

Decision

IN THE MATTER OF
WILLIAM J. MISHEL ET AL. DOING BUSINESS AS
TANNERS SHOE COMPANY

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

Docket 6590. Complaint, July 19, 1956—Decision, June 13, 1957

Order requiring three copartners in Brockton, Mass., selling shoes which they bought from the manufacturer through house-to-house salesmen on a commission basis, to cease representing falsely in newspaper and other advertisements for salesmen that shoe repairmen could expect to earn \$50 to \$100 per week selling their shoes in addition to the income from their regular occupations; and representing falsely in advertisements in magazines, catalogues, etc., and through use of the term "orthopedic," that their shoes had health features which would prevent and cure abnormalities and diseases of the feet, and that they manufactured their shoes.

Frederick J. McManus, Esq., for the Commission.

Roland A. Cormier, Esq., of Boston, Mass., and Hogan & Hartson, by Joseph J. Smith, Jr., Esq., and E. Barrett Prettyman, Jr., Esq., of Washington, D.C., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On July 19, 1956, the Federal Trade Commission issued its complaint against William J. Mishel, Bernard S. Lazarus and Manuel Alter, copartners doing business as Tanners Shoe Company (hereinafter collectively called respondents), charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served upon respondents.

The complaint alleges in substance that respondents, in connection with the sale and disposition of their product, men's shoes, made certain false representations with respect to such product. Respondents appeared by counsel and filed a joint answer admitting the partnership, commerce and competition allegations of the complaint and some of the representations set forth therein, but denying any false representations or violations of the Act.

Thereafter on January 14, 1957, the parties entered into a stipulation of facts in lieu of formal hearings. Subsequently, pursuant

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to leave granted, counsel for both parties submitted proposed findings of fact, conclusions of law and orders together with reasons in support thereof, and presented oral argument in support of such proposals. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.¹

Upon the entire record in the case including the stipulation of facts by the parties, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, respondents admitted and stipulated, and it is found that they are copartners doing business as Tanners Shoe Company with their office and principal place of business located at 25 Forest Street, Brockton, Massachusetts.

II. Interstate Commerce and Competition

The complaint alleged, respondents admitted and stipulated, and it is found, that they are now, and since January 1, 1954, have been engaged in the sale and distribution of shoes intended principally to be worn by adults. Respondents' principal method of selling their shoes is by means of sales representatives who make personal house-to-house solicitations of individual customers. Upon receipt of an order for a sale of shoes such representative collects a payment from the buyer, which is not more than \$4.00 per pair, and the shoes are sent to said buyer C.O.D. for the remainder of the purchase price. The cash payment which the sales representative collects from the purchaser is retained by him as his commission for making such sale and he receives no salary from respondents.

Respondents cause and have caused their said shoes, when sold, to be transported from their place of business in the State of Massachusetts to purchasers thereof located in various other states of the United States, and maintain and at all times mentioned herein have maintained a course of trade in said shoes in commerce between and among the various states of the United States. Respondents' volume of business in the sale of said shoes in commerce is and has been substantial. In the course and conduct of their business, respondents are and have been at all times mentioned herein in direct and substantial competition with other firms and individuals, and with corporations engaged in the sale and distribution of shoes in commerce.

¹ 5 U.S.C. § 1007(b).

III. The Unlawful Practices

A. *The Issues*

The principal issues in this case are whether respondents falsely represented:

(1) The amount of earnings that can be achieved through the part-time sale of their shoes;

(2) That their shoes contain health features, preventing and curing abnormalities and diseases of the feet, keeping the feet healthy, and conducive to the health of the feet;

(3) That their shoes are orthopedic shoes designed to prevent and correct diseases, deformities and disorders of the feet;

(4) That the use of their shoes assures comfort and perfect fit, the correction, prevention or assured relief of sore and tired feet, and the correction of foot troubles of substantial numbers of persons, and that the cushion used in such shoes conforms to the actual shape of the foot, comes snugly up under the arch, and provides support where it is most needed; and

(5) That they own the plant or factory in which their shoes are manufactured.

B. *The False Representations*

The parties stipulated and it is found that respondents have in the past secured salesmen through the following advertisement:

Hundreds of shoe repairmen are enjoying big extra incomes with this amazing plan. Men are making as much as \$50 to \$100 per week, in addition to the income from their shop. You Can Do It, Too!

In addition, it was stipulated and is found that respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their shoes, have made various statements concerning the nature and usefulness of their shoes in sales manuals supplied to their sales representatives, the contents of which are used by said persons in soliciting the purchase of respondents' shoes and in advertisements published in magazines of general circulation, in folders, circulars, form letters and in catalogues, some of which are exhibited to prospective purchasers by such sales representatives. Included among such statements are the following:

Health features, and Health Footwear.

Orthopedic Shoes, and Orthopedic Styles.

Assurance of comfort that is *your* most important selling point.

Show them comfort greater than they have ever had.

Everyone is interested in greater foot comfort. You can give it to them with Kushiontred.

Giving a perfect fit to every foot.

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Perfection in fit * * * give exact fit to every foot.

The chances are about 100 to 1 that Mr. Smith has "trouble" with his feet * * * They will almost certainly be sore and tired at the end of the day.

In Tanners Shoes * * * a velvet-smooth cushion * * * conforms to the actual shape of your foot.

* * * the cushion is extended to come snugly up under the arch.

They'll give you all the support the ordinary foot needs....

There's extra comfort too from the Moulded Inner Arch that gives gentle support to the main arch.

Right and Left Ortho Rubber Heels give extra support where it is most needed.

Moulded Inner Arch for support where you need it most.

It was further stipulated and is found that respondents in their catalogue have used the following statements:

The finest of footwear comes direct to you from our Modern Factory; Our factory men, long trained in quality shoe making, work constantly to bring you the utmost in style, comfort and value; and A branch of the U.S. Post Office in our own plant assures you of fast, efficient service on your orders.

Because the stipulation of facts establishes that all of the foregoing representations were made, the primary issue for disposition is whether or not such representations are false and misleading. They are considered *seriatim*:

1. Expected Earnings

As above set forth, respondents have represented that shoe repairmen may expect to earn as much as \$50 to \$100 extra per week selling respondents' shoes while carrying on their regular occupation. Respondents stipulated that repairmen who sell respondents' shoes while carrying on their regular occupations ordinarily do not make as much additional income as represented. Accordingly, it is concluded and found that such representation is false, misleading and deceptive.

2. Health Features and Footwear

Respondents represented their shoes as "Health Footwear" and as containing "Health Features." The complaint alleged that by such statements, respondents represented that wearing their shoes will prevent and cure abnormalities and diseases of the feet, will keep the feet healthy, and that their shoes contain features conducive to the health of the feet. It was stipulated that wearing respondents' shoes will neither prevent nor cure abnormalities or diseases of the feet and will not assuredly keep the feet of the wearer healthy.

Respondents, despite this admission, contend such statements to be mere puffing and not in violation of the Act. In this connection,

respondents apparently rely principally upon the holding of the Court of Appeals in the *Sewell* case,² wherein the Court reversed some of the Commission's findings concerning the respondent's advertising as mere puffing and not false representations. Such reliance is misplaced. The majority in *Sewell* clearly pointed out that: "Insofar as purely scientific and medical claims are concerned, the Commission is fully supported by this Court." One of the statements used by respondents in the present proceeding reads more specifically: "scientifically built health footwear." It is clear that the Court finds claims of scientific, medical or therapeutic properties to be false representations unless founded on fact. This appears to be fully in accord with the principles of the *New South Farm* case, *infra*, discussed more fully hereinafter. Accordingly, it is found that the aforesaid representations are false, misleading and deceptive.

3. Orthopedic Shoes

Respondents represented their product as "Orthopedic Shoes" and "Orthopedic Styles". Respondents also characterized their heels as "ortho," and used the term ortho several other times throughout the stipulated advertising.³ Respondents stipulated that their shoes are stock shoes and not orthopedic shoes, because they are not so constructed as to, and will not, prevent or correct deformities, diseases or disorders of the feet. It is well established that "orthopedic" shoes are those especially designed and constructed to cure, correct or improve the abnormalities, diseases or disorders of the feet of a particular individual.⁴ Webster's New Unabridged International Dictionary, Second Edit., 1950, defines "ortho" as follows: "Med., rectification; correction of deformities, as in orthopedic." It is clear that the term "ortho" carries much the same connotation as that found by the Commission with respect to the term orthopedic, and undoubtedly amounts to the same type of representation to the public.⁵ Accordingly, it is concluded and found that such representations are false, misleading and deceptive.

² *Sewell v. F.T.C.*, 240 F. 2d 228 (C.A. 9, 1956), petition for *certiorari* filed with the Supreme Court.

³ Exhibits C and L.

⁴ *The Irving Drew Corp.*, 49 F.T.C. 56 (1952); *Dr. Hiss Shoes, Inc.*, 49 F.T.C. 67 (1952).

⁵ Although respondents contend that the term "ortho" is not in issue, the use of such representation is specifically alleged in the complaint and found in the Exhibits C and L attached to and made a part of the stipulation, and obviously is used therein as synonymous with "orthopedic", exactly as defined above. Such a term, denoting correction of deformity or disorder, is patently medical, indisputably false and not puffing under all of the cases, and clearly within the scope of the allegation of the complaint concerning the use of "orthopedic." To permit its continuation would undo whatever might be accomplished by prohibiting the use of the term "orthopedic."

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4. Comfort, Fit, Conformance and Arch Support

The complaint alleged that by the use of the third, fourth, fifth, sixth and seventh statements set forth above in Section B, respondents represented that their shoes will assure comfort and a perfect fit. It was stipulated that it is not literally true that respondents' shoes will "assure" comfort or a perfect fit to all individuals. However, respondents contend that such representations constitute legitimate trade puffing and are not false representations within the meaning of the law. Needless to say, counsel supporting the complaint contends to the contrary.

An analysis of the leading cases appears to support the position of respondents in this respect. The best definition of the term puffing found by the undersigned is that used by the Supreme Court in the *New South Farm* case,⁶ where the Court said: "Mere puffing, i.e., the mere exaggeration of the qualities which the article has, is not actionable, but when a seller goes beyond that and assigns to an article qualities which it does not possess, does not simply magnify an opinion which he has, but invents advantages and falsely asserts their existence, he transcends puffing and engages in false representations and pretenses." It seems clear from the foregoing that the distinction between puffing and false representation is the distinction between exaggerating qualities which a product has as distinguished from falsely asserting qualities which it does not have. The stipulated record herein establishes that respondents' product, sold under the trade name "Kushiontred", consists of a soft resilient innersole from heel to toe made of sponge latex to cushion the foot, together with an elevated arch portion fitting more snugly under the arch of the foot than an ordinary shoe. It seems indisputable that such a cushion would provide more comfort than no cushion at all.

With respect to the "perfection of fit" allegation, respondents used this representation in connection with their statement of the undisputed fact that they had a far larger stock of shoes and range of sizes than the ordinary store, in fact more than ten times as many, ranging from sizes 5 to 14 and widths AAA to EEEEE. In the light of the definition of puffing by the Supreme Court and the fact that respondents' shoes possess qualities of greater comfort and the ability to provide a better fit because of their unusually large stock and range of sizes, it seems clear that respondents were exaggerating such qualities of comfort and fit and not attributing to their product qualities which it did not possess at all. The *Carlay*

⁶ *U.S. v. New South Farm & Home Co.*, 241 U.S. 64; See also, *Gulf Oil Corp. v. F.T.C.*, 150 F. 2d 106 (C.A. 5, 1945); *Carlay Co. v. F.T.C.*, 153 F. 2d 493 (C.A. 7, 1946).

case cited above is authority for the conclusion that such terms as "easy" and "perfect" are merely puffing and not false representations. The logic of the definition adopted by the Supreme Court seems inescapable.

As found above, one of the statements used by respondents was the following: "The chances are about 100 to 1 that Mr. Smith has 'trouble' with his feet * * * They will almost certainly be sore and tired at the end of the day." This representation was made in a salesman's manual designed to educate respondents' salesmen in the art of selling their product. The Mr. Smith referred to is a fictional owner and operator of a hardware store and the reference is to persons who because of their occupation are on their feet all day. The sentence following this statement reads: "He [Mr. Smith] will certainly welcome shoes that are of the correct size and width to give him perfect fit. He will certainly be interested in the luxurious comfort of the Tanners Kushiontred heel-to-toe Insole."

The complaint alleges that by the foregoing statement respondents represented that their shoes will correct, prevent or assure the relief of sore and tired feet and that substantial numbers of persons suffer from foot troubles which will be corrected by wearing respondents' shoes. Just how this representation is derived from the foregoing statement is not explained, nor is it elucidated in the proposed findings of counsel supporting the complaint. All the statement amounts to is that a person who is on his feet all day will almost certainly have sore and tired feet at the end of the day. Counsel supporting the complaint apparently connotes from the use of the word "trouble" that respondents represented that substantial numbers of persons suffer from foot trouble which will be corrected by using respondents' shoes, and also that such shoes will correct, prevent or assuredly relieve tired and sore feet. As pointed out by counsel for respondents, the statement appears to be no more than a representation that a person who is on his feet all day probably will find them sore and tired and welcome shoes which give him more comfort and a better fit.

It should be noted that the word trouble was used in quotation marks by respondents and as so used clearly does not refer to diseases of the feet generally, but refers to the following specification of "sore and tired." The statement as set forth in the complaint did not include the quotation marks around the word trouble, and without them it is of course possible to draw a different inference as to the meaning of the word in the context. However, as used, it seems clear that it is a general term modified immediately thereafter by a specific example. Such construction is a well established

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and logical method for determining the meaning of a word in a particular context. The representations which the complaint derives from this relatively simple statement do not, as respondents pointed out, accurately reflect the representations actually made. At most, the statement constitutes representations concerning comfort and fit, which already have been disposed of above as not being false representations within the meaning of the Act.⁷

The complaint also alleged that respondents falsely represented that the cushion in their shoes conforms to the shape of the foot, comes up snugly under the arch, and provides support where it is most needed, based upon respondents' statements numbers 9, 10, 11, 12 and 14 set forth above in Section B. It was stipulated that the cushion does not in all cases conform to the shape of the foot, come snugly up under the arch, or provide support where it is most needed, but that it does however conform more nearly to the shape of the foot than the ordinary shoe, comes up more snugly under the arch than the ordinary shoes, and provides support where support is often needed. With respect to these representations concerning conformance to the shape of the foot and the fit of the cushion to the arch, the stipulation establishes that respondents' product does have such qualities and hence such representations appear to fall within the category of legitimate puffing, or exaggeration of qualities which the product does possess, in the same manner as found above. It is accordingly found that these representations are not false and misleading within the meaning of the Act.

A more difficult question arises with respect to respondents' representation that their product will provide support where it is most needed. Respondents' eleventh statement set forth above in Section B is that the shoes give all the support the ordinary foot needs. This alone would appear to be proper and not a false representation concerning the product. At most, it would fall within the area of legitimate puffing previously described. However, the representation that the product provides support where it is most needed clearly carries an orthopedic or health connotation, and it is undisputed that respondents' shoes are not orthopedic or health shoes but are stock shoes. It would appear therefore that such representation is false in attributing to the product a quality which it does not possess rather than exaggerating a quality which it has. Different

⁷ In this connection it is interesting to note that in the *Sewell* case, *supra*, the Commission in its decision, *James H. Sewell*, Docket No. 5850 (1954), dismissed an allegation that respondent's product therein, somewhat similar functionally to the one involved in this proceeding, did not relieve strained and tired feet as represented. This would seem to lend support to the conclusions herein concerning respondents' representations having to do with comfort, fit, conformance and snugness.

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deformities, diseases and disorders of the feet would necessitate different types and kinds of support, and in such circumstances respondents' product could not and, as was stipulated, does not provide support where it is most needed. Accordingly, it is concluded and found that this representation is false, misleading and deceptive.

5. Ownership of Factory or Plant

As hereinabove found, respondents represented that they own or control the plant or factory in which their shoes are manufactured. It was stipulated that respondents do not manufacture their product but purchase it from another company and pay the manufacturer's profit thereon. It was also stipulated that there is a preference on the part of many members of the purchasing public to deal directly with the manufacturer of a product in the belief that by doing so they are afforded advantages such as better prices, services and values. It must now be considered well settled that such representations are false, misleading and deceptive and constitute violations of the Act.⁸

C. Respondents' Defense and Contentions

In addition to respondents' contentions concerning the merits of their various representations considered above, respondents also contend with respect to certain of these representations that the public interest does not require an order to cease and desist because they have discontinued these particular representations. After the issuance of the complaint respondents filed an affidavit that they had discontinued and do not intend to resume the representations concerning the amount of earnings that shoe repairmen can be expected to make selling respondents' shoes part time, the use of the term orthopedic in describing the shoes or styles of shoes sold by them, and any statements indicating or inferring that they own or operate the factory in which their shoes are manufactured.

This contention is without merit. It is well established that even the discontinuance and abandonment of the manufacture and sale of a product does not deprive the Commission of its discretion to issue a cease and desist order against future violations of the Act.⁹

⁸ *F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933); *F.T.C. v. Mid West Mills, Inc.*, 90 F. 2d 723 (C.A. 7, 1937); *M. Rudin & Sons, Inc.*, Docket No. 6318 (1956); *Rudin & Roth*, Docket No. 6419 (1956), and numerous cases cited therein.

⁹ *F.T.C. v. Goodyear Tire & Rubber Co.*, 304 U.S. 257 (1938); *F.T.C. v. Wallace*, 75 F. 2d 733 (C.A. 8, 1935); *Perma-Maid Co. v. F.T.C.*, 121 F. 2d 282 (C.A. 6, 1941); *Philip R. Park v. F.T.C.*, 136 F. 2d 428 (C.A. 9, 1943); *Gelb v. F.T.C.*, 144 F. 2d 580 (C.A. 2, 1944); *Deer v. F.T.C.*, 152 F. 2d 65 (C.A. 2, 1945); *Marlene's Inc. v. F.T.C.*, 216 F. 2d 556 (C.A. 7, 1954).

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This is true even where the practice has been discontinued prior to the issuance of the complaint. Here the affidavit of discontinuance was executed and filed subsequently to the issuance of the complaint. In such circumstances the need for a cease and desist order is even more apparent. As the courts have pointed out, it is a simple matter to discontinue a practice after a complaint has been issued. Only a cease and desist order effectively can prevent the resumption of such practices after the case is ended. As pointed out by counsel supporting the complaint, some years ago Mr. Mishel, one of the respondents herein, executed a stipulation with the Commission to cease and desist the use of some of the false representations alleged and found herein. In the light of this background, the appropriateness of the Commission's exercise of its discretion to issue a cease and desist order herein seems apparent.

D. Concluding Findings

Respondents' representations concerning comfort, fit, conformance to the foot, and conformance to the arch constitute puffing of qualities which respondents' shoes actually possess. There is no substantial evidence in the record that respondents represented that their shoes will correct, prevent or assuredly relieve sore and tired feet or that substantial numbers of persons suffer from foot troubles which will be corrected by wearing respondents shoes. Accordingly, it is found that the foregoing allegations of the complaint are not supported by reliable, probative and substantial evidence in the record.

The undisputed evidence in the record establishes, and hence it is found, that respondents, in the course and conduct of their business in commerce, by representing their product to contain health features and to be health footwear, to contain "ortho" qualities or be orthopedic shoes or styles, and to provide support where it is most needed, falsely and deceptively represented that their product contained such qualities and properties when in fact they did not, and further falsely and deceptively represented the amount of income which could be earned by selling respondents' product on a part-time basis, and falsely and deceptively represented that they owned and operated the plant or factory in which their product was manufactured.

It is further concluded and found that respondents, by furnishing their sales representatives the representations hereinabove found in Section III B 2, 3, 4 and 5, have placed in the hands of said persons a means and instrumentality whereby they may deceive and mislead the purchasing public in such respects as to respondents' product.

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E. *The Effect of the Unlawful Practices*

The acts and practices of respondents, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to such representations and thereby induce the purchase of substantial quantities of respondents' product. As a result, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors, and substantial injury has been and is being done to competition in commerce.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Act.

3. As a result of the above-found acts and practices of respondents, substantial injury has been done to competition in commerce.

4. This proceeding is in the public interest and an order to cease and desist the above-found unlawful practices should issue against respondents.

5. Respondents have not, as alleged in the complaint, violated the Act by representing that their product assures comfort and perfect fit, will correct, prevent or assuredly relieve sore and tired feet, will correct foot troubles suffered by substantial numbers of persons, conforms to the actual shape of the foot, or comes snugly up under the arch.

ORDER

It is ordered, That respondents William J. Mishel, Bernard S. Lazarus and Manuel Alter, copartners doing business as Tanners Shoe Company, or in any other name or names, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Act, of respondents' shoes, or any other shoes of similar construction or performing similar functions, do forthwith cease and desist from:

1. Using the terms "health features" or "health footwear" or any other term or words importing a like or similar meaning, alone or in combination with any other term or words, to describe or design-

nate said shoes, or representing in any manner, directly or by implication, that the use of respondents' shoes will prevent or cure abnormalities or diseases of the feet, will keep the feet healthy, or that said shoes contain features conducive to the health of the feet.

2. Using the terms "ortho", "orthopedic shoes" or "orthopedic styles" or any other term or words importing a like or similar meaning, alone or in combination with any other term or words, to describe or designate said shoes, or representing in any manner, directly or by implication, that the use of respondents' shoes will prevent or correct diseases, deformities or disorders of the feet.

3. Representing, directly or by implication:

(a) That the cushion in said shoes provides support where it is most needed;

(b) That shoe repairmen or others who sell respondents' shoes earn as much as \$50 to \$100 per week, in addition to their incomes from their shops or regular employment, or any amount in excess of the actual amount earned by respondents' representatives working on a part-time basis; and

(c) That respondents own, operate or control a factory or plant in which their shoes are manufactured, or that by buying from respondents a purchaser is buying from the manufacturer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 13th day of June, 1957, become the decision of the Commission; and, accordingly:

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

Complaint

IN THE MATTER OF

COLONIAL MANUFACTURING COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (C) OF THE CLAYTON ACT

Docket 6725. Complaint, Feb. 18, 1957—Decision, June 13, 1957

Consent order requiring a manufacturer of jellies and preserves in Oklahoma City to cease paying illegal brokerage fees on purchases of foodstuffs from a brokerage firm owned by its officers, 90% of whose business involved sales to it, with the result that it was receiving brokerage on its own purchases, in violation of Sec. 2(c) of the Clayton Act.

Mr. Cecil G. Miles for the Commission.

Mr. C. D. Ellison, of Oklahoma City, Okla., for respondents.

COMPLAINT

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

PARAGRAPH 1. Respondent Colonial Manufacturing Company, Inc., hereinafter sometimes referred to as "buyer respondent" is a corporation existing and doing business under and by virtue of the laws of the State of Oklahoma, with its offices and principal place of business located at 2800 So. Western Avenue, Oklahoma City, Oklahoma. Said buyer respondent has been, for the past several years, and is now, engaged in the business of manufacturing, selling and distributing jellies, preserves, apple butter, and other related products, hereinafter referred to as "food products", with gross sales approximating \$2,000,000 annually.

PAR. 2. Respondent N. F. Raupe Brokerage Company is a partnership engaged in the brokerage business, principally as the buying agent for respondent Colonial Manufacturing Company, Inc., the buyer respondent named herein. Respondent N. F. Raupe Brokerage Company, hereinafter sometimes referred to as "broker respondent", maintains its principal office and place of business in the same building and in the same offices with the buyer respondent. The broker respondent is 75 percent owned by the three individual respondents named herein, who are officers and substantial owners, if not the

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sole owners, of said buyer respondent. Approximately 90 percent of the brokerage business done by the broker respondent for its various principals during 1956 was on sales to buyer respondent. The total amount of such sales to said buyer respondent during 1956 was in excess of \$300,000, on which sales the broker respondent collected brokerage fees from the sellers or suppliers of said food products at the rate of 2½ to 5 percent of the net sales price, depending on the particular product sold.

PAR. 3. Respondents L. J. Wilkes, Jack W. Wilkes and L. T. Wilkes are individuals engaged principally in business as manufacturers of jellies, preserves, apple butter, and other related products. They are Chairman of the Board; President; and Secretary-Treasurer, respectively, of respondent Colonial Manufacturing Company, Inc. These individual respondents own and control all or substantially all of the capital stock of the buyer respondent and are responsible for its operational policies, including its purchase and sales policies. These individual respondents are also copartners in respondent N. F. Raupe Brokerage Company, located at the same address and in the same offices as the buyer respondent. They, along with one N. F. Raupe, who is head salesman for the buyer respondent, wholly own and control the said brokerage company, and are responsible for its sales and operational policies. These partners share equally in the profits of the broker respondent, including the profits on brokerage or commissions received on sales to the buyer respondent.

PAR. 4. In the course and conduct of the businesses of respondent Colonial Manufacturing Company, Inc. and the N. F. Raupe Brokerage Company, the buyer respondent since 1948 has made substantial purchases of food products from its suppliers through the broker respondent, on which purchases it received, or its officers and owners received, something of value as a commission, brokerage, or other compensation, or allowance or discounts in lieu thereof.

PAR. 5. In the course and conduct of the businesses, as aforesaid, all the respondents named herein, directly or indirectly, cause said food products, when purchased, to be transported from said state of origin to destinations in another state. There has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act, in said food products, across state lines, between these respondents, and the sellers of said food products.

PAR. 6. The acts and practices of the buyer respondent, the broker respondent, and the individual respondents, acting through

or in behalf of said buyer respondent as its officers and owners, in receiving and accepting something of value as a commission, brokerage, or other compensation, or allowance or discounts in lieu thereof, on their purchases of food products through a brokerage company owned and controlled by said individual respondents as herein alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of subsection (c) of section 2 of the Clayton Act (15 U.S.C. 13) as amended by the Robinson-Patman Act, the Federal Trade Commission on February 18, 1957, issued and subsequently served its complaint in this proceeding against respondents Colonial Manufacturing Company, Inc., a corporation existing and doing business under and by virtue of the laws of the State of Oklahoma; L. J. Wilkes, Jack W. Wilkes, and L. T. Wilkes, individually and as chairman of the board, president, and secretary-treasurer, respectively, of said corporate respondent, and also as copartners in the N. F. Raupe Brokerage Company. The office and principal place of business of respondents is located at 2800 South Western Avenue, Oklahoma City, Oklahoma.

On April 29, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the following

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order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

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

1. Respondent Colonial Manufacturing Company, Inc., is a corporation existing and doing business under the laws of Oklahoma, with its office and principal place of business located at 2800 South Western Avenue, Oklahoma City, Oklahoma. Respondents L. J. Wilkes, Jack W. Wilkes, and L. T. Wilkes are chairman of the board, president, and secretary-treasurer, respectively, of said corporation, and also are copartners in the N. F. Raupe Brokerage Company, with their office and principal place of business located at the same address as the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That the respondent Colonial Manufacturing Company, Inc., a corporation, and its officers, and the individual respondents, L. J. Wilkes, Jack W. Wilkes and L. T. Wilkes, individually and as officers of Colonial Manufacturing Company, Inc., and partners in the N. F. Raupe Brokerage Company, their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon any purchase of food products for their own account or for the account of any of them.

It is further ordered, That the respondent N. F. Raupe Brokerage Company, a partnership, and L. J. Wilkes, Jack W. Wilkes and L. T. Wilkes, individually and as partners in the said N. F. Raupe Brokerage Company, and their respective representatives, agents and employees, directly or through any corporate or other device in

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connection with the purchase of food products in commerce as "commerce" is defined in the aforesaid Clayton Act do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon any purchase of food products by or for the account of Colonial Manufacturing Company, Inc., where either of the individual respondents L. J. Wilkes, Jack W. Wilkes or L. T. Wilkes, individually or collectively are the agents, representatives or intermediaries acting for or in behalf of or are subject to the direct or indirect control of said Colonial Manufacturing Company, Inc., or any other buyer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 13th day of June, 1957, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF
VITASAFE CORPORATION ET AL.

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

Docket 6736. Complaint, Mar. 6, 1957—Decision, June 18, 1957

Consent order requiring sellers in New York City to cease representing falsely in advertising in newspapers, magazines, etc., that a 30-day supply of their vitamin and mineral product, "VITASAFE C. F. CAPSULES," would be sent free to persons responding to the advertisements and that such persons were under no obligation to purchase additional supplies; when in fact they were required to remit 25¢ in order to secure such "free" supply, and the offer was part of a scheme under which, after the 30-day supply, respondents shipped additional monthly supplies to persons answering the advertisements, mailed them statements requesting payment therefor and, when payment was not received, placed the accounts in the hands of a collecting agency and attorney to enforce collection—continuing this practice even after receiving notification from recipients to discontinue sending the monthly supplies.

Mr. Michael J. Vitale for the Commission.

Mr. James W. Cassidy, of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges the respondents with violating the Federal Trade Commission Act through advertising in newspapers, magazines, and other national advertising media, what is alleged to be a deceptive "30 day free trial" offer as an inducement to purchasers of their vitamin capsules, designated as "Vitasafe C.F. Capsules."

An agreement has been entered into between respondents, their counsel, and counsel supporting the complaint which provides, among other things, the following: Respondents admit all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; respondents waive the requirements that the decision must contain a statement of facts and conclusions of law; respondents waive further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondents waive any right to challenge