

IN THE MATTER OF
WASHINGTON MUSHROOM INDUSTRIES, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6273. Complaint, Dec. 22, 1954—Decision, Oct. 24, 1956

Order requiring sellers of mushroom spawn and fertilizer in Seattle, Wash., to cease representing falsely in their correspondence, advertisements, and trade literature, the demand for mushrooms, ease of culture, extraordinary financial returns even to inexperienced purchasers and users of their product, etc.

Mr. William R. Tincher and *Mr. Peter J. Dias* for the Commission.

Mr. Jeffrey Neiman, of Seattle, Wash., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondents have violated the Federal Trade Commission Act by making false and deceptive statements in connection with the selling of mushroom spawn and fertilizer. By answer the charges of the complaint were denied and the matter proceeded to hearings at which evidence both in support of and in opposition to the allegations of the complaint was received, duly recorded and later filed in the office of the Commission. At the completion of the presentation of evidence in support of the complaint, respondents filed a motion to dismiss the complaint because of failure of proof. This motion was denied. Following the completion of the taking of all the evidence, counsel in support of the complaint and counsel for respondents submitted proposed findings of fact and conclusions of law. Respondents' counsel, contemporaneously therewith, filed a motion to dismiss the complaint on the ground that the Federal Trade Commission has no jurisdiction in the matter. The proceeding is now before the Hearing Examiner, who, upon the basis of the entire record, makes the following findings of fact:

1. Respondent Washington Mushroom Industries, Inc., is a corporation organized in 1949, existing and doing business under and by virtue of the laws of the State of Washington. Respondent Arthur T. Lelles is an individual and president of said corporation. He formulates, directs and controls the sales and advertising policies of the said corporate respondent. The principal office and place

of business of said corporate respondent and respondent Lelles is located at 2954 Admiral Way, Seattle, Washington.

2. The respondents are now and for several years last past have been engaged in the business of selling and distributing mushroom spawn and fertilizer. Said respondents cause said mushroom spawn and fertilizer, when sold, to be transported from their place of business in the State of Washington to purchasers thereof located in various other States of the United States and the District of Columbia. There has been at all times mentioned herein a substantial course of trade in said mushroom spawn and fertilizer, so sold and distributed by said respondents, in commerce between and among the various States of the United States and in the District of Columbia. During 1954 respondents' sales amounted to \$333,000; for the first nine months of 1955, sales were \$245,000. Approximately 80% of these sales were to persons residing outside the State of Washington.

3. In the course of their business in commerce, in soliciting the sale of and selling mushroom spawn and fertilizer, respondents, in their advertising literature, have made the following statements and others of similar import and meaning:

(1) The general demand for them (mushrooms) far exceeds the available supply.

(2) Cultured mushroom growing is not seasonal. You can plant any time of the year, and grow mushrooms the year around.

(3) Plant at Once—the same day.

(4) Guaranteed market for your cultured mushrooms. We give a written contract to back grower with each order, guaranteeing to pay \$3.50 a lb. for dried mushrooms and 55¢ a lb. for fresh mushrooms.

(5) No odor in mushroom beds. Can place mushroom beds in a spare room if desired.

(6) Farms, lawns, pasture lands, grasslands, gardens can all be used to grow mushrooms 8 to 12 months each year, and in some parts the year around.

(7) One person can take care 5,000 up to 10,000 sq. ft. mushroom beds devoting full time. Spare time, one person can take care 1,000, 2,000 up to 3,000 sq. ft. mushroom beds.

(8) 6 pounds of mushrooms from each sq. ft. by planting three times a year in the same framed mushroom bed spaces. Make \$3.30 per sq. ft. planted, and sometimes more.

(9) \$4,165.00 was paid to (amateur) P. Babbitt in few weeks for mushrooms shipped us.

(10) Checks are mailed to our mushroom growers promptly for mushrooms shipped us.

(11) This is a growing mushroom industry—750,000 to 1,000,000 stores in the United States can become outlets for our exclusive mushroom products.

(12) Our 14,000 mushroom growers residing in every state of the United States, Alaska, Hawaiian Islands, Canada, Philippine Islands, Denmark and other foreign countries have purchased our mushroom growing materials to grow their mushrooms.

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(13)

*Do not be too late**We take more growers as we need more.*

(14) We need a few more mushroom growers right now, *we only permit more amateur growers to come in with us as we need more.* Be one of the few that we need right now. Send Your Order Today—Do Not Be Too Late.

4. The foregoing statements and others of similar import and meaning are contained in a single-page form-letter circular addressed to "Dear Friend," bearing the printed signature "Washington Mushroom Industries, Inc., A. T. Lelles, President." The same or similar statements are contained and enlarged upon in a 40-page booklet circulated by respondents, entitled "Grow Mushrooms At Home." These two pieces of advertising literature were sent or given to prospective customers throughout the United States, often in response to inquiries for information received from persons who had read one of respondents' abbreviated ads run in the "Business Opportunities" or other classification in the want-ad section of various magazines and newspapers, including "Field and Stream," the San Francisco Chronicle, the Zanesville, Wisconsin, Daily Gazette, and the Farmer-Stockman of Oklahoma City. Omitting the name and address, this ad read as follows:

GROW MUSHROOMS. Cellar, shed, spare, full time, year round. We pay \$3.50 lb. We PAID Babbitt \$4,165 in few weeks. FREE BOOK.

