

Syllabus

IN THE MATTER OF

BERENICE COHN, TRADING AS BERGO LABORATORIES

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2744. Complaint, Mar. 14, 1936—Decision, Sept. 17, 1937

Where an individual engaged in sale of "Nu-Nail," toilet preparation composed of American red vegetable dye, pure castor oil, and oil of sweet orange scent, and bottled and labeled by her for sale through department stores, drug jobbers, and beauty supply jobbers in half-ounce and four-ounce bottles, after purchase from manufacturer thereof in fifty gallon drums, and, as thus engaged, in substantial competition with others engaged in interstate sale of toilet preparations for use on the nails, in extensively advertising said preparation on a national scale through newspapers in various cities throughout the United States, through various periodicals of national circulation, through pamphlets, circulars, and folders, and through counter displays and newspaper advertising copy, etc., furnished to distributors and retail dealers in said preparation—

- (a) Represented that said preparation was a nail food and effective conditioner and nail rejuvenator, use of which would bring new life and vitality to the nails and keep the cuticle strong and healthy, and would eliminate brittleness, breaking, etc., ridging, white spots, and ingrown toe nails, and prevent nail biting; and
- (b) Represented, through use of word "laboratory" as a part of her trade name, that she conducted, operated, or maintained a laboratory for the purpose of manufacturing, testing, or experimenting with her said preparation;

Facts being defective nails and ordinary nails containing imperfections are due to systemic factor, application of said preparation to exterior of nail will not cause any radical change in physiology thereof, and will not eliminate breakage, etc., nor have other effects attributed to it as above set forth, but can only soften the epidermis and oil and polish the nail, and preparation in question is not a nail food nor an effective conditioner, and individual in question maintained no laboratories for manufacture of said product or for testing or experimenting therewith;

With capacity and tendency to mislead purchasing public into erroneous and untrue belief that said preparation will affect the nails as represented in such advertisements, and into purchase thereof on account of such erroneous belief, and to divert trade unfairly to her from competitors selling similar products in commerce who do not misrepresent the same:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles P. Vicini*, trial examiner.

Mr. Reuben J. Martin for the Commission.

Mr. Henry Haves, of Los Angeles, Calif., for respondent.

Complaint

25 F. T. C.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission having reason to believe that Berenice Cohn, trading as Bergo Laboratories, has been and is using unfair methods of competition in commerce as "commerce" is defined in said act, and it appearing to said Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Said respondent, Berenice Cohn, is an individual trading and doing business under the name and style of Bergo Laboratories, with her office and principal place of business located at 270 South Windsor Boulevard in the city of Los Angeles, within the State of California. Said respondent is now and for more than two years last past, has been engaged in the sale of a toilet preparation for the nails, under the trade name of "Nu-Nail" and in the distribution thereof between and among the various States of the United States. Respondent causes said toilet preparation for the nails when sold by her to be transported to the purchasers thereof located in the State of California and in various other States of the United States. There is now and for more than two years last past has been, a constant current of trade and commerce by respondent in such nail preparation between and among the various States of the United States. In the course and conduct of her business the said respondent is now, and for more than two years last past has been, in substantial competition in commerce between and among the various States of the United States with various other individuals, firms, partnerships, and corporations engaged in the interstate sale of toilet preparation for the nails.

PAR. 2. Said toilet preparation for the nails, "Nu-Nail," is a liquid composed of American red vegetable dye, pure castor oil, and oil of sweet orange scent and is manufactured for said respondent by the E. S. Miller Laboratories, Inc., of Los Angeles, Calif., and is purchased by said respondent in fifty-gallon drums. Said respondent causes the preparation to be removed from the fifty-gallon drum and placed in one-half ounce and four-ounce bottles which are then labelled and sold by respondent through department stores, drug jobbers, and beauty supply jobbers. In making sales of the said toilet preparation for the nails, "Nu-Nail," respondent uses direct solicitation and also traveling salesmen who handle the said product on a commission basis.

