuing guaranty with the Commission is constructive notice of the existence of such guaranty.

It has hereinabove been found that during the period in which respondent's continuing guaranty on file with the Commission was in effect, respondent shipped and delivered textile fiber products which were misbranded. It is, therefore, found that respondent furnished a false guaranty.

It is further ordered, That the hearing examiner's order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent Moe Osher, an individual, trading as Reliable Handkerchief Co., and his representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States of textile fiber products; and in connection with selling, offering for sale, advertising, delivering, transporting, or causing to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and in connection with selling, offering for sale, advertising, delivering, transporting, and causing to be transported, after shipment in commerce, textile fiber products, either in their original state or which have been made of other textile fiber products shipped in commerce; as the term "commerce" is defined in the Textile Fiber Products Identification Act, of handkerchiefs or other "textile fiber products", as such products are defined in and subject to the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

2. Furnishing false guaranties that textile fiber products are not misbranded under the provisions of the Textile Fiber Products Identification Act.

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

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

IN THE MATTER OF

SPADA FRUIT SALES AGENCY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(c) OF THE CLAYTON ACT

Docket C-248. Complaint, Oct. 3, 1962—Decision Oct. 3, 1962

Consent order requiring Tampa, Fla., packers of citrus fruit to cease paying brokerage or discounts in lieu thereof to brokers or direct buyers on purchases for their own accounts for resale.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly discribed, has been and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Spada Fruit Sales Agency, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located in Tampa, Florida, with mailing address as P.O. Box 364, Tampa, Fla.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter sometimes referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit directly, and in many instances through brokers, to buyers located in various sections of the United States. When brokers are utilized in making sales, respondent pays said brokers for their services a brokerage or commission, usually at the rate of 5 cents per carton or 10 cents per 1⅗ bushel box or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed and is now selling and distributing citrus fruit, in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of Florida in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from its place of business or packing plant in the State of Florida, or from other places within said State, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been, at all

times mentioned herein, a continuous course of trade in commerce in citrus fruit across state lines between said respondent and the respective buyers thereof.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondent paid, granted or allowed, and and is now paying, granting or allowing to these brokers and other direct buyers on their purchases, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Spada Fruit Sales Agency, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located in Tampa, Fla., with mailing address as P.O. Box 364, Tampa, Fla.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That the respondent Spada Fruit Sales Agency, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit or fruit products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of citrus fruit or fruit products to such buyer for his own account.

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

IN THE MATTER OF

CONSUMER LABORATORIES, INC., ET AL.

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

Docket 8199. Complaint, Dec. 6, 1960—Decision, Oct. 4, 1962

Order requiring distributors of drug products, with general office in Los Angeles, to cease representing falsely—in newspaper and magazine advertising, by radio and television broadcasts, and otherwise—that their "Oragen" tablets were weight reducing and a new reducing discovery, were made exclusively from oranges and were manufactured by them; and that their caffeine-containing product "Tirend" was a new, rapid invigorator, among other deceptive claims; and to cease using the word "Laboratories" in their trade name.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Consumer Laboratories, Inc., a corporation, and A. Richard Diebold, Harold S. Heldfond and Robert D. Jones, individually and as officers of said corporation, and Albert H. Diebold, individually and as director and sole stockholder of said corporation, hereinafter referred to as re-

*The complaint is published as amended by order dated March 30, 1962.

spondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Consumer Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its general office and place of business located at 8467 Beverly Boulevard, Los Angeles 48, Calif. Said respondent also maintains an office in New York at 375 Park Avenue, New York 22, N.Y.

Respondent A. Richard Diebold is an individual and chairman of the board of directors of the corporate respondent. His address is Toplands Farm, Roxbury, Conn.

Respondent Harold S. Heldfond is an individual and president of the corporate respondent. His address is 1264 Benedict Canon Drive, Beverly Hills, Calif.

Respondent Robert D. Jones is an individual and secretary-treasurer of the corporate respondent. His address is 177 East 94th Street, New York 28, N.Y.

Respondent Albert H. Diebold is an individual and director and sole stockholder of the corporate respondent. His address is Mill Neck, Long Island, N.Y.

The individual respondents named herein formulate, control, direct and approve the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth.

PAR. 2. Said corporate respondent was organized under the laws of the State of New York, on or about December 9, 1958. It is the legal successor to the business of a predecessor corporation, Consumer Drug Corporation, an Oregon corporation, engaged, among other things, in the business of the sale and distribution of two products, one sold and distributed under the name "Oragen," and the other sold and distributed under the name "Tirend." Both products contain ingredients which bring them within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

Respondent Consumer Laboratories, Inc., since about January 1959 has acquired the assets and all rights, title and interest to the business of Consumer Drug Corporation, including the marketing of the products, "Oragen" and "Tirend".

Respondent Harold S. Heldfond was president of the predecessor corporation, Consumer Drug Corporation, at the time of the sale of the business to respondent Consumer Laboratories, Inc., and for

several years prior thereto. Said respondent Heldfond has been president of the corporate respondent Consumer Laboratories, Inc., since its incorporation.

PAR. 3. The designation used by respondents for the product "Oragen" and, according to its label, the formula thereof, and directions for use, are as follows:

Designation: ORAGEN
Formula:

EACH SIX ORAGEN TABLETS PROVIDE:

Pectolex (Trade Mark)	2.4 Gm. (37.0 grs.)
(Pectin Cellulose Complex with Dried Protopectin Complex, Orange 1.2 Gm.—Methylcellulose 250 CPS 1.2 Gm.)	
Protein Hydrolysate	338 mg. (6 grs.)
Ascorbic Acid (Vitamin C)	18.0 mg.
Niacinamide	9.0 mg.
Thiamin Mononitrate (Vitamin B-1)	0.6 mg.
Riboflavin (Vitamin B-2)	1.2 mg.
Calcium Pantothenate	0.6 mg.
Pyridoxine Hydrochloride (Vitamin B-6)	0.3 mg.
Iron (from Iron Gluconate)	3.0 mg.
Calcium (from Dicalcium Phosphate)	222 mg.[1]
Phosphorous (from Dicalcium Phosphate)	168 mg.[2]
Vitamin B-12 Activity from Colbalamin Concentrate	0.6 mcgm.
Milk Powder—Defatted	776 mg. (12 grs.)
Artificial Coloring and Flavoring Added	

Directions:

As an aid to appetite appeasement, take two or four tablets ½ hour before meals, with at least one full glass of water. If necessary, an additional two to four tablets may be taken before meals, between meals, or at bedtime.

[1] Increased in current formula to 225 mg.
[2] Increased in current formula to 173.5 mg.

The designation used by respondents for the product "Tirend" and according to its label, the qualitative formula thereof, and directions for use, are as follows:

Contains: Synergex (Brand name for Sodium BI Phosphate and Calcium Phosphate Monobasic), Niacin, Caffeine Alkaloid, Dextrose (Grape Sugar) Thiamine Mono-Nitrate, with Lemon Bioflavonoid Complex for "Vitamin P" activity from tart lemons.
Directions: Adults: one or two tablets as needed. Avoid use too close to bedtime.

PAR. 4. The predecessor corporation, Consumer Drug Corporation, maintained its office and principal place of business in Portland, Oregon, and shipped the products "Oragen" and "Tirend" from its place of business in the State of Oregon to purchasers located in other states, principally in the western part of the United States.

For a period of time after its incorporation, the successor corporation, respondent Consumer Laboratories, Inc., continued its operation from the Portland, Oregon, address of the predecessor company. In or about September 1959, the general offices of the corporate respondent were moved to Los Angeles, California.

PAR. 5. Said respondents, in the course and conduct of the business of the sale and distribution of the products "Oragen" and "Tirend", have been and are now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they have sold and distributed such products to purchasers thereof in states other than the states of origin of shipment, and, either directly or indirectly caused such products, when sold, to be shipped and transported from the states of origin to purchasers located in other states. There is now, and has been, a constant course and flow of trade and commerce in such products between respondents in the states of origin and purchasers thereof located in other states.

The volume of business in such commerce has been and is substantial.

PAR 6. In the course and conduct of their said business, respondents, either directly or indirectly, have disseminated, and caused the dissemination of, certain advertisements concerning the said products "Oragen" and "Tirend", by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various states of the United States having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said products; and have disseminated, and caused the dissemination of, advertisements concerning said products by various means, including, but not limited to, the aforesaid media, for the purpose of inducing, and which were likely to induce, directly, or indirectly, the purchase of said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Among and typical of the statements contained in said advertisements disseminated as hereinabove set forth, and others of the same import not specifically set out herein, are the following:

(a) re Oragen

Reducing discovery from Oranges. Contains Natural Substances from Citrus Fruits, the result of Pharmaceutical Research by Sunkist Growers. Thousands of overweight persons have quickly and easily lost unsightly fat the new Oragen-way and continued to stay slim and attractive. * * * Lose extra pounds and keep them off with Oragen. A product of Consumer Laboratories, Inc., * * * Oragen makes losing weight as easy as gaining weight.

CLINICS RELEASE EXCITING NEWS ABOUT ORAGEN, REDUCING DISCOVERY FROM ORANGES. Consumer Laboratories' Exciting Reducing Aid. Contains Natural Substances from Citrus Fruits, the Result of Pharmaceutical Research by Sunkist Growers. * * * Overeaters, "nervous nibblers"—or any overweight person with flabby midriff, heavy thighs, arms, legs, or other fleshy spots may now safely help lose weight, thanks to the reducing discovery from oranges, Oragen.

The remarkable new reducing discovery from oranges . . . containing a citrus substance. The result of pharmaceutical research by Sunkist growers.

