

IN THE MATTER OF
THE BLANTON COMPANY

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

*Docket 6197. Complaint, Mar. 18, 1954—Decision, Dec. 26, 1956**

Order requiring a manufacturer of margarine in St. Louis, Mo., to cease violating the Oleomargarine Amendment to the Federal Trade Commission Act by disseminating advertisements in newspapers and periodicals, and by radio and television, which suggested, by use of the word "Creamo" in the brand or trade name and the words "cream," "sweet fresh cream," etc., that said oleomargarine was a dairy product.

Mr. Morton Nesmith for the Commission.

Coburn & Croft, by *Mr. Thomas L. Croft*, of St. Louis, Mo., for respondent.

INITIAL DECISION (THIRD) BY EVERETT F. HAYCRAFT,
HEARING EXAMINER

HISTORY OF THE CASE

The Federal Trade Commission on March 18, 1954, issued its complaint in this proceeding against the above-named respondent, which is engaged in the business of manufacturing oleomargarine and in the interstate sale and distribution thereof under the trade or brand name "Creamo," charging said respondent with violation of Section 15 of the Federal Trade Commission Act by the use of false, deceptive and misleading representations in connection with the sale and distribution of said oleomargarine in that it was represented or suggested therein that respondent's product is a dairy product, which is contrary to the fact. It was specifically alleged in the complaint that the use of the word "Creamo" as a trade name for respondent's oleomargarine was misleading in that it served as a representation or suggestion that respondent's product is a dairy product.

Testimony was taken in support of the allegations of the complaint. At the conclusion of the Commission's case in chief, counsel for respondent filed a motion to dismiss before the hearing examiner, which motion was granted by the hearing examiner. On November 5, 1954, the hearing examiner issued his first initial decision, dismissing the complaint on the ground that there was insufficient evidence in support of the allegations of the complaint to make out a prima facie case. An appeal was taken to the Commission by counsel in support of the complaint, and the Commission on May 5,

* Order denying motion to reopen proceedings and modify decision on p. 1278 of this volume.

1955,* being of the opinion that a prima facie case had been made out and that the complaint was erroneously dismissed, remanded the matter to the hearing examiner for further appropriate proceedings in due course.

Thereafter, the case was set down for hearing in St. Louis, Missouri, on October 10, 1955, for the purpose of allowing the respondent to submit evidence in opposition to the allegations of the complaint. On that date counsel in support of the complaint and counsel for respondent advised the hearing examiner that they had come to an agreement containing a consent order, which was submitted to the hearing examiner on October 13, 1955. The hearing examiner accepted the agreement, and issued his second initial decision on October 31, 1955, which he believed to be in conformance with the expressed opinion of the Commission, and which contained an order to cease and desist as follows:

(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 any 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 the ingredients contained in said product, or of a truthful statement that said product Creamo contains milk, cream or any other dairy product, *provided the percentage thereof contained, is clearly and conspicuously set forth in all of the advertisements using the name Creamo or the terms "milk" and "cream."*

On November 10, 1955, the Commission adopted the second initial decision of the hearing examiner. Thereafter, on December 2, 1955, however, the Commission reconsidered, and having concluded that said initial decision was not adequate and appropriate in all respects to dispose of the case, again remanded the case to the hearing examiner for further proceeding. Another hearing was held in St. Louis, Missouri, beginning on April 5, 1956, at which time further evidence was received, both in support of, and in opposition to, the allegations of the complaint, and on April 23, 1956, a hearing was held in Washington, D.C., at which rebuttal testimony was received in evidence.

FINDINGS AS TO THE FACTS AND LAW

The following facts were developed in support of the allegations of the complaint:

Respondent, The Blanton Company, is a corporation organized and existing under the laws of the State of Missouri with its principal place of business and factory located at 3400 North Wharf,

* 51 F.T.C. 1070.

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St. Louis, Missouri. Said respondent is now, and for several years last past has been, engaged in the sale and distribution of oleomargarine, using the brand names, "Blanton Creamo Brand" or "Creamo Brand" for its product, which it sells through wholesale and retail distributors. Respondent causes the said oleomargarine, when sold, to be transported from its factory to purchasers thereof located in various other states of the United States, being mainly designated as that east of the Rockies. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in its said product in commerce among and between the various states of the United States.

Respondent manufactures other food products, but with respect to Blanton Creamo Brand Oleomargarine, the average gross annual volume of sales is approximately three and a half million dollars.

In the course and conduct of its said business respondent has disseminated, and is now disseminating, and has caused, and is now causing, the dissemination of advertisements concerning its said product, oleomargarine, under the brand names of "Blanton Creamo Brand Oleomargarine," "Blanton Creamo Brand Margarine," "Blanton Creamo Margarine," "Creamo Brand Margarine" and "Creamo Margarine," by the United States mails and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, newspaper and other periodicals, radio and television advertising for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said product; and respondent has also disseminated, and is now disseminating, and has caused, and is now causing, the dissemination of advertisements concerning said product, by the aforesaid means, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of its said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in advertisements in newspapers and other periodicals, 1952-1954, are the following:

BLANTON
CREAMO
BRAND
(Picture of carton of
Creamo Oleomargarine)
CONTAINS 5% LIGHT CREAM
OLEOMARGARINE

A margarine distinctly better—made from choice vegetable oils blended with fat-free milk, cream, and enriched with 15,000 units Vitamin A.

The following statements were made by respondent in television and radio broadcasts in St. Louis, Missouri, and vicinity in 1952-1955.

Every single pound of BLANTON CREAMO MARGARINE puts Eagle Stamps in your Eagle Stamp book. It's the only margarine that's made fresh daily right here in St. Louis * * * the margarine that's better because it's blended with sweet fresh cream. All this and Eagle Stamps too. So remember, for freshness * * * for extra goodness * * * for extra savings—ask for Blanton Creamo Margarine. (1952)

The best tasting spread, regardless of price. That's what women write about Blanton Creamo Brand Margarine. Better tasting because it's made better with skim milk, PLUS 5% LIGHT CREAM. If you haven't yet tasted Creamo, get your proof-pound today. Taste the difference costlier ingredients make. (1952)

When there's only one margarine made with five percent fresh light cream * * * there's just one thing to tell you: Taste the difference cream makes. Because you *can* taste the difference * * * the very first time you taste cream-enriched Blanton Creamo Brand Margarine. And that's what you want in a bread-spread, isn't it? Flavor. And that's exactly what you get * * * when you serve Blanton Creamo Margarine. Flavor, velvety smoothness * * * and the extra goodness that only cream can give. Not only on your bread and toast * * * Creamo adds a world of flavor to hot dishes, too. Treat the whole family. Ask for cream-enriched Blanton Creamo Margarine, the very next time you shop. (CX 11)

The big difference between ordinary margarine and Blanton Creamo Brand Margarine * * * is *cream*. Like other margarines, Creamo is made from vegetable oils and fresh fat-free milk. *Unlike* other margarines, Creamo Margarine contains cream. Yes, ladies, the markets [sic] of Creamo Margarine add 5% light cream to every pound * * * to give it more flavor * * * to make it more delicious. Any woman who has baked a cake knows what a difference superior ingredients make. And that's the pure and simple reason for Creamo Margarine's superiority * * * the extra goodness of added cream. So why not buy a pound or two of Creamo Margarine today * * * see for yourself what a delicious difference cream makes. (CX 12)

CREAMO MARGARINE—CREAM MAKES SO MANY FOODS TASTE BETTER * * * AND CREAM MAKES MARGARINE TASTE BETTER TOO! SO MUCH BETTER THAT FIVE OUT OF SIX SCHOOL CHILDREN CHOSE CREAMO MARGARINE FOR FLAVOR * * * CREAMO MARGARINE BECAUSE *ONLY* CREAMO MARGARINE IS MADE WITH *CREAM* * * * JUST THE RIGHT AMOUNT. FIVE PERCENT SWEET LIGHT CREAM BLENDED TO FLAVOR PERFECTION AND LADIES, THAT'S *EXACTLY* WHAT YOU GET: FLAVOR PERFECTION * * * WHEN YOU BUY CREAM-ENRICHED CREAMO MARGARINE. SO MUCH CREAMIER * * * SO MUCH SMOOTHER SPREADING * * * SO MUCH MORE DOWNRIGHT DELICIOUS ON YOUR BREAD OR TOAST * * * MUFFINS OR BISCUITS * * * HOT VEGETABLE DISHES. PICK UP A POUND OF CREAM-ENRICHED CREAMO MARGARINE NEXT TIME YOU SHOP * * * YOUR *TASTE* WILL TELL YOU. (1955)

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The quantitative formula of "Blanton Creamo Brand Oleomargarine" is as follows:

1800 lbs. of hydrogenated margine oil, being a blend of refined cottonseed oil and soya bean oil.
100 lbs. of peanut oil.
325 lbs. of skim milk
124 lbs. of U.S. standard cream
75 lbs. of salt

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Added preservative and flavoring amount to less than one pound.

There is also added 200 grams of vitamin A, insuring a minimum of 15,000 units per pound.

The above materials, in the amounts specified, produce approximately 2375 lbs. of finished product.

In this case, we are not dealing with the usual misrepresentation case, that is, with false and misleading advertising which may have the tendency or capacity to deceive the public in violation of Section 5 of the Federal Trade Commission Act, but solely with the question of 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" in violation of Section 15(a)(2) of said Act as amended. It is now thoroughly established, both by Commission opinion and court opinion, that the 1950 amendment to Section 15, of the Federal Trade Commission Act constituted special legislation dealing with the longstanding butter-oleomargarine controversy and was intended to reach any form of advertising which, through suggestion, the association of ideas, or the use of dairy terms, leads, or has the capacity to lead, the consumer to believe that the oleomargarine in question is a dairy product.

The conclusion by the hearing examiner in his first decision that the advertisements of the respondent did not fall within the prohibitions of the statute, based as it was on the formula which showed the product contained substantial quantities of skim milk and U.S. standard cream, and the fact that the respondent made no effort to conceal the fact that the product was oleomargarine and there was little evidence that the trade name "Creamo" suggested a dairy product, was erroneous in the light of the decision of the Commission in this case and the decision of the Commission and of the United States Circuit Court of Appeals for the Second Circuit in the case of E. F. Drew & Company, Inc., decided July 13, 1956. It was pointed out in the opinion of the Commission in the present case, rendered in May 1955, at the time the case was first remanded:

If this proceeding had been brought under section 5 the question of concealment would be important; but inasmuch as we are dealing with section 15, or more particularly with section 15(a)(2), the prominent use of the term "oleomargarine" and the lack of any concealment that the product was in fact oleomargarine are immaterial.

As to the formula, this might have been controlling if it had been published alongside such statements as "Better tasting because it's made better with sweet fresh milk Plus Pure Cream." However, such statements standing alone without qualification or limitation, or the use of the name "Creamo" by itself, might well lead some people to believe that the product is a dairy product. Under section 15(a)(1), in determining whether any advertisement is misleading in a material respect, "there shall be taken into account * * * the extent to which the advertisement fails to reveal facts material to the light of such representations * * *."¹

Many of respondent's advertisements and radio continuities included the statement "Contains 5% Light Cream." We believe that if all the advertisements under scrutiny which used the name "Creamo" or the terms "milk" and "cream," had *clearly and conspicuously stated the percentages of cream and milk contained in the product*, then they would have been sufficiently informative and would adequately have negated any suggestion that respondent's "oleomargarine * * * is a dairy product." [Italics supplied.]

When the Commission remanded this case to the hearing examiner the second time, in December 1955, the Commission determined that it had no authority to include in a cease and desist order under Section 15(a)(2) a proviso permitting the unrestricted use of the name of a dairy product which is an ingredient of an oleomargarine, even if accompanied by a statement of the percentage thereof, and asked the United States Circuit Court of Appeals for the Second Circuit in the E. F. Drew case, which was then pending there, to modify its order by taking from the proviso to paragraph 1 thereof the following language:

or a truthful statement that said product contains butter or any other dairy product *provided the percentage thereof contained is clearly and conspicuously set forth*. [Italics supplied.]

The Court in its decision rendered July 13, 1956, granted this motion and amended the proviso in the order in that case to read as follows:

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 such product.

The order in the present case should contain the same proviso.

Counsel for respondent in attempting to defend the use of the word "Creamo" in the trade name of respondent, offered evidence to show that a trade mark registration was granted to respondent

¹ 15 U.S.C., Sec. 55(a).

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on the brand name of "Creamo Oleomargarine" by the Patent Office in June 1908, which was renewed in January 1928 and again in June 1948 for an additional twenty years. In this connection it is now well established that the Federal Trade Commission has jurisdiction over the advertising activities of respondent, even though their advertisements contain and feature a registered trade mark, *Federal Trade Commission v. Kay*, 35 F. 2d 160; *Masland Dura-leather Co., et al., v. Federal Trade Commission*, 34 F. 2d 733; *Marietta Mfg. Co., v. Federal Trade Commission*, 50 F. 2d 641; *Charles of the Ritz v. Federal Trade Commission*, 143 F. 2d 676, 679.

Evidence was also received showing that under the Oleomargarine Act of 1886, respondent's labels and brand name "Creamo Brand Oleomargarine" were approved by the Treasury Department on January 19, 1944, March 26, 1945, and July 1, 1949. Since 1923, these approvals were made pursuant to United States Treasury Department Regulation No. 9, which dealt with such matters as brands and trade marks and particularly whether such brand or label conveyed the impression that the article was the product of a dairy.

However, the record also contains a letter from the Assistant Commissioner of Internal Revenue dated April 19, 1956, stating that the provisions of Regulation No. 9 of the United States Treasury Department, dealing with brands and trade marks in the oleomargarine industry, were no longer applicable to domestic oleomargarine on or after July 1, 1950, although there had been no formal repeal of those provisions by the Treasury Department. There was also testimony to the same effect by Mr. Louis C. La Chance, Technical Advisor in the Excise Tax Division of the Internal Revenue Service.

Evidence was also received in the record herein that the United States Department of Agriculture, Bureau of Animal Industry, having jurisdiction over oleomargarine containing animal fats under the Meat Inspection Act and having the duty of approving brand names and labels if not false or deceptive, approved respondent's brand name "Creamo Brand Oleomargarine" on May 24, 1907, July 5, 1919, October 6, 1919, and April 16, 1945. However there has been no such approval since the passage of the statute involved in this case—1950. Furthermore, it appears that since 1950 the Department of Agriculture has not exercised jurisdiction over the respondent with respect to the manufacture of margarine since it does not contain animal fat and is not a meat food product.

It is also contended by counsel for respondent that the Federal Trade Commission has no jurisdiction over respondent's brand name

which appears on its labels, citing the case of *Fresh-Grown Preserve Corp. v. Federal Trade Commission*, 125 F. 2d 917 (C.C.A., 2).

It is not believed that the case cited is in full support of this contention. While it is true Section 15(a)(1) specifically exempts "labeling," the Commission is not proceeding against the labeling as such, but against false advertising of a trade name, containing the name or the word "Creamo," which incidentally is a part of the label on the carton. Furthermore, the record contains a letter from the Associate Commissioner of the Food and Drug Administration to the Commission, indicating that they saw no objection to the Commission's contemplated action against the trade name "Creamo" and would not regard any such action as an encroachment upon their jurisdiction under the Federal Food, Drug, and Cosmetic Act. The record also contains a copy of a letter from the Food and Drug Administration addressed to the then counsel for respondent, dated June 22, 1950, which reads in part as follows:

We still cannot escape the conclusion that the "Creamo" designation on this label will conflict with Section 403(a) of the Federal Food, Drug and Cosmetic Act.

It is also contended by counsel for respondent that the doctrine of res adjudicata should be applied and that the Commission should be estopped from entering an order to cease and desist in this case, since it dismissed a complaint in Docket No. 1558 on July 6, 1931, which contained charges similar to those in the present case. With respect to this defense, the allegations in the complaint in Docket No. 1558 were predicated on Section 5 of the Federal Trade Commission Act, long prior to the oleomargarine amendment of that Act, which became effective July 1, 1950, so that the allegations and charges were not the same and the doctrine of res adjudicata does not apply, *Federal Trade Commission v. Raladam*, 136 U.S. 149-52.

Another contention by counsel for respondent is that the enforcement of Section 55(a)(2), (Federal Trade Commission Act, Section 15(a)(2)) against the respondent would violate the Fifth Amendment of the Constitution, since the statute does not apply to some of respondent's competitors who are meat packers and who are not subject to the jurisdiction of the Federal Trade Commission. It is not believed that the cases cited by counsel for respondent in support of this contention are applicable to the facts in this case. It is recognized, of course, that respondent is entitled to the equal protection of the laws, but in the present case it is believed that there has been no unfair discrimination. In accordance with the decision

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of the Circuit Court of Appeals for the Fourth Circuit in the case of *Wallace, Secretary of Agriculture, v. Currin*, 95 F. 2d 856, 867:

It is sufficient that all persons subject to it (the statute) are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed.

In the present case it cannot be assumed that the meat packers will have "lighter restrictions" as to oleomargarine advertising than the Commission is imposing on the respondent. The meat packers are subject to the jurisdiction of the Secretary of Agriculture in enforcing the rules and regulations under the Meat Inspection Act, and Congress would be justified in relying upon the Secretary of Agriculture to adequately enforce the law over which he has jurisdiction. The Commission may well take official notice of the regulations of the Secretary of Agriculture in this respect as set forth in the Federal Register 18 (January 6, 1953), page 102, which provides, among other things:

(3) Whenever the name "oleomargarine" or "margarine" appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the words and statements prescribed in this section showing ingredients used shall immediately and conspicuously precede or follow, or in part precede and in part follow, such name, without intervening written, printed, or other graphic matter.

The final contention of counsel for respondent is that this proceeding should be dismissed as not being in the public interest since no members of the public had been misled or deceived by respondent's advertising. This contention the Court in the Drew case, *supra*, held was not tenable in the following language:

Petitioner, however, contends that there is no proof and no finding that its advertisements were *in fact* false or misleading. But this finding has been supplied by Congress in the statute itself, which states that any representation or suggestion that oleomargarine is a dairy product is deemed to be misleading. Nor is such a finding unreasonable. Congress might well think that confusion, deception and substitution of oleomargarine for butter or other dairy products was a problem that deserved legislative action. The method selected by Congress to effect this purpose is a matter of legislative discretion, not subject to attack if reasonably related to the end sought. Cf. *Carolene Products Co. v. United States*, 1944, 323 U.S. 18, 23, 27-32.

Respondent in its advertisements of oleomargarine has used the terms "cream," "milk" and "Creamo" in such a manner as to represent or suggest that its margarine is a dairy product. This has resulted from stressing the dairy contents of the product in addition to emphasizing the differences between Creamo and other margarines because of such dairy contents so as to suggest that respondent's product is not just a margarine, but a dairy product. The name

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"Creamo" is so similar to the word cream that, as used in the advertisements, it clearly suggests that respondent's product is a dairy product.

CONCLUSION

The acts and practices of the respondent, as above set forth, 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, as amended by the Oleomargarine Act of July 1, 1950. Milk and cream are dairy products, and the advertisements set forth in the foregoing findings containing such words are misleading in material respects and constitute false advertisements, as such term is defined in Section 15(a)(2) of the Federal Trade Commission Act, in that they serve as representations or suggestions that respondent's product is a dairy product.

Likewise, the use of the coined word "Creamo" as part of the trade or brand name of respondent's product is also misleading in a material respect in that it may serve as a representation or suggestion that respondent's product is a dairy product.

ORDER

It is ordered, That the respondent, The Blanton Company, 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 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 any statement, word, grade designation, design, device, symbol, sound or any combination thereof, which represents or suggests that such oleomargarine or margarine 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 in any such advertisement of all the ingredients contained in such product.

2. Disseminating or causing to be disseminated, as described in Paragraph 1 of this order, any advertisement in which the word or words "cream," "sweet fresh cream," "pure cream," "cream-enriched," "sweet light cream," "milk" or "sweet fresh milk" are used, except as a part of a truthful, accurate and full statement of all the ingredients contained in said product and as described in the foregoing proviso.

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3. Disseminating or causing to be disseminated, as described in Paragraph 1 of this order, any advertisement of oleomargarine or margarine in which the word "Creamo" is used as a part of or as a trade, brand or corporate name, unless, in connection and conjunction therewith, wherever used, there appear words clearly and conspicuously designating the product as oleomargarine or margarine and designating all the constituent ingredients.

4. 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 Paragraphs 1, 2 and 3 of this order.

OPINION OF THE COMMISSION

By SECRET, Commissioner.

Respondent, The Blanton Company, has appealed from the hearing examiner's initial decision and order filed August 6, 1956, holding respondent in violation of Section 15(a)(2) of the Federal Trade Commission Act.

Respondent sells and distributes an oleomargarine product, for which it uses brand names containing the word "Creamo," such as "Blanton Creamo Brand Oleomargarine." The complaint charges, and the hearing examiner found, that advertisements of this product disseminated by respondent and containing the words "milk" and "cream" are misleading in material respects and constitute false advertisements within the meaning of said Section 15(a)(2) in that they represent or suggest that Creamo is a dairy product.

The complaint further charges, and the examiner found, that the use of the word "Creamo" is misleading in a material respect in that it may serve as a representation or suggestion that respondent's product is a dairy product.

Respondent contends that the examiner's decision was based on an interpretation of the statute that the use of any name of a dairy ingredient is a *per se* violation. Dairy terms, of course, are prohibited only when they represent or suggest that the margarine is a dairy product. It is not at all evident that the examiner erred in interpreting the statute, but to be perfectly clear, the initial decision will be modified by the addition of an affirmative finding in this connection. We believe that respondent in its advertisements has used the terms "cream," "milk" and "Creamo" in such a manner as to represent or suggest that its margarine is a dairy product. This has resulted from stressing the dairy contents of the product

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in addition to emphasizing the differences between Creamo and other margarine because of such ingredients so as to suggest that Creamo is not just a margarine, but a dairy product. Creamo, being so similar to the word cream, clearly suggests, as used, that respondent's product is a dairy product.

The hearing examiner, inadvertently it appears, has failed to incorporate the "heart of the law" in Paragraph 1 of the order which "is its bar against representing or suggesting oleomargarine as a dairy product." *Reddi-Spread Corporation v. Federal Trade Commission*, 229 F. 2d 557 (1956). Consequently, this paragraph of the order will be modified to include the phrase "which represents or suggests" after the word "thereof."

Respondent contends in its appeal that it has manufactured and sold oleomargarine under the brand name "Creamo" since the company's inception in 1904; that this designation is the oldest brand name for oleomargarine in the entire industry, and that it has expended a total of \$2,250,836.64 from 1935 to 1955 in advertising and promoting this brand name before the public. Respondent points up the tremendous expenditure in time and money necessary to introduce a new brand name and to obtain consumer acceptance therefor, and argues that, if it is denied the right to use this brand name, this valuable business asset, built up over 50 years, would be greatly damaged, that consumer acceptance of the brand name would be lost to respondent, and that its entire financial resources would be inadequate to establish comparable consumer brand acceptance in a new name. For this reason, respondent requests that if some measure short of excision of the trade name will prevent deception, consideration should be given to the invocation of this substitute remedy which will protect its valuable property right.

On numerous occasions the courts have modified orders of the Commission which they believed had gone further than was necessary to protect competitors or the public (E.G. *Bear Mill Manufacturing Co., Inc. v. Federal Trade Commission*, 98 F. 2d 67). The reasoning of the courts in these cases was apparently based on the destruction of a valuable business asset in the form of good will and the decisions indicate that the destruction of business assets should not be ordered if it is possible to effectuate the purposes of the statute by less drastic means. However, since these early cases, the remedies selected by the Commission have been held to be, for all practical purposes, supreme unless there has been a clear abuse of discretion.

The first case in which the Supreme Court raised the question of whether or not a less drastic remedy than excision of the name would

suffice was *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212. In that case the Supreme Court permitted the name to be qualified by the addition of the explanatory phrase, "not grinders of wheat," and this was apparently based on the feeling of the court that so valuable a property right as a trade name should not be destroyed if qualifying words might cure the misrepresentation. However, the *Royal Milling Company* doctrine of qualification was not adhered to by several of the Circuit Courts, illustrative of which is the decision in *Herzfeld v. United States*, 140 F. 2d 207. Judge Learned Hand, speaking for the court, refused to follow the doctrine of modification established in the *Royal Milling* case, and stated that since the case was decided:

The Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme. * * * Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed.

We believe the Supreme Court has by its decision in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. at 608, "tacitly narrowed its decision in the *Royal Milling Company* case to such an extent that it is drawn within the rationale expressed by Judge Hand in the *Herzfeld* case" (*Alberty v. Federal Trade Commission*, 182 F. 2d 36). Mr. Justice Douglas, speaking for a unanimous Court, stated:

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. *It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.* As applied to this particular type of case, it is whether the Commission abused its discretion in concluding that no change "short of excision" of the trade name would give adequate protection. * * * The issue is stated that way for the reason that we are dealing here with trade names which, as *Federal Trade Commission v. Royal Milling Company* * * * emphasizes, are valuable business assets. * * * *The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed.* [Italics furnished.]

The Court in its opinion indicated, however, that destruction of trade names as business assets "should not be ordered if less drastic means will accomplish the same result." The recognition by the Court, therefore, that the selection of the remedy is within the allowable judgment of the Commission does not, in our opinion,

detract from its expressions that, where possible, the Commission should, by the remedy invoked, protect the valuable business assets acquired through continued use of a trade or brand name. In balancing the equities in this case, it is our impression that it is possible to protect respondent's good will and property rights in the name "Creamo" and yet remove the possibility that this name represents or suggests that the product is butter or a dairy product. Paragraph 3 of the order in the initial decision now flatly prohibits respondent from "Using the word 'Creamo' as a part of or as a trade, brand, or corporate name for oleomargarine or margarine." This order, accordingly, is modified to prohibit the use of the word "Creamo" in advertisements unless clearly and conspicuously accompanied by the words "oleomargarine" or "margarine" and a full statement of the various ingredients in the product. As so qualified, we do not believe that the use of the word "Creamo" in respondent's advertising will have the prescribed statutory effect of representing or suggesting that respondent's product is butter or a dairy product.

Respondent also poses the very interesting argument that the oleomargarine amendment as interpreted and applied against it by the hearing examiner is unconstitutional under the Fifth Amendment since the statute does not equally apply to respondent's competitors who are "packers" as defined in 7 U.S.C.A., Sec. 191. The matter of the Commission's jurisdiction over "packers" purveying oleomargarine is treated in some detail in our opinion in Docket No. 6409, *In the Matter of Armour and Company, et al.* If, as we construe it, respondent's contention here can be interpreted as raising the issue of the constitutionality of the amendment to the statute, the obvious answer is that it is not within the province of this Commission to pass upon the constitutionality of any of the legislation it is charged with administering. "* * * an administrative agency, invested with discretion, has no jurisdiction to entertain constitutional questions where no provision has been made therefor." (*Engineers Public Service Co. v. Securities & Exchange Commission*, 138 F. 2d 936.) Beyond determining whether the statute is being properly interpreted and applied, this Commission has no authority to declare further. In any event, as held by the examiner, there is nothing to indicate, and it cannot be assumed, that the meat packers will have "lighter restrictions" as to oleomargarine advertising than the Commission has imposed on the respondent.

One other point bears discussion. It appears that part of the order contained in the initial decision goes further in its prohibition than is warranted by the sections of the statute with which this action is concerned insofar as it is not limited to the dissemination

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of advertising by United States mails or by any means in commerce. The order accordingly will be further modified (1) by including in Paragraph 3 the qualification as to dissemination or causing to be disseminated, as described in Paragraph 1 of the order, of any advertisement, and (2) by including in the prohibition in Paragraph 4 any advertisement which contains the representation prohibited by Paragraph 3.

Respondent's appeal is granted to the extent indicated herein and otherwise denied. The findings, conclusions, and order contained in the initial decision, as modified in the accompanying order in accordance with this opinion, are adopted as those of the Commission.

Commission Kern did not participate in the decision herein.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that respondent's appeal should be granted in part and the initial decision modified and thereafter adopted as the Commission's decision:

It is ordered, That the initial decision be, and it hereby is, modified by the addition of a paragraph immediately prior to the "Conclusion" reading as follows:

Respondent in its advertisements of oleomargarine has used the terms "cream," "milk" and "Creamo" in such a manner as to represent or suggest that its margarine is a dairy product. This has resulted from stressing the dairy contents of the product in addition to emphasizing the differences between Creamo and other margarines because of such dairy contents so as to suggest that respondent's product is not just a margarine, but a dairy product. The name "Creamo" is so similar to the word cream that, as used in the advertisements, it clearly suggests that respondent's product is a dairy product.

It is further ordered, That Paragraph 1 of the order in the initial decision be, and it hereby is, modified by including after the word "thereof," the phrase "which represents or suggests."

It is further ordered, That Paragraph 3 of the order in the initial decision be, and it hereby is, modified to read as follows:

Disseminating or causing to be disseminated, as described in Paragraph 1 of this order, any advertisement of oleomargarine or margarine in which the word "Creamo" is used as a part of or as a trade, brand or corporate name, unless, in connection and conjunction therewith, wherever used, there appear words clearly and conspicuously designating the product as oleomargarine or margarine and designating all the constituent ingredients.

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It is further ordered, That Paragraph 4 of the order in which the initial decision be, and it hereby is, modified by striking out that part which reads "1 and 2 of this order" and inserting therefor the following: "1, 2 and 3 of this order."

It is further ordered, That the respondent 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 contained in the initial decision, as modified.

Commissioner Kern not participating.

IN THE MATTER OF
LELORD E. KORDEL TRADING AS
NUTRITION ENTERPRISES

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

Docket 6359. Complaint, June 6, 1955—Decision, Dec. 27, 1956

Consent order requiring a Detroit, Mich., seller to cease making false representations in advertising in newspapers, circulars, etc., as to the nutritional and healthful qualities of his "Super-Nutriway" mineral and vitamin preparation, and its superior freshness and excellence in comparison with competitive products.

Mr. Frederick McManus for the Commission.

Mr. Lelord E. Kordel, of Detroit, Mich., pro se.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with violation of the Federal Trade Commission Act through the making of certain representations in connection with a vitamin preparation sold by him. An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decisions and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondent specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued: