

IN THE MATTER OF

E. F. DREW & COMPANY, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AS AMENDED*Docket 6126. Complaint, Oct. 19, 1953—Decision, May 5, 1955*

Order requiring a corporation with principal office in New York City and factory in New Jersey, to cease using in advertising terms or statements which represented or suggested that its "Farm Queen" oleomargarine was a dairy product.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Mr. Samuel J. Loewenstein, of New York City, for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission on October 19, 1953, issued a complaint charging the respondent with having violated the Federal Trade Commission Act by the use of unfair and deceptive acts and practices in commerce in the sale of oleomargarine. It was alleged in the complaint that respondent had disseminated advertisements concerning its product under the trade name "Farm Queen Oleomargarine" in such a way as to be misleading in material respects and constituting false advertisements, as such term is defined in Sections 12 and 15 of the Federal Trade Commission Act, in that they serve as representations or suggestions that respondent's product is a dairy product which is contrary to the fact. It is further alleged that the use of the words "Farm Queen" as a trade name for respondent's oleomargarine is also misleading in a material respect in that it serves as a representation or suggestion that respondent's product is a dairy product. It is further alleged that the use by respondent of the foregoing practices had the capacity and tendency to mislead and deceive a substantial portion of the purchasing and consuming public into the erroneous and mistaken belief that respondent's oleomargarine is a dairy product, and into the purchase thereof in the reliance upon such erroneous and mistaken belief. It is also alleged that respondent's said practice placed in the hands of dealers and other distributors a means and instrumentality to mislead the purchasing and consuming

public into such erroneous and mistaken belief and into the purchase of substantial quantities of said products because of such belief.

Respondent filed its answer in which it denied all the material allegations, and testimony was taken in support of, and in opposition to, the foregoing allegations of the complaint before the above-named Hearing Examiner. Thereafter, the proceeding regularly came on for final consideration upon the complaint and answer thereto, the testimony taken, the proposed findings submitted by respective counsel and oral argument, and said Hearing Examiner having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom and order:

FINDINGS AS TO THE FACTS

1. *The Respondent*: E. F. Drew & Company, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 15 East 26th Street, New York, New York.

2. *Interstate Business of Respondent*: Said respondent is now, and since approximately April 1950 has been, engaged in the manufacture of oleomargarine at its factory located at Boonton, New Jersey, and in the sale and distribution thereof under the trade name of "Farm Queen" to distributors, usually dairies, for resale and delivery to consumers. It causes its said product, when sold, to be transported from its factory located in the State of New Jersey to purchasers thereof located in various other states of the United States. It maintains, and at all times mentioned herein has maintained, a substantial trade in oleomargarine in commerce among and between the State of New Jersey and other states, particularly the State of New York. Respondent's annual business in the sale of its said product under the trade name "Farm Queen" is in excess of \$100,000, of which approximately 75 percent is shipped from its said plant in the State of New Jersey to its customers located in other states.

3. *Dissemination of Advertisements in Interstate Commerce*: Respondent, in the course and conduct of its aforesaid business, during the year 1952 and until October 19, 1953, disseminated, and caused the dissemination of, advertisements concerning its said product "Farm Queen Oleomargarine" by means of United States mail and other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including form letters, circulars and leaflets, for the purpose of inducing, directly or indirectly, the purchase of said product. Among such advertising matter was a bottle hanger—a sort

of handbill with a round hole in the top so that it would fit over the neck of a milk bottle. These were furnished by the respondent to its customers, dairies, whose route men, in turn, delivered milk to the ultimate consumers from door to door; and also to wholesale distributors of dairy products, who resold to dairies for door to door distribution. The bottle hanger was intended to be used, and was used, by the dairy route men by hanging it over the neck of a bottle of milk left at the door of the ultimate consumer. The other advertising matter, such as circulars and leaflets, was intended to be left by the dairy route men for each household customer.