PAR. 3. In the regular course and conduct of her business, as hereinbefore set out in paragraph 1, said respondent has been and now is engaged in extensive advertising on a national scale as a means of furthering and aiding in the interstate sale and distribution of her said toilet preparation for the nails, "Nu-Nail." As mediums of advertising said respondent has used and is now using newspapers located in various cities throughout the United States, various magazines with national circulation such as Vogue and Harper's Bazaar, pamphlets, circulars, and folders.

In addition to the advertising which has been and now is being done by said respondent in newspapers, magazines, pamphlets, circulars, and folders, as hereinabove set forth, said respondent has been and now is furnishing to the distributors of and retail dealers in her said toilet preparation for the nails, "Nu-Nail" located in cities throughout the various States of the United States, pamphlets, circulars, folders, counter display, and copy for newspaper advertising, and space has been and is left at the bottom of all advertising copy for the insertion of the name and address of the particular dealer using the advertising and various distributors and retail dealers have used and are using said advertisements furnished to them by said respondent. All of said advertisements were and are intended by said respondent, Berenice Cohn, trading as Bergo Laboratories, to be read by the general public and in particular by the purchasers of toilet preparations for the nails and to cause and induce said purchasers to buy nail preparations sold and distributed by said respondent.

PAR. 4. Said respondent in her said advertisement of the toilet preparation for the nails known as "Nu-Nail" and sold by her, has made and is now making various false, deceptive, and misleading statements concerning said preparation. Among the said statements which said respondent has used and is now using in her advertisements in newspapers, magazines, pamphlets, circulars, folders, counter displays, and copy for newspaper advertising furnished to distributors and retail dealers with space at the bottom for insertion of the name and address of the particular dealer using the advertisement, are statements that "Nu-Nail" is a nail food, an effective conditioner, a nail rejuvenator and that it eliminates brittleness, breaking of the nails, splitting, peeling, ridging, white spots, and ingrown toenails; that it prevents nail-biting; and that it brings new life and vitality to the nails and keeps the cuticle strong and healthy.

The above statements made by said respondent in her said advertisements and in the advertising copy and pamphlets, circulars, folders, and counter display furnished by said respondent to distributors

Complaint

25 F. T. C.

and retail dealers, is false, deceptive and misleading because, in truth and in fact, said "Nu-Nail" is not a nail food, is not an effective conditioner, is not a nail rejuvenator; it does not eliminate brittleness, breaking of the nails, splitting, peeling, ridging, white spots, and ingrown toenails; it does not prevent nail-biting; it does not bring new life and vitality to the nails and it does not keep the cuticle strong and healthy.

Said respondent, Berenice Cohn, in the regular course and conduct of her business, trades under the name of Bergo Laboratories and advertises as Bergo Laboratories, whereas in truth and in fact said respondent does not maintain any laboratory, does not manufacture her own product, and does not test the same, but simply bottles and labels the preparation which is bought by her in bulk.

PAR. 5. The use by the said respondent, Berenice Cohn, trading as Bergo Laboratories, of the foregoing false, deceptive, and misleading misrepresentations alleged to be used by the said respondent in paragraph 4 hereof, have had and do now have the capacity and tendency to mislead and deceive the public into the erroneous and untrue belief that "Nu-Nail" is in truth and in fact a nail food, an effective conditioner, a nail rejuvenator; that it eliminates brittleness, breaking of the nails, splitting, peeling, ridging, white spots, and ingrown toenails; that it prevents nail-biting; that it brings new life and vitality to the nails and keeps the cuticle strong and healthy; and that said respondent maintains and operates a laboratory where "Nu-Nail" is manufactured and tested by her, and has thereby induced and does now induce the consuming public and especially the users of toilet preparations for the nails, acting in said erroneous belief, to purchase "Nu-Nail" in preference to toilet preparations for the nails offered for sale by other manufacturers and distributors of toilet preparations for the nails who do not falsely, deceptively, and misleadingly advertise their said products. As a result of such false, deceptive, and misleading representations on the part of said respondent, trade has been diverted to respondent from such manufacturers and distributors of toilet preparations for the nails who do not falsely, deceptively, and misleadingly advertise their products, and thereby injury has been done and is being done by the said respondent.