5. Through such advertising statements, respondents have represented and are now representing that

(1) There is a shortage of and an ever-increasing demand for mushrooms;

(2) Cultural mushroom spawn can be planted and grown any time of the year under usual conditions;

(3) Mushroom spawn can be planted the same day it is received;

(4) Respondents will purchase, from their mushroom growers, dried mushrooms at \$3.50 per lb. and fresh mushrooms at 55¢ per lb. shipped from any part of the United States to respondents' place of business in the State of Washington;

(5) There is no odor in mushroom beds and you can satisfactorily place mushroom beds in a spare room in the home;

(6) Mushrooms can be readily grown out-of-doors;

(7) Mushroom-growing is an easy and pleasant occupation, and persons, including those having no experience in growing them, can successfully raise large quantities and earn a substantial income in this field;

(8) Respondents' mushroom spawn will produce large financial returns to purchasers and users thereof;

(9) The business of respondents is sufficiently large in size and scope to service 750,000 to 1,000,000 stores in the United States;

(10) There are 14,000 mushroom growers, customers of respondents, residing in every State of the United States and elsewhere, including foreign countries using respondents' mushroom spawn and fertilizer;

(11) Respondents only accept new customers to fill a few vacancies occurring from time to time, depending upon the quantity of mushrooms being sent to respondents.

6. The foregoing statements and representations, with one exception, are exaggerated, false, misleading and deceptive. They have the tendency and capacity to mislead and deceive, and through their use respondents have misled and deceived the purchasing public into the erroneous and mistaken belief that such statements and representations are true, and into the purchase of substantial quantities of respondents' products because of such erroneous and mistaken belief. The one statement which is not false or misleading is that respondents will purchase from their customers and pay promptly for dried mushrooms at \$3.50 per pound and fresh mushrooms at 55¢ per pound.

7. The real respondent in this proceeding is Arthur T. Lelles. He owns 98% of the stock of the corporate respondent, Washington Mushroom Industries, Inc., which is the successor of Cultured Mushroom Industries, another corporation established in 1940, still in existence, of which Lelles is also president and owned 98% of the stock until it was transferred to respondent corporation. The name "Washington Mushroom Industries" was used by Lelles as a trade name, in 1940 and prior thereto.¹ He prepared the advertising and conducts the business. There are seven employees who work under his supervision and control.

8. Respondent Lelles is not an expert in mushroom-growing, either by education or experience. He has had no formal and, so far as the record shows, no practical education in mushroom cultivation. The mushroom spawn which he sells, known as pure cultured spawn, is not grown by him but purchased from a recognized expert mushroom-spawn producer located in Kennett Square, Pennsylvania, the outstanding mushroom-growing center of the United States; he has written no books or articles on the subject other than the two booklets of record—the "Grow Mushrooms" advertising booklet hereinbefore mentioned, and another 24-page booklet, the full title

¹ 26 F.T.C. 1404, A. T. Lelles, an individual operating under the trade name of Washington Mushroom Industries, entered into a stipulation, January 14, 1938, agreeing to cease and desist from making certain representations, some of which are similar to those set forth in this proceeding.

of which is "Science of Simplified Mushroom Cultivation, The Very Latest For Hobbyists And Amateur Mushroom Growers—A Complete Manual, Modern Mushroom Culture For Beginners," which on its cover shows copyrights from 1937 to 1953.

This latter booklet is for instruction, yet much of it is based on outdated and inaccurate information. Two specific instances will serve to illustrate this statement. During the course of the hearings respondent Lelles stated that for certain information contained in his publication he used as authority a book by W. Robinson entitled "Mushroom Culture, Extension and Improvement." It was learned later that the book was published around 1870 and the information which it contains was derived chiefly from studies the author had made of mushroom culture in the European area prior to that date. For source material of other statements in his booklet, respondent Lelles relied upon United States Department of Agriculture Farmers' Bulletin No. 1587, entitled "Mushroom Culture for Amateurs." The record shows that this bulletin was issued March, 1929, "Slightly revised September, 1933" and superseded in 1941 by Farmers' Bulletin No. 1875, entitled "Mushroom Growing in the United States."

The information in Lelles' booklet relating to growing mushrooms in the open, in lawns, pastures and grasslands was taken from early literature descriptive of outdoor mushroom cultivation in the British Isles and on the European mainland, and is inapplicable to conditions found generally in the United States. The several experts who testified in support of the allegations of the complaint in this proceeding gave evidence which is conclusive that the booklet is inaccurate, incomplete and unreliable in many particulars.

9. The testimony of respondent Lelles, likewise, is in many instances inaccurate and unreliable. Respondent Lelles testified at an early hearing that within a period of five or six weeks in 1940, P. Babbitt had been paid \$4,165 for mushrooms grown by him. When it was suggested that the period might have extended over at least six months, he replied, "I wouldn't say that." An examination of the 78 checks covering the Babbitt transaction shows that they were issued during a period of almost two years—from October 21, 1939 to October 3, 1941.² At this same hearing respondent Lelles was asked further about Babbitt, but he knew little. He said "perhaps" he could obtain figures showing how much spawn and fertilizer Babbitt has bought and that he "might" make an

² The hearing at which this testimony was given was held in Boston, April 5, 1955; respondent Lelles had the checks with him in Boston, at his hotel, and must have been as familiar with their dates as with their total amount.

effort to have those figures available at a later stage in the proceeding. But the information was never furnished.³

At a Seattle hearing respondent Lelles testified that he knew the market price of fresh mushrooms in that area. He gave a quotation which he said "was taken October 4, 1955 * * * from the Pacific Fruit & Produce Company who wholesale mushrooms here where they are produced." He added, "The wholesale price for 24 two-ounce baskets is \$4.75; * * * in four-ounce, in 24 little boxes, the price was \$8.65." He also described the crates in which the mushrooms were packed. Two days later it was discovered that fresh mushrooms are not packed or sold in either two-ounce or four-ounce baskets. A qualified expert testified that fancy-grade fresh mushrooms were selling at the time in Seattle for 61¢ per pound, and in California for 40¢ per pound.

Respondent Lelles testified that he could not fill his requirements of mushrooms because there is a shortage of mushrooms on the West Coast. Not only does the 40¢-per-pound California price negate the statement that there is a mushroom shortage in the west, but the grower-manager of Olympia Mushroom Farms, Inc., of Lacey, Washington, 65 miles from Seattle, testified that his company produces from 600,000 to 800,000 pounds of fresh mushrooms annually, that a large portion of this production has to be canned because it cannot be disposed of on the fresh-mushroom market, that of each 70,000 pounds produced they are now selling an average of 10,000 pounds of mushrooms fresh, and would be pleased to sell 20,000 pounds more fresh. Then, too, one wonders just what respondents' needs are. They have no mushroom products on the market, so far as the record shows, and never did have except perhaps briefly in 1954, and respondent Lelles has been in business since before 1938!

For fear of belaboring this aspect of the case, just one more illustration will be given. In explaining the advertising representation that respondents do not accept orders for mushroom spawn except as more growers are needed, respondent Lelles testified that respondents regularly turned down large orders, on several occasions have refused to fill orders from customers seeking only small quantities of spawn, and that often such customers were notified of such refusal by letter. Pressed to produce copies of such letters, respondent Lelles delayed compliance but finally, at the last hearing, October 13, 1955, presented copies of letters dated August 12, 1955, October 6, 1955, and October 12, 1955, which were obviously prepared solely for presentation in this proceeding. Respondents' bookkeeper

³ The hearings were completed October 13, 1955, in Seattle.

admitted there "weren't too many" who were refused, and it developed later that most or all of those were individuals who wanted special prices or other special consideration.

10. With the shipment of spawn each purchaser receives the "Mushroom Cultivation" booklet, through which he is informed for the first time that mushroom beds are not particularly simple to construct. They should be in a place where temperature can be regulated, where the air around the beds will be moving at all times without direct drafts on the beds. To accomplish this it is suggested in the booklet that the grower "run small stove pipes with the outlet clear out in the fresh air and the bottoms or inlets about 4 inches above the floor spaces where the beds are. * * * There should be pipes to draw fresh air to the beds, also pipes to take out the stale air from the space where the mushroom beds are."

The booklet states that compost can be made by six different methods. Two of these are for outdoor cultivation; three of the others require from 26 to 30 days for the process; one presumably can be completed in a single day, provided the materials are on hand. All but one of these six methods provide for the use of manure and a special fertilizer sold by respondents. All require use of much water and frequent turning of the compost material.

The first method, which requires only straw and fertilizer, involves eight steps which take from 26 to 30 days to complete; the second method requires straw, fertilizer and horse manure, and involves nine steps which take about 30 days to complete; the third method, involving six steps, specifies that the horse manure, three cubic yards of which are needed for each 100 square feet of beds, "must be strictly fresh from grain-fed horses, containing one-third straw bedding in it, * * * free from shavings or chemicals that are often used to dress horses"; the warning is here given, "If the horse manure is not as above specified * * * it will not be any good for Cultured Mushroom growing." The compost is to be prepared "under roof of some kind protected from rain or snow." The "easy" directions are, in part, as follows:

Step 1. Wet the horse manure by sprinkling water over it, and at the same time while you are sprinkling it with water use a pitch fork and keep on making a heap pile as the wetting is done. Pile 5 feet high and as wide and long as space permits, and the quantity of the horse manure materials permit. If the quantity of the materials is too small, in that event make it as high as possible. * * * An inch of soil on top of the heap pile will help fill the air spaces to keep the tremendous heat in the heap pile. * * * (T)he soil should be removed from the top of the pile before each turning.

Four turnings are prescribed. Directions for turning are—

Step 2. Turn the inner to the outside, and bring the outer materials to the inside, sprinkle with water and break all the lumps while sprinkling and repile in the usual manner as before.

Method 4 is an impractical, ineffective quick method suggested "for hobbiests amateur growers." It calls for use of "any one of the manures such as Chicken, Rabbit, Sheep, Cows, Horses, Leafmold, etc. * * * old or fresh (which) can be mixed with any kind of straw, or hay, soil and Amco Fertilizer."

Methods 5 and 6 relate to preparation of beds in the open, a procedure which, at page 14 of the booklet, is said to be "very experimental for the beginner until he or she learns how to make and take care of the beds correctly." At page 14 the novice is told, "In the open it is advisable to make the beds in the months of April, May, June or July and spawn the beds from the 15th of April until the 15th of August, depending upon summer's duration, of course," and at page 17 that "50 to 60 degrees temperature is the most desirable for steady normal growth after the beds are prepared and planted."

Following this there are instructions for ventilating, picking, drying, twice-a-week spraying, disinfecting and shipping. The grower is told that fresh compost materials should be used for each planting and that between plantings the beds are to be cleaned out thoroughly and sprayed with "either Black Leaf 40 or the 85% Pyrethrum Powder." After reading this booklet the enthusiasm of the amateur grower undoubtedly becomes considerably dulled, but he is assured that "replacement of mushroom spawn of the initial purchase is made strictly (according) to the terms of the Mushroom Purchase Agreement." Replacements are made "provided you send us the charges," which are usually computed to an amount greater than the cost of all the material sent as replacement.

Respondents' own literature—that part of it which is provided the customer after the sale has been completed—establishes that the growing of mushrooms is not easy; that the process is not odorless; that the use of a spare room is neither practical nor feasible; that mushrooms cannot be grown the year around nor for eight to twelve months each year outdoors, on farms, pasture lands, lawns or gardens; that the spawn cannot be successfully planted "at once—the same day" by an amateur not informed about the preparatory steps required; and that one person cannot in his spare time satisfactorily care for up to 3,000 square feet of mushroom beds.

Not only are respondents' representations in these respects contradicted by respondents' own literature, but there is in the record an abundance of substantial, reliable, probative evidence establishing

beyond any question that the representations of the respondents in these respects are false, misleading and deceptive.

11. Respondents' advertising statements relative to the profits obtainable from mushroom-growing if purchasers of respondents' spawn and fertilizer follow respondents' directions are false, misleading and deceptive.

In 1954, respondents' total sales amounted to \$333,656. If from this amount \$5,656 is deducted as representing sales of mushroom salt and seasoning, net sales of spawn and fertilizer would account for \$328,000. If the average sale were of spawn and fertilizer to plant 500 square feet, at respondents' selling price of \$114.90, respondents would have sold enough spawn to plant 1,425,000 square feet of mushroom beds. From such plantings, with a production of 2 pounds of fresh mushrooms per square foot,⁴ respondents' customers should have raised 2,850,000 pounds of mushrooms, for which, at respondents' 55¢-per-pound price, they should have realized \$1,567,500. At half production—one pound of mushrooms per square foot—they should have received \$783,750. They actually sold back to respondents only \$5,324.76 worth of mushrooms.

Customers' receipts from sale of mushrooms to respondents amounted to only 1.62% of the amount of money they paid respondents for spawn and fertilizer. Assuming that same growers may have sold some mushrooms locally, or consumed some, such amounts could not have been substantial, and the financial beating taken by respondents' customers is astounding.

In the meantime respondents were carrying on an enterprise highly profitable to themselves. Established spawn producers, including the one who supplied respondents, were selling spawn in 1954 to commercial growers at "less than \$2 for sufficient spawn to plant 100 square feet of beds." The eight pounds of fertilizer which respondents included for each 100 square feet of plantings could not have cost much, and it is safe to assume that on each 500-square-foot outfit sold by respondents the gross profit to respondents was approximately \$100, or approximately \$285,000 on sales of \$328,000, a profit of over 86% computed on selling price; a phenomenal 666% plus if based on estimated cost price⁵ of the merchandise sold. In an enterprise of this character the \$5,324 which respondents paid for mushrooms could be charged off as business expense and the mushrooms dumped in the sewer. There

⁴ Respondents suggest that for three plantings growers should raise six pounds per square foot, or two pounds per square foot per planting, which the Department of Agriculture says is a good yield.

⁵ Cost price of spawn and fertilizer is estimated liberally at \$15 for a quantity sufficient to plant 500 square feet of beds.

is no showing in this record that respondents used the mushrooms they bought in the commercial manufacture of mushroom salt, seasoning or any other product, and there is no financial incentive for respondents to embark upon or enlarge any such phase of their business.