* * * I tried Oragen * * * and here's what happened—I lost 24 pounds in 6 weeks. I honestly think that anyone wanting to reduce * * * should take Oragen like I did.

* * * Do away with unsightly, flabby midriff, heavy arms, thighs and legs . . . recapture the lure of your own true slenderness and charm.

Natures safe, effective answer to unsightly bulges.

Here's exciting news. A reducing discovery from oranges. Yes, from the sunny citrus groves of California science has unlocked the secret of safe reducing Oragen. * * * If you have flabby, heavy arms that embarrass you; thick unsightly legs you can't conceal; embarassing bulges that can mar your beauty, then try Oragen. Clinical research shows that 88% of those using Oragen lost an average of 18⅗ pounds and up to 29½ pounds in 10 weeks.

Oragen Tablets—fully guaranteed.

Guaranteed Oragen Tablets.

Get guaranteed Oragen from oranges.

(b) re Tirend

Join the millions who enjoy life with "Tirend". Internal power instantly.

Whenever you feel tired * * * you can have safe pep and energy in just 20 minutes * * * amazing TIREND tablets provide instant power * * * a happy glow of new found exhilaration * * * you can have new energy surging to every part of your body in just 20 minutes.

Tirend tablets will give you instant new pep and energy for a good time all evening long.

Thanks to TIREND the amazing new pep tablet, you can feel wonderful in just 20 minutes.

Whenever you feel really tired out—do you know that you too can feel wonderful in just 20 minutes? Yes, amazing TIREND tablets have been created to provide safe and effective pep almost instantly * * *.

* * * * * * *

You should have TIREND handy for all those times when you need a quick and lasting lift. Take a TIREND * * * You will feel energy surging to every part of your body in just 20 minutes or you pay nothing.

Thanks to amazing TIREND tablets you can feel a new, invigorating energy—a great new surge of internal power—a happy, glorious feeling of renewed life *within minutes!* * * * and it lasts for hours *without letdown* or *after effects!*"

Safe Pep and Energy in 20 minutes.

Nowadays when people are bushed * * * half dead from a hard days work or nervous strain and there are important things to be done * * * they take TIREND * * * guaranteed to give instant new pep and energy * * * A surge of internal power to every muscle of the body.

TIREND tablets give you amazing new pep and energy for a good time all evening long.

* * * During World War II, German scientists discovered the amphetamines, which supposedly helped stimulate their race to be "Super-Human" * * * These have been used since then in this country, but they are restricted to doctor's prescription. Then TIREND was developed in a research institute. Their scientists combined military research during the war with more recent advances in medicine and the result was the wonder-working TIREND formula * * *

Amazing TIREND the new safe pep tablets provide instant internal power.

Laboratory makes available safe new invigorator to give physical and mental "Lift" in minutes.

PAR. 8. Through the use of said advertisements, as referred to in paragraph 7 hereof, relating to the product "ORAGEN", and other advertisements similar thereto but not specifically set out herein, respondents have represented, and are now representing, directly or by implication, that:

(1) Respondents' product "Oragen" has weight reducing properties.

(2) Its use will cause a reduction of weight in overweight persons in specific parts of the body, that is, spot reducing.

(3) Its use will result in the loss of weight of a specific amount in a specified period of time.

(4) "Oragen" is fully guaranteed.

(5) "Oragen" is derived from oranges.

(6) "Oragen" is manufactured by respondent Consumer Laboratories, Inc.

(7) "Oragen" is a new reducing discovery.

(8) "Oragen", itself, is the result of research by the Pharmaceutical Research Department of Sunkist Growers.

PAR. 9. Through the use of said advertisements, as referred to in paragraph 7 hereof, relating to the product "TIREND", and other advertisements similar thereto but not specifically set out herein, respondents have represented, and are now representing, directly or by implication, that:

(1) Respondents' product "Tirend" is an amazing and wonder-working product.

(2) The use of "Tirend" will provide amazing pep and energy, instantly, within minutes or within 20 minutes.

(3) "Tirend" was developed in a research institute and represents the combined efforts of scientists and military research and recent advances in medicine.

(4) "Tirend" is similar to, and as effective as, the amphetamines.

(5) "Tirend" is guaranteed to give instant new pep and energy.

(6) "Tirend" is a new "invigorator".

(7) "Tirend" will be of benefit in the treatment of all cases of tiredness.*

PAR. 10. The said advertisements and representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

(1) Respondents' product "Oragen" has no weight reducing properties in itself. Any weight reduction which may follow its use is caused by a reduced caloric intake.

(2) The use of "Oragen" will not cause a reduction of weight in any specific area of the body, that is, spot reducing.

(3) The use of "Oragen" will not result in the loss of any specific amount of weight for any specified period of time.

(4) The terms and conditions of the guarantee of "Oragen", given by respondents to purchasers, and the manner in which they will perform under such guarantee are not set forth in connection therewith.

(5) "Oragen" contains a number of ingredients which are not derived from oranges.

(6) "Oragen" is not manufactured by respondent Consumer Laboratories, Inc.

(7) "Oragen" is not a new reducing discovery as it has no reducing properties and bulk producing products, such as "Oragen" have been known for many years.

(8) "Oragen" is not the result of research by the Pharmaceutical Research Department, or any other department, of Sunkist Growers.

(9) Respondents' product "Tirend" is not an amazing or wonder-working product. Such benefits that may result from its use come from its caffeine content, which is found in coffee, tea and other drinks, and the benefits obtained from the recommended dosage of one or two tablets will be the same as those obtained by drinking one or two cups of coffee.

---

*Added by amendment of March 30, 1962.

(10) The benefits afforded by the use of "Tirend" will not be instantaneous or within minutes or within 20 minutes but in a substantially longer period of time, varying in individual cases, and in the case of numerous persons such benefits will not be afforded in less than one hour.

(11) "Tirend" was not developed in a research institute and does not represent the combined efforts of scientists and military research and recent advances in medicine.

(12) "Tirend" is not similar to or as effective as the amphetamines.

(13) The terms and conditions of the guarantee of "Tirend" given to purchasers and the manner in which respondents will perform under such guarantee are not set forth in connection therewith.

(14) "Tirend" is not a new "invigorator" as its effective ingredient for such purpose, namely caffeine, has been known and used for such purpose for many years.

(15) "Tirend" will not be of benefit in the treatment of tiredness caused by disease or tiredness other than that which is of a temporary nature caused by over-exertion or loss of sleep.*

PAR. 11. Respondents, through the use of the word "Laboratories" as a part of the name of the corporate respondent, thereby represent, directly or by implication, that corporate respondent owns or operates a laboratory in connection with its business, which is contrary to the fact.

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

Mr. Lewis F. Depro and *Mr. Berryman Davis* for the Commission.

Rogers, Hoge & Hills, by *Mr. William L. McGuire*, of New York, N.Y., for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

The issue in this proceeding is whether respondents are in violation of Section 5 of the Federal Trade Commission Act through the dissemination of false advertisements concerning certain drug products which they sell in commerce.

The proceeding was initiated by a complaint issued December 6, 1960, and was reassigned to the present examiner on September 21, 1961, for hearing and the issuance of an Initial Decision therein. The matter was heard in part on February 19, 20, and 21, 1961 at New York, New York.

*Added by amendment of March 30, 1962.

On April 16, 1962 respondents filed a motion to withdraw their answer to the complaint, as amended, and to file in lieu thereof a "Substitute Answer" annexed to the motion. Under the "Substitute Answer," respondents admit all the material allegations of fact in the complaint, as amended, except that they deny that respondents A. Richard Diebold and Robert D. Jones, as individuals, are responsible and liable for the acts and practices complained of and deny that respondent Albert H. Diebold is responsible and liable either as an individual or as a stockholder or director of the corporate respondent or otherwise for the acts complained of. Respondents under said "Substitute Answer" waive all intervening procedure and further hearing as to the facts admitted in the substitute answer.

There being no objection to respondents' motion to withdraw their original answer and to file in lieu thereof the "Substitute Answer" annexed thereto, the motion is hereby granted and the answer of respondents to the complaint herein, as amended, is deemed to be the said "Substitute Answer."

On the same date of April 16, 1962, respondent Albert H. Diebold filed a motion for a dismissal of the amended complaint as it relates to him. Also on the same date, respondents A. Richard Diebold and Robert D. Jones filed a motion for a dismissal of the amended complaint as against them as individuals (but not as officers of corporate respondent). The motions were supported by annexed affidavits and by a memorandum of law. The motions were endorsed "No Objection" by counsel supporting the complaint who also entered into a stipulation with respondents for the entry of a proposed order calling for a dismissal of the complaint as to Albert H. Diebold and for dismissals of the complaint against A. Richard Diebold and Robert D. Jones individually. It having appeared that good cause existed for granting of said motions and that the public interest would not be prejudiced thereby, the motions were granted under an order dated May 7, 1962.

By a stipulation dated April 16, 1962, the parties hereto submitted a proposed cease and desist order, which they deem appropriate in the premises, for the consideration of the examiner. The proposed order is adopted and set forth below. The said stipulation and proposed order, not having been filed, will be filed at or prior to the time of the filing of the Initial Decision herein.

The facts in this matter as adduced by the pleadings, stipulations of fact, the testimony, and the documentary evidence are as follows but it should be noted that the facts with respect to Albert H. Diebold are not given as the complaint has been dismissed as to him.

