

## Complaint

## IN THE MATTER OF

## DEARBORN SUPPLY COMPANY

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

*Docket 3593. Complaint, Sept. 17, 1938—Decision, July 14, 1943*

Where a corporation, engaged in offer, sale, and distribution of its "Mercolized Wax or "Mercolized Wax Cream" cosmetic; in advertisements thereof—

Failed to reveal facts material in the light of the representations therein made:

1. e., (1) that it should not be applied at any one time to an area larger than the face and neck, that too frequent applications and use over excessive periods of time should be avoided, that adequate rest periods between series of treatments should be observed, that it should not be used where the skin was cut or broken, and that in all cases a proper patch test should be made to determine whether the patient was allergic or sensitive to the preparation; or (2) to caution public that it should be used only as set forth in directions which sufficiently apprised reader of precautions necessary to avoid injurious effects;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that preparation in question was safe for indiscriminate use, thereby causing its purchase thereof, whereby substantial trade was diverted unfairly to it from competitors:

*Held*, That such acts and practices under the circumstances set forth, were all to the prejudice of the public and competitors, and constituted unfair methods of competition in commerce, and unfair and deceptive acts and practices therein.

Before *Mr. Arthur F. Thomas* and *Mr. Edward E. Reardon*, trial examiners.

*Mr. C. S. Cox*, *Mr. John W. Carter, Jr.*, and *Mr. Carrel F. Rhodes*, for the Commission.

*Mr. Louis A. Spies* and *Nash & Donnelly*, of Washington, D. C., and *Mr. Thomas A. Brennan*, of New York City, for respondent.

## 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 the Dearborn Supply Co., a corporation, hereinafter referred to as respondent, has violated the provisions of the 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:

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PARAGRAPH 1. Respondent, Dearborn Supply Co., is a corporation, created and existing under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 2350 Clybourn Avenue, Chicago, Ill.

PAR. 2. Respondent is now and for more than 12 years last past has been engaged in the business of compounding, distributing, and selling a line of cosmetics under various names, some of which are: "Mercolized Wax," "Parker-Belmont Beauty Cream," "Powdered Saxolite," "Powdered Tarkroot" and "Phelactine." Respondent causes said products, when sold, to be transported from its place of business in the State of Illinois to its customers located in other States of the United States and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said cosmetics in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business respondent is in active and substantial competition with other corporations and with partnerships and individuals engaged in the sale and distribution of cosmetics in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of said business, and for the purpose of inducing the purchase of said cosmetics, respondent, by means of advertising circulars and folders, and by means of advertisements inserted in magazines and newspapers, circulated generally throughout the United States, has made many statements and representations concerning the character and nature of said cosmetics and concerning the results obtained from their use. By the means and in the manner aforesaid, the respondent makes, among others, statements concerning its products as hereinafter set forth:

(a) Among, and typical of, the representations made by respondent concerning its product "Mercolized Wax" are the following:

Pure Mercolized Wax.

Pure Mercolized Wax Beautifies the Skin. Bleaches—Cleanses—Nourishes, Softens and Protects.

You will find only Mercolized Wax \* \* \* actually absorbs the discolored outer scales in tiny flake-like particles clearing away the grimy, dirt-laden surface skin.

Free your skin of blemishes and all discolorations that mar its natural loveliness with our Mercolized Wax.

Mercolized Wax brings to you a simple, natural way of beautifying the skin and keeping it young. \* \* \* contains active ingredients that actually absorb the surface skin with all its discolorations and blemishes. \* \* \* Gradually you will notice the new clearness and smoothness of your skin.

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Soon the entire discolored outer layer of skin will have disappeared and fresh underskin which forms your new complexion appears soft, white and youthfully beautiful. Mercolized Wax brings out the hidden beauty in your skin.

There is only one way to completely beautify a discolored blemished complexion and that one way is to take off the worn-out surface skin by absorbing it with pure Mercolized Wax.

Coarseness, roughness and other blemishes that rob the skin of youthful beauty are dissolved with the surface skin.

Mercolized Wax will convert a faded, worn-out, or discolored complexion into one of captivating loveliness.

It \* \* \* lubricates \* \* \*.

It clears away freckles, tan, oiliness, sunburn or any other blemishes.

Invisible particles of aged skin are freed and all defects such as blackheads, tan, freckles and large pores disappear.