PAR. 6. Said false, deceptive, and misleading representations of said respondent contained in its advertising have resulted in injury to respondent's competitors and to retail dealers and distributors and in prejudice to the buying public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, and entitled "An

Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission on the 14th day of March 1936, issued and served its complaint in this proceeding upon the respondent, Berenice Cohn, an individual, trading as Bergo Laboratories, charging said respondent with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of the respondent's answer thereto, testimony and other evidence in support of the allegations of said complaint were introduced by Reuben J. Martin, attorney for the Commission, before Charles P. Vicini, an examiner of the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by Henry Haves, attorney for the respondent, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, and the brief in support of the complaint (the said respondent having failed to file brief, and not having requested oral argument), and the Commission having duly considered the same, and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Berenice Cohn, is an individual trading and doing business under the name and style of Bergo Laboratories, with her office and principal place of business located at 270 South Windsor Boulevard in the city of Los Angeles, within the State of California. Said respondent is now, and for more than two years last past has been, engaged in the sale of a toilet preparation for use on the nails under the trade name of "Nu-Nail," and in the distribution thereof between and among the various States of the United States. The respondent causes said toilet preparation, when sold by her, to be transported from her aforesaid place of business in the State of California, to the purchasers thereof located in the State of California and in various other States of the United States. There is now, and for more than two years last past has

Findings

25 F. T. C.

been, a constant current of trade and commerce by said respondent in said nail preparation between and among the various States of the United States. In the course and conduct of her said business, the said respondent is now, and for more than two years last past has been, in substantial competition in commerce between and among the various States of the United States, with various other individuals, firms, partnerships, and corporations engaged in the interstate sale of toilet preparations for use on the nails.

PAR. 2. The toilet preparation for use on the nails, "Nu-Nail," sold by the respondent, is a liquid composed of American red vegetable dye, pure castor oil, and oil of sweet orange scent. Until February 1936, "Nu-Nail" was manufactured for the respondent by the E. S. Miller Laboratory, Inc., of Los Angeles, Calif. Since February 1936, it has been manufactured for the respondent by Brunswick Wholesale Drug Company of Los Angeles, California. Respondent purchases the preparation "Nu-Uail" from the manufacturer in 50 gallon drums. Said respondent then causes the preparation "Nu-Nail" to be removed from the 50 gallon drum and bottles it in one-half ounce and four ounce bottles which are then labeled and sold by the respondent through department stores, drug jobbers, and beauty supply jobbers. In making sales of the said toilet preparation for use on the nails, "Nu-Nail," respondent uses direct solicitation and also employs traveling salesmen who solicit the sale of the said product on a commission basis.

PAR. 3. In the regular course and conduct of her said business, the respondent has been, and now is, engaged in extensive advertising on a national scale as a means of furthering and aiding in the interstate sale and distribution of her said toilet preparation for use on nails, "Nu-Nail." Respondent has used and is now using as media of advertising, newspapers located in various cities throughout the United States, various magazines having national circulation, such as "Vogue" and "Harper's Bazaar" and also pamphlets, circulars, and folders. In addition to the advertising which has been and now is being done by said respondent in newspapers, magazines, pamphlets, circulars, and folders, the respondent has also been and now is furnishing to the distributors of and retail dealers in her said toilet preparation for use on the nails, "Nu-Nail," located in cities throughout the various States of the United States, pamphlets, circulars, folders, counter display, and copy for newspaper advertising. Space has been, and is now left at the bottom of all of said advertising copy for the insertion of the name and address of the particular dealer using the advertising, and various distributors and retail dealers have used and are using said advertisements, copy for which was and is so furnished to them by said respondent. All of such said advertise-

ments were and are intended by the respondent to be read by the general public and in particular by that portion of the general public which purchases toilet preparations for use on the nails and to cause and induce said purchasers to buy the preparation for use on the nails, "Nu-Nail," sold and distributed by said respondent.