Respondent Consumer Laboratories, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its general office and place of business located at 8467 Beverly Boulevard, Los Angeles 48, California, and a New York office at 375 Park Avenue, New York 22, New York. Respondent A. Richard Diebold, with address at Toplands Farm, Roxbury, Connecticut, is an individual and chairman of the board of directors of the corporate respondent. Respondent Harold S. Heldfond, with address at 1264 Benedict Canon Drive, Beverly Hills, California, is an individual and president of corporate respondent. Respondent Robert D. Jones, with address at 177 East 94th Street, New York 28, New York, is an individual and secretary-treasurer of the corporate respondent. The individual respondents named above formulate, control, direct, and approve the policies, acts, and practices of the corporate respondent including the acts and practices hereinafter set forth.

Corporate respondent was organized under the laws of the State of New York, on or about December 9, 1958. It is the legal successor to the business of a predecessor corporation, Consumer Drug Corporation, an Oregon corporation, engaged, among other things, in the business of the sale and distribution of two products, one sold and distributed under the name "Oragen," and the other sold and distributed under the name "Tirend." Both products contain ingredients which bring them within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

Corporate respondent since about January 1959 has acquired the assets and all rights, title, and interest to the business of Consumer Drug Corporation, including the marketing of the products, "Oragen" and "Tirend." Respondent Harold S. Heldfond was president of the predecessor corporation, Consumer Drug Corporation, at the time of the sale of the business to corporate respondent and for several years prior thereto. Heldfond has been president of corporate respondent since its incorporation.

The designation used by respondents for the product "Oragen" and, according to its label, the formula thereof, and directions for use, are as follows:

Designation: ORAGEN
Formula:

EACH SIX ORAGEN TABLETS PROVIDE:

Pectolex (Trade Mark)	2.4 Gm. (37.0 grs.)
(Pectin Cellulose Complex with Dried Protopectin Complex, Orange 1.2 Gm.—Methylcellulose 250 CPS 1.2 Gm.)	
Protein Hydrolysate	338 mg. (6 grs.)
Ascorbic Acid (Vitamin C)	18.0 mg.
Niacinamide	9.0 mg.
Thiamin Mononitrate (Vitamin B-1)	0. 6 mg.
Riboflavin (Vitamin B-2)	1. 2 mg.
Calcium Pantothenate	0. 6 mg.
Pyridoxine Hydrochloride (Vitamin B-6)	0. 3 mg.
Iron (from Iron Gluconate)	3.0 mg.
Calcium (from Dicalcium Phosphate)	222 mg.[1]
Phosphorous (from Dicalcium Phosphate)	168 mg.[2]
Vitamin B-12 Activity from Colbalamin Concentrate	0.6 mcgm.
Milk Powder—Defatted	776 mg. (12 grs.)
Artificial Coloring and Flavoring Added	-------------------

Directions:

As an aid to appetite appeasement, take two or four tablets ½ hour before meals, with at least one full glass of water. If necessary, an additional two to four tablets may be taken before meals, between meals, or at bedtime.

[1] Increased in current formula to 225 mg.
[2] Increased in current formula to 173.5 mg.

The designation used by respondents for the product "Tirend" and according to its label, the qualitative formula thereof, and directions for use, are as follows:

> Contains: Synergex (Brand name for Sodium BI Phosphate and Calcium Phosphate Monobasic), Niacin, Caffeine Alkaloid, Dextros (Grape Sugar) Thiamine Mono-Nitrate, with Lemon Bioflavonoid Complex for "Vitamin P" activity from tart lemons.
> Directions: Adults: one or two tablets as needed. Avoid use too close to bedtime.

The predecessor corporation, Consumer Drug Corporation, maintained its office and principal place of business in Portland, Oregon, and shipped the products "Oragen" and "Tirend" from its place of business in the State of Oregon to purchasers located in other states, principally in the western part of the United States. For a period

of time after its incorporation, the successor corporation, corporate respondent herein, continued its operations from the Portland, Oregon address of the predecessor company. In or about September 1959, the general offices of the corporate respondent were moved to Los Angeles, California.

The aforementioned respondents, in the course and conduct of the business of the sale and distribution of the products "Oragen" and "Tirend", have been and are now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they have sold and distributed such products to purchasers thereof in states other than the states of origin of shipment, and, either directly or indirectly, caused such products, when sold to be shipped and transported from the states of origin to purchasers located in other states. There is now, and has been, a constant course and flow of trade and commerce in such products between respondents in the states of origin and purchasers thereof located in other states. The volume of business in such commerce has been and is substantial.

In the course and conduct of their said business, respondents, either directly or indirectly, have disseminated, and caused the dissemination of, certain advertisments concerning the said products "Oragen" and "Tirend", by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said products; and have disseminated, and caused the dissemination of, advertisements concerning said products by various means, including, but not limited to, the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in said advertisements disseminated as hereinabove set forth, and others of the same import not specifically set out herein, are the following:

(a) re Oragen

Reducing discovery from Oranges. Contains Natural Substances from Citrus Fruits, the result of Pharmaceutical Research by Sunkist Growers. Thousands of overweight persons have quickly and easily lost unsightly fat the new Oragen-way and continued to stay slim and attractive. * * * Lose extra pounds and

keep them off with Oragen. A product of Consumer Laboratories, Inc., * * * Oragen makes losing weight as easy as gaining weight.

CLINICS RELEASE EXCITING NEWS ABOUT ORAGEN, REDUCING DISCOVERY FROM ORANGES. Consumer Laboratories' Exciting Reducing Aid. Contains Natural Substances from Citrus Fruits, the Result of Pharmaceutical Research by Sunkist Growers. * * * Overeaters, "nervous nibblers"—or any overweight person with flabby midriff, heavy thighs, arms, legs, or other fleshy spots may now safely help lose weight, thanks to the reducing discovery from oranges, Oragen.

The remarkable new reducing discovery from oranges . . . containing a citrus substance. The result of pharmaceutical research by Sunkist growers.

* * * I tried Oragen * * * and here's what happened—I lost 24 pounds in 6 weeks. I honestly think that anyone wanting to reduce * * * should take Oragen like I did.

* * * Do away with unsightly, flabby midriff, heavy arms, thighs and legs . . . recapture the lure of your own true slenderness and charm.

Natures safe, effective answer to unsightly bulges.

Here's exciting news. A reducing discovery from oranges. Yes, from the sunny citrus groves of California science has unlocked the secret of safe reducing Oragen. * * * If you have flabby, heavy arms that embarrass you; thick unsightly legs you can't conceal; embarassing bulges that can mar your beauty, then try Oragen. Clinical research shows that 88% of those using Oragen lost an average of 18⅗ pounds and up to 29½ pounds in 10 weeks.

Oragen Tablets—fully guaranteed.

Guaranteed Oragen Tablets.

Get guaranteed Oragen from oranges.

(b) re Tirend

Join the millions who enjoy life with "Tirend". Internal power instantly.

Whenever you feel tired * * * you can have safe pep and energy in just 20 minutes * * * amazing TIREND tablets provide instant power * * * a happy glow of new found exhilaration * * * you can have new energy surging to every part of your body in just 20 minutes.

Tirend tablets will give you instant new pep and energy for a good time all evening long.

Thanks to TIREND the amazing new pep tablet, you can feel wonderful in just 20 minutes.

Whenever you feel really tired out—do you know that you too can feel wonderful in just 20 minutes? Yes, amazing TIREND tablets have been created to provide safe and effective pep almost instantly * * *.

* * * * * * *

You should have TIREND handy for all those times when you need a quick and lasting lift. Take a TIREND * * * You will feel energy surging to every part of your body in just 20 minutes or you pay nothing.

Thanks to amazing TIREND tablets you can feel a new, invigorating energy—a great new surge of internal power—a happy, glorious feeling of renewed life *within minutes!* * * * and it lasts for hours *without letdown* or *after effects!*

Safe Pep and Energy in 20 minutes.

Nowadays when people are bushed * * * half dead from a hard days work or nervous strain and there are important things to be done * * * they take

TIREND * * * guaranteed to give instant new pep and energy * * * A surge of internal power to every muscle of the body.

TIREND tablets give you amazing new pep and energy for a good time all evening long.

* * * During World War II, German scientists discovered the amphetamines, which supposedly helped stimulate their race to be "Super-Human" * * * These have been used since then in this country, but they are restricted to doctor's prescription. Then TIREND was developed in a research institute. Their scientists combined military research during the war with more recent advances in medicine and the result was the wonder-working TIREND formula * * *

Amazing TIREND the new safe pep tablets provide instant internal power.

Laboratory makes available safe new invigorator to give physical and mental "Lift" in minutes.

Through the use of the advertisements referred to above relating to the product "Oragen", and other advertisements similar thereto but not specifically set out herein, respondents have represented, and are now representing, directly or by implication, that:

(1) Respondents' product "Oragen" has weight reducing properties.

(2) Its use will cause a reduction of weight in overweight persons in specific parts of the body, that is, spot reducing.

(3) Its use will result in the loss of weight of a specific amount in a specified period of time.

(4) "Oragen" is fully guaranteed.

(5) "Oragen" is derived from oranges.

(6) "Oragen" is manufactured by respondent Consumer Laboratories, Inc.

(7) "Oragen" is a new reducing discovery.

(8) "Oragen", itself, is the result of research by the Pharmaceutical Research Department of Sunkist Growers.

Through the use of the aforementioned advertisements, relating to the product "TIREND", and other advertisements similar thereto but not specifically set out herein, respondents have represented, and are now representing, directly or by implication, that:

(1) Respondents' product "Tirend" is an amazing and wonder-working product.

(2) The use of "Tirend" will provide amazing pep and energy, instantly, within minutes or within 20 minutes.