Make yours a beautiful skin with Mercolized Wax Cream.

Is your skin clear, smooth and young looking? It Should be and it Can be.

\* \* \* Eagerly and deftly Mercolized Wax Cream goes about its task of flaking off, superficially discolored outer layer of skin, revealing the young, fresh looking underskin. It really helps the skin to renew itself. Your skin emerges from a series of Mercolized Wax Cream applications looking more like its radiant, natural, beautiful self than it has looked in many a day. \* \* \*

Complete renovation of the complexion in from one to three weeks should result from following the above instructions closely.

Mercolized Wax Cream keeps your skin young looking. \* \* \* This simple all-in-one cleansing, softening and beautifying cream has been a favorite for over a quarter of a century with lovely women the world over.

This simple all-purpose beauty aid is the only cream necessary for the proper care of your skin.

(b) Among, and typical of, the representations made by respondent concerning its product "Parker-Belmont Beauty Cream" are the following:

Wonderful oxygen cream bleaches skin.

Parker-Belmont Beauty Cream beautifies any skin.

A skillful scientific blending of creams for bleaching, pore-deep cleansing, clearing, softening, lubricating and all-around beautifying.

Parker-Belmont Beauty Cream whitens skin quickly.

Dark skin is lightened and whitened two or three shades.

This single cream is a blend of all the creams your skin requires.

Parker-Belmont Beauty Cream normalizes a dry to too oily skin. It is soothing to sensitive tissues.

(c) Among, and typical of, the representations made by respondent concerning its products "Powdered Saxolite" are the following:

Saxolite Astringent is a refreshing skin tonic. Smoothes out wrinkles and age lines. Refines coarse pores. Eliminates oiliness.

Gives your skin a fresh, clean, lively appearance.

(d) Among, and typical of, the representations made by respondent concerning its product "Powdered Tarkroot" are the following:

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A Tarkroot Beauty Mask revives and refreshes a fatigued, drooping face more quickly and completely than anything else can.

It is beneficial for almost every condition such as age lines, wrinkles, enlarged pores, blackheads and other surface blemishes.

Wrinkles and age lines are smoothed out. Relaxed, sagging contours are pulled up into proper position. The circulation is aroused to nourish the drooping tissues. Pores are purged of all impurities.

Tarkroot Beauty Mask wakes up dull skin!

Tarkroot Face Rester relieves facial fatigue.

The quickest way to renew your complexion is to give yourself a facial pack treatment with Tarkroot Beauty Mask.

Beautify your skin with Tarkroot Face Mask.

Tarkroot performs a four-purpose plan of beautifying by tightening, refining, purifying and stimulating.

(e) Among, and typical of, the representations made by respondent concerning its product "Phelactine" are the following:

Try Phelactine Depilatory, removes superfluous hair gently. Leaves skin smooth, soft and hair-free. Simple to use.

Try Phelactine—the "different" hair remover.

Excellent for removing superfluous hair from your face. Quicker to use.

All of said statements, together with other statements of similar import and meaning, appearing in respondent's advertising literature, disseminated as aforesaid, purport to be descriptive of respondent's products and of their effectiveness in use. In all of its advertising literature, respondent, directly and by inference, through the statements and representations herein set out and through other statements and representations of similar import and effect, represents that the product "Mercolized Wax" is a "wax"; that said preparation absorbs the surface skin and surface discolorations, blemishes, and impurities; that it removes all coarseness, roughness, blackheads, tan, freckles, sunburn, and large pores from the skin and cleanses, softens, bleaches, lubricates, and protects the skin; that it is a natural way to make the skin beautiful; that it nourishes the skin, helps the skin renew itself, and is an all-in-one cleansing, softening, and beautifying cream and an all-purpose beauty aid.

In the manner aforesaid, respondent represents that the product "Parker-Belmont Beauty Cream" is a skillful, scientific blend of creams for pore-deep cleansing, clearing, softening, lubricating, and all-around beautifying of the skin; that it is an oxygen cream that bleaches the skin, making the skin lighter by two or three shades; and that it is a blend of all the creams a skin requires and that it normalizes either a dry or an oily skin.

In the manner aforesaid, respondent represents that its product "Saxolite Astringent" is a skin tonic which smoothes out wrinkles

and age lines, refines coarse pores, eliminates oiliness, giving the skin a fresh, clear, lively appearance.

In the manner aforesaid, the respondent represents that its product "Powdered Tarkroot," when used as a "beauty mask," will revive and refresh a "fatigued" and "drooping" face more quickly and completely than other products, smoothing out wrinkles and age lines, pulling "relaxed" and sagging contours into proper position, purging the pores of all impurities, and arousing the circulation so as to nourish the "drooping" tissues; that said product beautifies the skin by tightening, purifying, refining, and stimulating, and is the quickest way to "renew" the complexion.

In the manner aforesaid, the respondent represents that its product "Phelactine" is "different" from other hair removers; that it is quicker and simpler to use, removing superfluous hair gently, leaving the skin smooth, soft, and hair free.

PAR. 5. Respondent's representations and implications as to the value and usefulness of said products are false or grossly exaggerated and greatly exceed those which might truthfully be made for said products. In truth and in fact the product "Mercolized Wax" is not a wax and said product does not absorb the surface skin and surface discolorations, blemishes, and impurities; it does not remove all coarseness, roughness, blackheads, tan, freckles, sunburn, and large pores from the skin; it does not cleanse, soften, bleach, lubricate, and protect the skin; it is not a natural way to make the skin beautiful; and it does not nourish the skin, help the skin renew itself, and it is not an all-in-one cleansing, softening, and beautifying cream or an all-purpose beauty aid. In truth and in fact the product "Parker-Belmont Beauty Cream" is not a skillful or scientific blend of creams, nor is it efficacious for pore-deep cleansing, clearing, softening, lubricating, and for all-around beautifying of the skin; it is not an oxygen cream and it will not bleach the skin, making it two or three shades lighter and it is not a "blend of all the creams" the skin requires, nor does it normalize either a dry or an oily skin. In truth and in fact the product "Saxolite Astringent" is not a skin tonic nor will it smooth out wrinkles or age lines, refine coarse pores, eliminate oiliness or give the skin a fresh, clean, lively appearance. In truth and in fact the product "Tarkroot Beauty Mask" when used as a "beauty mask" will not revive and refresh a "fatigued" and "drooping" face more quickly and completely than will other products; nor will it smooth out wrinkles and age lines or pull "relaxed" and sagging contours into the proper position or purge the pores of all impurities, and it will not arouse the circulation so as to nourish

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the "drooping" tissues or beautify the skin by tightening, purifying, refining, and stimulating and it is not the quickest way to, nor does it, "renew" the complexion. In truth and in fact the product "Phelactine Depilatory" is not different from any number of hair removers on the market and is no quicker or simpler to use and it does not remove superfluous hair gently, leaving the skin smooth, soft, and hair free.

In truth and in fact the product "Mercolized Wax" has a tendency to cause removal of the surface skin but leaves the skin with deeper hues and blemishes than those present originally and constant and continuous use of this product not only accentuates the blemishes present in the surface skin but may, under certain conditions, be harmful to the user thereof because of the ingredients from which said product is composed.

PAR. 6. The use of the aforesaid false advertisements, disseminated in the manner above described, induces or is likely to induce, directly or indirectly, the purchase of a cosmetic.

PAR. 7. There are among the competitors of the respondent many who distribute and sell cosmetics in said commerce who do not in any manner misrepresent the quality or character of their respective products or their effectiveness when used.

PAR. 8. The use of each and all of the false and misleading representations and implications made and used by the respondent in designating and describing its said products and their effectiveness when used, and said false advertisements as hereinabove alleged, has had and now has a tendency and capacity to, and does mislead and deceive a substantial number of the purchasing public into the erroneous and mistaken belief that all of said representations and implications are true. As a result of such erroneous and mistaken belief a number of the consuming public have purchased a substantial volume of respondent's said products with the result that trade in said commerce has been diverted unfairly to the respondent from its competitors who truthfully advertise their respective products and the effectiveness thereof when used, and thereby injury has been done and is now being done by respondent to competition in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 9. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## REPORT, SUPPLEMENTAL FINDINGS AS TO THE FACTS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 17, 1938, issued and subsequently served its complaint in this proceeding upon the respondent, Dearborn Supply Co., a corporation, charging it with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of that act. On October 26, 1938, the respondent filed its answer to the complaint. Thereafter, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts executed by the respondent and W. T. Kelley, chief counsel for the Commission, subject to the approval of the Commission, might be taken as the facts in the proceeding and in lieu of testimony in support of the charges stated in the complaint or in opposition thereto, and that the Commission might proceed upon such statement of facts to make its report, stating its findings as to the facts and its conclusion based thereon, and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs. Thereafter, the proceeding regularly came on for hearing before the Commission upon the complaint, answer, and stipulation (the stipulation having been approved, accepted and filed); and the Commission, having duly considered the matter, on August 15, 1939, made its findings as to the facts and its conclusion based thereon and issued its order requiring the respondent to cease and desist from the practices charged in the complaint.<sup>1</sup>

Subsequently, the respondent filed a petition with the Commission requesting that certain portions of the stipulation, findings as to the facts, and order to cease and desist be modified or set aside; and the Commission, having duly considered such petition, on October 16, 1939, issued its order modifying the stipulation, findings as to the facts, and order to cease and desist by striking therefrom certain portions with respect to the harmful potentialities of respondent's cosmetic preparation designated "Mercolized Wax," and directing that the proceeding be reopened solely for the purpose of taking testimony in support of and in opposition to the allegations of the complaint with respect to the injurious effects which might result from the use of such preparation. In all other respects the stipulation, findings as to the facts, and order to cease and desist were left in full force and effect. Thereafter, hearings were held before trial examiners of the Commission theretofore duly designated by it, at which hearings testimony and other evidence were introduced in

<sup>1</sup> See 29 F. T. C. 648.

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support of and in opposition to such allegations of the complaint, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Subsequently, the proceeding came on for hearing before the Commission on such testimony and other evidence, report of the trial examiners upon the evidence, briefs in support of and in opposition to such allegations of the complaint, and oral argument; and the Commission, having duly considered the matter and being fully advised in the premises, makes this its supplemental findings as to the facts and its conclusion drawn therefrom:

## FINDINGS AS TO THE FACTS

PARAGRAPH 1. The preparation here involved is a cosmetic preparation, formerly designed by respondent as "Mercolized Wax" but now designated by it as "Mercolized Wax Cream." The specific ingredient of the preparation which forms the subject of the present inquiry is ammoniated mercury. When respondent first put the preparation on the market, in 1926, the amount of ammoniated mercury used was 8.75 percent, which was continued until January 1933, at which time the amount was reduced to approximately 6 percent. In July 1936, the percentage was again reduced to 3.1 percent, and in January 1940, a further reduction was made to 3.007 percent.

PAR. 2. During the course of the hearings a number of expert witnesses were introduced, both on behalf of the Commission and on behalf of respondent, and a substantial volume of testimony was taken. The witnesses included physicians, dermatologists, pathologists, and pharmacologists, and all of them appear to have been thoroughly qualified in their respective fields. In addition to the oral testimony, respondent also introduced in evidence reports showing the results of certain experiments and tests performed both on human beings and on animals to ascertain the effect of the external application of ammoniated mercury. After careful consideration of the entire record, the Commission is of the opinion that the following conclusions may reasonably be drawn from the evidence. On some of these points the evidence is without conflict, and on those points where there is a conflict, the Commission is of the opinion that the conclusions are dictated by the substantial weight of the evidence.

PAR. 3. The effects produced by the external application of ammoniated mercury to the human body fall into two classifications, local effects and systemic effects. With respect to the local effects, it is recognized by medical and scientific opinion that the principal property of ammoniated mercury is that of an irritant. The action of the drug is keratolytic—that is to say, its tendency is to break down

and separate the tissues of the outer layer of the skin, and in consequence, it promotes or hastens the exfoliation or peeling off of the outer layer. While the drug appears to have been in somewhat more general use among physicians and dermatologists in the past than at present, it is still used and prescribed frequently for certain skin disorders.

Whether harmful effects may be expected to result from the application to the skin of a preparation containing ammoniated mercury is dependent upon a number of factors, including the amount of ammoniated mercury in the preparation, the frequency of application, the length of the period over which the treatment extends, the duration of the rest period between series of treatments, the area of the skin to which the preparation is applied, the condition of the skin, particularly with respect to whether it is cut or broken, and the sensitivity or reaction of the patient. Where the amount of ammoniated mercury is excessive, the application frequent, the period of use extended, proper rest periods not observed, or the area large, the use of ammoniated mercury is likely to result in erythema, oedema, inflammation, irritation, or other manifestations of dermatitis, and this is particularly true where the skin is already cut or broken at the time of the application. While these results are much more likely to occur in the case of those persons who are allergic or sensitive to ammoniated mercury, the factor of allergy or sensitivity is not always controlling. In more than a negligible number of instances such results occur even where no prior sensitivity existed. In some cases this is due to the fact that the use of ammoniated mercury causes the development of a condition of sensitivity where none existed previously.

With respect to the percentage of ammoniated mercury which may safely be used in a cosmetic preparation, the record does not afford an absolute answer. It seems fairly clear, however, that the danger point is around 3 percent to 5 percent, the other factors being favorable.

PAR. 4. With respect to the inquiry as to whether harmful systemic results follow the external use of ammoniated mercury, the answer turns upon two points: first, whether the drug is absorbed into the system, and second, if absorption does take place, whether the effect is cumulative. That some degree of absorption does take place seems established by the record. Whether the amounts absorbed accumulate in the body depends largely upon the efficiency of the organs of elimination, particularly the renal organs. If these organs are functioning efficiently, the amount which will be retained in the system may be regarded as negligible. Conversely, if the organs of elimination are not functioning effectively, substantial amounts of the drug are likely

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to be retained in the system. In such event, the principal danger is to the kidneys, particularly in those cases where a nephritic condition is present. The effect of ammoniated mercury in such cases is to aggravate the nephritis.

PAR. 5. During recent years respondent has revised and amplified its directions for the use of its preparation, and the directions now enclosed in each package of the preparation read as follows:

## DO NOT RUB IN

## DIRECTIONS

for using

## MERCOLIZED WAX CREAM

as a

## BLEACH AND SKIN BEAUTIFIER

Before you retire for the night, wash the face with warm water and soap. Rinse well and pat dry with a soft towel. Then apply a thin film of Mercolized Wax Cream, smoothing it on evenly. Do not rub it in the skin or get it near the eyes or cuts. The next morning wash it off with soap and water. Continue nightly applications for 30 days. After a few applications the outer, darker, duller skin begins to flake off, which lasts for a few days, exposing a lighter, younger, fairer skin. Bleaching activity follows and continues with the application of Mercolized Wax Cream.

If irritation or redness of the skin appears after a few applications, discontinue using Mercolized Wax Cream for a day or two and apply Parker Belmont Beauty Cream or any good cold cream. Then re-apply Mercolized Wax Cream.

## CAUTION

Mercolized Wax Cream is different from ordinary cold creams, cleansing creams, etc. It is for adults and is medicated. It should not be used recklessly or applied on an area of the body larger than face and neck at one time. Use it according to the above directions. Continued use for a prolonged period of time may cause local irritation or inflammation. One jar usually gives sufficient bleaching effect to last for a period of two months. Therefore the complete treatment should not be repeated oftener than every three months. Where nephritis exists this product should not be used.

## HYPERSENSITIVITY (ALLERGY)

Some people are hypersensitive to one or more substances such as foods, pollens, chemicals, etc. To determine sensitivity to Mercolized Wax Cream before using as a bleach or freckle lightener—apply a thin layer to the unbroken skin at the elbow crease or side of neck, covering an area the size of a twenty-five cent piece, 24 hours before you intend to use Mercolized Wax Cream. If following this test there appears at the site of the application redness, burning, itching or small blisters within 24 hours, you are sensitive to the ingredients of Mercolized Wax Cream and should not use it.

The Commission is of the opinion that, in view of the fact that the amount of ammoniated mercury in respondent's preparation has been reduced to approximately 3 percent, these directions are sufficient in substance to apprise persons examining them of the precautions which must be observed in the use of the preparation if injurious effects are to be avoided. Respondent's advertisements, however, make no reference to these precautions nor to the injurious effects which are likely to result from the indiscriminate use of the preparation, nor is there any statement in the advertisements referring to the directions for use and cautioning the public that the preparation should be used only as directed. The Commission is therefore of the opinion and finds that the advertisements constitute false advertisements in that they fail to reveal facts material in the light of the representations made therein, and material with respect to consequences which may result from the use of the preparation under the conditions prescribed in the advertisements or under such conditions as are customary or usual.

PAR. 6. The Commission finds further that the use by respondent of these false advertisements has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that respondent's preparation is safe for indiscriminate use, and the tendency and capacity to cause such portion of the public to purchase respondent's preparation as a result of the erroneous and mistaken belief so engendered. In consequence thereof, substantial trade has been and is being diverted unfairly to respondent from its competitors.

#### CONCLUSION

The acts and practices of the respondent as herein found are all to the prejudice of the public and of respondent's competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

#### SUPPLEMENTAL ORDER TO CEASE AND DESIST

This proceeding having heretofore been reopened by the Commission for the purpose of taking testimony and other evidence in support of and in opposition to certain allegations of the complaint, and such testimony and other evidence having thereafter been introduced before trial examiners of the Commission theretofore duly designated by it; and the proceeding having come on for hearing before the Commission on such testimony and other evidence, report of the trial

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examiners upon the evidence, briefs in support of and in opposition to such allegations of the complaint, and oral argument; and the Commission having made its supplemental findings as to the facts and its conclusion that such allegations of the complaint have been sustained and that the respondent has, in respect thereof, violated the provisions of the Federal Trade Commission Act:

*It is ordered*, That the respondent, Dearborn Supply Co., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of respondent's cosmetic preparation designated "Mercolized Wax" or "Mercolized Wax Cream," or any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same names or under 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 fails to reveal that said preparation should not be applied to an area of the skin larger than the face and neck at any one time, that too frequent applications and use over excessive periods of time should be avoided, that adequate rest periods between series of treatments should be observed, that the preparation should not be used where the skin is cut or broken, and that in all cases a proper patch test should be made to determine whether the patient is allergic or sensitive to the preparation; provided, however, that such advertisement need contain only the statement, "CAUTION: Use only as directed," if and when the directions for use, wherever they appear, on the label, in the labeling, or both on the label and in the labeling, contain warnings to the above effect.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement fails to comply with the requirements set forth in paragraph 1 hereof.

*It is further ordered*, That the respondent shall, within 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.

## Syllabus

IN THE MATTER OF  
THE CEMENT INSTITUTE ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED

*Docket 3167. Complaint, July 2, 1937—Decision, July 17, 1943*

As respects the multiple basing point pricing system as applied by the cement industry, the recognized principle of economics, that uniformity of price tends to result from free competition in the case of a standardized article sold to well informed buyers, does not serve to explain the identical delivered prices of the producers of cement, many sales of which, under the resulting price pattern, have the characteristic of dumping, and the principle cannot explain uniformity of identical offers or sealed bids. Furthermore, it is also true that uniformity of price in a given market is equally consistent with free competition or with monopoly. And when—as in the sale of cement—the price is established by the seller, the price leadership of the governing base mill is accepted by other sellers and there is no bargaining between buyers and sellers, prices are not the result of market action in a true economic sense, but merely expressions of a noncompetitive or monopolistic price structure.

As regards the cement industry's multiple basing point pricing system, under which (1) each mill shrinks its mill net by the amount necessary for it to match the delivered prices established pursuant to said system, each mill or producer waiving its advantage in its natural sales territory in return for reciprocal waiver by the other producers; which (2) tends toward maintaining a price level sufficiently high to permit separate producers to sell cement outside the territory naturally tributary to their respective mills; and under which (3) in the face of a total productive capacity for the industry long substantially in excess of total consumption, the producers, in the 1932 and 1933 depression years, following a decline in consumption to less than 30 percent of capacity, made numerous substantial increases in their base prices, many of which were still in effect, unchanged, in 1938, and, in the case of others, with few exceptions, showed only minor readjustments since early in 1933; and prices, remained unchanged over varying numbers of years and showed a high degree of rigidity; general conditions shown to exist by producers' testimony and other evidence in explanation of the above situation—including evidence concerning the use of cement in connection with other materials, as well as that relating to shifting location of demand for cement—tended to coincide with, rather than contradict, the direct proof of restraints imposed on competition by them.

The failure of Congress in the Robinson-Patman Act to define price as mill net—  
or the amount recovered by the cement mills after freight and other charges, under their multiple basing point plan of identical delivered prices—does not avoid the necessity of having some definite concept of price in carrying out the administrative duty of preventing price discrimination under the statute,