PAR. 4. Respondent in her said advertisements of the preparation for use on the nails known as "Nu-Nail" which is sold by her, has made, and is now making various statements concerning the qualities of said preparation "Nu-Nail" and the benefits which will accrue to the users thereof. The representations which said respondent has used and is now using in her advertisements in newspapers, magazines, pamphlets, circulars, folders, counter displays and copy for newspaper advertising furnished by her to distributors and retail dealers contain the following statements:

"Nu-Nail," the scientific nail conditioner that eliminates breakage and brittleness, giving nails new life, new luster, new vitality.

"Nu-Nail" stops breakage of the nails.

"Nu-Nail" makes the nails hard, strong, pliable, thus eliminating that brittleness which too often results in split ends and breaking * * * positively stops nail biting.

"Nu-Nail" is not a polish, it is a food, an effective conditioner that enables every woman to have lustrously beautiful and shapeful nails.

Applying it (Nu-Nail) night and morning to the nails and cuticle will tend to prevent hang nails, nail splitting and breaking.

"Nu-Nail" made of pure essential oil * * * a scientifically compounded preparation to correct a tendency to hang nails and splitting.

"Nu-Nail" overcomes the habit of biting nails.

Use this fragrant orange tinted preparation night and morning and soon even the brittlest nails will become flexible.

Nails that break require "Nu-Nail." Nails become brittle and break when not properly nourished. To thoroughly discourage nails from such an annoying practice this very pleasant preparation is suggested.

This new preparation rejuvenates tired lifeless nails.

Take a vacation from broken nails. "Nu-Nail—the original nail rejuvenator—ends brittleness, peeling, splitting—ragged cuticle and nail biting."

Summertime is broken nail time unless you use "Nu-Nail."

"Nu-Nail" stops nail breakage.

PAR. 5. Defective nails and the ordinary nail containing imperfections are due to a systemic factor behind such condition. The application of respondent's preparation, "Nu-Nail," to the exterior of the nail will not cause any radical change in the physiology of the nail. The only effect produced and which can be produced by the use of respondent's preparation, "Nu-Nail," is to soften the epidermis. "Nu-Nail" will not eliminate breakage, brittleness, splitting, or peeling of the nails. "Nu-Nail" is not a nail tonic. "Nu-Nail" affects only the surface or exterior portion of the nail and such external

Conclusion

25 F. T. C.

application does not and cannot affect the growing cells of the nail. "Nu-Nail" does not and cannot give new life to nails. Nails are deeply rooted and grow rapidly. The only portion of the nail which can be affected by the application of "Nu-Nail" is the portion which has grown into visibility.

PAR. 6. Nail brittleness is caused by many different disturbances. The application of respondent's preparation "Nu-Nail" to the exterior of the nail has no effect upon the causes of the brittleness, and "Nu-Nail," in cases where brittleness is due to disease, is powerless to rectify the causes and can do no more than to oil and polish the nail. "Nu-Nail" is not a nail food and the external application of "Nu-Nail" in nowise affects the growing cells or the formation or development of the nail. "Nu-Nail" is not an effective conditioner because it only affects the external portion of the nail. It does not affect the fundamental cause of defects in the nails. The biting of nails is due to nervousness in the individual, and respondent's preparation "Nu-Nail" does not affect the nervous condition of the user and cannot and will not prevent or stop the biting of the nails. "Nu-Nail" will not remove or eliminate white spots on the nails and the use of "Nu-Nail" will not affect nor promote the growth of the nails nor will it bring life and vitality to the nails.

PAR. 7. Respondent does not maintain any laboratories for the purpose of manufacturing the said product "Nu-Nail" nor of testing or experimenting with the same.