(3) "Tirend" was developed in a research institute and represents the combined efforts of scientists and military research and recent advances in medicine.

(4) "Tirend" is similar to, and as effective as, the amphetamines.

(5) "Tirend" is guaranteed to give instant new pep and energy.

(6) "Tirend" is a new "invigorator".

(7) "Tirend" will be of benefit in the treatment of all cases of tiredness.

The aforementioned advertisements and representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

(1) Respondents' product "Oragen" has no weight reducing properties in itself. Any weight reduction which may follow its use is caused by a reduced caloric intake.

(2) The use of "Oragen" will not cause a reduction of weight in any specific area of the body, that is, spot reducing.

(3) The use of "Oragen" will not result in the loss of any specific amount of weight for any specified period of time.

(4) The terms and conditions of the guarantee of "Oragen", given by respondents to purchasers, and the manner in which they will perform under such guarantee are not set forth in connection therewith.

(5) "Oragen" contains a number of ingredients which are not derived from oranges.

(6) "Oragen" is not manufactured by respondent Consumer Laboratories, Inc.

(7) "Oragen" is not a new reducing discovery as it has no reducing properties and bulk producing products, such as "Oragen" have been known for many years.

(8) "Oragen" is not the result of research by the Pharmaceutical Research Department, or any other department, of Sunkist Growers.

(9) Respondents' product "Tirend" is not an amazing or wonder-working product. Such benefits that may result from its use come from its caffeine content, which is found in coffee, tea, and other drinks, and the benefits obtained from the recommended dosage of one or two tablets will be the same as those obtained by drinking one or two cups of coffee.

(10) The benefits afforded by the use of "Tirend" will not be instantaneous or within minutes or within 20 minutes but in a substantially longer period of time, varying in individual cases, and in the case of numerous persons such benefits will not be afforded in less than one hour.

(11) "Tirend" was not developed in a research institute and does not represent the combined efforts of scientists and military research and recent advances in medicine.

(12) "Tirend" is not similar to or as effective as the amphetamines.

(13) The terms and conditions of the guarantee of "Tirend" given to purchasers and the manner in which respondents will perform under such guarantee are not set forth in connection therewith.

(14) "Tirend" is not a new "invigorator" as its effective ingredient for such purpose, namely caffeine, has been known and used for such purpose for many years.

(15) "Tirend" will not be of benefit in the treatment of tiredness caused by disease or tiredness other than that which is of a temporary nature caused by over-exertion or loss of sleep.

Respondents, through the use of the word "Laboratories" as a part of the name of the corporate respondent, thereby represent, directly or by implication, that corporate respondent owns or operates a laboratory in connection with its business, which is contrary to the fact.

CONCLUSIONS

On the basis of the foregoing evidentiary findings of fact, the examiner concludes that the dissemination by respondents (remaining after the aforementioned dismissals as to some of the original respondents) of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Consumer Laboratories, Inc., a corporation, and its officers, and Harold S. Heldfond, individually and as an officer of said corporation, and A. Richard Diebold and Robert D. Jones as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the products designated "Oragen" and "Tirend," or any other product of substantially similar composition, or possessing substantially similar properties, whether sold under said names, or any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement:

A. Represents, directly or indirectly, that:

(1) "Oragen" is a new reducing discovery or that it has any weight reducing properties in itself;

(2) Any specific predetermined weight reduction can be achieved by using respondents' product "Oragen" for a prescribed period of time;

(3) "Oragen" will cause weight loss from specific parts of the body or is effective in spot reducing;

(4) The product "Oragen" or the product "Tirend" is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform are clearly set forth;

(5) The ingredients in "Oragen" are derived exclusively from oranges;

(6) "Oragen," itself, is the result of research by a department or division of Sunkist Growers;

(7) The product "Oragen" or the product "Tirend" is manufactured by Consumer Laboratories, Inc., or that respondents manufacture any other product when they do not own, operate or control the plant in which the products are manufactured;

(8) Consumer Laboratories, Inc., owns or operates a laboratory;

(9) The benefits afforded by the use of "Tirend" will occur in less than one hour;

(10) "Tirend" was developed by a research institute or that it represents the combined efforts of scientists and military research and recent advances in medicine; or misrepresenting in any manner the origin or development of said product;

(11) "Tirend" is similar to, or as effective as, the amphetamines;

(12) "Tirend" is a new invigorator or any other kind of a new product;

(13) "Tirend" will be of benefit in the treatment of tiredness unless limited to tiredness of a temporary nature caused by overexertion or loss of sleep.

B. Uses such words as "amazing," "wonder-working," or any other words or terms of the same import, to describe "Tirend" or its properties.

2. Disseminating, or causing the dissemination of, any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said products, which advertisement contains any of the representations prohibited in Paragraphs 1.A. and 1.B. hereof.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent Albert H. Diebold as an individual, director, and sole stockholder, and as to respondents A. Richard Diebold and Robert D. Jones as individuals.

FINAL ORDER

Respondents having filed, under § 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed final order in this proceeding, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply opposing said exceptions; and

The Commission having considered said exceptions and having concluded that the grounds set forth in support thereof do not justify modification of the proposed final order, and that said order should be adopted and entered as the final order of the Commission:

It is ordered, That respondents' exceptions to the proposed final order be, and they hereby are, denied.

It is further ordered, That the initial decision be modified by striking therefrom the sentence beginning on line 13 with the words "The individual respondents" and ending on line 16 with the words "set forth" on page 919 thereof and substituting the following:

> The individual respondent Harold S. Heldfond formulates, controls, directs, and approves the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The individual respondent Albert H. Diebold is no longer a director of the corporate respondent, having resigned as such on March 31, 1961, for reasons of health. He has virtually retired from all business activities and has not been engaged in the management of the corporate respondent for several years. The individual respondent A. Richard Diebold is Chairman of the Board of the corporate respondent. However, only a small portion of his time, approximately ten percent, is devoted to corporate respondent, the remainder being devoted to other business enterprises and to charitable organizations. He did not originate or formulate the advertising copy, claims or representations challenged in the complaint. The individual respondent Robert D. Jones is Secretary-Treasurer of corporate respondent. He is a member of the bar of the State of New York, with his office located in New York City. He supervises the accounting, financial, tax, and legal work for corporate respondent. His responsibilities do not include the writing or placing of advertising copy nor did he originate or formulate the advertising claims hereinafter set forth. On the basis of the foregoing, the order herein will provide for dismissal of the complaint as to Albert H. Diebold and for dismissal as to A. Richard Diebold and Robert D. Jones in their individual capacities but not in their official capacities.

It is further ordered, That the order to cease and desist contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Consumer Laboratories, Inc., a corporation, and its officers, and Harold S. Heldfond, individually and as an officer of said corporation, and A. Richard Diebold and Robert D. Jones as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the products designated "Oragen" and "Tirend," or any other product of substantially similar composition, or possessing substantially similar properties, whether sold under said names, or any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement:

A. Represents, directly or indirectly, that:

(1) "Oragen" is a new reducing discovery or that it has any weight reducing properties in itself;

(2) Any specific predetermined weight reduction can be achieved by using respondents' product "Oragen" for a prescribed period of time;

(3) "Oragen" will cause weight loss from specific parts of the body or is effective in spot reducing;

(4) The product "Oragen" or the product "Tirend" is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform are clearly set forth;

(5) The ingredients in "Oragen" are derived exclusively from oranges:

(6) "Oragen" itself, is the result of research by a department or division of Sunkist Growers;

(7) The product "Oragen" or the product "Tirend" is manufactured by Consumer Laboratories, Inc., or that respondents manufacture any other product when they do not own, operate or control the plant in which the products are manufactured;

(8) The benefits afforded by the use of "Tirend" will occur in less than one hour;

(9) "Tirend" was developed by a research institute or that it represents the combined efforts of scientists and military research and recent advances in medicine; or

misrepresenting in any manner the origin or development of said product;

(10) "Tirend" is similar to, or as effective as, the amphetamines;

(11) "Tirend" is a new invigorator or any other kind of a new product;

(12) "Tirend" will be of benefit in the treatment of tiredness unless limited to tiredness of a temporary nature caused by overexertion or loss of sleep.

B. Uses such words as "amazing," "wonder-working," or any other words or terms of the same import, to describe "Tirend" or its properties.

2. Disseminating, or causing the dissemination of, any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said products, which advertisement contains any of the representations prohibited in Paragraphs 1.A. and 1.B. hereof.

It is further ordered, That respondents, Consumer Laboratories, Inc., a corporation, and its officers, and Harold S. Heldfond, individually and as an officer of said corporation, and A. Richard Diebold and Robert D. Jones, as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the products designated "Oragen" and "Tirend," or any other preparation or product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Laboratories", or any other word of the same import or meaning as a part of their corporate name, or representing in any other manner that respondents own, operate or control a laboratory.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent Albert H. Diebold as an individual, director, and sole stockholder, and as to respondents A. Richard Diebold and Robert D. Jones as individuals.

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

It is further ordered, That Consumer Laboratories, Inc., a corporation, and A. Richard Diebold and Robert D. Jones as officers of said corporation, and Harold S. Heldfond shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist as set forth herein.

