

IN THE MATTER OF

HERBOLD LABORATORY, INC., 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 5733. Complaint, Jan. 16, 1950—Decision, May 7, 1951

Where a corporation and its president who formulated and controlled its policy and practices, engaged in selling and distributing a cosmetic preparation designated "Herbold Pomade"; in advertisements including circulars and newspapers, as well as other advertising matter—

(a) Represented falsely that their said preparation would add color to the roots of the hair and prevent the hair from becoming gray, and would impart the former natural or natural-like shade or color to gray, streaked, and faded hair; the facts being that the so-called color produced upon the hair was limited to shades from gray to black and was not natural or natural-like but, on the contrary, was artificial and unnatural;

(b) Represented falsely that said preparation would help to remove loose dandruff and would keep the scalp clean and free of dandruff;

The facts being that it would not remove loose dandruff scales, but would only render them less conspicuous by causing them to adhere more closely to the scalp and hair shafts;

(c) Falsely represented that said product was safe and harmless; when in fact it contained lead, which might cause ill effects when brought into contact with the skin; and

(d) Represented falsely that it was a unique, new, and revolutionary product; With capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken belief that such representations were true, and with effect of inducing it, as a result, to purchase respondent's said preparation:

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

Mr. B. G. Wilson for the Commission.

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 Herbold Laboratory, Inc., a corporation, and Milton Herbold, individually and as an officer of Herbold Laboratory, Inc., a corporation, hereinafter referred to as respondents, have 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:

PARAGRAPH 1. Respondent Herbold Laboratory, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California. Milton Herbold is president of said Herbold Laboratory, Inc. The corporate respondent and individual respondent have their office and principal place of business located at 7212 Melrose Avenue, Hollywood, Calif. The individual respondent, Milton Herbold, formulates and controls the policies and practices of said corporate respondent.

PAR. 2. The respondents are now and for more than two years last past have been engaged in the business of selling and distributing a cosmetic preparation as "cosmetic" is defined in the Federal Trade Commission Act. The designation used by respondents for their preparation and directions for use are as follows:

Designation: Herbold Pomade

Directions for Use:

How to use HERBOLD Pomade
for Best Results

To Add Lustrous Color to Gray,
Streaked or Off-color Hair

For the first 2 to 4 weeks, take a little Herbold Pomade on your finger tips and massage it into your hair at the scalp daily. A little used daily is better than larger amounts at longer intervals. Massage is important . . . it hastens the action. This simple process adds lustrous color to gray, faded and off-color hair and gives a well groomed appearance. Thereafter to maintain the desired shade, use as needed, usually about 2 to 3 times a week . . . to add color to new growth, and to keep the hair well groomed.

Shampooing

While Herbold Pomade usually adds color gradually, *quicker* results can be obtained, if desired, by washing the hair before it is applied the *first* time. Thereafter make no change in your established habit of washing your hair.

Some Gray hair reacts more slowly than others, and in a few instances more than one jar may be required to show satisfactory color. Regular use helps remove loose dandruff and serves as a splendid dressing to groom dry, brittle hair.

Caution

For external use only. Do not use if there is any break or abrasion in the skin.

The respondents cause their said preparation when sold to be transported from their place of business in the State of California to the purchasers thereof located in various States of the United States.

Respondents maintain, and at all times mentioned herein have maintained a course of trade in said preparation between and among the various States of the United States.

PAR. 3. In the course and conduct of their aforesaid business, respondents, subsequent to March 21, 1938, disseminated and caused the dissemination of certain advertisements concerning their said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to circulars, booklets, magazines, newspapers, and other advertising matter, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said preparation; and respondents disseminated and caused the dissemination of the advertisements, including but not limited to circulars, booklets, magazines, and newspapers, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said preparation in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among and typical of the statements and representations contained in said advertisements disseminated as aforesaid are the following:

When the new growth of gray hair begins to show, or even before it begins to show you can easily re-color it or prevent it from ever showing, and blend it in with the color you already have.