Among and typical of the statements and representations contained in said advertisements furnished to dairies and other distributors for delivery to consumers were the following:

Farm Queen is always country-fresh * * * made from pure, highly refined, fresh vegetable oils.

Farm Queen gives you all the fresh, natural, golden-rich flavor of nature's finest vegetables * * * churned to delicate, sweet creamy goodness. Contains no artificial flavoring.

Starting now, our drivers will have it for you with the same day-to-day freshness which characterizes our other dairy products.

Since October 19, 1953, respondent has discontinued the use of the foregoing phrases, except it has continued to use the trade name "Farm Queen" in describing its said product.

4. *Specific Violations:* Such expressions as "churned to delicate sweet creamy goodness" and the statement "Starting now, our drivers will have it for you with the same day-to-day freshness which characterizes our other dairy products," when used by respondent in its advertising matter, as hereinbefore described, are representations or suggestions that respondent's oleomargarine is a dairy product.

CONCLUSIONS

The acts and practices of respondent, as hereinabove 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.

This case is controlled by the provisions of Sections 12 and 15 (a) (2) which read as follows:

"SEC. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5."

"SEC. 15. (a) (2) In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine."

The allegations in the complaint which go beyond the provisions of Section 12 and Section 15 (a) (2) of the Federal Trade Commission Act are not supported by the evidence in the record. From an examination of the advertisements themselves as well as the results of the surveys made among housewives in one city to obtain their opinions with respect to the advertisements, and representations contained therein, there appear to be only three statements which have the capacity and tendency to lead a purchaser to believe that respondent's product is a dairy product. There is no evidence in the record to support the allegation that any customer had purchased respondent's oleomargarine in reliance upon such erroneous and mistaken belief. It is not believed that it was necessary for the complaint to contain such allegations. Apparently Congress in the Oleomargarine Act, which amended Section 15 of the Federal Trade Commission Act, did not give the Commission the discretion of determining whether or not the representations of the respondent engender such erroneous and mistaken belief. All that is necessary for the Commission to allege and prove in order to show a violation of this section is that respondent represented that its oleomargarine "is a dairy product." It is not necessary for the Commission to allege and prove that it is *not* a dairy product. Congress recognized that oleomargarine is not a dairy product so did not place upon the Commission the requirement of such proof.

With respect to the trade name "Farm Queen," from its context on the label and in advertising matter, and also as a result of the surveys that were made, there is insufficient evidence in the record to support the allegation that the use of this phrase alone as a trade name is mis-

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leading as a representation that respondent's product is a dairy product. There are so many other activities associated with a farm other than dairying, that the use of the word "farm" in a trade name does not suggest a dairy. Furthermore, the principal ingredients of margarine are grown on a farm.

As to the contention of respondent that it has not disseminated false and misleading advertisements in interstate commerce, it is held that the facts disclosed by the record, and as herein found, give the Commission jurisdiction over the activities of the respondent. Certainly the respondent is engaged in the dissemination of advertisements when it prepares such advertisements and furnishes them to its customers for distribution to the public by those customers. Respondent once having prepared those advertisements containing the misleading statements and having furnished them to its customers had set in motion a form of dissemination which it contemplated and expected the dairy customer to complete by physically distributing the advertisements to the consuming public. Having performed the initial act, the respondent cannot say that the completion of that act by its customers was not a continuation of its own act, and where those customers were located in states other than the State of New Jersey, such dissemination took place in interstate commerce.

As to the contention of respondent that the word "churned" does not represent or suggest that respondent's oleomargarine is a dairy product, the understanding of the public of this word is so closely associated with the manufacture of butter, a typical and recognized dairy product, that for the respondent to use the word in describing oleomargarine is a representation or suggestion that oleomargarine also is a dairy product. Admittedly, the "churning" process in the manufacture of butter is not followed in the manufacture of oleomargarine. The agitation is necessary to make the butter—to separate the fat from the liquid—but this agitation is not necessary in the manufacture of oleomargarine, which is a mixture and all that is necessary to be done is to mix or blend the ingredients.

With respect to the contentions of counsel for the respondent, that since the respondent has discontinued all of the expressions set forth in Paragraph Three of the complaint, with the exception of "Farm Queen," the complaint should be dismissed, it is held that so long as respondent contends that it has a right to use the expressions which, have been found herein to have been misleading and false advertisements in material respect, the Commission is amply justified in requiring the respondent to cease and desist making those representations.

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It is ordered, That the respondent, E. F. Drew & Co., Inc., a corporation, and its officers, agents representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of oleomargarine or margarine 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 contains:

The terms "churned to delicate, sweet creamy goodness," "country-fresh," or "* * * the same day-to-day freshness which characterizes our other dairy products," or any other statement, word, grade designation, design, device, symbol, sound, or any combination thereof which represents or suggests that said product is a dairy product: *Provided, however*, That nothing contained in this order shall prevent the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product, or of a truthful statement that said product contains butter or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth.

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 any of the representations prohibited in Paragraph One of this order.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the opinion of the Commission:

This is the first contested case to be decided under the so-called Oleomargarine Amendment to section 15 of the Federal Trade Commission Act.¹ The amendment was part of the new Oleomargarine Act which became effective July 1, 1950.²

Under the amendment it is unlawful to disseminate any oleomargarine advertisement which is misleading in a material respect. The phrase "material respect" is defined in section 15 (a) (2) to include representations "made or suggested by statement, word, grade, designation, design, device, symbol, sound or any combination thereof, that such oleomargarine or margarine is a dairy product, * * *"

¹ 15 U. S. C. Sec. 55.

² Public Law No. 459, 81st Cong., 2d Sess., March 16, 1950; 64 Stat. 20.

Section 15 (f) defines "oleomargarine" or "margarine" to mean:

"(1) All substances, mixtures and compounds known as oleomargarine or margarine;

"(2) All substances, mixtures, and compounds which have a consistence similar to that of butter and which contain any edible oils or fats other than milk fat if made in imitation or semblance of butter."

The advertising matter under examination consisted of form letters, handbills, circulars and leaflets. They contained such statements as:

"Farm Queen margarine * * * is always country fresh * * *"

"Starting now our drivers will have it for you with the same day to day freshness which characterizes our other dairy products."

"* * * churned to delicate sweet creamy goodness."

These were charged in the complaint to be misleading in material respects in that they served to represent or suggest that respondent's product was a dairy product. The complaint also condemned, for the same reason, the use of "Farm Queen" as a trade name for respondent's oleomargarine.

One of the handbills, a so-called bottle hanger, had a round hole at the top so that it would fit over the neck of a milk bottle. These were furnished by respondent both to dairies and wholesale distributors of dairy products. The bottle hanger was used by the route man who hung it over the bottle of milk on the doorstep of the housewife. The leaflets, circulars and other advertising matter were also designed for door-to-door delivery by the dairy route man.

The hearing examiner held that such expressions as "churned to delicate, sweet, creamy goodness" and "Starting now our drivers will have it for you with the same day to day freshness which characterizes our other dairy products" had the capacity and tendency to lead a purchaser to believe that respondent's oleomargarine "is a dairy product." The hearing examiner said that while there was no evidence in the record that any customer had purchased respondent's oleomargarine in reliance upon such erroneous and mistaken belief, such proof was unnecessary under the Oleomargarine Act; that amended section 15 did not give the Commission discretion to determine whether or not respondent's representations engendered such belief; "All that is necessary for the Commission to allege and prove," he said, "in order to show a violation of this section is that respondent represented that its oleomargarine 'is a dairy product.'"

The initial decision did not include a prohibition against the use of the expression "country fresh" or against the use of the trade name "Farm Queen." The hearing examiner did not discuss "country

fresh" but with respect to the name "Farm Queen" he said there was insufficient evidence in the record to show that the use of this phrase constituted a representation that respondent's oleomargarine was a dairy product. "There are so many other activities associated with a farm," he said, "that the use of the word 'farm' in a trade name does not suggest a dairy." He added that the "principal ingredients of margarine are grown on a farm."

The oleomargarine-butter controversy, which culminated in the Oleomargarine act of 1950, had been waged in the halls and chambers of Congress for the better part of a century. The Act of August 2, 1886, for example, defined "butter" and "oleomargarine" and imposed upon the latter "discriminatory" excise taxes as well as labeling and packaging requirements.³

It was clear from the beginning that this exercise of the taxing power was not designed to raise revenue, but to achieve certain regulatory effects in the field of competition between oleomargarine and butter.⁴

In opening the Senate debate on the 1886 Act, Senator Miller said:

I resort to no subterfuges in this case, Mr. President. My objective in bringing forth this bill and supporting it is, not to secure a large increase to the revenue of our Government; but I have sought to invoke the taxing power of the Government in order that under it the Government might take absolute control of [oleomargarine] manufacture, might properly regulate it, and so regulate and control it that it should be carried on in a legitimate way and that the product should be sold to the consumer in all cases for what it is, and it is for that purpose that the friends of this measure have invoked the taxing power of the Government.⁵

The difference in tax treatment between yellow oleomargarine and white oleomargarine was first inserted in the law by the Act of May 9, 1902.⁶ This Act imposed a 10 cents per pound tax on oleomargarine which was artificially colored to look like butter.

By the Act of March 4, 1931, the 10 cent tax was made to apply to all oleomargarine which met an arbitrary statutory definition of "yellow" whether or not colored artificially.⁷

The 1950 bill as it passed the House and as it was reported to the Senate by the Committee on Finance continued to regulate oleomargarine in many respects under the Federal Food, Drug and Cosmetic Act, but provided for the repeal of all Federal taxation on oleomargarine. The Senate Committee in reporting the bill attempted to forestall some of the arguments of the Senators from dairy States by pointing out that

³ 24 Stat. 209.

⁴ Senate Report 309, Cong. Rec. Jan. 4, 1950, p. 44.

⁵ Cong. Rec. July 17, 1886, p. 7073.

⁶ 32 Stat. 193.

⁷ 46 Stat. 1549. See also Sen. Rep. 309, Cong. Rec. Jan. 4, 1950, pp. 44-45.

the Federal Trade Commission already had jurisdiction, under existing law, to prevent misrepresentation of oleomargarine as butter; also to prohibit advertising practices which were in any way deceptive or which confused oleomargarine with butter.⁸ These arguments failed to satisfy the opposition and, therefore, during the course of floor debate, Senator McCarthy of Wisconsin offered the amendment which became law as part of section 15 of the Federal Trade Commission Act.

Senator Fulbright who was in charge of the bill accepted the McCarthy amendment. For this reason the legislative history of the amendment consists largely of the comments of its sponsor, his colloquies with one or two other Senators, and the Conference Committee report.

Inasmuch as this is a case of first impression, it may be helpful to quote from these sources at some length:

Mr. McCARTHY. Simply stated, Mr. President, the amendment is for the purpose of making illegal the unfair and dishonest advertising of oleomargarine. I have before me some unusual examples of the attempts of the oleomargarine interests to try to pass their product off as butter. I believe that is unfair, not only to the dairy farmer, but also to the consumer. * * *

I have before me a newspaper from Memphis, the Memphis Press-Scimitar, dated February 24, 1949, advertising Durkee's oleomargarine, beside what looks like a pound of butter. There is pictured a dairy farm. This is advertised as "country fresh." Obviously the purpose of it is to create the impression that this is a dairy product.

I have before me, Mr. President, a newspaper from San Francisco, the San Francisco Call-Bulletin, advertising Wilson's oleomargarine as "churned fresh daily." As we know, "churning" means separating the butterfat from the milk. That is the common conception of it. There are of course other conceptions of churning, but in the public mind "churning" means taking the cream and removing the butter. They advertise this as "churned fresh daily," and they mention the word "milk" in it also.

I have before me also a newspaper from White Plains, N. Y., the Reporter Dispatch, dated December 1, 1949, in which again appears a very good drawing of dairy products. Underneath are the words "Dairy products, margarine, Numaid, 2 pounds 45 cents," under the heading of "Dairy products." * * *

* * * * *

I have before me also, Mr. President, a New York newspaper dated Thursday, November 17, 1949. It is the Reporter Dispatch of White Plains. Again we find the same type of deliberately dishonest advertising. There appear drawings of cheese and butter, very excellent and very appetizing in appearance, and a huge banner saying "Remember, Dairy Products are Vital to Good Health." Underneath that it says "Nucoa, pound package 27 cents."

I have before me also, Mr. President, but unfortunately it cannot be reproduced in the Record, the Durkee package in which they pack the oleomargarine, very deliberately made to appear exactly as a butter package, even down to the grade

⁸ Sen. Rep. 309, Cong. Rec. Jan. 4, 1950, p. 45.

⁹ Cong. Rec. January 6, 1950, p. 128.

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AA, which only butter manufacturers should be entitled to use under the rules and regulations of the Department of Agriculture. * * *

Mr. WILEY. * * * The whole purpose of the amendment is clearly to indicate that it would be illegal for the oleo interests to advertise their products as dairy products. That is the sum and substance of the amendment, is it not?

Mr. McCARTHY. Yes, the purpose of the amendment is to prevent any form of advertisement which gives the impression, directly or by inference, that the consumer is buying butter.

Mr. WILEY. In other words, the amendment would place no limitation upon the legitimate advertising of oleomargarine or margarine?

Mr. McCARTHY. None whatsoever. I might say that there should not be. If the oleo interests can sell their product on its merits I do not think we should in any way try to resist them. But I do think we should make sure that they advertise it solely as what it is.¹⁰

* * * * *

Mr. AIKEN. * * * All of us know that it is widely misrepresented as a dairy product. I hold in my hand an advertisement clipped from a Vermont newspaper of last week. * * *

Here is the advertisement:

"Oleo, Golden Maid."

It is neither golden, nor do I suppose any maid had any part in its preparation. But there is the misleading inference that it is yellow oleomargarine. It is not. After the words "Golden Maid," we see where the rub comes on the consumer: "One pound package, 19 cents."¹¹

* * * * *

Mr. McCARTHY. * * * I am very happy that we finally arrived at a clear-cut issue. The issue no longer is whether oleomargarine taxes are to be repealed. The dairy farmers, and the oleo interests are agreed that we should remove the taxes. The sole question now is how much protection will be accorded the producer and the consumer. * * * The principal source of fraud is the attempted imitation of butter even down to the minutest detail of packaging. * * *¹²

* * * * *

I have here another very interesting advertisement. It is another Durkee advertisement. It uses the words "country fresh." It displays a large picture of what at first glance appears to be a butter carton. There is a drawing of a barn, a silo and a pasture. * * *

Mr. FULBRIGHT. In view of the fact that I have accepted the Senator's amendment, I should like to inquire the Senator's purpose in discussing it further * * *

Mr. McCARTHY. * * * I had planned to discuss advertising containing the word "fresh" and the words "country fresh," but * * * I shall spend very little time on it. However, I have here a large advertisement, approximately 2 feet by 4 feet in size, which says "country fresh churned." It also uses the word "milk." It uses the phrases "fresh dairylike flavor" and "no artificial flavoring."

Mr. President, as I have already stated, oleomargarine does not come from the country, but from an oil mill consisting of tanks, pipes, valves, and knobs. That oil mill can be owned by a soap company, or a paint company, or an inter-

¹⁰ Cong. Rec. January 6, 1950, p. 129.

¹¹ Cong. Rec. January 10, 1950, p. 273.

¹² Cong. Rec. January 12, 1950, p. 359.

national cartel employing slaves on the coast of Africa—but none of these things has anything to do with the American countryside as represented by barns and silos. As I have additionally stated, oleomargarine is not fresh, but uses a preservative, as it is required to state by law. Nothing can be fresh and preserved at one and the same time. That ought to be obvious to anyone. Yet, this advertisement, sponsored by a supposedly reputable corporation, undertakes to tell the housewives of America that oleomargarine containing a preservative is not only fresh, but country fresh. In the face of this evidence, how are we to believed (sic) that the oleomargarine interests can be trusted with a color which is the traditional color of butter unless we very closely control their advertising?¹³

The Conference Committee accepted the amendment, as the Senate passed it, with this addition:

except that nothing contained herein shall prevent a truthful, accurate and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine.¹⁴

Senator George, the senior Manager on Part of the Senate, said the addition was necessary because “* * * the Conference Committee was advised—indeed, there was no dispute upon the point—that certain dairy products—for instance, milk in some form—were used in the manufacture of oleomargarine.”¹⁵

In the light of the legislative history outlined above, we not only think the decision of the hearing examiner was fully justified, but we believe he should have gone further and prohibited the use of the term “country fresh.” It seems to us that “country fresh”—particularly as the term was used in the milk bottle hanger which said at the top in large print “Buy it Fresh from your Milkman!”—also constituted a representation that the product was a dairy product.

It is true, of course, that all of respondent’s advertising contained the word “oleomargarine” or “margarine” in large print, but the whole controversy leading up to amended section 15 of the Federal Trade Commission Act seems to be based on the assumption that the word “oleomargarine” is not by itself a sufficient negation; in other words, Congress seems to have conclusively presumed that many people think that the product, even when described by its correct name, is a dairy product and that the use of the name “oleomargarine” does not prevent it from being palmed off to the public as such. Whether or not, this legislative view was or is a valid one is not for us to decide.¹⁶

Congress was not merely striking at general misrepresentation or deception, already covered by existing law, but intended to deal spe-

¹³ Cong. Rec. January 12, 1950, pp. 359–360.

¹⁴ Cong. Rec. March 8, 1950, p. 3060.

¹⁵ Cong. Rec. March 8, 1950, pp. 3060–61.

¹⁶ It has been suggested that the term oleomargarine is as well known today as the term butter. We do not have to pass on this question inasmuch as Congress has decided otherwise.

cifically with the contention that the oleomargarine industry was attempting to profit from the good will of the dairy industry.

We are frank to say we have had some difficulty in coalescing the statutory language and the legislative intent. However, the real purpose of the amendment seems to be, and the statutory language lends itself to this interpretation, to stop the practice of suggesting that oleomargarine is a dairy product by associating it with dairy terms—thus the prohibition against any representation “made or suggested” by “statement, word, grade, designation, design, device, symbol, sound, or any combination thereof. * * *” It was intended, we believe, to reach a form of advertising which, through suggestion and association of ideas, leads or may lead the consumer to believe that the particular oleomargarine in question is a dairy product.

All of respondent's representations, except the trade name, “Farm Queen,” seem to fall into this category. If the amendment is to have any meaning we must conclude that it went beyond existing law which prohibited advertisements having the tendency and capacity to deceive, and reached a situation like the present where the suggestion that oleomargarine is a dairy product resulted from associating it with dairy terms.³⁷ This is not to say that all dairy terms, as such, are precluded. They are prohibited only when they suggest to the reader that the product is a dairy product.

Except as modified herein, we adopt the findings of the hearing examiner and the initial decision is affirmed.

FINAL ORDER

Counsel supporting the complaint and respondent E. F. Drew & Co., Inc. (erroneously named in the complaint as E. F. Drew & Company, Inc.), both having filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and granting in part and denying in part the appeal of counsel supporting the complaint, and affirming the initial decision as modified:

³⁷ Representative Andresen of Minnesota explained the purpose of the amendment as follows:

“This amendment would also prevent the use in oleomargarine ads of dairy scenes or dairy terms, such as pictures of cows or dairy farms or equipment, or such terms as dairy breed names, churned, and so forth. The amendment would also prevent the grouping of oleomargarine with dairy products in advertisements, particularly where such grouping occurs in a box or under a heading entitled ‘Dairy Products’ or suggesting that the products so grouped are dairy products.” Cong. Rec. Mar. 9, 1950, p. A1933.

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It is ordered, That the initial decision be, and it hereby is, modified by:

1. Inserting the term "country-fresh" directly after the term "churned to delicate, sweet creamy goodness" in paragraph number 4 of the findings of fact so as to include it as one of the terms found to constitute a representation or suggestion that respondent's oleomargarine is a dairy product.

2. Changing the word "two" to "three" in the third paragraph of the Conclusion so that the second sentence therein now reads: "From an examination of the advertisements themselves as well as the results of the surveys made among housewives in one city to obtain their opinions with respect to the advertisements, and representations contained therein, there appear to be only three statements which have the capacity and tendency to lead a purchaser to believe that respondent's product is a dairy product."

3. Changing the order to cease and desist so that it now reads as follows:

It is ordered, That the respondent, E. F. Drew & Co., Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of oleomargarine or margarine 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 contains:

The terms "churned to delicate, sweet creamy goodness," "country-fresh," or " * * * the same day-to-day freshness which characterizes our other dairy products," or any other statement, word, grade designation, design, device, symbol, sound, or any combination thereof which represents or suggests that said product is a dairy product;

Provided, however, That nothing contained in this order shall prevent the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in said product, or of a truthful statement that said product contains butter or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth.

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

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which contains any of the representations prohibited in Paragraph One of this order.

It is further ordered, That respondent E. F. Drew & Co., Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist as hereinabove set forth.

Commissioner Gwynne not participating for the reason that he did not hear oral argument.

IN THE MATTER OF
THE BLANTON COMPANY

Docket 6197. Complaint, Mar. 18, 1954—Order, May 5, 1955

Order reversing initial decision which dismissed the matter as not involving misrepresentation, for the reason that in a proceeding brought under sec. 15 (a) (2)—the Oleomargarine amendment—the prohibitions of sec. 5 are not controlling; and remanding the matter to the hearing examiner for further consideration.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. William L. Pencke and *Mr. Morton Nesmith* for the Commission.

Mr. M. R. Garstang, of Washington, D. C., for National Milk Producers Federation, amicus curiae.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the opinion of the Commission:

This is an appeal from the initial decision of the hearing examiner granting respondent's motion to dismiss made at the close of the case in chief of counsel supporting the complaint.

The complaint charged that certain advertising representations of respondent were misleading in material respects, in violation of section 15 of the Federal Trade Commission Act, as amended, in that, they suggested that respondent's Creamo oleomargarine was a dairy product.

The complaint also challenged, for the same reason, the use of the word "Creamo" as a trade name for respondent's oleomargarine.

Reference is made to the Commission's opinion in the Matter of E. F. Drew & Company, Inc., Docket No. 6126, entered this day, for an analysis and interpretation of the new oleomargarine amendment to the Federal Trade Commission Act.

We agree with counsel in support of the complaint that we are not dealing here with the usual misrepresentation case, that is, with false and misleading advertising which may have the tendency or capacity to deceive in violation of section 5 of the F. T. C. Act,¹ but solely with the question whether or not the respondent has through the use of any "statement, word, grade, designation, design, device, symbol, sound or any combination thereof" suggested that the oleomargarine sold by it "is a dairy product."²

¹ 15 U. S. C. sec. 45.

² 15 U. S. C. sec. 55.