IN THE MATTER OF

AMERICAN RADIATOR AND STANDARD SANITARY CORPORATION

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

Docket 7835. Complaint, Mar. 21, 1960—Decision, Oct. 5, 1962

Order dismissing, as not sustained by the evidence, complaint charging a manufacturer of heating, cooling, plumbing, and kitchen products, among others, with violating Section 5 of the Federal Trade Commission Act through the wrongful inducement of discriminatory allowances from its suppliers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and it appearing to the Commission that a proceeding by it would be to the interest of the public, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. American Radiator and Standard Sanitary Corporation is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 40 West 40th Street, New York, N.Y.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the manufacture, sale and distribution of many diversified products, including heating, cooling, plumbing and kitchen products. Respondent sells and distributes said products for use and resale both through independent wholesalers and through its own Amstan Supply Division. Said Amstan Supply Division, operating through approximately seventy-five wholesaling branches, sells and distributes both respondent's said products and similar and related products purchased from other manufacturers, hereinafter referred to as respondent's "suppliers". Through said Amstan Supply Division, respondent is in substantial competition with many other corporations, persons, firms, and partnerships in the purchase, sale and distribution of heating, cooling, plumbing and kitchen products and similar and related products.

Respondent's sales are substantial, being approximately $500,000,-000 annually.

PAR. 3. In the course and conduct of its said business, respondent has caused and now causes its said products to be shipped and transported from the state or states of location of its various manufacturing plants, warehouses and places of business to purchasers thereof located in states other than the state or states of the United States wherein said shipment or transportation originated. In the sale of its said products respondent at all times relevant herein has been and now is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its said business, in such commerce, respondent has knowingly induced or received from many of its suppliers payment to it, or for its benefit, of money or other things of value as compensation, or in consideration, for services and facilities furnished by, or through respondent, in connection with the sale or offering for sale of products sold to it by said suppliers. But such payments were not made available by such suppliers on proportionally equal terms to all their other customers competing with respondent in the sale and distribution of products of like grade and quality purchased from such suppliers.

PAR. 5. For example, as a result of solicitations by respondent, many of respondent's suppliers have made payments to respondent to assist respondent in defraying the cost of television programs known variously as "Builders Showcase" and "Showcase of Homes" and sponsored by respondent in New Orleans, Louisiana; St. Louis, Missouri; Pittsburgh, Pennsylvania; and Dallas, Texas. In consideration of such payments, respondent has undertaken to promote the sale of such suppliers' products, by its Amstan Supply Division, to the builders of the homes featured on said television programs and to the subcontractors of such builders. In fact, the purchase of certain products from said Amstan Supply Division by said builders and subcontractors is the condition upon which respondent will permit the featuring of said homes upon said programs.

PAR. 6. In the period 1957 to 1959, inclusive, some of respondent's suppliers made such payments to respondent. Said payments aggregated more than $15,000.

Among and typical of the suppliers who made such payments, to or for the benefit of respondent, were Bridgeport Brass Company, Inc., Bridgeport, Connecticut and Grabler Manufacturing Company, Cleveland, Ohio.

PAR. 7. Respondent's suppliers making such payments, including those expressly named in paragraph 6 hereof, did not offer or otherwise make available to all their customers, competing with respond-

ent in the sale and distribution of their respective products of like grade and quality, any similar payments as compensation, or consideration, for advertising or other services or facilities, on terms proportionally equal to those granted respondent.

When it induced or received from these suppliers the payments or allowances described in paragraphs 5 and 6 hereof, respondent knew, or should have known, that they constituted payments or allowances which such suppliers were not offering or otherwise making available on proportionally equal terms to their other customers competing with respondent in the sale and distribution of the products of such suppliers.

PAR. 8. In knowingly inducing or receiving such special payments from suppliers, which were not available on proportionally equal terms to its competitors, respondent has engaged in acts and practices which were all to the prejudice and injury of its competitors and of the public, which have the tendency and effect of obstructing, hindering, lessening and preventing competition in the sale and distribution of the aforementioned products, and which, accordingly, constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson and *Mr. Alan R. Lyness* supporting the complaint.

Mr. William E. Willis of *Sullivan & Cromwell*, of New York, N.Y., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

This proceeding was brought under Section 5 of the Federal Trade Commission Act by the issuance of a complaint dated March 21, 1960. Counsel supporting the complaint seeks among other things to test the propriety of respondent manufacturer of building supplies, who also does its own wholesaling in part, soliciting its suppliers to engage cooperatively in an advertising program designed to sell homes on condition that the builders of the homes, so advertised, will cause plumbing, heating, and air conditioning contractors on such homes to use the products of respondent and its cooperating suppliers and to purchase them through the wholesaling subsidiary of respondent.

The Pleadings

Very briefly, the charge contained in the complaint is that the respondent induced suppliers for its building supply distribution division (Amstan) to contribute to a television program on which builders

exhibited homes which they had built. These supplier contributions, it was charged, were not made available on proportionally equal terms to the suppliers' other customers. Respondent knew or should have known about this discrimination. The concluding paragraph of the complaint charges:

> In knowingly inducing or receiving such special payments from suppliers, which were not available on proportionally equal terms to its competitors, respondent has engaged in acts and practices which were all to the prejudice and injury of its competitors and of the public, which have the tendency and effect of obstructing, hindering, lessening and preventing competition in the sale and distribution of the aforementioned products, and which, accordingly, constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Paragraph 5 which commences "For example," after describing payments to respondent for particular television programs, continues as follows:

> . . . In consideration of such payments, respondent has undertaken to promote the sale of such suppliers' products, by its Amstan Supply Division, to the builders of the homes featured on said television programs and to the subcontractors of such builders. In fact, the purchase of certain products from said Amstan Supply Division by said builders and subcontractors is the condition upon which respondent will permit the featuring of said homes upon said programs.

In its answer, respondent admitted that payments for the program were made by Amstan's suppliers but denied that the suppliers had not made such allowances to others or that it knew or should have known of any such discrimination. Respondent also denied that builders were required to use the products of the contributing suppliers and it claimed that the matter was moot because the program had been experimental, had been voluntarily discontinued and there was no likelihood of its being resumed.

Prehearing Proceedings and Motions

Authority to hear this matter was transferred to the undersigned on April 4, 1961, from another hearing examiner and there have been several changes in counsel supporting the complaint.

A prehearing conference was held April 21, 1961, at which the issues were discussed and a procedure for notification of each party by the other of the names of witnesses and the documents to be used was established. It was also provided that objections to documents noticed must be made in advance. There was no discussion at the prehearing conference indicating that the quoted section of paragraph 5 would be relied upon solely to establish the violation of Section 5 of the

Federal Trade Commission Act. The hearing examiner was informed by counsel supporting the complaint that witnesses would be required to establish the violation, that a stipulation proposed by counsel for respondent would not be acceptable to him and that the initial hearing should be held at Dallas, Texas. After an opportunity was afforded counsel to discuss settlement, it was arranged that a form of order would be submitted by counsel and that a hearing would commence in Dallas on July 25, 1961. An order embodying the results of the conference was issued July 10, 1961.

Between the date of the prehearing conference and the issuance of the pretrial order, respondent moved to dismiss the complaint on the ground of mootness and to postpone the hearings, or in the alternative, to certify as a question to the Commission whether or not the continued prosecution of the proceeding was in the public interest. This motion was denied by order dated July 5, 1961, after hearing oral argument and examining extensive briefs. The order stated the basis of the decision and indicated that the motion was denied without prejudice to a renewal thereof at the close of the taking of evidence.

On July 11, 1961, counsel supporting the complaint requested that the last two days of the hearings scheduled for Dallas, Texas be set for New Orleans. An order to that effect was issued July 12, 1961. On July 13, 1961, counsel for respondent protested informally, by letter, that counsel supporting the complaint had not sent him the names of witnesses. He sought an adjournment on that ground. The hearing examiner denied this application, by letter, and suggested that should counsel for respondent find that counsel supporting the complaint was attempting to take improper advantage, he might make an application for deferred cross-examination or for action under Rule 3.29(e). Copies of both letters were addressed to counsel supporting the complaint. Counsel for respondent denied vigorously that he was making any charge of impropriety which would make action under Rule 3.29(e) appropriate.

Nature of the Proof

At the opening of the hearing in Dallas on July 25, 1961, counsel supporting the complaint announced that he had determined not to call witnesses but intended to make the case a documentary one. Hence, there was no violation of the pretrial order. At the Dallas hearing, counsel supporting the complaint offered 27 exhibits, several of which consisted of a number of pages. These, for the most part, had been authenticated by counsel for respondent in compliance with the pretrial order of July 10, 1961. However, as to a few, additional concessions were required before they could be received in evidence.

Counsel for respondent undertook to consider such requests for concessions and was given until August 7, 1961, to respond. Thereupon, counsel supporting the complaint indicated that he would rest the Commission's case if the concessions sought were made and if the exhibits, the admissibility of which depended on such concessions, were received in evidence. Since it appeared to the hearing examiner that the proof offered failed to establish either that respondent's suppliers had violated Section 2(d) by giving discriminatory allowances or that there was any evidence that respondent had reason to believe that such suppliers had discriminated, he suggested that counsel supporting the complaint amend the pleadings to conform to the proof which gave some indication that respondent had agreed with its suppliers that it would make it a condition of the inclusion of a particular builder's home on television, that the builder utilize supplier's products in such buildings. This was a subject of strenuous objection by respondent's counsel who claimed that respondent was entitled to know with precision the charge made against his client. Counsel supporting the complaint argued that the proof was clearly within the pleadings without amendment. He, however, made the suggested motion which was granted.

Following the hearing and on July 27, 1961, the hearing examiner issued an order directing counsel supporting the complaint to submit a draft of the specific amendments to the language of the complaint by August 10, 1961, in default of which he would be deemed to have withdrawn his motion. Respondent was given until August 7, 1961, to file its statement responding to the requests for concessions and counsel supporting the complaint was required to state whether he rested by August 10, 1961. October 2, 1961, which was the next practicable date, was fixed in the order as the date for the next hearing.