PAR. 8. The advertisements and recommendations of respondent as set out herein in paragraph 4 are false, misleading, and deceptive and have had and do now have the capacity and tendency to mislead the purchasing public into the erroneous and untrue belief that "Nu-Nail" will affect the nails as represented in such advertisements, and into the purchase of respondent's said product on account of such erroneous belief. The misstatements and misrepresentations in such advertisements have had and do now have the capacity and tendency to unfairly divert trade to respondent from competitors selling similar products in commerce among and between the various States of the United States, who do not misrepresent their products.

CONCLUSION

The aforesaid acts and practices of the respondent, Berenice Cohn, trading as Bergo Laboratories, are to the prejudice of the public and competitors of the respondent and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress approved September 26, 1914, entitled "An

1045

Order

Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before Charles P. Vicini, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, and the brief filed herein (respondent having filed no brief and not having requested oral argument), and the Commission having made its findings as to the facts and its conclusion that said respondent Berenice Cohn, an individual, trading as Bergo Laboratories, has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That the respondent Berenice Cohn, an individual trading as Bergo Laboratories, or trading under any other name, her representatives, agents, and employees in connection with the offering for sale, sale and distribution of the toilet preparation now known as and sold under the name "Nu-Nail" or any preparation under whatever name sold, composed of the same or similar ingredients and possessing similar properties, in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

- (a) Representing that said preparation is a nail food;
- (b) Representing that said preparation is an effective conditioner;
- (c) Representing that said preparation is a nail rejuvenator;
- (d) Representing that the use of said preparation will eliminate brittleness, breaking of the nails, splitting, peeling, ridging, white spots on the nails, and ingrown toe nails;
- (e) Representing that the use of said preparation will prevent nail biting;
- (f) Representing that the use of said preparation will bring new life and vitality to the nails and will keep the cuticle strong and healthy;
- (g) Representing, by the use of word "laboratory," or any other term of similar meaning or like import, as a part of her trade name or in any other manner, that she conducts, operates, or maintains a laboratory for the purpose of manufacturing, testing, or experimenting with her said toilet preparation, until and unless she actually owns, operates, or directly and absolutely controls a laboratory maintained for said purposes.

Order

25 F. T. C.

(h) And from making any other similar representations of like import or effect as to the therapeutic or medicinal value of said preparation or the benefits accruing from the use thereof, unless and until said representations are true in fact.

It is further ordered, That the respondent, Berenice Cohen, trading as Bergo Laboratories, shall within 60 days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with the order hereinabove set forth.

Complaint

IN THE MATTER OF

RICHARD I. STEWART, TRADING AS AVOCADO SOAP
PRODUCTS COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3183. Complaint, July 22, 1937—Decision, Sept. 17, 1937*

Where an individual engaged in manufacture, sale, and distribution of soap to purchasers thereof in the States of the United States and in the District of Columbia, in substantial competition with those similarly engaged—

- (a) Represented, through use of the word "Avocado," together with depictions of said fruit, and through such statements as "Contains the Oil of Sun Ripe Avocados," etc., and "AVOCADO TISSUE SOAP Nature's Aid to Beauty," in advertisements, price lists and labels and otherwise, that his said soap contained a substantial amount of oil of avocado; and
- (b) Made such statements as " * * * Highly recommended by beauty specialists. * * * Not just a soap but a distinct beauty aid";

Facts being amount of said oil contained in soap in question, thus described, was infinitesimal compared to total of other ingredients used in manufacture thereof, and was not sufficient to warrant claim that such soap was made from avocado oil, and soap in question was not a natural aid to beauty nor recommended by beauty specialists, and had no beneficial effect different from any other soap;

With tendency and capacity to lead distributors and purchasing public into belief that said statements and representations were true, and with effect of inducing members of the public to purchase his said product on account of such erroneous beliefs, and with result of thereby unfairly diverting trade to him from competitors who do not make similar misleading representations concerning the ingredients or value of their respective products; to the substantial injury of competition in commerce:

Held, That such acts and practices were to the prejudice of the public and competitors and constituted unfair methods of competition.

Mr. S. Brogdyne Teu II for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Richard I. Stewart, an individual doing business under the trade name of Avocado Soap Products Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect