

IN THE MATTER OF
PACIFIC GAMBLE ROBINSON CO. ET AL.

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (c) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5819. Complaint Oct. 18, 1950—Decision, Apr. 5, 1951

Where a corporation which was one of the largest wholesale grocers in the 15 Middle Western, Northwestern, and Far Western States in which it operated, doing an annual volume of business of about \$150,000,000, conducted its retail grocery business through subsidiary corporations including the operator of a large chain of retail grocery stores, and purchased substantially all of its requirements through a concern whose capital stock was owned by three of its stockholders and with which it was so closely integrated that the two operated in said matter as a single business enterprise—

- (a) Received from vendors from whom it purchased a substantial portion of its requirements of grocery products, commissions, brokerage, or other compensation or discounts in lieu thereof, in the form of purchasing and resale promotional services or facilities, through aforesaid intermediary concern acting for it or as its agent, which purchased said food products for its account from vendors who paid or granted said intermediary commissions, etc., in connection with said purchases; and,

Where said purchasing concern, nominally the broker for several vendors of the products purchased and sold by said corporation, but actually exclusively engaged in purchasing for the account of the latter substantially all of its requirements, from said vendors when available or, when not, from other vendors—

- (b) Received and accepted payments made to it in connection with the purchases it made for said corporation, as a result of its close integration therewith in said matter, and made use of the payments or grants so received to pay the expense of furnishing to said corporation purchasing services which had to do with the availability, quality, prices, and terms of sale of grocery products generally, and with advice which was tendered to and acted upon by said corporation as to what, when and from whom to purchase grocery products, and the prices to pay and all other matters which assured as nearly as possible that said corporation purchased its requirements of grocery products at the most favorable prices, terms and conditions; and included the advertising agency continuously employed by said intermediary:

Held, That such acts and practices of said corporation and intermediary, in receiving and in transmitting commissions, brokerage, or other compensations or allowances or discounts in lieu thereof, as above set out, were in violation of subsection (c) of the Clayton Act as amended.

Before *Mr. Webster Ballinger*, trial examiner.

Mr. Edward S. Ragsdale for the Commission.

Ryan, Askren & Mathewson, of Seattle, Wash., for respondents.

Stinchfield, Mackall, Crounse & Moore, of Minneapolis, Minn., also represented International Brokerage Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that the corporations named in the caption hereof as the parties respondent herein and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (c) of section 2 of the Clayton Act (U. S. C. Title 15, sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Pacific Gamble Robinson Co., herein-after sometimes referred to as Pacific, is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with an office and its principal place of business located at Occidental Avenue and King Street, Seattle, Wash.

Pacific is now, and for many years last past has been, under different corporate names, directly and through subsidiary corporations, engaged in the wholesale and retail grocery business, buying and selling a wide variety of grocery products, including fresh and canned or otherwise processed fruits and vegetables, sugar, other foods, and general household supplies. While some of said grocery products bore trade names or marks owned by the respective manufacturers, processors, or packers thereof, a very substantial portion of them, known in the trade as private brands, bore trade names or marks owned by Pacific directly or through one or more subsidiary corporations, such as Fine Foods, Inc.

Organized prior to 1936, the corporate name of Pacific from 1937 to 1942 was Pacific Fruit and Produce Company, Inc. In 1942 its corporate name was changed to that which it now bears upon there being merged into it Gamble-Robinson Co., a Delaware corporation, also organized prior to 1936 and similarly engaged in the wholesale grocery business.

Of substantial relative size prior to 1942, upon said merger in that year and thereafter Pacific became and is now one of the largest wholesale grocers in the Middlewestern, Northwestern, and Far-western States, operating about 125 branch warehouses in about 15 States, utilizing about 1,500 trucks and trailers, employing about 5,000 persons, and doing an annual volume of business of approximately 150 million dollars. Some of said warehouses are now, and since said merger in 1942 have been, operated under the name of Gamble-Robinson Co., and the others under the name of Pacific Fruit and Produce Co., depending generally upon which of said names they were operated under prior to said merger.

Pacific conducts, and for several years last past has conducted its retail grocery business through one or more subsidiary corporations, such as Tradewell Stores, Inc., which operates a large chain of retail grocery stores from headquarters located in Seattle, Wash.

From 1942 to the present time, Pacific purchased all, or substantially all, of its requirements of grocery products, including private brands, through respondent International Brokerage Co., as hereinafter more particularly alleged.

PAR. 2. Respondent International Brokerage Co., hereinafter sometimes referred to as International, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business located at 300 North Fifth Street, Minneapolis, Minn.

Organized in 1937, International is now, and since said merger in 1942, has been engaged in the business of purchasing for the account of Pacific all, or substantially all, of its requirements of grocery products, including private brands, as hereinafter more particularly alleged.

From 1937, until said merger in 1942, International was similarly engaged for the account of Gamble Robinson Co., the president of which during said period, one Donald Phelps Gamble, organized International, owned all of its capital stock from its organization until some time prior to said merger, and upon said merger became and is now the vice president of Pacific.

PAR. 3. In the course of and conduct of their said business, International, from 1937 until the present time, Gamble-Robinson Co., from 1937 until 1942, and Pacific, from 1942 until the present time, were engaged in commerce, as commerce is defined in the Clayton Act, as amended by the Robinson-Patman Act, purchasing grocery products or causing them to be purchased from vendors with places of business located in several States of the United States and causing grocery products so purchased to be transported from said vendors' places of business to destinations in other States.

PAR. 4. In the course of said business in commerce, Gamble-Robinson Co., from 1937 to 1942 until the present time, purchased a substantial proportion of their requirements of grocery products, including private brands, from vendors who paid or granted to them, in connection with said purchases, commissions, brokerage, or other compensation, or discounts or allowances in lieu thereof, which they received or accepted.

Some of said payments or grants were so made to and received or accepted by Gamble-Robinson Co. and Pacific through International, who, acting, in fact, as an intermediary for them or in their behalf,

or as their agent or representative, in the course of said commerce from 1937 until the present time, purchased said food products for the account of Gamble-Robinson Co. and Pacific from said vendors who paid or granted to International, in connection with said purchases, commissions, brokerage or other compensation or allowances in lieu thereof, which International, acting as aforesaid, received or accepted.

Some of said payments or grants made to and accepted or received by Gamble-Robinson Co. and Pacific through International, acting as aforesaid, were in fact made to and received or accepted by Gamble-Robinson Co. and Pacific, International having transmitted said payments or grants to Gamble-Robinson Co. and Pacific in the form of purchasing and resale promotional services or facilities.

PAR. 5. Some of said payments or grants in connection with said purchases in commerce from said merger in 1942 to the present time were made, received or accepted, and transmitted substantially in the following manner and under the following circumstances.

Nominally the broker for several vendors of the kinds of grocery products purchased and sold by Pacific, International was exclusively engaged in purchasing for the account of Pacific all, or substantially all, of its requirements of grocery products from said vendors when they were available from them or from other vendors when they were not. Such other vendors, not having appointed International as their broker in connection with purchases by Pacific upon request of International or otherwise, usually found it necessary, nevertheless, to solicit and affect such transactions through International. International effected no purchase and sales transactions between any vendors and vendees other than Pacific. Vendors of grocery products, in soliciting and effecting sales to vendees other than Pacific, including Pacific's competitors and others located in the same cities and trade areas as Pacific, utilized services and facilities other than those of International.

International undertook to inform Pacific of the availability, quality, prices, and terms of sale of grocery products generally, and not merely of such information concerning those products sold by vendors from whom it was a nominal broker, although it sought to become and became such a broker in connection with purchases by Pacific for as many vendors as appeared desirable or possible. International's relationship with Pacific was such that it gave advice to Pacific, which Pacific acted upon, with respect to what, when, and from whom to purchase grocery products, the prices to pay, and all other matters which assured, as nearly as possible, that Pacific purchased its requirements of grocery products, at the most favorable prices, terms, and conditions.

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International and Pacific were so integrated as to facilitate the performance of said purchasing services by International for Pacific, and to cause them to operate in substance as a single business enterprise. All of International's capital stock is now, and for several years last past subsequent to said merger, has been owned in equal shares by three stockholders of Pacific who at the time of acquiring International's stock were officers, directors and/or employees of Pacific. International's division offices, of which it had several, including its said principal office, usually consisted of desk space in one of Pacific's branch warehouses, often within the offices of Pacific, with International and Pacific jointly using many of the same services and facilities, including telephone numbers, post office boxes, and some employees. Each of International's division offices served several of Pacific's branch warehouses. Every month, upon instructions from and on forms furnished by Pacific, each of its branch warehouses reported to the appropriate division office of International its requirements of grocery products. From such reports, purchase requisitions or orders were prepared for Pacific and approved by International. International forwarded said requisitions to vendors for whom it was nominally a broker when the grocery products so requisitioned were available from them or to other vendors or their brokers when they were not.

Pursuant to said requisitions, said vendors sold grocery products to Pacific; and those of said vendors for whom International was nominally a broker paid or granted to International, in connection with said transactions, commissions, brokerage, or other compensation, or allowances in lieu thereof, which International received or accepted.

Substantially all of said payments or grants so received or accepted were used by International to pay its expenses in furnishing said purchasing services to Pacific and to pay for furnishing to or for the benefit of Pacific services or facilities in connection with its resale of grocery products. In 1947 and 1948, for example, International calculated its net earnings at less than 1 percent of its brokerage revenue.

Among such resale services and facilities was the advertising of Pacific's private brands, including those owned through its subsidiary corporation, Fine Foods, Inc., for which purpose International continuously employed and paid an advertising agency. In 1947 and 1948, for example, International expended approximately 30 percent of its brokerage revenue in furnishing advertising services or facilities to or for the benefit of Pacific.

PAR. 6. The acts and practices of respondents in receiving or accepting and in transmitting commissions, brokerage, or other compensation or allowances or discounts in lieu thereof, made or granted

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as hereinabove alleged, are in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION OF THE COMMISSION

Pursuant to rule XXII of the Commission's rules of practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated April 5, 1951, the initial decision in the instant matter of trial examiner Webster Ballinger, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WEBSTER BALLINGER, TRIAL EXAMINER

Pursuant to the provisions of an act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C. Sec. 13), the Federal Trade Commission on October 18, 1950, issued and subsequently served its complaint in this proceeding upon respondents Pacific Gamble Robinson Co., a corporation, and International Brokerage Co., a corporation, charging them, and each of them, with violation of subsection (c) of section 2 of said act as amended. February 5, 1951, respondents filed a joint answer in which they, and each of them, admitted all material allegations of fact set forth in said complaint and waived all further hearings as to said facts and all intervening procedure, on the condition that said admissions were solely for the purpose of this proceeding before the Commission, or the courts on review, or for enforcement of any final order that may be entered, or to recover any penalty for violation thereof. Thereafter the proceeding regularly came on for consideration by the above-named trial examiner theretofore duly designated by the Commission upon said complaint and answer (all intervening procedure having been waived) and said trial examiner, having duly considered the record herein, makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Pacific Gamble Robinson Co., hereinafter referred to as Pacific, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with an office and its principal place of business located at Occidental Avenue and King Street, Seattle, Wash. In 1942 two then existing corporations—the Pacific Fruit and Produce Co., Inc., and the Gamble-Robinson Co.—merged under the corporate name Pacific Gamble Robinson Co., one of the respondents herein.

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PAR. 2. Respondent Pacific is now, and its immediate predecessors and subsidiary corporations, has been for many years last past, engaged in the wholesale and retail grocery business in the Middle Western, Northwestern, and Far Western States. It sells and has sold a wide variety of grocery products, including fresh and canned or otherwise processed fruits and vegetables, sugar, other foods, and general household supplies. It is one of the largest wholesale grocers in the territories in which it operates maintaining about 125 branch warehouses in 15 States, has about 1,500 trucks and trailers, employs about 5,000 persons and does an annual volume of business of approximately \$150,000,000. Some of said warehouses are now, and since said merger in 1942 have been, operated under the name of Gamble-Robinson Co. and the others under the name of Pacific Fruit and Produce Co., depending generally upon which of said names they were operated under prior to said merger. Pacific conducts, and for several years last past has conducted, its retail grocery business through one or more subsidiary corporations, such as Tradewell Stores, Inc., which operates a large chain of retail grocery stores from headquarters located in Seattle, Wash. From 1942 to the present time, Pacific purchased all, or substantially all, of its requirements of grocery products, including private brands, through respondent International Brokerage Co., as hereinafter more particularly set forth.

PAR. 3. Respondent International Brokerage Co., hereinafter referred to as International, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business located at 300 North Fifth Street, Minneapolis, Minn. Since 1942 International has purchased for the account of Pacific all, or substantially all, of its requirements of grocery products, including private brands.

PAR. 4. In the course and conduct of their said business respondents Pacific and International at all times subsequent to 1942 were engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, purchasing grocery products, or causing them to be purchased, from vendors with place of business located in divers States of the United States and causing said products so purchased to be transported from said vendors' places of business to destinations in other States.

PAR. 5. In the course of said business in commerce, Pacific at all times subsequent to 1942 purchased a substantial portion of its requirements of grocery products, including private brands, from vendors who paid or granted to it, in connection with said purchases,

commissions, brokerage, or other compensation, or discounts or allowances in lieu thereof, which it received or accepted.

Some of said payments or grants were so made to and received or accepted by Pacific through International, who, acting, in fact, as an intermediary for Pacific or in its behalf, or as its agent or representative, in the course of said commerce purchased said food products for the account of Pacific from said vendors who paid or granted to International, in connection with said purchases, commissions, brokerage, or other compensation or allowances in lieu thereof, which International, acting as aforesaid, received or accepted. Some of said payments or grants made to and accepted or received by Pacific through International, acting as aforesaid, were in fact made to, and received or accepted by, Pacific, International having transmitted said payments or grants to Pacific in the form of purchasing and resale promotional services or facilities.

PAR. 6. Some of said payments or grants in connection with said purchases in commerce to the present time were made, received or accepted, and transmitted substantially in the following manner and under the following circumstances.

Nominally the broker for several vendors of the kinds of grocery products purchased and sold by Pacific, International was exclusively engaged in purchasing for the account of Pacific all, or substantially all, of its requirements of grocery products from said vendors when they were available from them or from other vendors when they were not. Such other vendors, not having appointed International as their broker in connection with purchases by Pacific upon request of International or otherwise, usually found it necessary, nevertheless, to solicit and effect such transactions through International. International effected no purchase and sales transactions between any vendors and vendees other than Pacific. Vendors of grocery products, in soliciting and effecting sales to vendees other than Pacific, including Pacific's competitors and others located in the same cities and trade areas as Pacific, utilized services and facilities other than those of International.

International undertook to inform Pacific of the availability, quality, prices, and terms of sale of grocery products generally, and not merely of such information concerning those products sold by vendors for whom it was a nominal broker, although it sought to become and became such a broker in connection with purchases by Pacific for as many vendors as appeared desirable or possible. International's relationship with Pacific was such that it gave advice to Pacific, which Pacific acted upon, with respect to what, when, and from whom to purchase grocery products, the prices to pay, and all other matters

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which assured, as nearly as possible, that Pacific purchased its requirements of grocery products, at the most favorable prices, terms, and conditions.

International and Pacific were so integrated as to facilitate the performance of said purchasing services by International for Pacific, and to cause them to operate in substance as a single business enterprise. All of International's capital stock is now, and for several years last past subsequent to said merger, has been owned in equal shares by three stockholders of Pacific who at the time of acquiring International's stock were officers, directors, and/or employees of Pacific. International's division offices, of which it had several, including its said principal office, usually consisted of desk space in one of Pacific's branch warehouses, often within the offices of Pacific, with International and Pacific jointly using many of the same services and facilities, including telephone numbers, post-office boxes, and some employees. Each of International's division offices served several of Pacific's branch warehouses. Every month, upon instructions from and on forms furnished by Pacific, each of its branch warehouses reported to the appropriate division office of International its requirements of grocery products. From such reports, purchase requisitions or orders were prepared for Pacific and approved by International. International forwarded said requisitions to vendors for whom it was nominally a broker when the grocery products so requisitioned were available from them or to other vendors or their brokers when they were not.

Pursuant to said requisitions, said vendors sold grocery products to Pacific; and those of said vendors for whom International was nominally a broker paid or granted to International, in connection with said transactions, commissions, brokerage, or other compensation, or allowances in lieu thereof, which International received or accepted.

Substantially all of said payments or grants so received or accepted were used by International to pay its expenses in furnishing said purchasing services to Pacific and to pay for furnishing to or for the benefit of Pacific services or facilities in connection with its resale of grocery products. In 1947 and 1948, for example, International calculated its net earnings at less than 1 percent of its brokerage revenue.

Among such resale services and facilities was the advertising of Pacific's private brands, including those owned through its subsidiary corporation, Fine Foods, Inc., for which purpose International continuously employed and paid an advertising agency. In 1947 and 1948, for example, International expended approximately 30 percent of its brokerage revenue in furnishing advertising services or facilities to or for the benefit of Pacific.

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CONCLUSION

The acts and practices of respondents in receiving or accepting and in transmitting commissions, brokerage, or other compensation or allowances or discounts in lieu thereof, made or granted as hereinabove found were in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent Pacific Gamble Robinson Co. and its officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the purchase of fruits, grocery, household and other products of whatsoever nature in commerce, as "commerce" is defined in the aforesaid Clayton Act as amended, do forthwith cease and desist from directly or indirectly—

1. Receiving or accepting from any seller anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof on or in connection with purchases made for respondent's own account, either directly or by or through respondent International Brokerage Co.

2. Receiving or accepting from respondent International Brokerage Co. in the form of money, credit, services, or otherwise, any commission or brokerage or any compensation, allowance, or discount in lieu thereof, or any part thereof, received by said International Brokerage Co. as an intermediary or agent for said respondent or while subject to the direct or indirect control of said respondent.

It is further ordered, That respondent International Brokerage Co. and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, grocery, household, and other products of whatsoever nature in commerce, as "commerce" is defined in the aforesaid Clayton Act as amended, do forthwith cease and desist from directly or indirectly—

1. Receiving or accepting from any seller anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made by respondent International Brokerage Co. while acting under the control of and in fact for and on behalf of respondent Pacific Gamble Robinson Co.

2. Receiving or accepting from any seller, anything of value as a commission or brokerage, or any compensation, allowance or discount in lieu thereof, on or in connection with purchases made for respondent's own account or while acting for or in behalf of a purchaser as

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an intermediary or agent or subject to the direct or indirect control of such purchaser.

3. Paying, transmitting, or delivering to or for the benefit of any such purchaser either directly or in any form of money, credit, advertising, or other services of whatsoever nature, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, or any part thereof, received from any seller while acting as an intermediary or agent for such purchaser or while subject to the direct or indirect control of such purchaser.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 the order to cease and desist [as required by said declaratory decision and order of April 5, 1951].

Complaint

IN THE MATTER OF

ACME BREWERIES, ALSO DOING BUSINESS AS CALIFORNIA BREWING ASSOCIATION: ACME BREWING CO.: AND BOHEMIAN DISTRIBUTING CO., LTD.

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

Docket 2888. Complaint, June 11, 1942¹—Decision, Apr. 9, 1951

Where three corporations engaged in the brewing and interstate sale and distribution of their "Acme" light beer which differed in no substantial respect from other high grade American beers; in advertising their said beer—

Falsely and misleadingly represented, through the use of the statement "Dietetically NON-FATTENING" that their beer would not increase the weight of the consumer and did not adequately disclose, through the additional words in much smaller type, "Relatively so, compared with other foods," the circumstances under which their said beer would not increase the weight of the consumer;

The facts being that while beer, as a food beverage with a relatively low caloric content, is for all practical purposes nonfattening, it has a tendency to stimulate the appetite of many consumers; and, if consumed so as to result in an increase in the drinker's caloric intake beyond his normal requirement, will probably result in a proportionate gain in weight;

With effect of misleading and deceiving a substantial portion of the purchasing public with respect to the contents and weight-increasing capacities of their said beer, and thereby inducing the purchase of substantial quantities thereof, and unfairly diverting trade and commerce to them from their competitors, to the injury thereof and that of the public; and with tendency and capacity so to do:

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

Before *Mr. Abner E. Lipscomb*, trial examiner.

Mr. R. P. Bellinger for the Commission.

Cummings, Stanley, Truitt & Cross, of Washington, D. C., and *Mr. Norman A. Eisner*, of San Francisco, Calif., for respondents.

AMENDED AND SUPPLEMENTAL 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 Acme Breweries, a corporation, also doing business as California Brewing Association, Acme Brewing Co., a corporation, and Bohemian Distributing Co., Ltd., a corporation, hereinafter referred to as respondents, have vio-

¹ Amended and supplemental.

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lated 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 amended and supplemental complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondent Acme Breweries, also doing business as California Brewing Association, is a California corporation with its principal office and place of business located at 762 Fulton Street, San Francisco, Calif. The respondent Acme Brewing Co. is a California corporation with its principal office and place of business located at 2080 East Forty-ninth Street, Los Angeles, Calif. Respondent Bohemian Distributing Co., Ltd., is a California corporation with its principal place of business located at 2060 East Forty-ninth Street, Los Angeles, Calif. All of the respondents are now, and for several years last past have been, engaged in the sale and distribution of beer sold under the brand name "Acme Beer." All of the respondents have acted together and in cooperation with each other in carrying out the acts and practices herein alleged.

In the course and conduct of their business, as aforesaid, the respondents cause, and for several years last past have caused, their said beer, when sold, to be transported from their respective places of business in California to the purchasers thereof located in various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in beer in commerce between and among the various States of the United States and in the District of Columbia.

The respondents are now, and at all times mentioned herein have been in substantial competition with other corporations, and with partnerships and individuals engaged in the sale and distribution of beer in commerce between and among the various States of the United States and in the District of Columbia. Among said competitors are many who do not use the acts, practices, and methods hereinafter alleged.

PAR. 2. In the course and conduct of their business as aforesaid, the respondents have disseminated and are now disseminating, by United States mails, by the use of newspapers, trade papers, circulars, and various other types of printed matter circulated generally among the public; and by advertisements broadcast from radio stations which have sufficient power to, and do, convey the programs emanating therefrom to listeners in various States of the United States other than the State in which said broadcasts originate and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of their said beer; and respondents

have disseminated, and are now disseminating, false advertisements concerning their said beer by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of their said beer in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among and typical of the statements and representations contained in said advertisements, disseminated as aforesaid, are the following:

Only Acme beer combines a rich creamy head with its non-fattening formula. Enjoy Acme to stay slender.

Superior Non-Fattening Refreshment.

Acme Beer is the Prince of Pilsener * * * Acme is non-fattening due to its formula. * * * Acme Beer won't add pounds to your weight.

Medical tests have shown that Acme Beer absolutely will not increase weight. The particular ingredients of Acme have a tendency to slenderize.

Acme Beer is non-fattening. You see the things that makes fat are carbohydrates, and Acme Beer contains no starches or carbohydrates, so you see there is a difference.

* * * * *

DIETETICALLY NON-FATTENING.

Relatively so, compared with other foods.

PAR. 3. Through the use of the aforesaid advertisements containing said statements disseminated as aforesaid, and others of similar import, the respondents have represented, among other things, that their said beer is substantially different from other beers in that their beer contains no fattening substances and it will not increase the weight of the consumers thereof. In truth and in fact said beer is not substantially different from other beers. It does contain fattening substances and it will increase the weight of the consumers thereof.

PAR. 4. The use by the respondents of the aforesaid false advertisements and said misleading and deceptive statements and representations has had, and now has, the tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public with respect to the contents and weight-increasing capacities of their said beer and to induce the purchase of substantial quantities of said beer as a result of the erroneous and mistaken belief so engendered. Trade in said commerce is thereby unfairly diverted to the respondents from their competitors to the injury of said competitors and to the injury of the public.

PAR. 5. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and of respondents' 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act the Federal Trade Commission, on June 11, 1942, issued and subsequently served its amended and supplemental complaint in this proceeding upon the respondents named in the caption hereof, charging them 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 said act. After the issuance of said amended and supplemental complaint and the filing of respondents' answer thereto, testimony and other evidence were introduced before a trial examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final consideration by the Commission upon said amended and supplemental complaint, answer thereto, testimony and other evidence, recommended decision of the trial examiner with exceptions thereto filed by counsel for the respondents, and brief of counsel supporting the complaint (no brief having been filed by respondents, and oral argument not having been requested); and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the trial examiner, and being now 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. Respondent Acme Breweries is a California corporation, which at times trades under the name of California Brewing Association. Its principal office is located at 762 Fulton Street, San Francisco, Calif. Respondent Acme Brewing Co. is a California corporation, having its plant located in the city of Vernon, Calif., its Post Office address being 2080 East Forty-ninth Street, Los Angeles 11, Calif., with its principal office at 762 Fulton Street, San Francisco, Calif. Respondent Bohemian Distributing Co., Ltd., is likewise a California corporation; its plant is located at Vernon, Calif., and its address is 2254 East Forty-ninth Street, Los Angeles 11, Calif.

PAR. 2. Respondent Acme Breweries owns 80 percent of the capital stock of respondent Acme Brewing Co., and respondent Bohemian Distributing Co., Ltd., owns the remaining 20 percent of the capital stock of Acme Brewing Co. Respondents Acme Breweries and Acme Brewing Co. are primarily brewers of beer, and respondents Acme Breweries and Bohemian Distributing Co., Ltd., are distributors thereof.

PAR. 3. All of the respondents are now, and for several years last past have been, engaged in the sale and distribution of beer sold under the brand name "Acme," and all have acted together and in cooperation with each other in carrying out the acts and practices hereinafter found to exist. In the course and conduct of their said businesses, respondents cause, and for some years last past have caused, their said beer, when sold, to be transported from their respective places of business in the State of California 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 their said product in commerce between and among the various States of the United States.

Respondents are now, and at all times mentioned herein have been, in substantial competition with other corporations and with partnerships and individuals likewise engaged in the sale and distribution of beer in commerce.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have disseminated, and are now disseminating, false and misleading advertisements concerning their said beer by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of their said beer; and respondents have disseminated, and are now disseminating, false and misleading advertisements for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of their said beer in commerce as "commerce" is defined in the Federal Trade Commission Act. Said advertisements in addition to various picturizations contain in substance the statement "Dietetically NON-FATTENING" and, in much smaller type, the additional words "Relatively so, compared with other foods." In some of the advertisements this qualification appears in immediate conjunction with the words "Dietetically NON-FATTENING," and in others it appears in the lower part of the advertisements or in other inconspicuous locations to which attention is directed by means of an asterisk placed before the word "Dietetically."

PAR. 5. Through the use of the statement "Dietetically NON-FATTENING" respondents have falsely and misleadingly represented that their beer will not increase the weight of the consumer thereof, and the qualification heretofore used and the manner in which said qualification has been used, as aforesaid, do not adequately disclose the circumstances under which their said beer will not increase the weight of the consumer.

Respondents' said beer is not substantially different from other

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beers, and its consumption will, under the circumstances and conditions hereinafter mentioned, result in increasing the weight of the consumer thereof. Acme Beer is what is known to the industry as a light beer, that is, a beer in which a medium volume of material is used, resulting in low extract and moderate alcoholic content. The analysis of Acme Beer is as follows:

Specific gravity at 20°/20° C.....	1.01325
Balling of beer.....	3.38
Alcohol by weight.....	3.74
Alcohol by volume.....	4.70
Extract, real.....	5.09
Dextrines, calculates.....	3.10
Reducing sugar (as maltose).....	1.22
Protein.....	0.406
Total acidity as lactic.....	0.174
pH.....	4.52
Color (Iovibond series 52½" cell).....	3.06
Ash (minerals).....	0.194
Original extract.....	12.31

Acme Beer possesses no substantial material analytical differences from other high-grade beers of a similar type brewed by American manufacturers.

Beer in itself is for all practical purposes a nonfattening beverage, for the reason that it is a food beverage with a relatively low caloric content. In the common and now generally accepted usage, the terms "fattening" and "nonfattening," as applied to any article of diet, signify a comparison. A food that is nonfattening is one which has a low caloric content. A food that is fattening is one which has a high caloric content. As compared with some other food beverages, beer has a relatively low caloric value. For example, beer has a lower caloric content than an equal amount of whole milk.

The chief factors to be considered in the question of whether or not an individual will gain weight are the amount of calories he consumes and the disposition made thereof by his body or physical system. Thus, barring pathological considerations, one's weight will increase if and when his caloric intake exceeds the caloric expenditure, regardless of the source of the calories. Beer has a tendency to stimulate the appetite of many consumers, and if a person consumes the required number of calories in food other than beer for his proper and healthful maintenance and also consumes beer in addition thereto, he will probably gain weight proportionate to the caloric increase supplied by the beer; and the converse is also true, that if the beer so consumed does not increase the drinker's caloric intake beyond his normal requirement of calories, then there will be no weight increase. In other words, if the beer is taken as a substitute for some other article of

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diet of equal or greater caloric content, the beer so consumed will not cause the consumer to gain weight unless it stimulates his appetite to the extent of causing him to consume more calories by reason of heartier eating otherwise. If beer is consumed only as a portion of the normally required diet, rather than in addition thereto, it is not fattening in most cases. Due to the above facts, the question of whether a person will gain weight by reason of drinking beer depends to some extent on the individual. These scientific facts are applicable to Acme Beer and to other beers of similar type now on the American market.

PAR. 6. The use by the respondents of the aforesaid false and misleading advertisements has had, and now has, the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public with respect to the contents and weight-increasing capacities of their said beer, and to induce the purchase of substantial quantities thereof as a result of the erroneous and mistaken belief so engendered. Trade in commerce is thereby unfairly diverted to respondents from their competitors, to the injury of said competitors and of the public.

CONCLUSION

The acts and practices of respondents as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended and supplemental complaint of the Commission, respondents' answer thereto, testimony and other evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner with exceptions thereto, and brief of counsel supporting the complaint (no brief having been filed by respondents, and oral argument not having been requested); and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondents, Acme Breweries, a corporation, also doing business as California Brewing Association, Acme Brewing Co., a corporation, and Bohemian Distributing Co., Ltd., a corporation, and their respective officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of their

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product designated as Acme Beer, or any other product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from:

1. Disseminating, or causing to be disseminated, by means of the United States mails, or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains the words "Dietetically Non-Fattening," or otherwise represents, directly or by implication, that their said beer will not increase the weight of the consumer, unless such representation be qualified by the statement, made clearly and conspicuously, in immediate conjunction therewith, "when taken in substitution for foods of equal or greater caloric value and not in addition to the normally required diet," or other statement of similar meaning.

2. 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 the representation prohibited in paragraph 1 of this order.

It is further ordered, That the 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 this order.

Syllabus

IN THE MATTER OF
ARTHUR R. LEWIS AND BEN A. HENSLER, TRADING AS
VAWNE FOUNDATIONS, ET AL.

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

Docket 5106. Complaint, Sept. 17, 1946¹—Decision, Apr. 13, 1951

Among the articles of wearing apparel made by the process known variously as "full-fashioned," "fashioned," and "fully fashioned" are underwear, sweaters, and hosiery.

The terms "full-fashioned" and "fashioned" as applied to articles of apparel are regarded as synonymous by members of the trade, and as descriptive of apparel knit on a flat bed or bar machine in the course of which flat fabric is shaped in the knitting to conform to the shape of the limb or body; and there is a preference for full-fashioned articles of feminine apparel on the part of a substantial segment of the purchasing public, to which full-fashioned hosiery is particularly well and favorably known for holding its shape and as being more expensive than hosiery produced by other methods.

There is also a preference among the purchasing public for apparel represented as made of silk; and products made from rayon, resembling silk, are accepted by the purchasing public as silk, even though they may not be designated by terms representing that they are made of silk.

Where a corporation and its three officers who controlled its advertising policies and business activities, engaged in the manufacture and interstate sale and distribution of their "Wispese" girdles;

Through statements adopted and used by one of said individuals, its president, in advertisements in newspapers and periodicals, and on labels and other advertising material distributed among the purchasing public and to dealers in ladies' apparel for distribution thereto; and through similar statements made by them and others at their instance and suggestion—

- (a) Represented that said girdles were "full fashioned," namely, made of pieces of elastic fabric knit flat, of uniform texture, and permanently shaped in the knitting by the process known to the knitting trade as "narrowing" so as to conform to the shape of the body; and,

Where said individual, its president—

- (b) Represented directly and by implication, through the statements in the advertising and labeling thereof above referred to, that the fabric of which said girdles were made was manufactured and shaped by the same process through which full-fashioned stockings were made;

The facts being that their girdles were made on a tubular knitting machine over a cylinder of uniform diameter, and not under the process known as "full-fashioned," nor were they shaped by the same process as full-fashioned stockings; and the shaped appearance imparted to their said product would not be retained under similar conditions of use for periods as long as would the shape of similar garments produced by the full-fashioned process;

¹ Amended and supplemental.