On August 5, 1961, respondent filed its response conceding the facts which were necessary to the authentication of the documents to which it had previously objected, and on August 17, 1961, counsel supporting the complaint filed a statement that he did not desire to submit specific amendments to the complaint and that he would rest the Commission's case if the hearing examiner admitted the questioned exhibits. By order of August 29, 1961, the hearing examiner admitted the additional exhibits held that no amendment to the phraseology of the complaint had been made, that counsel supporting the complaint had rested and that counsel for respondent might move to dismiss the complaint at a hearing to be held October 2, 1961, but should be prepared to present evidence on that date.

On October 6, 1961, the hearing having been postponed at respondent's request, respondent's counsel stated that he would not move to dismiss until after he had offered his proof. Respondent's proof consisted of the testimony of David A. DeWahl, counsel and secretary to respondent and the offering of three exhibits. This evidence was limited to respondent's affirmative defenses and in no way touched upon the alleged violation. There was no cross-examination.

In rebuttal, counsel supporting the complaint sought to have the hearing examiner infer from the fact that the Commission had issued complaints against the suppliers whose payments to respondent allegedly violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act, that such payments were in fact discriminatory in that they were not offered on proportionally equal terms to customers other than respondent. The hearing examiner refused to draw any such inference and ordered that the proposed findings, conclusions and briefs be filed November 9, 1961, with reply briefs by November 20, 1961. On the latter date, a hearing was held and counsel supporting the complaint was permitted to argue in lieu of filing a reply brief.

Basis for Decision

On the basis of the entire record including all of the foregoing, the hearing examiner makes the following findings of fact, conclusions therefrom and order. All findings not found in terms or in substance are rejected as either erroneous or immaterial.

FINDINGS OF FACT

1. Respondent is a corporation organized, existing and doing business under the laws of the State of Delaware and has its principal office and place of business at 40 West 40th Street, New York, New York;

2. Respondent is now, and for many years last past has been engaged in the manufacture, sale and distribution of many diversified products, including heating, cooling, plumbing and kitchen products;

3. Respondent sells and distributes said products for use and resale both through independent wholesalers and through its own Amstan Supply Division (hereinafter sometimes referred to as Amstan);

4. Amstan operates through approximately sixty-three wholesaling branches and sells and distributes both respondent's products and similar and related products purchased from other manufacturers;

5. Respondent's total sales of all products during 1957, 1958 and 1959 were as follows:

1957	$482,880,000
1958	476,620,000
1959	517,413,000

6. In the course and conduct of its business, respondent has caused and now causes its said products to be shipped and transported from state or states of location of its various manufacturing plants, warehouses and places of business to purchasers thereof located in states other than the state or states of the United States wherein said shipment or transportation originated. In the sale of its said products respondent at all times relevant herein has been and now is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act;

7. Respondent is in competition with a substantial number of other business entities in the purchase, sale and distribution of heating, cooling, plumbing and kitchen and related products. Among such competitors in the distribution field is a wholesale concern identified in the evidence as "Southland Supply." (CX 16d)[1]

8. During the year 1957 respondent urged certain of its suppliers, including Bridgeport Brass Company, Grabler Manufacturing Company and Tyler Pipe and Foundry Company, among others, to assist it in defraying the cost of a series of television presentations in New Orleans, La., St. Louis, Mo., Pittsburgh, Pa., and Dallas, Texas. Edward F. Eddy of Amstan in or about August 1957 made a resume describing the program and its results which reads, in part, as follows:

Purpose

To help new home builders promote the sale of their homes which contain American-Standard products and non-corporate products purchased by the plumbing-heating contractor from Amstan Supply. The basic idea behind the program is to help the builder overcome his sales problem and by so doing give him a definite incentive to want to use our products and to do business with our branch.

Medium

The program is carried out through a half hour television show in color * * * Title of the program is "Builders Showcase" * * *. During the half hour viewers are taken on a tour of nine different homes. The sales features of the important rooms in each house are pointed out. Prospective home buyers, can in a sense, shop for a home in the comfort of their living room and if interested can visit the home that same afternoon.

Sponsorship

Amstan is co-sponsor of "Builders Showcase" with Lone Star Gas Company and MacAtte, Inc., a firm handling builders supplies. Under terms of the con-

[1] A reference preceded by "CX" refers to those exhibits received in evidence at the instance of the Commission. Although Southland Supply's activities are contrasted with Amstan's there is no evidence as to Southland's ownership, management or control.

tract each co-sponsor is entitled to designate 3 builders per show. Each sponsor is entitled to a one-minute spot.

* * * * * * *

Cost

Contract calls for $300 per show or the total of $10,800 for 36 weeks. Plumbing-Heating Division and Air Conditioning Division both are sharing the cost under terms of their respective cooperative advertising plans.

Results to Date

During May, June and July 35 new homes have been designated by Amstan to appear on "Builders Showcase". 11 homes have been sold as of July 31. The approximate value of these homes was $422,000. As best as can be determined, we have done $48,478 worth of business with a gross profit of $8,540. This program has been instrumental in converting 8 new builders to American-Standard products or to make their purchases through a plumbing-heating contractor friendly to Amstan. * * * (CX 14a, b)

In connection with its one-third contribution to the Builders Show Case program, Amstan secured contributions from other manufacturing divisions of respondent and from other suppliers as shown in the table attached and marked Appendix A.

9. There was no direct proof offered concerning the advertising policy or other advertising allowances, if any, by Bridgeport Brass Company, Grabler Mfg. Company, or any of the suppliers other than respondent's divisions who contributed to said programs.

10. The hearing examiner does not infer from the form of the request or from the form of the contributions on either the first or subsequent programs, that the suppliers did not grant advertising allowances to other customers on a proportionately equal basis or that respondent had reason to believe that they were not affording similar allowances to other customers.

11. Counsel supporting the complaint referred, in part, to the following as supporting the inference refused in Finding 10: (a) the suppliers insistence upon anonymity; (b) two inter-office letters in respondent's files marked "Personal and Confidential", and (c) Grabler Manufacturing Company's letter to Garland of Amstan on May 7, 1957, which stated, "I am sure that this was to be handled through you, and I trust my writing you on the matter is not out of order." These circumstances do not appear sufficient, particularly in light of the ease of proof of the policies of these suppliers, to constitute substantial and reliable evidence that there was discrimination in granting advertising allowances. There are a number of inferences which may be drawn from the suppliers' unwillingness to have their names mentioned on the television program. One of these is that they did not desire to be a target for requests by advertising agencies for

television stations to engage in direct advertising. Other letters dealing with the same subject matter were not marked "Personal and Confidential." Hence, the hearing examiner cannot draw the inferences suggested by counsel supporting the complaint. (CX 6, 9 and 20)

12. In the case of other divisions of respondent, Amstan was required to seek advertising allowances on the basis of application forms which would indicate a policy of supplying cooperative advertising to others as well as to Amstan. (CX 8b, 8c and 10b) In the case of Tyler Pipe and Foundry Company, also, the allowance was made on the basis of tons supplied which suggests, at least, that there was a measure applied which would form a basis for making proportional allowances to others. (CX 21)

13. It was contemplated by respondent's suppliers that respondent's representatives would approach builders who were building homes for sale and urge them to participate in the TV programs by insisting that their building contractors utilize American Standard materials sold through Amstan and also utilize the products of the contributing suppliers—Bridgeport, Tyler and Grabler—in building the homes to be exhibited. (CX 9a, b and c, CX 9) It is also clear that such action was taken and aroused some adverse comment by the contractors. (CX 16b and f, 17a and 22b)

14. There was no proof as to the basis (other than utilizing cooperating suppliers' products in the homes featured) upon which builders were selected to participate in the program. It is clear that both new accounts and existing accounts were solicited for business. (CX 16b) It was not a condition to the participation of a builder that his contractors agree not to use supplies of competitors in their business. The condition sought to be imposed was merely that the contractor in the homes advertised on the TV program utilize the products of respondent and the contributing suppliers. (CX 16c)

15. The results of the program were analyzed in a number of interoffice memoranda. These are colored to an extent by an apparent desire of some of the writers to see that the program was continued. Some of these are discussed in ensuing findings.

16. One Dallas official of Amstan in a report evaluating the program made it clear that "the program cannot and should not be credited with a full amount of this increase [of business], but * * * must share credit with the salesmen, your service policy and other factors." [Brackets supplied.] (CX 25a)

17. The writer of the report discussed in finding 16 stated in the same report that his records indicated an increase in business in excess of $200,000 over 1957 which at 12 percent would amount to $24,000 gross profit at a cost of $1,750. (CX 25a)

18. Mr. E. F. Eddy in October 1957 made an exhaustive evaluation of the program which was sent to respondent's president. This reported the enthusiasm of the builders and the value of the program to them. It also indicated, however, a lack of enthusiasm on the part of the contractors. "Some [of the contractors] even resented being told by the builder where the material was to be purchased. A few were willing to give Amstan the fixtures but felt their obligation ended there. They wanted to purchase the roughing for the best price." [Brackets supplied] (CX 16b) This same memorandum indicated a substantial increase in gross sales to regular customers and some increase in business in the form of sales to new accounts. It established that Southland (which is presumably another wholesaler) showed a decrease in quality fixtures sold, whereas the previous year they held a substantial lead over Amstan. After some adjustments, the writer concluded that Amstan was "in front by $115,000." (CX 16d) However, the memorandum also indicated that, in the commercial market, for schools, hospitals, etc. Southland supplied more jobs than Amstan. This tabulation of Southland jobs included jobs outside Dallas.

19. The manager of the Dallas branch told the manager of Marketing: "After evaluating the comments of the builders that I contacted personally and analyzing the reports submitted to me by the other two gentlemen, [who conducted a survey] I am now of the opinion that even though we cannot measure this program in its nth dollar value, I believe in my own mind that it has helped the Dallas Branch's movement of merchandise through this medium of advertising. In conducting this survey, I found that this program is being received by the builders with open arms. At first, all I was receiving from some of the builders were comments about the pressure being applied to them to get them to insist on their plumbing contractors using our products. I now find that the builders are acceptable and realize that they cannot get this type of advertising for themselves without exerting some effort on their part. * * *" [Brackets supplied] (CX 22b)

20. So far as the effect of the TV program on suppliers other than respondent's own manufacturing divisions, the results tabulated in Exhibit 16e evoked the comment presumably by some reader "not good" as there was no trend of increase and with some of these suppliers an actual decrease.

21. Results were reported by Hopkins, an employee of respondent, in his February 11, 1958 letter to the manager of Sales Development of Amstan. (CX 18a, b, c) Hopkins was more enthusiastic. He stated, "The larger accounts listed below probably do some seventy-five percent of the new construction (residential) business in the Dallas

market and therefore represent the greatest potential of increase which could be derived from our television show efforts. We feel that at least 75 percent of the increase reflected in the purchases by these accounts were directly or indirectly derived from the efforts and influence of our T.V. program on the market. It is not our wish to detract from the ability or effectiveness of our sales department, but do feel compelled to give due credit to a tool with which we feel we can dominate our market." Hopkins then lists the names of some contractors and the increases in business received in 1957 over 1956 which total some $167,906.18. He calculated the 75 per-cent mentioned as $125,929.63. (CX 18a, b, c)

DISCUSSION

The position of counsel supporting the complaint has had a commendably flexible quality. First, at the prehearing conference it appeared that the charge was like *Grand Union* (Docket 6973) with additional allegations of an evidentiary nature (complaint paragraph 5). At the Dallas hearing, this position seemed to have been abandoned because of the failure to prove that the advertising allowances solicited were discriminatory. Substituted was a charge that the unfair acts and practices committed sounded in Section 3 of the Clayton Act, i.e., a requirement that builders who sought TV time must have the contractors they hire use only respondent's products. On final argument, after the findings were submitted, there was a third shift which seemed to suggest that respondent's alleged unfair tactics were in the nature of a monopolization of the Dallas market in distribution, but the other former contentions were reiterated and hence will be discussed seriatim.

The Grand Union type charge, i.e., inducement of discriminatory allowances, failed utterly because it was not shown that the allowances induced were discriminatory. In the case of violations of Section 2(f) of the Robinson-Patman Act, the Commission is required to establish that the prices induced are in fact discriminatory *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953). This is so because the person inducing such an allowance does not have access to the information required to prove or disprove the discrimination in price. By a parity of reasoning, the same rule should apply in the case of an inducement of discriminatory allowances. Although counsel supporting the complaint made an ingenious argument from the documents in evidence, in the opinion of the writer he failed to establish by substantial or reliable evidence either that the allowances were discriminatory or that respondent had reason to believe that they were.

As to the charge that respondent entered into agreements excluding its competitors from the custom of the plumbing contractors for the builders who were offered TV time by the respondent, the charge is simply not factually substantiated. All that was required by respondent was that, in the houses advertised, the builder require his plumbing contractors to utilize respondent's products and the products of the cooperating advertisers. There was no attempt to require the plumbing contractors to use only respondent's supplies in connection with other buildings and the evidence shows that; in fact, they did not do so. When a case under Section 5 of the Federal Trade Commission Act is founded on such allegations, it stands in the same position as would a case expressly brought under Section 3 of the Clayton Act. *Rural Gas Service, Inc., et al.*, Docket 7065. (Opinion of Commissioner Elman dated October 24, 1961) Clearly a Section 3 case would require that the contract come strictly within the four corners of the language of the statute. *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463 (1923) and, it would, in addition, require extensive proof concerning the structure of the industry and respondents share therein, before an order should issue. *In the Matter of Murray Space Shoe Corporation*, Docket No. 7476 (Opinion of Commissioner Kern, dated October 17, 1961), *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949), *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) cf. *Maico Co.*, Docket No. 5822, 50 F.T.C. 485 (1953), *Mytinger & Casselberry, Inc.*, F.T.C. Docket No. 6962 (1960) Prof. Milton Handler 16 The Record of the Association of the Bar of the City of New York 398.

Passing now to the charge sounded in monopolization, while it may be that respondent is dominant in the field of production and distribution of plumbing, heating, air conditioning, and kitchen products, the record is barren of evidence on this subject. Respondent is a very large company with a record of sales of almost a half billion dollars annually. Its size alone is not a reason to restrict its activity in the absence of the possession or exercise of monopoly power unless it be shown to have engaged in practices opposed to good morals because characterized by deception, bad faith, fraud or oppression or practices determined to be against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. *Federal Trade Commission* v. *Gratz, et al.*, 253 U.S. 421 (1920), *In the Matter of R. H. Macy & Co., Inc.*, Docket 7869 (Initial Decision of Hearing Examiner Creel dated October 17, 1961). No such practices have been established here.

Despite upholding its flexibility, the Supreme Court has pointed out that the Federal Trade Commission Act does not permit the Com-

mission to prohibit every unethical competitive practice regardless of its character or consequences. *Federal Trade Commission* v. *Keppel* 291 U.S. 304, (1934). The economic impact of any restrictive practice, and hence an element in its reasonableness, will in a measure depend upon the size and position of an accused enterprise in its industry. See *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922), *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451 (1922), *International Business Machine Corp.* v. *United States*, 298 U.S. 131 (1936), *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949), and *Tampa Electric Company* v. *Nashville Coal Co.*, 365 U.S. 320 (1961). Here, however, the only showing of the dominant position of the respondent is its record of sales. There was no comparison made with the sales of its competitors. In fact the record fails to show more than that there are competitors. Counsel supporting the complaint seemed to argue, at the hearing held to discuss the proposed findings and conclusions, that he had established that respondent dominated the distribution of its class of building supplies in the city of Dallas, that that city was a separable market and that he had also shown that Southland Supply, the principal competitor of Amstan in the Dallas market, had been injured. In doing so, he leans heavily on Eddy's report (CX 16) and on Hopkin's letter (CX 18). In the absence of testimony describing the competition in the area, the hearing examiner must look to the evidence as a whole to determine whether the inferences which counsel supporting the complaint would draw are justified by the absence of equally reasonable but contrary inferences. The record indicates that one of the three cosponsors of the Builders Showcase program in Dallas is another building-supply house. It may well compete with both Amstan and Southland Supply. Moreover, Southland clearly dominates one phase of the sale of respondent's products, the commercial building end. It may also be true that other manufacturers of supplies competitive with respondent's such as Crane, Kohler, and Carrier, to mention a few well-known producers, also have supply houses or distribution of their product in the Dallas area. The record tells us nothing about their operations in detail—only competition is mentioned. Eddy's emphasis is on the sale by Southland of *respondent's* products. The record does not indicate whether Southland carries other producers' building supplies and fixtures or not. It is also difficult to understand how the quotation out of context of a single phrase "dominate the market" by an enthusiastic proponent of the TV advertising program can be magni-

fied to support a charge of localized monopoly. All Amstan was dominating—according to the proof—was respondent's own products. Absent conspiracy, respondent could have chosen to sell only through its own distributor. *Naifel & Ronson*, 218 F.2d 205 (10 Cir. 1954).

Another facet of this same contention is that by offering advertising to the builder, respondent was *bribing* him to require the contractors he hired to utilize respondent's materials bought through its distributor Amstan to the detriment of the Amstan's competitor Southland. Amstan's other suppliers are claimed to be conspiring to the same end. Counsel seems to say that because of respondent's size, it is capable of giving larger advertising opportunities to builders than could others and thus it can buy the business just as if it offered money. Such an argument, if sustained, would spell the end of cooperative advertising. Compare *Eastern Railroads Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 126 (1961). Whenever a large company offered its retail distributors an opportunity to advertise its product with it on an equal or proportional basis, it could be charged with bribing the retailer to buy its product rather than its competitors'. The label, "bribing", it seems, is entirely inappropriate. Both the manufacturer of building supplies and the builder have an interest in the sale of a home built by the builder provided it incorporates the manufacturer's product. Each has right to utilize advertising, which has recently been described [2] as a vital lubricant to American business, properly to interest the public in purchasing the house. However, the manufacturer to justify the use of its stockholders' money must see that it is advertising a house containing its product, not the product of someone else.

None of the several theories of the case are established by substantial evidence quite apart from the fact that only the first theory should properly be considered under the pleadings. Hence, it becomes unnecessary to consider the respondent's affirmative defense that it ceased the practices complained of long before the issuance of the complaint and has so educated its personnel that no unlawful activity will occur in the future.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of respondent and of the subject matter of this proceeding. The findings of fact are based on the entire record and on reliable and substantial evidence.

[2] Address of Hon. Paul Rand Dixon, November 14, 1961, Chicago Better Business Bureau, Inc., entitled "Why Depreciate the Advertising Dollar."

2. Counsel supporting the complaint failed to establish the following by substantial or reliable proof:

a. The right of builders to specify the type of building materials to be utilized by contractors employed in their building operations.

b. The structure of the industry involved, the existence of separable markets or the line of commerce allegedly affected.

c. The advertising policies of the suppliers of Amstan, other than respondent, to establish whether or not the contribution to the TV cooperative advertising Builders Showcase Program was discriminatory.

d. The effect of the Builders Showcase Program, as distinguished from other factors involved, in the increase in business of respondent's Amstan division or the decrease of Southland Supply.

e. Respondent's knowledge of the advertising policies of the suppliers of Amstan who contributed to the Builders Showcase program.

f. Any agreement on the part of builders or contractors not to use the goods of a competitor, except in connection with houses subject of the cooperative advertising effort.

3. Read as a whole, the complaint charges a violation of Section 5 of the Federal Trade Commission Act through the wrongful inducement of discriminatory allowances from respondent's suppliers.

4. To establish such a wrongful inducement, counsel supporting the complaint has the burden of proving both that there was an illegal discrimination in the allowances and that respondent knew of the discrimination. This burden has not been met.

5. Construed, as last contended, by counsel supporting the complaint, the complaint charges some injury to competition because of an agreement among builders, other suppliers of respondent and respondent that such builders would require contractors employed in their building operations to use only the supplies manufactured by respondent and the cooperating suppliers in homes to be exhibited on the Builders Showcase Program.

6. To establish such a violation of Section 5 of the Federal Trade Commission Act, counsel supporting the complaint would have the burden among other things, of establishing that the acts and practices were inherently illegal or unfair, or were unreasonable and had a dangerous tendency to substantially lessen competition or to create a monopoly. This burden has not been met.

7. There is nothing inherently illegal, unfair, or unreasonable, in a manufacturer's advertising cooperatively buildings containing its products or in insisting that its products be used in buildings so advertised as a condition of eligibility for free advertising. Even if it had been established that respondent's business increased because of such

advertising, such success would not constitute a legal injury to competition nor a result contrary to the public interest.

8. The complaint herein not having been sustained by substantial and reliable evidence, it is unnecessary to consider respondent's affirmative defense. The complaint should be dismissed.

ORDER

It is ordered, That the complaint herein be dismissed.

APPENDIX A

Analysis of Contributions in Dollars to Amstan from Suppliers [1]

	Dallas shows			St. Louis shows 4-27-58 to 10-19-58	New Orleans shows			Pittsburgh shows (dates not given)
	5-26-57 to 1-26-58	2-2-58 to 7-27-58	8-3-58 to 1-25-59		11-1-58 to 6-29-58	7-6-58 to 12-14-58	12-21-58 to 6-14-59	
Respondent's other divisions	4,534	4,790	3,704	4,040	3,110	2,930	5,660	9.750
Bridgeport Brass Co	600	600	600	600	600	600	600	750
Grabler Manufacturing Co	600	None	300	1,000	300	300	300	900
Tyler Pipe & Foundry Co	600	500	300	None	None	None	None	None
Nibco[2]	None	None	None	None	600	600	600	750
Anniston[3]	None	None	None	None	600	600	600	750

[1] Source 27 (a) through (g).
[2] Not identified.
[3] Not itentified.

OPINION OF THE COMMISSION

By Kern, *Commissioner:*

Respondent in this proceeding is charged with violating Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving payments from suppliers for services and facilities furnished by or through respondent, in connection with the sale or offering for sale of goods not available to all of their competitors on proportionally equal terms.[1]

Counsel supporting the complaint proved that allowances for respondent's TV program were, in fact, solicited and received. He neglected, however, to develop whether or not such payments were, in fact, discriminatory, nor did he prove the identity of respondent's competitors victimized by the alleged discriminations with any degree

[1] Counsel supporting the complaint has also taken the position in the course of this proceeding that the complaint in addition charges respondent with unfairly seeking preference for the products of its wholesaling division from builders benefiting from the TV program supported in part by the payments induced from its suppliers. It is obvious, however, from an examination of the complaint as a whole that respondent is charged with inducing discriminatory payments which were not available on proportionally equal terms to its competitors and that no other allegations of unfair trade practices are contained therein independent of that charge.

of clarity. The hearing examiner refused to infer from the documentary evidence in the record proving the solicitation and receipt of payments for the support of respondent's TV program that the allowances were discriminatory or that respondent had reason to believe that the allowances were not available to their competitors on proportionally equal terms.

Counsel supporting the complaint thereupon addressed a motion to the Commission requesting that the matter be remanded to the hearing examiner to receive testimony and records from officials of respondent's suppliers to prove that the payments were discriminatory.

By our order issued February 7, 1962, we thereupon stayed the initial decision and remanded the proceeding to the hearing examiner that he might determine in the first instance in light of the materiality of the new evidence offered by counsel supporting the complaint, fairness to the parties and other relevant considerations, whether the effective and expeditious disposition of this proceeding would best be served by receiving the additional evidence. The examiner, by his order of August 22, 1962, denied the motion for the reception of further evidence. With the whole record before us, including the examiner's order on the motion for the reception of further evidence, we must now determine whether the public interest will best be served by dismissing or reopening this proceeding.

We are of the opinion that the evidence proffered by counsel supporting the complaint was material, and it is further our view, contrary to the position taken by the hearing examiner, in the initial decision and during the course of the remand proceeding, that had counsel supporting the complaint proven that the payments induced were, in fact, not available to respondent's competitors on proportionally equal terms, then the manner in which the funds were solicited as documented by the record might well be sufficient to support the inference that respondent had induced the payments with knowledge of their discriminatory nature. The critical element of knowledge on the part of the buyer as to the nonavailability on proportionally equal terms to competitors of the payments induced, of course, frequently has to be established from indirect circumstantial inferences. As the Fifth Circuit stated under analagous circumstances in a proceeding under Section 2(f) of the Clayton Act as amended by the Robinson-Patman Act, "Rarely will buyers have committed the crudities to permit categorical and direct proof." [2] The examiner in this instance, however, correctly refused to infer that, in fact, the pay-

[2] *Mid-South Distributors, et al.* v. *Federal Trade Commission,* 287 F. 2d 512 (5th Cir. 1961), *cert. denied* 368 U.S. 838 [7 S.&D. 41] (1961).

ments were discriminatory on the basis of merely the evidence available in the record. Where the fact of discrimination is as readily susceptible of direct proof as it was in this instance, neither the examiner nor the Commission should resort to inference.

Administrative agencies generally, and, of course, the Commission, have wide discretion in determining whether a proceeding should be reopened for the reception of further evidence in a matter not yet decided. Administrative agencies are not necessarily restricted by the rules governing motions in courts for new trials based on after-discovered evidence.[3] Nor is the public interest to be thwarted merely because of mistake or inadvertence on the part of the Commission or its staff.[4] There are no hard and fast rules to guide us in this instance, for in determining whether the case should be reopened, we must necessarily strike a balance between the inconvenience to respondent resulting from further hearings and the public interest in the conclusion of this proceeding by a decision on the merits rather than on procedural grounds. On weighing all the factors before us, including the fact that respondent apparently discontinued the practice under consideration herein prior to the inception of the investigation leading up to the complaint, we conclude that the public interest will best be served by concentrating the Commission's limited funds and manpower on more pressing and more current problems, keeping a scrutiny on respondent lest it resume the practice challenged in this proceeding.

Final Order

The Commission by its order of February 7, 1962, having remanded the proceeding to the hearing examiner for his determination, in the first instance, whether the request of counsel supporting the complaint for leave to adduce further evidence should be granted, and having extended the period within which the initial decision would become effective; and

The hearing examiner having issued his order filed August 22, 1962, denying the motion for the reception of further evidence; and

The matter having come on to be considered by the Commission and the Commision having, for the reasons stated in the accompanying opinion, determined that the case should not be reopened for the reception of further evidence but that the proceeding should be terminated without prejudice:

[3] *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961); see also *N.L.R.B.* v. *Menaged*, 193 F. Supp. 135 (D. Md. 1961).

[4] *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 55 [5 S.&D. 210, 214] (4th Cir. 1950).

It is ordered, That the initial decision be modified by striking therefrom findings numbered 10 through 12, on pages 938 and 939 thereof, and substituting therefor the following finding:

10. Counsel supporting the complaint has not sustained the burden of proving that the payments induced by respondent for its TV program were unavailable on proportionally equal terms to respondent's competitors competing in the resale of goods purchased from suppliers who made such allowances.

It is further ordered, That the findings in the initial decision numbered 13 through 21 be renumbered 11 through 19, respectively.

It is further ordered, That the initial decision be modified by striking therefrom that portion beginning on page 941 with the phrase "The position of counsel supporting the complaint" and ending on page 946 with the phrase "it is unnecessary to consider respondent's affirmative defense."

It is further ordered, That the initial decision as so modified be, and it hereby is, adopted as the decision and order of the Commission.

IN THE MATTER OF

ENTERPRISE STORES, INC., ET AL.

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

Docket 8028. Complaint, June 27, 1960—Decision, Oct. 5, 1962

Order requiring the Boston operators of chains of department stores selling electrical appliances and other merchandise to the public, to cease their practice of using amounts designated as "list", "mfr's list", "orig. list", and "reg.", together with lesser amounts in their advertising, representing falsely thereby that the higher amounts were the usual retail prices in their trade areas and that the difference represented a saving to the purchaser.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Enterprise Stores, Inc., a Massachusetts corporation, J. M. Fields of Orlando, Inc., a Delaware corporation, J. M. Fields of Worcester, Inc., a Massachusetts corporation, J. M. Fields of Holyoke, Inc., a Massachusetts corporation, J. M. Fields of Tampa, Inc., a Delaware corporation, J. M. Fields of Hartford, Inc., a Massachusetts corporation, J. M.

728-122—65——61