May be used on dyed hair too—even if hair has been dyed with coal tar dyes, henna or other dyes, it will add an even natural looking color to the roots and the rest of the hair.

Not a coal tar dye. You get a normal—not a "dyed" look.

Herbold is not just another hair preparation. It is a unique new product—an entirely new approach to the gray hair problem—at the same time serving as an excellent dressing for dry, dull, brittle hair and itchy scalp due to loose dandruff. There is no other product you can substitute for it.

Herbold Pomade is guaranteed harmless.

My sister and I are using Herbold Pomade and have found it very successful for graying hair.

Herbold Pomade—adds deep, rich color to faded gray, streaked hair and does it easily without muss or bother; * * * Herbold Pomade, upon your finger tips and massage it into your hair. That is all you do. Yet this simple process adds color from hair root to hair end—lustrous color.

Use Herbold Pomade as your regular hair dressing, for all types and shades of hair. Just one preparation for all colors of hair—no confusing shades to select. * * * Gradually your hair becomes a new, lustrous, natural-like color, to match the original shade.

When your gray hair appears; or your hair becomes dull—lacking color and lustre, use Herbold Pomade, as your regular hair dressing, and prevent unsightly grayness and drab dullness from showing * * * use Herbold Pomade as your daily hair dressing to prevent grayness, and drab dullness

appearing. * * * It will add an even, natural-looking color to the roots and the rest of the hair.

When the new growth of gray hair begins to show or even before it begins to show you can easily recolor it to prevent it from showing and blend it in with the color you already have.

Herbold Pomade must add youthful-looking color to gray, streaked, dull hair * * *.

* * * It helps to remove loose dandruff and to keep the scalp clean and free of dandruff * * *.

PAR. 5. Through the use of the aforesaid statements and representations appearing in the advertisements above set forth, and others of similar import not specifically set out, respondents represented that their preparation, Herbold Pomade, is not a dye; will add color to the roots of the hair and prevent the hair from becoming gray; will impart the former natural or natural-like shade or color to gray, streaked, and faded hair; that it helps to remove loose dandruff and will keep the scalp clean and free of dandruff; and that it is a harmless, unique, new and revolutionary hair dye and hair dressing preparation.

PAR. 6. The aforesaid advertisements are misleading in material respects and are "false" advertisements as that term is defined in the Federal Trade Commission Act. In truth and in fact, respondents' preparation, Herbold Pomade, is a dye. It will not add color to or color the roots of the hair and will not prevent hair from becoming gray. Said preparation will not impart the former shade or color to gray, streaked, and faded hair in most instances, since the so-called color it produces upon the hair is limited to various shades from gray to black. Such shade or color as is produced is not natural or natural-like but, on the contrary, is artificial and unnatural. Said preparation will not keep or help to keep the scalp clean or free from dandruff. Its use will not remove loose dandruff scales but only render them less conspicuous by causing them to adhere more closely to the scalp and hair shafts. Said preparation is not safe or harmless for the reason that it contains lead, a substance which may cause ill effects when it comes into contact with the skin. It is not a new, unique, or revolutionary product.

PAR. 7. The use by the respondents of the foregoing false, deceptive and misleading statements and representations, disseminated as aforesaid, has had and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such statements and

representations are true, and induces a substantial portion of the purchasing public because of such erroneous and mistaken belief to purchase respondents' said preparation.

PAR. 8. The aforesaid acts and practices of the respondents, as herein alleged, 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.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act the Federal Trade Commission, on January 16, 1950, issued and subsequently served its complaint in this proceeding upon the respondents, Herbold Laboratory, Inc., a corporation, and Milton Herbold, individually and as an officer of Herbold Laboratory, Inc., charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondents' answer thereto, a written stipulation as to the facts was entered into by and between Daniel J. Murphy, Chief, Division of Litigation, of the Commission, and the respondents, in which it was stipulated and agreed that subject to the approval of the Commission the statement of facts contained therein may be taken as the facts in this proceeding and in lieu of evidence in support of the charges stated in the complaint or in opposition thereto, and that the Commission may proceed upon said statement of facts to make its report stating its findings as to the facts (including inferences which it may draw from the said stipulated facts) and its conclusion based thereon, and enter its order disposing of this matter, without the presentation of argument or the filing of briefs. Thereafter the Commission, having approved and accepted said stipulation as to the facts, served upon the respondents a tentative decision including findings as to the facts, conclusion, and order to cease and desist, and afforded the respondents an opportunity to show cause why said tentative decision should not be made the decision of the Commission in this matter. The respondents not having appeared in response to said leave to show cause, this proceeding came on for final hearing before the Commission upon the complaint, answer thereto, and stipulation as to the facts; and the Commission, having duly considered the matter 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 facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Herbold Laboratory, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California. Milton Herbold is president of said Herbold Laboratory, Inc. The corporate respondent and individual respondent have their office and principal place of business located at 7212 Melrose Avenue, Hollywood, Calif. The individual respondent, Milton Herbold formulates and controls the policies and practices of said corporate respondent.

PAR. 2. The respondents are now and for more than 2 years last past have been engaged in the business of selling and distributing a cosmetic preparation as "cosmetic" is defined in the Federal Trade Commission Act. The designation used by respondents for their preparation and directions for use are as follows:

Designation: Herbold Pomade

Directions for Use:

How to use HERBOLD Pomade
for Best Results

To Add Lustrous Color to Gray,
Streaked or Off-color Hair

For the first 2 to 4 weeks, take a little Herbold Pomade on your fingers tips and *massage* it into your hair at the scalp daily. A little used daily is better than larger amounts at longer intervals. Massage is important . . . it hastens the action. This simple process adds lustrous color to gray, faded and off-color hair and gives a well groomed appearance. Thereafter to maintain the desired shade, use as needed, usually about 2 to 3 times a week . . . to add color to new growth, and to keep the hair well groomed.

Shampooing

While Herbold Pomade usually adds color gradually, *quicker* results can be obtained, if desired, by washing the hair before it is applied the *first* time. Thereafter make no change in your established habit of washing your hair.

Some Gray hair reacts more slowly than others, and in a few instances more than one jar may be required to show satisfactory color. Regular use helps remove loose dandruff and serves as a splendid dressing to groom dry, brittle hair.

Caution

For external use only. Do not use if there is any break or abrasions in the skin.

The respondents cause their said preparation, when sold, to be transported from their place of business in the State of California to the purchasers thereof located in various States of the United States.

Respondents maintain and at all times mentioned herein have maintained a course of trade in said preparation between and among the various States of the United States.

PAR. 3. In the course and conduct of their aforesaid business, respondents, subsequent to March 21, 1938, disseminated and caused the dissemination of certain advertisements concerning their said preparation by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, circulars, booklets, magazines, newspapers, and other advertising matter, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said preparation; and respondents disseminated and caused the dissemination of advertisements, including, but not limited to, circulars, booklets, magazines, and newspapers, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said preparation in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among and typical of the statements and representations contained in said advertisements disseminated as aforesaid are the following:

When the new growth of gray hair begins to show, or even before it begins to show you can easily re-color it or prevent it from ever showing, and blend it in with the color you already have.

May be use on dyed hair too—even if hair has been dyed with coal tar dyes, henna or other dyes, it will add an even natural looking color to the roots and the rest of the hair.

Not a coal tar dye. You get a normal—not a "dyed" look.

Herbold is not just another hair preparation. It is a unique new product—an entirely new approach to the gray hair problem—at the same time serving as an excellent dressing for dry, dull, brittle hair and itchy scalp due to loose dandruff. There is no other product you can substitute for it.

Herbold Pomade is guaranteed harmless.

My sister and I are using Herbold Pomade and have found it very successful for graying hair.

Herbold Pomade—adds deep, rich color to faded gray, streaked hair and does it easily without muss or bother; * * * Herbold Pomade, upon your finger tips and massage it into your hair. That is all you do. Yet this simple process adds color from hair root to hair end—lustrous color.

Use Herbold Pomade as your regular hair dressing, for all types and shades of hair. Just one preparation for all colors of hair—no confusing shades to select. * * * Gradually your hair becomes a new, lustrous, natural-like color, to match the original shade.

When your gray hair appears; or your hair becomes dull—lacking color and lustre, use Herbold Pomade, as your regular hair dressing, and prevent unsightly grayness and drab dullness from showing * * * use Herbold Pomade as your daily hair dressing to prevent grayness, and drab dullness appearing. * * * It will add an even, natural-looking color to the roots and the rest of the hair.

When the new growth of gray hair begins to show or even before it begins to show you can easily recolor it to prevent it from showing and blend it in with the color you already have.

Herbold Pomade must add youthful-looking color to gray, streaked, dull hair * * *.

* * * It helps to remove loose dandruff and to keep the scalp clean and free of dandruff * * *.

PAR. 5. Through the use of the aforesaid statements and representations appearing in the advertisements above set forth, and others of similar import not specifically set out, respondents represented that their preparation, Herbold Pomade, will add color to the roots of the hair and prevent the hair from becoming gray; will impart the former natural or natural-like shade or color to gray, streaked, and faded hair; that it helps to remove loose dandruff and will keep the scalp clean and free of dandruff; and that it is a harmless, unique, new, and revolutionary hair dye and hair dressing preparation.

PAR. 6. The aforesaid advertisements are misleading in material respects and are "false" advertisements as that term is defined in the Federal Trade Commission Act. In truth and in fact, respondents' preparation Herbold Pomade will not add color to, or color, the roots of the hair and will not prevent hair from becoming gray. Said preparation will not impart the former shade or color to gray, streaked, and faded hair in most instances, since the so-called color it produces upon the hair is limited to various shades from gray to black. Such shade or color as is produced is not natural or natural-like but, on the contrary, is artificial and unnatural. Said preparation will not keep or help to keep the scalp clean or free from dandruff. Its use will not remove loose dandruff scales but only render them less conspicuous by causing them to adhere more closely to the scalp and hair shafts. Said preparation is not safe or harmless for the reason that it contains lead, a substance which may cause ill effects when it comes into contact with the skin. It is not a new, unique, or revolutionary product.

PAR. 7. The use by the respondents of the foregoing false, deceptive, and misleading statements and representations, disseminated as aforesaid, has had, and now has, the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public

into the erroneous and mistaken belief that all such statements and representations are true, and induces a substantial portion of the purchasing public because of such erroneous and mistaken belief to purchase respondents' said preparation.

CONCLUSION

The acts and practices of the 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 complaint of the Commission, the respondents' answer thereto, and a stipulation as to the facts entered into by and between Daniel J. Murphy, Chief, Division of Litigation, of the Commission, and the respondents, in which stipulation the respondents waived all intervening procedure and further hearing as to said facts; 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, Herbold Laboratory, Inc., a corporation, its officers, and Milton Herbold, individually and as an officer of Herbold Laboratory, Inc., their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce of a cosmetic preparation designated as "Herbold Pomade," or any preparation 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, directly or indirectly:

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 represents, directly or by implication:

(a) That said preparation will add color to, or color, the roots of the hair and prevent the hair from becoming gray.

(b) That said preparation will impart the former natural shade of color to gray, streaked, or faded hair.

(c) That said preparation will remove loose dandruff or will keep or help to keep the scalp clean or free from dandruff.

(d) That said preparation is safe or harmless.

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(e) That said preparation is a new, unique, or revolutionary product.

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 preparation, any advertisement which contains any of the representations prohibited in paragraph "1" of this order.

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

IN THE MATTER OF
NATIONAL TEA COMPANY AND NATIONAL TEA COM-
PANY—STANDARD GROCERY DIVISION

MODIFIED ORDER TO CEASE AND DESIST

Docket 5648. Order, May 8, 1951

Order modifying, as below set out, Commission's cease and desist order of May 15, 1950, 46 F. T. C. 829 at page 834, so as to require respondent corporation, engaged in the operation of some 700 retail grocery stores in Chicago and 48 stores in Indianapolis, and in purchasing numerous food and grocery items in interstate commerce, for resale therein, from various sellers, in competition with others similarly engaged, to cease and desist from knowingly inducing or receiving from sellers certain unlawful discriminations as in said order below set out.

Mr. Eldon P. Schrup for the Commission.

Kirkland, Fleming, Green, Martin & Ellis, of Chicago, Ill., for National Tea Co.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the substitute answer of the respondent, National Tea Co., in which answer said respondent admitted all of the material allegations of fact set forth in the complaint and waived all intervening procedure and further hearing as to said facts; and the Commission, having made its findings as to the facts and its conclusion that the respondent had violated subsection (f) of section 2 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), on May 15, 1950, issued, and on May 22, 1950, served upon said respondent, its order to cease and desist. Thereafter, this matter came on for hearing before the Commission upon a petition, filed on behalf of the respondent, requesting certain modifications in the aforesaid order to cease and desist, and the answer to such petition, filed by counsel in support of the complaint, and the Commission, having entered its order granting the respondent's petition now issues this its modified order to cease and desist.

It is ordered, That the respondent, National Tea Co., a corporation, and its officers, agents, representatives and employees, directly or

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through any corporate or other device, in or in connection with the purchase of food products or other items of merchandise in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Knowingly inducing or receiving from any manufacturer or seller, by or through means of any coupon or other similar device, any discount, rebate, or other allowance higher than, or price lower than, that allowed by such manufacturer or seller to competitors of the respondent, when such coupon or other similar device results in a discrimination in favor of the respondent.

It is further ordered, For reasons appearing in the Commission's findings as to the facts in this proceeding, that the complaint herein be, and it hereby is, dismissed as to National Tea Co.—Standard Grocery Division.

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

IN THE MATTER OF
SILK-O-LITE MANUFACTURING CORP.

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

Docket 5709. Complaint, Nov. 9, 1949—Decision, May 8, 1951

Where a corporation engaged in the manufacture and interstate sale and distribution of lamp shades, of which 85 percent were composed solely of rayon and of which 15 percent had silk shantung tops with rayon linings—

- (a) Represented through the use of the word "silk" as a part of its name, and the statements in connection therewith "Manufacturers of Silk Lamp Shades", on invoice forms, that it was a manufacturer of silk lamp shades, when in fact more than 85 percent of the fabric content of its products was rayon;
- (b) Represented through the use of the hyphenated word "Silk-O-Lite" on the tags attached to its lamp shades and the words on the reverse side thereof, "Celanese and Acetate Taffeta Top, Fine Rayon Taffeta Lining", that the entire top portion of its shades was made of material other than rayon, and, when considered in connection with the similarity in appearance of rayon and silk, conveyed thereby the deceptive impression that it was silk; and
- (c) Placed in the hands of purchasers of its products for resale the same deceptive implication through advertising data supplied by it:

Held, That such acts and practices as above set out, constituted deceptive acts and practices.

Respondent's revision of its label and advertising data subsequent to the institution of the instant proceeding, as a result of which it inserted in the label immediately under the word "Silk-O-Lite", in small type, the words "Mfg. Corp." and, in lieu of the words "Celanese and Acetate Taffeta Top, Fine Rayon Taffeta Lining", the words "Fine Rayon Celanese Taffeta"; revised its advertising data so as to describe the material in the top of its shades as "Celanese Rayon Taffeta", and the material in the lining as "rayon"; and revised its invoices so that there appeared therein under the word "Description", the words "The fabric content of this lamp shade group is fine Celanese Rayon Taffeta; Rayon lined for durability"; constituted no defense to the charges contained in the complaint, and, if permanently adopted and adhered to, would not correct the deceptive inference flowing from the word "silk" in the hyphenated word "Silk-O-Lite" in respondent's corporate name and trade mark, and the words "Manufacturers of Silk Lamp Shades".

Before *Mr. Webster Ballinger*, trial examiner.

Mr. Edward F. Downs for the Commission.

Nemeroff, Jelline, Danzig & Paley, of New York City, for respondent.