12. Out of many years of experience respondent Lelles has produced two success stories—one, the story of Babbitt, which is now shrouded in a cloak of vague forgetfulness; relevant statistical facts are not available and respondent Lelles does not know where Babbitt now is, so the full details of that transaction cannot be obtained. Then there is the John Betts story, which has run concurrently with this proceeding. The complaint was filed in December, 1954; hearings were held in Boston, Massachusetts, April 4 and 5, 1955; in New Haven, Connecticut, April 6, 1955; in Philadelphia, Pennsylvania, April 7 and 8; in Washington, D.C., April 11, and in Seattle, Washington, October 10, 11 and 13, 1955.

In 1953 Betts had purchased enough spawn and fertilizer for 100 square feet of planting, but he had no success. In January, 1955, he bought spawn from respondents for 500 square feet of beds; in April, 1955, he purchased spawn and fertilizer for 2,000 square feet more. Success was immediate. During the twenty-four weeks beginning April 6, 1955, and ending September 21, 1955, Betts received twenty-four checks from respondents, totaling \$5,026.05.

Betts testified on October 10, 1955, in Seattle, that the mushrooms which he sold respondents had been produced in the cellar of his home in Brooklyn, New York, and had been dried in his yard in the open, then shipped to respondents. He said it took over eight pound of fresh mushrooms to produce one pound of the dried product, hence Betts must have produced 11,488 pounds of fresh mushrooms during the 5½-month period, which is at the rate of 4.59 pounds per square foot of mushroom bed. The average commercial production of mushrooms in the United States is about a pound and a half per square foot, and any production of two pounds or more is good. The Department of Agriculture Farmers' Bulletin No. 1875, at page 37, says that as a consequence of the inability of the amateur mushroom grower to follow commercial methods "he must be content with an average yield of three-fourths of a pound per square foot of bed space."

From observance of witness Betts and his demeanor on the witness-stand, there arises a strong conviction that the full details of the Lelles-Betts transaction have not been disclosed. Without some further corroboration than that which was presented at the hearing, the Betts story cannot be accepted at face value.

13. Further, to show the tremendous possibilities of the mushroom business, respondents represent that "this is a growing industry—750,000 to 1,000,000 stores in the United States can become outlets for our exclusive products." After listening to the evidence, one wonders what products these are. There is no evidence in the record that respondents now market or ever have marketed commercially any mushroom product other than spawn. To arrive at the number of stores mentioned in the advertisement, respondent Lelles consulted the 1948 Business Census of the United States Department of Commerce. There he found and enlarged upon the fact that there are in the United States more than 750,000 retail stores, including groceries, meat markets, fish and seafood establishments, fruit and vegetable stores, egg and poultry houses, bakeries, candy and nut stores, milk and dairy products stores, department stores and variety stores. This representation of respondents' is an extravagant fantasy. Into the same category falls respondents' representation that they have 14,000 mushroom growers residing throughout the United States and elsewhere. Respondent Lelles testified that in this statement they were referring to all the various persons to whom they have sold spawn during the many years respondents have been in the business.

14. The difficulties encountered in the growing of mushrooms by inexperienced persons was amply illustrated by the testimony of the several customers of respondents who appeared as witnesses. Except for Betts and perhaps one other, none of them had been able to grow mushrooms profitably. Most of them had failed completely; some had raised a few pounds of mushrooms. The plight of these growers is most clearly demonstrated by the fact, heretofore noted, that from \$328,000 worth of spawn sold to them by respondents only \$5,324 worth of mushrooms were produced.

Mushroom-growing, according to the qualified experts who testified in this proceeding, is a highly technical operation; more skill and labor are required than in almost any other form of horticultural venture. Commercially it is a difficult and highly competitive business.

Unless there is complete control of temperature, atmospheric moisture content and ventilation, satisfactory growing conditions cannot be maintained. At certain stages of growth temperatures between 72° and 75° are desirable; at other stages temperatures should be between 68° and 70°; and at still other stages, between 60° and 62°; sudden temperature variations outside these limits may be calamitous. Only the experienced grower is able to determine the correct temperature for the various stages of growth,

and unless proper facilities are available, satisfactory temperature regulation cannot be maintained. The same is true of atmospheric moisture content and ventilation. Air-conditioning and mechanical circulatory systems are practical necessities. Mushrooms abhor direct sunlight, so diffused lighting must be provided. One manual lists fifteen diseases commonly affecting mushrooms, and nineteen varieties of pests which must be controlled. During the growing season systematic spraying must be carried on to eliminate disease and insect damage, and between plantings the beds must be thoroughly and completely fumigated. The old compost must be replaced with new, and in the preparation of new compost much care and hard work is required.

The difficulties of mushroom culture, whether on a commercial basis or by amateurs, are pointed out by handbooks and manuals prepared for the industry,⁶ and have been made the subject of comment by members of the technical staff of the United States Department of Agriculture, including E. B. Lambert, plant pathologist of outstanding reputation. As recently as April, 1954, the Department of Agriculture issued a single-page warning over Dr. Lambert's signature advising inquiring mushroom-growers that advertisements which give the impression that mushroom-growing is a new industry offering unusual opportunities for profit from a comparatively small outlay of capital are misleading. The substantial, reliable, probative evidence in this proceeding supports that statement. The communication points out, further, that to make a net profit of \$2,500 per crop, about 20,000 square feet of beds would be required, which, with proper surroundings and equipment, would cost approximately \$30,000 to build. The cost at market price of enough spawn to plant 100 square feet is stated to be less than \$2, and on the witness-stand Dr. Lambert stated that during the early part of 1955 the price of fresh mushrooms at the canneries in eastern Pennsylvania was 27¢ per pound and that about two-thirds of the mushroom production was sold at that price.

CONCLUSION

Except for the statement that respondents will promptly pay \$3.50 a pound for dried mushrooms and 55¢ a pound for fresh mushrooms shipped to them by their spawn and fertilizer customers, the statements and representations of respondents as alleged in the complaint and as found herein are false, misleading and deceptive; they have had and now have the tendency and capacity to mislead

⁶ See Handbook of Mushroom Culture by Albert M. Kligman, M.D., Ph. D., 1950; Manual of Mushroom Culture by G. Raymond Rettew and Forrest G. Thompson, 1948.

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and deceive the purchasing public; and they constitute acts and practices which are to the prejudice and injury of the public and violate the Federal Trade Commission Act. This proceeding is in the public interest. Accordingly,

It is ordered, That respondents, Washington Mushroom Industries, Inc., a corporation, and its officers, and Arthur T. Lelles, individually and as an officer of said corporation, whether trading under these or any other name or names, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the sale and distribution of mushroom spawn or fertilizer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That the usual or customary earnings or profits which may be derived through using respondents' said products in the culture of mushrooms is any amount in excess of the average amount actually earned by users of said products in such culture under usual or normal conditions;

2. That persons possessing no previous knowledge or technical skill pertaining to the culture of mushrooms may earn substantial incomes raising mushrooms;

3. That there is a shortage of mushrooms, when such is not in fact true;

4. That mushrooms may be grown out-of-doors at any time of the year;

5. That mushroom culture or mushroom beds are odorless;

6. That the size, scope or nature of respondents' business is other than it is in fact;

7. That respondents will sell to only a limited number of customers.

It is further ordered, That respondents' motion to dismiss the complaint herein be, and the same hereby is, denied.

ON APPEAL FROM INITIAL DECISION

By MASON, Commissioner:

Respondents are engaged in the advertising, sale and distribution in interstate commerce of mushroom spawn and fertilizer. The complaint against them charges violation of the Federal Trade Commission Act through the dissemination of false, deceptive, and misleading statements in advertising in newspapers and magazines and in promotional literature and brochures concerning their products sent to persons answering such advertisements, thus inducing a substantial number of purchases in interstate commerce. In 1954

respondents' sales amounted to \$330,000 and for the first nine months of 1955 to \$245,000, according to the record.

Respondents run advertisements in the want-ad sections of newspapers and magazines under "Business Opportunities" or other similar classification, which omitting respondents' name and address, usually read as follows:

GROW Mushrooms. Cellar, shed, Spare, full time, year round. We pay \$3.50 lb. We PAID Babbitt \$4,165.00 in few weeks. FREE BOOK * * *

As a result of leads obtained through such ads, and other means, respondents mail out to prospective customers a single page circular and a booklet entitled "Grow Mushrooms At Home."

The complaint charges, and the hearing examiner found, with one exception hereinafter adverted to, that through advertising statements contained therein respondents have misrepresented that:

1. Mushrooms are in short supply in the face of an ever-increasing demand;
2. Mushroom spawn can be planted and grown in any season;
3. Spawn can be planted the same day it is received;
4. Respondents will purchase dried mushrooms at \$3.50 per lb. and fresh at 55¢ per lb., shipped from anywhere in the United States;
5. Mushroom beds have no odor and can even be satisfactorily cultivated in a spare room in the home;
6. Mushrooms can readily be grown out of doors;
7. Mushroom growing is easy and pleasant and that inexperienced persons can successfully raise large quantities and earn a substantial income;
8. Respondents' mushroom spawn will produce large financial returns;
9. Respondents' business is sufficiently large in scope to service 750,000 to 1,000,000 stores;
10. There are 14,000 customers (growers) of respondents' in every state and in numerous foreign countries using respondents' mushroom spawn and fertilizer;
11. Respondents only accept new customers to fill a few vacancies from time to time, depending upon the quantity of mushrooms being shipped by customers to respondents.

The hearing examiner's initial decision found that, with one exception, respondents' representations were false and misleading; the exception being that respondents will purchase mushrooms at the prices stated. However, the hearing examiner also found that the average cost to respondents for enough spawn and fertilizer to plant

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500 square feet is about \$15.00. Respondents sell a kit for the same area at an estimated \$114.90. The hearing examiner further found that the gross profit on each kit sold by respondents was about \$100, or approximately \$285,000 on net sales of \$328,000, a profit of over 86% based on selling price—666% based on estimated cost to respondents of planting kits sold.

As indicated, in 1954, respondents' net sales of mushroom planting kits were \$328,000, and the hearing examiner, analyzing the evidence before him, found that even "at half production—one pound of mushrooms per square foot—they [respondents' customers] should have received \$783,750. *They actually sold back to respondents only \$5,324.76 worth of mushrooms.*" [Emphasis supplied.]

As to the "why and wherefore" explaining these operations we need only to refer to the testimony of witnesses who were respondents' customers reciting the difficulties they encountered. Only a few of them had raised even a few pounds of mushrooms.

On the basis of the record made, the hearing examiner made his findings of fact and conclusion and entered his order to cease and desist. The order would prohibit respondents from representing, directly or by implication:

1. That the usual or customary earnings or profits which may be derived through using respondents' said products in the culture of mushrooms is any amount in excess of the average amount actually earned by users of said products in such culture under usual or normal conditions;

2. That persons possessing no previous knowledge or technical skill pertaining to the culture of mushrooms may earn substantial incomes raising mushrooms;

3. That there is a shortage of mushrooms, when such is not in fact true;

4. That mushrooms may be easily grown;

5. That mushrooms may be grown out-of-doors at any time of the year; or that they may be grown indoors, without disclosing that special cooling, heating, lighting, ventilating and moisture-controlling equipment is necessary for such culture;

6. That mushroom culture or mushroom beds are odorless;

7. That the size, scope or nature of respondents' business is other than it is in fact;

8. That respondents will sell to only a limited number of customers.

Respondents' principal contention on appeal is that the initial decision fails to recognize that respondents were catering to amateur mushroom growers to interest them in a "hobby" or "fascinating game" and that they did not cater to commercial growers who have

problems of a magnitude not comparable to those of the individual amateur who wants to grow mushrooms in a cellar or shed to earn "pin money." We do not think the evidence supports respondents' position in this respect. On the contrary, the findings, supported by substantial testimonial and documentary evidence, show clearly that respondents' central advertising theme was consistently to offer a profit-making venture to induce purchase of respondents' spawn. About a dozen of respondents' customers, appearing as witnesses herein, testified that they purchased spawn from respondents' primarily with a profit-making motive. Typical of such testimony is that of witness Moore called by the Commission, who after stating that he saw the ad in a "Business Opportunities" classified section and that he wanted a retirement income, responded as follows:

Q. And your interest was in picking up a little income, if possible, is that right?

A. That is right.

Q. That is what prompted you, did it, to write in to the company?

A. Yes. (R. 61).

and witness Lemire, also called by the Commission, testified to the effect that after reading the literature it seemed like a simple way of earning extra money at home; that it didn't seem to require much work and that since she had to take care of her husband she wanted something that would bring in a little extra money. Quoting her exactly on this point the record at page 109 shows she stated flatly that:

* * * I think that was the thing that I noticed most, that's what appealed to me, that I could earn extra money at home.

We are of the opinion that respondents' contention as to their offer being one of a "fascinating game" or "hobby" is without merit. Their representations clearly were intended and did appeal to the profit-seeking motives of prospective customers.

Respondents' representations on contact with prospective customers are clearly shown by the record herein to be false and misleading in that they misrepresent the facts not only as to the substantial profits to be derived from mushroom culture but also as to other matters hereinafter discussed. It is only after the sale has been completed (and, even further, only after checks have been cleared) that customers learn that they have been misled. It is only then, when delivery of their purchases are made, that they are furnished with respondents' instruction booklet on "Mushroom Cultivation" advising of the need for temperature and humidity regulation and twice a week spraying and disinfecting, and describing several dif-

ferent, and sometimes complicated, methods of preparing compost, etc.

Respondents' own literature even—the brochure “Mushroom Cultivation” mentioned above—which is furnished the customer after completion of a sale establishes that mushroom cultivation is arduous; that the beds are not odorless even with compost made solely of straw since preparation of the beds under any method produces an odor; that mushrooms cannot be grown in a spare room as a practical matter; that mushrooms cannot be easily cultivated outdoors; that the spawn cannot be planted successfully the “same day” it is received [by an amateur not fully aware of the considerable time and effort required in preparation of the beds]; and that one person cannot in spare time successfully cultivate and properly care for up to 3,000 square feet of mushroom beds.

Respondents' advertising representations in these respects are, as shown, not only contradicted by their own literature but the record establishes that the representations involved are false, misleading and deceptive; and this on the basis of considerable substantial, reliable and probative evidence.

Parenthetically, we note the decision below on the points above discussed turned, in some considerable degree, upon the demeanor and credibility of two of the witnesses presented on behalf of the respondents.¹ The initial decision reviews their testimony in some detail and arrives at certain stated conclusions relative thereto. We have carefully examined the transcript of that testimony and have no reason to believe otherwise than that the hearing examiner properly evaluated same.

Another phase of the appeal before us that may be considered as requiring specific disposition involves evidentiary matters as follows:

(a) Respondents contend on appeal that the finding contained in the initial decision as to the representation that the business of respondents is sufficiently large in size and scope to service 750,000 to 1,000,000 stores in the United States should not be included because they “were barred from going into this matter in the presentation of the case.” There is in respondent Lelles' testimony evidentiary basis for the protested finding and the initial decision in Paragraph 13 correctly abstracts and characterizes the representation involved as being “an extravagant fantasy.” Furthermore, on this point in their brief respondents expressly “admitted that no repre-

¹ Respondent Arthur T. Lelles, R. 189 et seq., R. 584 et seq., R. 788 et seq., R. 887 et seq.; and witness John Betts, R. 648 et seq.

sentation should be made as to the size and scope of the respondents' business other than is the fact." We are of the opinion that the finding in question is appropriate and based upon sufficient record evidence to warrant the conclusion drawn by the hearing examiner thereon.

(b) Respondents also contend that the hearing examiner incorrectly excluded evidence regarding respondents' operations with regard to mushroom salt (actually a segment, as we see it, of respondents' larger misrepresentations concerning the size and scope of respondents' business and the question of demand for respondents' products). It is respondents' position in this regard that the hearing examiner ruled that the matter of mushroom salt was not in issue and that inclusion of any reference to the subject in the initial decision is prejudicial. We have concluded that the hearing examiner merely limited consideration of the subject insofar as the case in chief in support of the complaint was concerned. Respondents were not prejudiced thereby. If there were any resultant prejudice it was to the disadvantage of counsel supporting the complaint. The question was spread upon the record in general terms adequate to frame the issue and to establish a record basis for the reference in the initial decision concerning the general question of demand for respondents' products and the particular question of the part played by mushroom salt in establishing the size and scope of respondents' business. Respondents' contention here also is without merit.

Respondents in their exceptions to the hearing examiner's findings and conclusion object to language therein concluding that they have represented "Mushroom growing is an easy and pleasant occupation." Their contention is that they have not stated in their advertising literature that mushroom growing is *easy*. Further, in their brief, in objecting *inter alia* to the form and scope of the order with respect to Paragraph 4 thereof prohibiting any representation "That mushrooms may be easily grown," they contend that no representation in so many words has been made and that, if made, it is in the nature of dealer's puffing.

The subsidiary findings in this respect are not in error since there is exaggeration in respondents' representations. We hold that the evidence is sufficient to sustain them in that the growing of mushrooms is difficult and arduous. We conclude, however, that the lack of direct evidence to support a specific inhibition against use of the relative term "easy" in the proposed order does not warrant inclusion of Paragraph 4.

What may be easy for one person may be difficult for another. As the Court in the *Kidder* case² pointed out, terms which are relative "are largely a matter of personal opinion."

The order to cease and desist is modified by deleting therefrom Paragraph 4 and by renumbering the next succeeding paragraphs thereof.

Paragraph 5 of the order to cease and desist contained in the initial decision would require respondents to disclose in their advertising that to grow mushrooms indoors "* * * special cooling, heating, lighting, ventilating and moisture controlling equipment is necessary * * *" Respondents contend such equipment is not necessary. Subsidiary findings by the hearing examiner are to the effect that the mechanical systems in question "are practical necessities" and the record evidence, while conflicting in some respects, adequately supports those subsidiary findings. However, we are of the opinion that failure to make the statement in respondents' advertising that special cooling, heating, lighting, ventilating and moisture controlling equipment is necessary for the indoor culture of mushrooms is not necessarily misleading and, further, that inclusion of such statement is not essential to prevent deception. Accordingly, we conclude that Paragraph 5 of the order to cease and desist contained in the initial decision should be modified to read as follows:

5. That mushrooms may be grown out-of-doors at any time of the year;

In view of the foregoing considerations, the initial decision, as modified above, is adopted as the decision of the Commission. Appropriate order will be entered.

FINAL ORDER

Respondents having filed an appeal from the hearing examiner's initial decision and the matter having come on to be heard upon the whole record, including briefs (oral argument not having been requested), and the Commission having rendered its decision modifying the order to cease and desist contained in the initial decision and adopting the initial decision, as modified, as the decision of the Commission:

It is ordered, That respondents, Washington Mushroom Industries, Inc., a corporation, and Arthur T. Lelles, individually and as an officer of said corporation, 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 modified.

² *Kidder Oil Co. v. F.T.C.* (C.A. 7, 1941), 117 F. 2d 892.

Decision

IN THE MATTER OF
DOLCIN CORPORATION, ET AL.MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 5692. Complaint, Aug. 18, 1949—Modified Order, Oct. 29, 1956

Order modifying the Commission's cease and desist order of Dec. 2, 1952, 49 F.T.C. 566—requiring respondent corporation and its officers to cease misrepresenting in advertising the therapeutic properties of its medicinal preparation "Dolcin"—to conform to the decree of the Court of Appeals of the District of Columbia of July 1, 1954.¹

Mr. Joseph Callaway and Mr. Daniel J. Murphy for the Commission.

Markel & Hill, of Washington, D.C., and *Mr. Sigmund Eisenstein*, of New York City, for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 18, 1949, issued and subsequently served its complaint in this proceeding upon respondents Dolcin Corporation, a corporation, and Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individually and as officers of said corporation, 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, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; 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, conclusion drawn therefrom, and order:

¹ Reported in 219 F. 2d 742, 5 S. & D. 646.