

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.

By the Commission, Commissioner MacIntyre not concurring.

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IN THE MATTER OF  
LANOLIN PLUS, INC.

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

*Docket 8150. Complaint, Oct. 19, 1960—Decision, Sept. 12, 1962*

Order requiring a Newark, N.J., distributor to cease representing falsely in advertising in newspapers and magazines and by means of television and radio broadcasts that its "Rybutol" vitamin-mineral would be of benefit in the treatment of tiredness, loss of a sense of well-being and happiness, and premature aging, and would provide pep, strength and energy over night, unless such claims were expressly limited to cases where symptoms were caused by a deficiency of the nutrients contained in the preparation and clear disclosure was made of the fact that such symptoms were generally due to causes other than nutritional deficiency.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Lanolin Plus, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Lanolin Plus, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 37 Empire Street in the city of Newark, State of New Jersey.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for the said preparation, the formula thereof and directions for use are as follows:

## Complaint

Designation: Rybutol.

Formula: Each Rybutol Gelucap contains:

|                                                                                 |          |
|---------------------------------------------------------------------------------|----------|
| Vitamin B-1 (Thiamin Chloride).....                                             | 15 mg.   |
| Vitamin B-2 (Riboflavin).....                                                   | 6 mg.    |
| Vitamin C (Ascorbic Acid).....                                                  | 30 mg.   |
| Niacinamide.....                                                                | 10 mg.   |
| Calcium Pantothenate.....                                                       | 3 mg.    |
| Vitamin B-6 (Pyridoxine HCL).....                                               | 0.5 mg.  |
| Mixed Tocopherols (Vitamin E).....                                              | 5 mg.    |
| Powdered Whole Dried Liver.....                                                 | 100 mg.  |
| Dried Debittered Yeast.....                                                     | 100 mg.  |
| Choline Dihydrogen Citrate.....                                                 | 20 mg.   |
| Inositol.....                                                                   | 20 mg.   |
| dl-Methionine.....                                                              | 20 mg.   |
| Folic Acid.....                                                                 | 0.1 mg.  |
| Vitamin B-12 (Activity Equiv.) (From Vitamin B-12 Activity<br>Concentrate)..... | 3 mcg.   |
| Ferrous Gluconate.....                                                          | 30 mg.   |
| Dicalcium Phosphate, Dried.....                                                 | 200 mg.  |
| Potassium Iodide.....                                                           | 0.15 mg. |
| Magnesium Sulfate, Dried.....                                                   | 7.2 mg.  |
| Copper Sulfate, Dried.....                                                      | 5 mg.    |
| Manganese Sulfate.....                                                          | 3.4 mg.  |
| Cobalt Sulfate.....                                                             | 0.2 mg.  |
| Potassium Chloride, C.P.....                                                    | 1.3 mg.  |

with excipients and fillers in a coated tablet.

Directions: Adults—As a supplementation to the daily diet, one RYBUTOL Gelucap daily. As an aid in preventing or correcting deficiency symptoms (if due to a dietary deficiency of the essential vitamins listed), one to three RYBUTOL Gelucaps daily or as directed by a physician.

PAR. 3. Respondent causes the said preparation, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various states of the United States, and in the District of Columbia, having sufficient power to

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carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

## VIDEO

PAN LEFT ON BOTTLE TILL NEW CARD APPEARS WITH LEGEND: "NEW-FOUND PEP AND ENERGY—OVERNIGHT!"

DISSOLVE TO MCU HAGGARD MAN IN CHAIR. HIS WIFE STANDS IN BACKGROUND.

## AUDIO

ANNCR: \* \* \* prove to yourself that Rybutol will give you new-found pep and energy. Yes, get rid of that "growing old" feeling . . . and do it overnight!

If you're too tired too often, if you've lost that sense of well-being and happiness . . . Due to a lack of B1, B2 & Niacin,  
... MORE

## VIDEO

CUT TO CU OF WOMAN'S WORRIED FACE. KEEP HUSBAND IN SHOT.

CUT TO TCU OF DUMMY RYBUTOL BOTTLE. CARD ALONGSIDE WITH LEGEND:

CUT TO MCU OF MAN AT BATHROOM MIRROR, KNOTTING HIS TIE. WOMAN STANDS BESIDE HIM. WE SEE THEIR HAPPY REFLECTION IN MIRROR.

## AUDIO

ANNCR: This is your chance to discover—once and for all . . . what Rybutol can do . . . and for only ninety-nine cents!

High potency Rybutol gives you a combination of 20 essential vitamins and minerals that are absorbed directly into your blood stream at full strength. Tomorrow morning, Rybutol must make you feel stronger, peppier, with more energy than you've ever known . . . or your money back!

How old are you? It's how young you look, act and feel that counts. The fact is that today you can be a young 50, a young 60, yes a young 75, because now medical research proves high potency RYBUTOL actually makes your blood grow younger. It's true! Clinical tests proved it in case after case. Look, in the photograph of living blood, arrows show young blood cells before RYBUTOL. Now one week after RYBUTOL the young red blood cells you need to feel your healthiest are increased three times. So if you need Vitamins B<sub>1</sub>, B<sub>2</sub> and Niacin, if you feel and look years older than you actually are, start taking RYBUTOL today and get that young blood feeling again fast. It's guaranteed. You'll look and act younger in just one week or money back. Prove it to yourself with this Can't-Lose RYBUTOL Offer—buy three months' supply and get twenty-five days' supply free.

PAR. 6. Through the use of the said advertisements and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that Rybutol (a) will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, and (b) will provide pep, strength and energy overnight.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, Rybutol (a) will not be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should except in a small minority of persons whose tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than they should are symptoms of an established deficiency of one or more of the nutrients provided by the preparation, and (b) even in such cases of established deficiency the use of the said preparation will not provide pep, strength or energy overnight.

Furthermore, the statements and representations in said advertisements have the capacity and tendency to suggest and do suggest to persons who experience feelings of tiredness, loss of a sense of well-being, loss of happiness, and who appear and feel older than they should, that there is a reasonable probability that they have symptoms which will respond to treatment by the use of respondent's preparation. In the light of such statements and representations, said advertisements are misleading in a material respect and therefore constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material fact that in the great majority of persons experiencing tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than they should these symptoms are not caused by an established deficiency of one or more of the nutrients provided by Rybutol, and that in such case the said preparation will be of no benefit.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. Berryman Davis* supporting the complaint.

*Mr. Andrew Graham, Mr. William L. McGuire, and Mr. Robert A. Gerlin* of New York, N.Y., and *Mr. Herbert A. Fogel* of Philadelphia, Pa., for respondent.

## INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

This is a proceeding brought by the Federal Trade Commission, by complaint issued October 19, 1960, charging respondent with violation of the Federal Trade Commission Act in the advertising of its vitamin and mineral product, Rybutol. The principal question of law posed is whether the Commission, after accepting a stipulation governing the advertisement of a particular product, may properly require affirmative disclosures in subsequent advertising by another owner of that product when such affirmative disclosures were not required in the original stipulation.

The factual issue is whether or not respondent's advertising is misleading because it claims overnight restoration of strength and energy and fails to indicate that, in connection with general symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, Rybutol will only be of benefit in the minority of cases where the symptoms are due to a deficiency in one or more of the nutrients provided by the preparation.

## The Proof Offered

Ten hearings were held commencing March 8, 1961, and concluding November 16, 1961, interspersed by long intervals primarily due to the limited availability of medical experts and other engagements of counsel.

Proposed findings and conclusions were ordered filed January 22, 1962, and counter proposals by January 29, 1962.

Very generally, the proof consisted of expert testimony on the efficacy of vitamin therapy and the causes of the symptoms claimed to be cured by conceded advertisements for Rybutol. Published data of the Department of Agriculture and the testimony of experts from that department were offered on the general subject of nutritional deficiency, and data concerning the quantity of vitamin preparations used by physicians and by laymen were introduced.

## Basis for Decision

On the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions therefrom and order. All findings and conclusions not specifically adopted in terms or in substance are disallowed as erroneous or immaterial.

## FINDINGS

(1) Respondent Lanolin Plus, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 37 Empire Street, in the city of Newark, State of New Jersey.

(2) Respondent is now and for sometime last past, has been engaged in the sale and distribution of a preparation containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

(3) The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

Designation: Rybutol.

Formula: Each Rybutol Gelucap contains:

|                                                                                 |          |
|---------------------------------------------------------------------------------|----------|
| Vitamin B-1 (Thiamin Chloride).....                                             | 15 mg.   |
| Vitamin B-2 (Riboflavin).....                                                   | 6 mg.    |
| Vitamin C (Ascorbic Acid).....                                                  | 30 mg.   |
| Niacinamide.....                                                                | 10 mg.   |
| Calcium Pantothenate.....                                                       | 3 mg.    |
| Vitamin B-6 (Pyridoxine HCL).....                                               | 0.5 mg.  |
| Mixed Tocopherols (Vitamin E).....                                              | 5 mg.    |
| Powdered Whole Dried Liver.....                                                 | 100 mg.  |
| Dried Debittered Yeast.....                                                     | 100 mg.  |
| Choline Dihydrogen Citrate.....                                                 | 20 mg.   |
| Inositol.....                                                                   | 20 mg.   |
| dl-Methionine.....                                                              | 20 mg.   |
| Folic Acid.....                                                                 | 0.1 mg.  |
| Vitamin B-12 (Activity Equiv.) (From Vitamin B-12<br>Activity Concentrate)..... | 3 mcg.   |
| Ferrous Gluconate.....                                                          | 30 mg.   |
| Dicalcium Phosphate, Dried.....                                                 | 200 mg.  |
| Potassium Iodide.....                                                           | 0.15 mg. |
| Magnesium Sulfate, Dried.....                                                   | 7.2 mg.  |
| Copper Sulfate, Dried.....                                                      | 5 mg.    |
| Manganese Sulfate.....                                                          | 3.4 mg.  |
| Cobalt Sulfate.....                                                             | 0.2 mg.  |
| Potassium Chloride, C.P.....                                                    | 1.3 mg.  |

with excipients and fillers in a coated tablet.

Directions: Adults—As a supplementation to the daily diet, one RYBUTOL Gelucap daily. As an aid in preventing or correcting deficiency symptoms (if due to a dietary deficiency of the essential vitamins listed), one to three RYBUTOL Gelucaps daily or as directed by a physician.

(4) Respondent causes said preparation, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains, and, at all

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times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

(5) In the course of its business, respondent has disseminated, and caused the dissemination of, advertisements concerning said preparation, Rybutol, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements by means of television and radio broadcasts transmitted by stations located in various states of the United States and in the District of Columbia. Such broadcasts are carried across state lines and are designed to induce and likely to induce the purchase of Rybutol.

(6) Among and typical of the representations contained in advertisements disseminated by respondent are the following:

## VIDEO

PAN LEFT ON BOTTLE TILL NEW CARD APPEARS WITH LEGEND: "NEW-FOUND PEP AND ENERGY—OVERNIGHT!"

DISSOLVE TO MCU HAGGARD MAN IN CHAIR. HIS WIFE STANDS IN BACKGROUND.

CUT TO CU OF WOMAN'S WORRIED FACE. KEEP HUSBAND IN SHOT.

CUT TO TCU OF DUMMY RYBUTOL BOTTLE. CARD ALONGSIDE WITH LEGEND:

CUT TO MCU OF MAN AT BATHROOM MIRROR, KNOTTING HIS TIE. WOMAN STANDS BESIDE HIM. WE SEE THEIR HAPPY REFLECTION IN MIRROR.

## AUDIO

ANNCR: \* \* \* prove to yourself that Rybutol will give you new-found pep and energy. Yes, get rid of that "growing old" feeling . . . and do it overnight!

If you're too tired too often, if you've lost that sense of well-being and happiness . . . Due to a lack of B1, B2 & Niacin, . . . MORE

ANNCR: This is your chance to discover—once and for all . . . what Rybutol can do . . . and for only ninety-nine cents?

High potency Rybutol gives you a combination of 20 essential vitamins and minerals that are absorbed directly into your blood stream at full strength.

Tomorrow morning, Rybutol must make you feel stronger, peppier, with more energy than you've ever known . . . or your money back!

How old are you? It's how young you look, act and feel that counts. The fact is that today you can be a young 50, a young 60, yes a young 75 because now medical research proves high potency RYBUTOL actually makes your blood grow younger. It's true! Clinical tests proved it in case after case.

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Look, in the photograph of living blood, arrows show young blood cells before RYBUTOL. Now one week after RYBUTOL, the young red blood cells you need to feel your healthiest are increased three times. So if you need Vitamins B1, B2 and Niacin, if you feel and look years older than you actually are, start taking RYBUTOL today and get that young blood feeling again fast. It's guaranteed. You'll look and act younger in just one week or money back. Prove it to yourself with this Can't Lose RYBUTOL Offer—buy three months' supply and get twenty-five days' supply free.

Respondent represented directly and by implication in the foregoing advertisements stipulated to in this proceeding that Rybutol:

(a) Will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, and (b) will provide pep, strength and energy overnight.

(7) While the lack of certain of the nutrients included in the vitamins and minerals contained in Rybutol may cause symptoms of tiredness, loss of a sense of well-being, loss of happiness and appearing and feeling older than one should, such symptoms are among those present in the early stages of a great many other diseases.

(8) Rybutol, if taken for the vague symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, would not, in the normal course of medical practice, be expected to make the patient feel much better overnight. Medical art as distinguished from medical science, embraces the use of remedies without scientifically-established therapeutic value. Certain of the remedies of this character are known as placebos. A tablet containing the ingredients contained in Rybutol, or one made up of a completely inert substance, might be prescribed as a placebo. In a significant number of cases, particularly those involving patients subject to suggestion, the patient might respond favorably, although there would be no causal relationship between the ingredients contained in the placebo tablet and the condition causing the symptoms. Except given as a placebo, the ingredients contained in Rybutol would not be expected to have any significant effect except on a deficiency caused by lack of the specific nutrients contained in such formula.

(9) The dosage prescribed in the directions for Rybutol is less than the dosage ordinarily prescribed for the alleviation of iron deficiencies in iron deficiency anemias. Taken over a period of time it would, however, assist in remedying an iron deficiency and also in remedying a deficiency in the vitamins included in its formula.

(10) There is general agreement among medical experts: (a) That cases of frank vitamin deficiency such as those found in cases of beri beri and pellagra are extremely rare in the United States today, (b) that vitamins and minerals are necessary, (c) that they can be secured

by an adequate diet or by supplementary use of pills or other therapy, (d) that the lack of vitamins or minerals could cause symptoms such as those described in the complaint, and (e) that such symptoms are present in the early stages of a great many diseases and can be caused by emotional stress or strain of various kinds.

(11) The general symptoms described in the advertising of Rybutol would not be alleviated by its administration if due to diseases, emotional or other stresses, and not to deficiencies of the nutrients contained in Rybutol.

(12) There is a difference of opinion among doctors concerning the desirability of the routine administration of vitamins or minerals in cases where the history, age or general condition of the patient give no indication that the addition of vitamin or mineral supplements are required. There is also a difference of opinion among doctors concerning the desirability of attempting to ascertain whether or not vitamin or mineral deficiencies exist by the expedient of prescribing vitamins and minerals and observing the results.

(13) Tests for certain mineral deficiencies such as iron deficiencies are relatively inexpensive and routinely administered. Tests for deficiencies in vitamins vary in the degree of effectiveness and in the relative value and the cost of performing the test.

(14) Except possibly in the case of families in the very low income group, a diet containing essential vitamins is available to everyone in the United States.

(15) A substantial number of manufacturers of processed foods such as bakery bread, ready-to-eat cereals and milk replace to a greater or lesser degree the vitamins lost in processing. In the case of some national groups in the United States, however, certain foods such as French bread, Jewish Rye bread, and home-baked type bread are not fortified with vitamins.

(16) Vitamins can be lost through improper preparation and storage of foods. Vitamin deficiency can also be caused by failure to eat the food provided or plate loss, as that is sometimes described.

(17) There is a large sale—in the magnitude of some 330 million dollars—of vitamin preparations annually in the United States.

(18) Such sale of vitamin products and fortification of processed foods and milk would tend to reduce possible vitamin deficiencies in the diet of persons in the United States.

(19) A great majority of the persons exhibiting symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, experience those symptoms from

causes other than from deficiencies due to lack of the nutrients contained in Rybutol.

The hearing examiner has made this finding on the basis of the demeanor of the expert witnesses and for the following additional reasons:

(a) He accepts the opinion of the expert witnesses called by counsel supporting the complaint because of their outstanding qualifications and their wide experience in the field. The fact that certain grants were given by the Nutrition Foundation which is preponderantly financed by food processors to two of them is not regarded as having influenced their testimony in any way. That Foundation, in addition, numbers among its members two manufacturers of pharmaceuticals, and the suggestion that the Foundation would alienate these members by unjustly attacking vitamin therapy is rejected. Moreover, the dedication of the witnesses to professional standards was apparent.

(b) He refuses to accept the estimates by the independent experts called by the respondent to the extent that they attempt to cast doubt on the opinions of the experts of counsel supporting the complaint, among other reasons, because; their experience was more limited in scope, and they appeared to place heavy reliance upon results of routine administration of vitamins without adequate regard to the placebo effects.

(c) He refuses to accept the contradictory testimony of respondent's expert who had previously approved the advertising in question while employed by respondent's advertising agency because such prior approval would have a tendency, whether consciously or not to color the witness' testimony, and because the witness appeared during the proceeding to have intimately associated himself with respondent's position. Moreover, in his exposition of the literature offered by respondent, the witness failed clearly to point out the limitations inherent in the surveys conducted by the Department of Agriculture and tended to rely on them to an extent not justified by the reports of such surveys.

(d) He interprets, on the basis of his testimony as a whole, the testimony of Dr. Richard W. Vilter (who was asked whether the symptoms described in the Rybutol advertising would be more frequently associated with vitamin deficiencies than with other diseased conditions and who answered it would be just as frequent with other diseases as with vitamin deficiencies) as meaning merely that the witness did not agree that such symptoms would be *more* likely to be associated with vitamin deficiencies. Moreover, the questioner excluded other causes than disease from the question.

(e) He does not regard the surveys of the Department of Agriculture as reaching any conclusion contrary to the opinion of the experts

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called by counsel supporting the complaint. These surveys were based on a calculation of the vitamin content contained in the foods which the 6,060 questionnaires (used to determine statistically the eating habits of 50,000,000 American households) stated the interviewed householders had used during a week's period. A determination of vitamin and mineral adequacy was made by comparison with the Recommended Dietary Allowances of the National Research Council (RX 31). In the general discussion, appearing at page 27 of National Research Council's publication, the council states in part, "... it must be realized that diets less than recommended dietary allowances do not of necessity imply nutritional deficiency." Thus the Council's statement shows that there is no basis for a finding that symptoms will arise because even a deficiency cannot be implied in cases where the diet fails to meet recommended allowances. Moreover, in the reports of the Department of Agriculture (e.g., Report No. 6 of Household Food Consumption Survey 1955 [RX 2b]), the following clear statement regarding deficiencies in diet appears:

... This does *not* prove that all of those families were poorly fed or subject to malnutrition. The recommended allowances provide a considerable margin of safety over average needs. This margin varied for the different nutrients. About 90 per cent of the householders had food that provided at least two-thirds of the recommended amounts of ascorbic acid and calcium, and the diets of an even higher percentage furnished at least two-thirds of the allowances for other nutrients. (Italic supplied.)

After stating that food discarded as plate waste or during and after preparation was not recorded so that the amounts of nutrients might be smaller, the report continued:

The nutrient content was calculated only for foods. *No estimate was made of the minerals in the local water or in baking powder, for calories in alcoholic beverages, or for any vitamin or mineral supplements.* (Italic supplied.)

(20) The hearing examiner takes official notice that the stipulation entered into as part of the disposition of the Commission's proceedings, "*In the Matter of V.C.A. Laboratories, et al*", Docket No. 6071, has never been amended, altered, modified, vacated or rescinded. In accepting the stipulation, the Commission (50 F.T.C. 1011) closed the case "without prejudice, however, to the right of the Commission to reopen the same or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances." Said stipulation involved the product Rybutol at a time when it was owned by a corporation completely disassociated with respondent, although having the same president. Respondent is successor by several mesne conveyances to the business

of the sale of Rybutol. The business of the sale of Rybutol has been continuous since before the entry into the stipulation in Docket No. 6071, and the product with the same or substantially similar formula has been distributed, advertised, offered for sale and sold through the same channels of trade as are used in the sale of that product by respondent. Advertisements received in evidence in this proceeding were disseminated subsequent to the entry into the stipulation in Docket No. 6071.

#### CONCLUSIONS

(1) The Federal Trade Commission has jurisdiction of the person of respondent and of the subject matter of this proceeding. Respondent is engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the acts and practices herein referred to, take place in commerce within the meaning of such Act. The proceeding is in the public interest and is not in any way a violation of a stipulation entered into by the Commission, or a private dispute between the food and the medicine industries, as the respondent claims.

(2) The findings of fact heretofore made have been made on the basis of substantial and reliable evidence.

(3) Rybutol is a preparation containing ingredients which come within the classification of drugs, as the term drug is defined in the Federal Trade Commission Act.

(4) Since Rybutol will not be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness and appearing and feeling older than one should, except in those cases where such symptoms are caused by a deficiency of one or more of the nutrients provided by that preparation, and, even in such cases, the use of the preparation will not provide pep, strength and energy overnight; the advertisements disseminated by respondent, while they refer incidentally to the lack of certain nutrients, tend to create a misleading impression on persons to whom such advertising is directed, i.e., that there is a substantial probability that the symptoms will respond to treatment by Rybutol.

(5) The misleading character results from three separate circumstances:

(a) Respondent does not inform the public that the general symptoms described appear in the early stages of many diseases, are caused by a variety of conditions other than vitamin or mineral deficiency, and that in such cases, which are in the majority, the preparation will not be of benefit;

- (b) The preparation will not produce results overnight, and
- (c) The advertisements, considered as a whole, fail clearly to bring to the attention of the viewer that the preparation is only valuable in cases where there is a deficiency of the nutrients contained therein.
- (6) The dissemination by respondent of advertising containing the representations charged and failing to contain affirmative representations covering the existence of numerous other diseases, causing such symptoms in which the application of the preparation would not be of value, is misleading in material respects.
- (7) The stipulation, entered into by the Commission in connection with the sale of Rybutol by a former owner of the business of the sale of Rybutol, is not *res judicata* as against the Commission; does not inure to the benefit of the respondent which was a stranger to the proceeding, and cannot be used to prevent the Commission from taking such action in the public interest as may be required to prevent unfair and deceptive acts and practices in commerce which were initiated or carried on following the entry into the stipulation in Docket No. 6071. (See *F.T.C. v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 398 [5 S. & D. 498, 502] (1953)). To suggest that the Commission has refused to honor the spirit of its stipulation is wholly without basis in fact or law.
- (8) The Commission is not required to adopt any specific procedure in carrying on its functions and, in the presence of what it believes to be a violation of the Federal Trade Commission Act, may proceed by complaint and is not required to offer respondent an opportunity to enter into a stipulation. (See *In the Matter of Lifetime, Inc.*, Docket No. 7616, Opinion by Chairman Dixon, December 1, 1961 [59 F.T.C. 1231, 1250]).
- (9) Despite the decision in *Alberty et al v. F.T.C.*, 182 F.2d 36 [5 S. & D. 184] (D.C. Cir. 1950) that an affirmative order of the Federal Trade Commission must be stricken; it is now clear, even in the same circuit, that affirmative orders should be issued in proper circumstances. *Theodore Kagen Corp. v. F.T.C.*, 283 F.2d 371 [6 S. & D. 837] (D.C. Cir. 1960). Such orders were held appropriate in *Keele Hair and Scalp Specialists, Inc. v. F.T.C.*, 275 F.2d 18 [6 S. & D. 719] (5th Cir. 1960) and *Ward Laboratories, Inc. v. F.T.C.*, 276 F.2d 952 [6 S. & D. 787] (2d Cir. 1960), where medicinal preparations were involved and also in *Bantam Books, Inc. v. F.T.C.*, 275 F.2d 680 [6 S. & D. 744] (2d Cir. 1960), a case involving book abridgement. Here, although it had knowledge that its product had previously been subject to attack for false and misleading advertising; nevertheless, respondent asserted that the product would rejuvenate overnight when

it is clear that any such miraculous cure would be due to purely accidental psychological causes, if it ever occurred, rather than to the effects of the mild dosage contained in Rybutol. Such circumstances require the issuance of an order sufficiently stringent so that the unwary public will not again be deceived. (See *Charles of the Ritz v. F.T.C.*, 143 F.2d 676 [4 S. & D. 226] (2d Cir. 1944), *Colgate-Palmolive Company, et al.* (F.T.C. Docket No. 7736 [59 F.T.C. 1452, 1457]), Opinion of Commissioner Elman dated December 29, 1961)). The circumstance, that the respondent's product is generally regarded as harmless to the consumer's health, does not prevent unfair practices to induce its use from constituting an unwarranted assault on the consumer's pocketbook. (See *Bantam Books, Inc. v. F.T.C.*, 275 F.2d 680 [6 S. & D. 744] (2d Cir. 1960)). Moreover, continued self-dosage in cases of some of the more serious diseases which may give rise, in the early stages, to similar symptoms to those allegedly cured; rather than prompt medical diagnosis and treatment, might well have serious consequences.

(10) The hearing examiner relies upon the expert testimony of the witnesses called by counsel supporting the complaint. (See *Erickson v. F.T.C.*, 272 F. 2d 318 [6 S. & D. 697] (7th Cir. 1959), *Dr. W. B. Caldwell, Inc. v. F.T.C.*, 111 F. 2d 889, 891 [3 S. & D. 218, 221] (7th Cir. 1940)), and does not construe the reports of the survey of the Department of Agriculture as contrary to such testimony. The technique of sampling was not designed to record vitamin and mineral supplements, and the reports did not show that the recorded deficiencies in recommended allowances had a real or substantial relationship to the existence of symptoms such as those described in respondent's advertising. *Bristol-Myers Co. v. F.T.C.*, 185 F. 2d 58 [5 S. & D. 204] (4th Cir. 1950).

(11) The dissemination by the respondent of the false and misleading advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act. *Exposition Press, Inc. and Edward Uhlan v. F.T.C.*, 295 F. 2d 869 [7 S. & D. 240] (2d Cir. November 6, 1961).

#### ORDER

*It is ordered.* That respondent Lanolin Plus, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated Rybutol, or any other preparation of substantially similar

composition or possessing substantially similar properties, under whatever name or names sold, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States mail, by radio, by television, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(a) That the use of said preparation will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness or appearing or feeling older than one should, unless such advertisement expressly limits the effectiveness of the preparation to those persons whose symptoms have been caused by an established deficiency of one or more of the nutrients provided by the preparation and, further, unless the advertisement clearly and conspicuously reveals the fact that in the great majority of persons these symptoms are caused by conditions other than those which may respond to treatment by the use of the preparation, and that in such persons the preparation will not be of benefit.

(b) That the use of said preparation will provide pep, strength or energy overnight.

2. Disseminating, or causing to be disseminated, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparation, any advertisement which contains any of the representations prohibited in Paragraph 1, above, or which fails to comply with the affirmative requirements of Paragraph 1, above.

#### OPINION OF THE COMMISSION

By Kern, *Commissioner*:

The complaint in this matter charges that respondent Lanolin Plus, Inc., violated the Federal Trade Commission Act by the dissemination of false advertisements of its vitamin preparation Rybutol.

The hearing examiner, in his initial decision filed February 2, 1962, held that such charges of false advertising were sustained by the record and he ordered respondent to cease and desist these practices. Respondent has appealed. The principal issues raised are: (a) whether the Commission is restricted in its handling of this proceeding because of its disposition of an earlier matter involving Rybutol in Docket No. 6071 and (b) whether there is substantial evidence on

the record as a whole to support the examiner's ruling as to affirmative disclosure and his order which prohibits representations for benefit in the treatment of symptoms mentioned in the complaint unless it is revealed that in a great majority of persons these symptoms are caused by conditions other than those which may respond to treatment by use of the preparation, and that in such persons the preparation will not be of benefit.

Respondent, Lanolin Plus., Inc., a Delaware corporation with offices in Newark, New Jersey, is engaged in the sale, offering for sale and distribution of Rybutol, a "drug" as that term is defined in the Federal Trade Commission Act.

In its advertisements of Rybutol, respondent has represented that the product will be of benefit in the treatment of tiredness, loss of a sense of well-being, loss of happiness and appearing and feeling older than one should, and will provide pep, strength and energy overnight.

The Commission in *VCA Laboratories, et al.*, Docket No. 6071, 50 F.T.C. 1011, on June 16, 1954, settled a prior case dealing with the product Rybutol by accepting a stipulation and agreement to cease and desist submitted by VCA Laboratories and by closing the case without prejudice. Respondent contends that the stipulation and agreement to cease and desist in the prior case (hereafter referred to as the "stipulation") in some way bars or precludes the Commission from proceeding in this matter. Such a contention is groundless. It is abundantly clear from the documents that the Commission expressly reserved its authority to take whatever action it might deem necessary in the future.<sup>1</sup> Moreover, VCA Laboratories, corporate respondent in Docket No. 6071, prior to the issuance of this complaint, was liquidated and dissolved. Its assets were acquired by Rexall Drug and Chemical Company, and, thereafter, by one or more mesne conveyances, were sold to Lanolin Plus, Inc. The latter, respondent herein, was in no way involved in the stipulation in Docket No. 6071 and is in fact a complete stranger to that proceeding.

In all the circumstances, the Commission by proceeding here is violating neither the letter nor the spirit of the aforementioned stipulation. The instant proceeding is a new action involving a different respondent, and such respondent has had adequate opportunity to be

<sup>1</sup> In its order closing the case in Docket No. 6071, in which order the Commission accepted "the proposed stipulation and agreement to cease and desist submitted by respondent", the Commission ordered:

"... that the case growing out of the complaint herein, be, and it hereby is, closed, without prejudice, however, to the right of the Commission to reopen the same or to take such further or other action against the respondents at any time in the future as may be warranted by the then existing circumstances." (50 F.T.C. 1011.)

heard on the issues now raised. The contention that the Commission is barred from the present action is rejected.

We turn now to a consideration of respondent's appeal on the merits. Respondent primarily takes exception to the examiner's finding that a great majority of persons exhibiting symptoms of tiredness, loss of a sense of well-being, loss of happiness, and appearing and feeling older than one should, experience these symptoms from causes other than from deficiencies due to the lack of the nutrients contained in Rybutol, and to the form of the order which requires as to the benefits represented disclosures in line with such finding.

We understand, sympathize with and indeed share that universal thirst to maintain that youthful feeling and would not wish unduly to discourage by arbitrary administrative interference the advertisement of drugs calculated to aid in that direction. Moreover, the pursuit of happiness (albeit it may oftentimes prove unobtainable) is one of the three unalienable rights by which, according to the authors of our Declaration of Independence, all men are endowed by their Creator; here again drugs calculated to aid in such a pursuit should not arbitrarily be interfered with by administrative regulation. However, the hearing examiner has found, and we think correctly on the basis of this record, that lack of these desirable conditions or states of mind or body may be brought about from many causes—and that the great majority of people suffer from symptoms such as tiredness, loss of sense of well-being, loss of happiness, and appearing and feeling older than one should, due to disorders other than vitamin deficiency. We believe that honest advertising of a vitamin product, which advertising is geared to the basic idea that the product benefits such symptoms, therefore requires some affirmative recognition of this basic truth. Again animadverting to our Declaration of Independence: “\* \* Let facts be submitted to a candid world”.

Expert witnesses called by counsel for the complaint testified that the great majority of persons experiencing tiredness and the other symptoms above mentioned would have these symptoms as a result of a disease or condition other than vitamin deficiencies. Doctor Grace A. Goldsmith, M.D., Professor of Medicine, Tulane University, New Orleans, Louisiana, and an expert in nutrition, testified: “I would say more than 90 percent would have diseases other than vitamin deficiencies.” Doctor Frederick John Stare, of Needham, Massachusetts, Professor of Nutrition and Chairman of the Department of Nutrition, Harvard University School of Public Health, when asked what percentage of all patients in the United States who exhibited symptoms of tiredness and the other symptoms above men-

tioned suffered such symptoms as a result of diseases other than vitamin deficiency stated that it would be 95 to 96 per cent. Dr. Thomas Stone Sappington, M.D., Associate Clinical Professor of Medicine, George Washington University, Washington, D.C., testified in a similar vein.<sup>2</sup>

The examiner in making his finding on this issue considered and evaluated the testimony of these experts as well as the testimony of the experts called by the respondents and other evidence introduced in the proceeding. We believe there is substantial evidence on the record as a whole to support the examiner's finding, including the expert witnesses called by complaint counsel, and, accordingly, we reject respondent's argument on this question. See *Erickson Hair and Scalp Specialists v. Federal Trade Commission*, 272 F. 2d 318 [6 S. & D. 697] (7th Cir. 1959).

As to the scope or form of the order, the examiner having found that the advertisements were misleading in failing to reveal that the great majority of persons suffering from the referred to symptoms have disorders other than vitamin deficiency, molded the order in a manner best calculated to eliminate such deception.<sup>3</sup>

Respondent relies on *Alberty, et al. v. Federal Trade Commission*, 182 F. 2d 36 [5 S. & D. 184] (D.C. Cir., 1950), but that case does not hold against such affirmative disclosure where it is found, as here, that the failure to make any affirmative statement in itself is misleading. *Ward Laboratories, Inc., et al. v. Federal Trade Commission*, 276 F. 2d 952 [6 S. & D. 787] (2d Cir. 1960), *cert. denied* 364 U.S. 827; *Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission*, 275 F. 2d 18 [6 S. & D. 719] (5th Cir. 1960).

The other contentions of respondent have been considered and they are all rejected. We specifically reject the assertion that the examiner's conclusion as to the possible serious consequences in certain instances of continued self-dosage of Rybutol is unsupported by the record. There is substantial evidence to support such conclusion,

<sup>2</sup> Dr. Sappington testified regarding his patients who suffered from tiredness and the other symptoms mentioned in the complaint in part as follows: "... I would estimate or approximate that 85 per cent of patients weren't suffering from vitamin or mineral deficiencies, ... that ten per cent of the remaining 15 per cent [later clarified in the testimony as 10 per cent of the total] of patients were suffering from primarily vitamin or mineral deficiencies, and that another five per cent had a vitamin or mineral deficiency which was secondary to a primary illness, such as cirrhosis of the liver or cancer, and so on."

<sup>3</sup> The same provision for affirmative disclosure was used in prior matters involving vitamin preparations. See *Phoenia Pharmaceutical Company, et al.*, Docket No. 8397, 59 F.T.C. 756, and *Approved Formulas, Inc., et al.*, Docket No. 8151, 59 F.T.C. 58. The orders in such matters were based on agreements to enter into consent orders.

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including the testimony of Dr. Richard W. Vilter who testified on behalf of complaint counsel.

Respondent's appeal is denied. It is directed that the initial decision of the hearing examiner be adopted as the decision of the Commission. An appropriate order will be entered.

## FINAL ORDER

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

The Commission, for the reasons stated in the accompanying opinion, having denied respondent's appeal, and having directed that the initial decision of the hearing examiner be adopted as the decision of the Commission:

*It is ordered*, That the hearing examiner's initial decision be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That 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 to cease and desist contained in the initial decision.

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IN THE MATTER OF

THE GARLAND COMPANY ET AL.