

Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

NATIONAL BAKERS SERVICES, INC.

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

Docket 7480. Complaint, Apr. 30, 1959—Decision, Apr. 10, 1963*

Order requiring a Chicago corporation, engaged in licensing some 182 bakeries throughout the United States to produce a bread from its special formula and to market the bread under its exclusive trademark "Hollywood"—in such connection making available to its licensees a "special mix" and providing and paying for all advertising matter and services—to cease representing falsely in such advertising—in newspapers, by radio and television, etc.—that its "Hollywood Bread" contained fewer calories than other foods and that consumption of the bread would cause a loss in weight or prevent a weight gain.

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 National Bakers Services, Inc., a corporation, hereinafter referred to as respondent,

*Published as amended July 22, 1959.

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 National Bakers Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 100 W. Monroe Street, Chicago, Illinois.

PAR. 2. Respondent is now, and for more than five years last past has been, engaged in the business of granting to various bread-baking companies and firms, located throughout the United States, the right to use a certain formula for making a certain food product, as "food" is defined in the Federal Trade Commission Act. Said food product is known and designated as "Hollywood Bread" and "Hollywood Special Formula Bread." It is hereinafter referred to as "Hollywood Bread."

In connection therewith respondent makes available to its licensees a "special mix" to be used in said formula, and in addition thereto respondent provides all advertising matter and services for said licensees in order to further the sale of said food product by said licensees, by arranging, furnishing, and placing all advertising material used in advertising said food product to the public. All such advertising is paid for by respondent.

The volume of business of said licensees in selling said food product is substantial.

PAR. 3. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said food product 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 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 carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said food product; and has disseminated, and caused the dissemination of, advertisements concerning said food product 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 food product in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among and typical of the statements and representations

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contained in said advertisements disseminated as hereinabove set forth are the following:

(a)

(Picture of Elizabeth Taylor)

REDUCING DIETS
must be nourishing

* * * * *

It is no wonder that Hollywood Bread is considered a valuable aid in weight control by millions of beauty-conscious women. . .

* * * a welcome treat on restricted diets.

* * * * *

Only about
46 CALORIES (Statement is encircled
PER SLICE! with black stars.)
(18-gram slice)

* * * * *

(b)

The extra protein bread for healthy
little stars . . . and figure-wise
mothers

* * * * *

Adults who are watching their weight can watch their nutrition, too, by including Hollywood Special Formula Bread in their daily diet.

* * * * *

(c)

when a woman's
Panther Slim

(Picture of Elizabeth Taylor and
panther with basket of bread in
his mouth)

* * * she's *vital* as well as slender.

A good figure is more than luck when a
lady watches her weight the famous
Hollywood Way. *Hollywood Bread* is high
in protein, vitamins and minerals, yet
has *only 46 calories per 18 gram slice*.

* * * * *

PAR. 5. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent represented, directly or by implication:

(a) That said bread is a low calorie food;

(b) That said bread is substantially lower in calories than and, therefore, substantially different in caloric value from ordinary breads; and

(c) That eating said bread will cause the consumer to lose weight or prevent the consumer from gaining weight.

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PAR. 6. The aforesaid advertisements referred to in Paragraph 5 are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

- (a) Said bread is not a low calorie food;
- (b) Said bread is not substantially different in caloric value from ordinary breads; and
- (c) Eating said bread will not cause the consumer to lose weight and will not prevent the consumer from gaining weight.

PAR. 7. The dissemination by respondent of said false advertisements, as alleged herein, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Michael J. Vitale and *Mr. Arthur B. Edgeworth* for the Commission.

Winston, Strawn, Smith & Patterson, by *Mr. Thomas A. Reynolds, Sr.*, *Mr. James L. Perkins* and *Mr. Donald Bixler*, of Chicago, Ill., and *Wald, Harkrader & Rockefeller*, by *Mr. Robert L. Wald*, of Washington, D.C., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

APRIL 30, 1962

This proceeding has been brought under the Federal Trade Commission Act, charging, in substance, that respondent has violated said Act by disseminating in commerce alleged false and misleading advertising of the food product "Hollywood Bread." It is charged that this food product is misrepresented, directly or by implication, in that respondent has claimed untruthfully in its advertising that (1) such bread is a low-calorie food; (2) that it is substantially lower in calories and therefore substantially different in caloric value than ordinary bread; and (3) that eating said Hollywood Bread will cause the consumer to lose weight, or prevent the consumer from gaining weight. The respondent denies these charges. In this initial decision it is determined that the material allegations of the complaint have been established, and an appropriate order is accordingly being issued herein.

The complaint herein was issued April 30, 1959. After its service, but before respondent had filed answer, counsel supporting the complaint, on July 8, 1959, filed their motion to amend the complaint. Respondent, on July 21, 1959, filed an answer thereto objecting to the proposed amendment, but on July 22, 1959, the hearing examiner then assigned to the case issued his order authorizing the proposed amend-

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ments on the grounds that they would facilitate determination of the proceeding on the merits, and also that they were reasonably within the scope of the original complaint. He also extended respondent's time to answer, and respondent on August 26, 1959 duly filed its answer to the complaint as amended.

On August 18, 1959, prior to any hearings, the proceeding was transferred to the undersigned hearing examiner. On and between October 28, 1959, and November 30, 1960, some twelve hearings were held in Washington, D.C., and in Chicago, Illinois. The case-in-chief was rested January 6, 1960, and respondent rested its defense November 30, 1960, subject to the examiner's ruling on certain proffered documentary evidence. This evidence was received on December 30, 1960, by an order which also terminated the reception of evidence, since counsel supporting the complaint had waived the presentation of any evidence in rebuttal. The proposed findings, conclusions and order of the parties, respectively were duly filed March 15, 1961, but thereafter, in September 1961, upon leave granted, certain supplemental memoranda were filed by counsel for the parties analyzing the Commission's decision in *Docket 7472, Bakers Franchise Corporation, et al.*, which was issued July 19, 1961 [59 F.T.C. 70], and upon which counsel held differing views, as hereinafter more fully discussed.

The proceeding has been ably and vigorously contested throughout by counsel for the parties. Numerous interlocutory rulings were necessitated on various objections and motions of the parties. While all such matters inhere in the record for such further action before higher authority as the respective parties hereafter deem appropriate, for clarity the disposition of several of such matters is now stated.

Appeal was taken to the Commission on June 24, 1960, by counsel supporting the complaint from certain rulings relating to evidentiary matters. On June 28, 1960, counsel supporting the complaint filed a document entitled "Motion To Amend Complaint To Conform To Proof", which was actually a request for leave to add certain individual officials of respondent corporation, as parties respondent. This motion came long after the case-in-chief had rested, respondent's defense had substantially progressed, and a number of its witnesses had already testified. The examiner therefore, on July 12, 1960, certified the motion to the Commission. On July 21, 1960, the Commission issued an order denying said interlocutory appeal, and also denying said motion for amendment of the complaint by adding new parties respondent.

At the hearing held November 10, 1960, respondent in its defense subpoenaed and sought to examine a Commission employee, one Albert

Hamilton Porter, who had acted as a Commission's attorney-examiner during the investigation of the case prior to trial. Respondent sought to prove by this witness, in substance, that he was not qualified to make a survey of public opinion, and that his interviews with the consumer-type witnesses who had already testified in this proceeding concerning their impressions as to certain of respondent's advertisements were not properly conducted. Porter had not been called as a witness for the Commission, and this examiner ruled in substance that as a Commission employee he was barred from testifying generally as to his official acts and reports, both under the Commission's rules of confidentiality and under the Federal Trade Commission Act, since the Commission had not waived its privileges. The examiner ruled also that Porter had conducted no survey, and that the said witnesses had not testified as a part of a survey, but only each severally as a consumer witness under long-prevailing and judicially-approved practice in such cases.

There is no issue as to the corporate existence and capacity of the respondent; the fact that it is operating in interstate commerce; or the fact that respondent's advertisements in question have been transmitted by various media in interstate commerce. The evidence submitted by Commission's counsel in support of the complaint consists of some sixteen consumer or public witnesses who examined and gave their impressions of the meaning of certain published advertisements of Hollywood Bread disseminated by and through respondent. Two expert medical witnesses also testified for the Commission, and various documents, Commission's Exhibits 1 to 25, inclusive, and 28, were received in evidence. Respondent's evidence was presented through two expert witnesses with medical qualifications; two food chemists; one expert in bread advertising; one expert in market research; and one officer of the respondent corporation. Respondent's documentary evidence, its Exhibits 1 through 18, was also received. Considerable testimony, offers of proof, and a number of exhibits offered by each of the parties were rejected for reasons stated on the record, repetition of which is unnecessary here.

The factual and legal proposals submitted by the respective parties are extensive. All such proposed findings of fact and conclusions of law which are not incorporated herein, either as submitted or in substance and effect, are hereby rejected. The proposed order submitted by counsel supporting the complaint is adopted herein, in substance.

The hearing examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of the witnesses who appeared before him. All procedural and evidentiary matters have been thoroughly reviewed, and rulings made thereon during the course of the proceeding are

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hereby confirmed. All arguments, proposals and briefs of counsel have been carefully studied and considered in the light of the entire record. Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint have fully sustained the burden of proof incumbent upon them, and have established by reliable, probative and substantial evidence and the fair and reasonable inferences drawn therefrom, all the material allegations of the complaint; and further finds that evidence submitted by or relied upon by respondent fails to establish facts constituting any valid defense to the charges of violation contained in the complaint.

More specifically, upon due consideration of the whole record, the hearing examiner makes the following:

FINDINGS OF FACT

The product here involved, respondent's "Hollywood Bread", is a basic food which, in the classic expression used by one of respondent's expert medical witnesses, Dr. Robert M. Kark, "* * * is the staff of life * * *". It is to be noted that § 12 *et seq.*, of the 1938 amendments to the Federal Trade Commission Act, Congress, in the public interest, specifically protected the public from false advertising of food by making it unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) by United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food * * *; or (2) by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food * * *.

The dissemination or the causing to be disseminated of any false advertisement * * * shall be an unfair or deceptive act or practice in commerce within the meaning of Section 5.

Although the general principles of law pertaining to the interpretation of advertising matter in unfair-practices cases have now become basic and well known, it is of major importance in the present type of case, that Congress has expressly provided governing rules of interpretation of the general advertising of foodstuffs, as follows:

Sec. 15. * * * (a) (1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are

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customary or usual. No advertisement * * * shall be deemed to be false if it * * * contains no false representation of a material fact, * * *

* * * * *

(2) * * * (b) The term "food" means * * * articles used for food or drink for man or other animals, * * * and * * * articles used for components of any such article.

In passing upon the questioned advertisements in evidence herein, which were published in newspapers and brochures or by radio announcements, the examiner has carefully considered all pertinent evidence, has followed these guiding principles of interpretation, and, with respect to Hollywood Bread wrappers, has also considered them in the nature of "labels" upon a food product. The examiner has in like spirit followed the general legal principles of interpretation of "labels".

As already stated, in the memoranda of counsel relating to the Commission's decision in *Bakers Franchise Corporation, et al., supra*, their views differ widely as to the applicability and effect of this decision upon the proceeding at bar. It is substantially the position of respondent's counsel that the two cases are entirely different from each other, and since in *Bakers Franchise Corporation, et al.*, the principal issue was the excision of the use of the trademark "Lite Diet" bread, which issue is not present herein, said decision is not controlling here. Counsel supporting the complaint, however, insist that the case is applicable on the doctrine of *stare decisis*. It is true that there is no issue here of excision of a trademark or name. It is also true that the complaint herein, as originally framed, followed the general allegations of *Bakers Franchise Corporation*, but that case, which had been pending prior to the issuance of the complaint herein, had caused some confusion, and counsel supporting the complaint herein moved to amend the complaint before answer "to obviate a question that arose at a recent hearing concerning the wording of the complaint" [in *Bakers Franchise Corporation*] and "[s]ince the complaint in this case is almost identical to the other and to avoid the controversy raised concerning the pleading in" *Bakers Franchise Corporation*, counsel supporting the complaint in the case at bar submitted an amendment rearranging the language and changing the charges herein. It is therefore clear that this case is being tried on somewhat different issues than those upon which *Bakers Franchise Corporation* was tried, and, strictly speaking, that case cannot be considered as decisive of the instant case. But in connection with the relevancy of evidence and other matters, certain rulings of the Commission in the *Bakers Franchise Corporation* case state principles which are applicable here, and which will be referred to further hereinafter.

The record is replete with many irrelevant and immaterial matters,

but insofar as pertinent to the issues framed in this case, the evidence shows the following facts:

Respondent National Bakers Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 100 W. Monroe Street, Chicago, Illinois.

Respondent is now, and for more than five years last past has been, engaged in the business of granting to various bread-baking companies and firms, located throughout the United States, the right to use a certain formula for making a certain food product, as "food" is defined in the Federal Trade Commission Act. Said food product is known and designated as "Hollywood Bread" and "Hollywood Special Formula Bread". It is hereinafter referred to as "Hollywood Bread".

In connection therewith respondent makes available to its licensees a "special mix" to be used in said formula, and in addition thereto respondent provides all advertising matter and services for said licensees in order to further the sale of said food product by said licensees, by arranging, furnishing and placing all advertising material used in advertising said food product to the public. All such advertising is paid for by respondent. The volume of business of said licensees in selling said food product is substantial.

In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said food product 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 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 carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said food product; and has disseminated, and caused the dissemination of, advertisements concerning said food product 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 food product in commerce as "commerce" is defined in the Federal Trade Commission Act.

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

- (a) (Picture of Elizabeth Taylor)
- REDUCING DIETS
must be nourishing

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* * * * *

It is no wonder that Hollywood Bread is considered a valuable aid in weight control by millions of beauty-conscious women * * *

* * * a welcome treat on restricted diets.

* * * * *

Only about
46 CALORIES (Statement is encircled
PER SLICE! with black stars.)
(18-gram slice)

* * * * *

(b) when a woman's
Panther Slim

(picture of Elizabeth Taylor and panther with basket of bread in his mouth)
* * * she's *vital* as well as slender. A good figure is more than luck when a lady watches her weight the famous *Hollywood Way*. *Hollywood Bread* is high in protein, vitamins and minerals, yet has *only 46 calories per 18 gram slice*.

* * * * *

The respondent's advertising in question consists of 14 advertisements (Commission's Exhibits 1-14, inclusive) which were disseminated in newspapers in commerce. Commission's Exhibits 15 to 22, inclusive, were radio broadcasts. The basic theme of each of these advertisements was that Hollywood Special Formula Bread contains "only about 46 calories per 18-gram slice". The newspaper advertisements, for the most part, contain the picture of some glamorous Hollywood star, such as Elizabeth Taylor, with references to her vitality and slimness, the effect of such advertising being to convey to the reader that use of this bread by the consumer would make the person who ate such bread also equally trim, slim and lithe. Some of the pictures show such stars in company with such creatures as black panthers or tigers carrying baskets of Hollywood Bread in their mouths, and accompanying the motion-picture star. These only add further emphasis, by implication, to the representation that the use of such product would make one slim and lithe like such animals. While some of the advertisements are less alluringly framed, nevertheless the overall impression of each of them is that eating Hollywood Bread will reduce one's weight or prevent the increase thereof. As is pointed out in *Bakers Franchise Corporation, supra*, it is difficult to summarize the testimony of consumer witnesses. In the present case, as in *Bakers Franchise*, "the direct examination of the consumer witnesses followed a simple pattern. They were handed one of respondent's advertisements and then asked what" the advertisement meant to them. Naturally each of the witnesses testified somewhat differently, but upon study of the entire testimony of the 16 consumer witnesses,

the three charges of the complaint are found to be abundantly supported.

The testimony of these witnesses was specifically offered by counsel supporting the complaint as an aid to the hearing examiner, and not as absolute proof per se. And since the witnesses only testified to the first four of such exhibits, the examiner, of necessity, has carefully considered the remaining exhibits (Commission's Exhibits 5-22, inclusive). Eight of these consumer witnesses were women, and eight were men, all from the vicinity of Alexandria or Arlington, Virginia. Of these witnesses, six were housewives, one a police officer, one a real-estate developer, one a salesman, one unidentified as to occupation, and six were employees of various branches of the United States Government. Four of the witnesses testified that they had previously eaten Hollywood Bread; another testified that her doctor instructed her to eat such bread in connection with her dieting.

It has been contended throughout by counsel for respondent that these witnesses were not fairly selected or interrogated by the attorney-examiner who interviewed them. It is true that these witnesses all came from the metropolitan area of Washington, D.C., and were not called from various distant parts of the country where some of the advertisements had been printed. This is immaterial, since an advertisement, wherever it is published, may be presumed to give the same general impression to those who read it.

Counsel for respondent objected originally to the use of these exhibits with such consumer witnesses because they bore certain marks, but after such marks had been erased, announced their satisfaction with their presentation to such witnesses. There is no evidence from which it can be found or inferred that these marks were on the exhibits at the time they were first presented to the witnesses in the interviews prior to the hearing. These interviews occurred about a year before the witnesses testified. Respondent's counsel sought to discredit and destroy the testimony of these consumer witnesses by calling the attorney-examiner who had conducted the interviews, but his testimony was rejected by the examiner, as hereinbefore stated. They also later attempted to discredit such evidence by hypothetical statements concerning the method of interview in questions put to the witness Gleiss, a market research expert and executive vice president of Gould, Gleiss and Benn, Inc., which is an independent market research agency located in Chicago, Illinois, and engaged in the business of conducting surveys and other market research services for advertisers and the like. These questions attempted to frame the method whereby proposed consumer witnesses were interviewed by the investigator for the Commission, and to base his expert opinion upon

such matters to the effect that the Commission's method of selecting and preparing consumer witnesses to testify concerning advertising is an improper way to conduct surveys, or otherwise to elicit the impressions of such witnesses. The objection of counsel supporting the complaint to such evidence was sustained. In brief, it may be said here that the testimony of consumer witnesses must stand upon its own merits in each particular instance, and cannot be weakened, contradicted or impeached by the testimony of one who never saw these witnesses, and who would, in effect, be usurping the function of the hearing examiner in determining the credibility of the witnesses and the weight of their testimony.

In evaluating the testimony of consumer witnesses, the usual criteria applicable to all witnesses must be and have been employed herein. Even when they have been interviewed by representatives of the Commission prior to testifying, their testimony cannot be disregarded for this reason. Counsel for respondent object to any previous conferences with such witnesses being had by Commission personnel, but in the orderly process of preparing proceedings for trial, it would appear that failure to interview such witnesses would be a serious defect in preparation by counsel supporting the complaint. Theoretically, an ideal witness, of course, would be one who knew absolutely nothing about the case before being sworn. But from time immemorial it has always been considered proper for witnesses to be interviewed in advance, prior to their testimony, both by investigators, and by counsel calling such witnesses. Many courts refuse to permit cross-examination on this subject, since it is so inherent in competent trial practice. Whether or not such witnesses are unduly influenced thereby, or whether they fail to interpret the advertising correctly, are altogether different questions, which call for their resolution upon the whole record by the trier of the facts. There is no evidence herein from which it can be directly found or fairly inferred that these consumer witnesses were improperly influenced by any representative of the Commission prior to testifying. Such consumer testimony certainly cannot be summarily rejected merely because a hearing examiner would prefer to interpret such advertising matter for himself, or because he disagrees with some or all of the opinions of such consumer witnesses. The examiner certainly cannot arbitrarily disregard the evidence of any "public witness" as to what such advertising means, whether favorable or unfavorable to the party calling such witness. Of course, if any such testimony is highly prejudiced or unreasonable, such matters go to the credibility, value and weight of such evidence.

In the present case, as to the consumer witnesses' interpretation of

Commission's Exhibits 1 through 4, the examiner arrives at the same conclusions as such witnesses did with respect to the representations made in the said advertisements. Moreover, he cannot see how any fair-minded person, lacking specific technical knowledge, could come to any other conclusions. In this connection, however, the examiner has carefully weighed and entirely disregarded the impression evidence given by one consumer witness, Edward J. Chapin (R. 154-185), because this witness claimed to have special knowledge of the matters in question, and therefore cannot be considered as fairly representative of ordinary consumers who would read the advertisements. The examiner's determination of these matters is based not only upon the testimony of the other consumer witnesses and upon that of the experts who testified with regard thereto, but also upon his own practical judgment and experience. For these and many other reasons, unnecessary to state here, the examiner rejects respondent's plea that all the testimony of the consumer witnesses must be summarily disregarded. See in this connection the Commission's decision of January 12, 1961, in Docket 7748, *Stanley Perkis, an individual trading as Murray Hill House* [58 F.T.C. 71].

In addition to the testimony of the consumer witnesses, there was some professional expert testimony relating to the interpretation of the advertising as well as to the falsity thereof. Four eminent nutritionists, all with great professional background and experience, testified in this case. Dr. Bernice K. Watt, a nutrition analyst for the United States Department of Agriculture, and Dr. Oral L. Kline, Director of the Division of Nutrition, Food and Drug Administration, testified in support of the complaint. Respondent presented the testimony of Dr. Max K. Horwitt, Medical Research Adviser of the Department of Public Welfare of the State of Illinois, and Dr. Robert M. Kark, Professor of Medicine at the University of Illinois College of Medicine. All of these experts have spent many years as consultants to various Government agencies and departments, and all were renowned research specialists and authors. These four very eminent experts are all substantially agreed as to the nutritional qualities of bread. There is abundant evidence in the record pertaining to the nutrition contained in bread; but the nutritional qualities of respondent's Hollywood Bread are not at issue in this case. Therefore, no useful purpose can be served by discussing at length any of the extensive evidence on this subject. Insofar as any testimony of these four expert witnesses relates to the interpretation of the advertising matter in question, however, their evidence has been fully considered and weighed with all other pertinent evidence in the record.

We now pass to a consideration of the evidence specifically relating to each of the three charges of the complaint. As to the first issue,

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that respondent has falsely claimed its bread to be a low-calorie food: while respondent contends that it has not advertised Hollywood Bread as a "low-calorie food", the record positively shows the contrary. See Commission's Exhibits 3 and 25, and Respondent's Exhibits 16 and 18. Commission's Exhibit 3, which is the advertisement the public sees first, refers to Hollywood Bread in direct connection with the expression "low-calorie foods". And respondent's vice president, Medina, admitted that these advertisements contained these words. The latter three exhibits are the elaborate little diet brochures referred to in the said advertisement, which, upon inquiry, are sent by respondent to those interested. The first two brochures are different editions of substantially the same document, each being entitled "Diet and Calorie Guide". The third is entitled "Calorie and Diet Chart". All of these brochures naturally extol the virtues of Hollywood Bread, and the specific daily and weekly diets set forth therein, except for one or two menus, uniformly call for the use of two slices of Hollywood Bread at each meal. The "Calorie and Diet Chart" (RX 18) has the word "Hollywood" and a picture of a loaf of Hollywood Bread immediately under the word "diet", and on the last page, following the list of calorie contents of various foods, states "Hollywood Special Formula Bread", and immediately thereunder, that the chart is designed "to help you like low-calorie foods". The implications from this and each of the other three said exhibits, that Hollywood Bread is a low-calorie food, are undeniable.

Five of the consumer witnesses testified, in substance, that from the advertisement they had just read (CX 3), they understood Hollywood Bread was a low-calorie food. Dr. Horwitt, as an expert witness for respondent, while contending that there is no such absolute scientific term as a "low-calorie food", nevertheless admits that this expression is frequently used by the laity. Since respondent has specifically used this language in its advertising to the public, it must be found that respondent has represented therein that Hollywood Bread is a low-calorie food, and it is so understood by the public. There is substantial, credible expert testimony in the record that bread is not a low-calorie food, and therefore such representation of Hollywood Bread as a low-calorie food is false, misleading and deceptive.

As to the second issue, that respondent has represented its bread to be substantially lower in calories than ordinary bread, while occasionally respondent has referred in its advertisements to its bread as a "slim slice" or "thinly sliced" (See CX 5 and RXs 13, 14 and 15), for the most part its advertisements make no statement regarding the thickness of its slices of bread, and nine of the consumer witnesses testified, in substance, that they got the impression from the advertisements

they read (CXs 1-4) that Hollywood Bread had less calories than other bread; and there is evidence that this comparison was by the slice, which they believed to be of the same size and weight as the customary slices of bread other than Hollywood Bread. Dr. Kline expressly testified that in his opinion the average consumer, reading Commission's Exhibit 4, for example, "would take this to mean that the bread [Hollywood Bread] is considerably different from other similar products on the market in respect to its caloric value". It is respondent's basic theme, "Only about 46 calories in an 18-gram slice," which appears in each of the four exhibits, which chiefly leads the said witnesses to their conclusions. After considering these matters and all other evidence pertaining to this issue, the examiner, therefore, finds that respondent has represented that its Hollywood Bread is substantially lower in calories, and therefore substantially less in caloric value, than ordinary bread, when compared slice for slice.

The evidence shows that bread cut in ordinary-sized slices contains approximately 63 or 64 calories and weighs about 23 grams per slice, but that the consuming public generally does not know this fact, and assumes from respondent's advertising that an 18-gram slice of Hollywood Bread is the same weight as a slice of ordinary bread, and therefore, since it contains "only about 46 calories" per slice, that Hollywood Bread is significantly lower in calories than other bread. The evidence discloses that all breads, when sliced in equal portions, have about the same caloric values, and on any weight-to-weight balance, there is no substantial difference in the caloric values of different breads. See also the Commission's opinion in *Bakers Franchise Corporation, et al., supra*, [59 F.T.C. 70], where a representation similar to that here in question is analyzed and the falsity thereof disclosed. It is therefore found that respondent's advertisements are false, misleading and deceptive, in that they lead the public to believe that Hollywood Bread is substantially lower in caloric value than ordinary bread.

As to the third issue, that respondent has falsely represented that eating Hollywood Bread will cause the consumer to lose weight or prevent him from gaining weight, respondent's counsel contend that the evidence discloses that the advertising as interpreted by about 12 consumer witnesses and as it must reasonably be interpreted by anyone, does not convey the impression that Hollywood Bread is offered as a diet in and of itself, but only as part of a diet. The witnesses so considered the advertising they read, and the hearing examiner is in full agreement with respondent's counsel; but nevertheless the consumer witnesses testified, and the examiner finds, that the respondent's advertising does indicate to the reader that Hollywood Bread itself, as

a part of a diet, will cause the consumer to lose weight, or will prevent the consumer from gaining weight. In other words, in the context of the various advertisements in evidence, it is clear that Hollywood Bread is so associated and classified with low-calorie foods that one reading the advertisements must conclude that this product is offered as one which will reduce weight or prevent its gain. The use of the glamorous movie stars, lithe animals, and various expressions all in the context of the various advertisements cannot be otherwise interpreted. Since the evidence shows that bread itself is incapable of reducing weight or staying weight gain, the respondent's said advertising, which so indicates, is false, misleading and deceptive.

With respect to all of respondent's advertising in question here, it is notable that respondent's advisor and expert witness on bread advertising, Elwood J. Sperry, testified in Chicago on June 22, 1960, that he "fought very strenuously" against the inclusion of the phrase "only 46 calories per 18-gram slice" which appeared in all of respondent's advertising of Hollywood Bread. He had been objecting to respondent's use of such advertising for several years prior to his testimony, and testified that "at one time, through the president, I stopped all Hollywood [Bread] advertising then until a meeting was had by all concerned * * * but all persons connected or having to do with the advertising said it [the expression "only 46 calories per 18-gram slice"] was mandatory and must be included in all copy of advertising". Mr. Sperry, after a visit to the Federal Trade Commission, had also strongly recommended that the Commission's criticism of "exemplary and exaggerated use of the motion picture stars" in respondent's advertising of its bread was well founded, and such practice should be discontinued. He believes his advice in this respect has been followed by the respondent. He further objected to the use of "only 46 calories per 18-gram slice" in respondent's advertising without a definite explanation of the size of the slice referred to, and also objected to the use of the phrase "stay slender" in such advertising.

It must also be remarked that in most of the earlier advertising of respondent it had never indicated that its bread was thinly sliced, but in connection with its defense, respondent's newer type of transparent bread wrappers were received in evidence, having been adopted some months after this litigation had begun (RXs 13-15, inclusive), in which the slogan theretofore used, "About 46 calories in an 18-gram slice" (See RXs 11 and 12) had been changed to "Thinly sliced" or "Thin Sliced". This is tantamount to an admission by respondent that its use of the expression "About 46 calories in an 18-gram slice" and similar statements, as previously used in nearly all of its advertising matter, was deceptive, and that its expert, Mr. Sperry, had been

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eminently correct in urging its deletion, or at least the inclusion of a clear explanation of what it meant.

As already referred to, the examiner finds from the record that the ordinary person does not understand what an 18-gram slice is. Such a person is unable to compare it with the ordinary slice of bread, which weighs 23 grams and contains approximately 63 calories as against the 46 calories in respondent's 18-gram slice. The ordinary member of the public, of course, cannot be expected to have any real understanding of this technical terminology, and does not understand the difference between nutritional values and caloric values. Dr. Kline testified to this effect.

It is of special significance that one of respondent's experts on nutrition, Dr. Horwitt, testified with respect to diets:

It is not the kind of food that you are dieting on, it is the amount of, the various techniques which are used, psychological techniques which are used to make a person decrease his weight, represent all kinds of techniques to cheat him, or trick him, or to make him—cheat himself, I mean, to get him to the point where he feels he is doing something to reduce his weight.

In the prescription of diets by the medical profession, of course, it is necessary and proper that such psychological devices be used to induce reluctant patients to revise their thinking and adopt diets which will control their weight. But, as the Supreme Court said long ago in *F.T.C. v. Raladam Co.* (1931), 283 U.S. 643 at page 653 [2 S.&D. 116, 122],

Of course, medical practitioners * * * are not in competition * * *. They follow a profession and not a trade and are not engaged in * * * business.

But respondent here is a corporation engaged in trade, competing for the bread market, and interested primarily in selling Hollywood Bread. It is not a professional expert prescribing for the psychological ills of patients, and the use by it of any psychological tricks to mislead and deceive the public is an unwarranted misapplication of such principles. The respondent's advertising in all the respects charged, therefore, violates the provisions of the Federal Trade Commission Act.

Upon consideration of the whole record, the hearing examiner reaches the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the respondent, and of the subject matter of this proceeding.
2. This proceeding is in the public interest.
3. The acts and practices of the respondent, as hereinabove found, are in violation of the Federal Trade Commission Act.

Accordingly,

It is ordered, That respondent, National Bakers Services, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, and distribution of the food product designated as "Hollywood Bread" or "Hollywood Special Formula Bread", or any other product of substantially similar composition, whether sold under the same names or under any other name or names, do forthwith cease and desist from:

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

(a) Hollywood Bread or any similar product is a low-calorie food;

(b) Said bread is substantially different in caloric value from ordinary breads;

(c) Said bread contains fewer calories than ordinary breads;

(d) A slice of Hollywood Bread contains fewer calories than a slice of ordinary breads, unless it is clearly and conspicuously disclosed in immediate conjunction therewith that Hollywood Bread is sliced thinner than some ordinary breads;

(e) Eating Hollywood Bread or any similar product will cause the consumer to lose weight or will prevent the consumer from gaining weight;

2. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any such food product, which advertisements contain any of the representations prohibited in paragraph 1 hereof.

OPINION OF THE COMMISSION

FEBRUARY 1, 1963

By Dixon, *Commissioner*:

This matter is before the Commission for consideration of respondent's exceptions to the hearing examiner's initial decision in which he found and concluded that respondent had violated, and was violating,

the Federal Trade Commission Act by disseminating false advertising of a food in commerce.

Respondent National Bakers Services, Inc. (sometimes herein referred to as National or respondent), is engaged in the business of licensing bakeries to produce a bread from respondent's special formula and to market the bread under respondent's exclusive trademark, "Hollywood." Respondent's 182 baker-licensees are located throughout the entire United States and "Hollywood" bread is sold, and "Hollywood" bread advertising has appeared, in each State of the United States.

An important part of the service rendered by respondent to its licensed bakeries is the preparation and dissemination of advertising extolling the merits of "Hollywood" bread. The baker-licensee pays the respondent a fee of one or more cents per loaf to defray the cost of preparation and placement of the advertising. The choice of media is determined in consultation with the licensee and may be either radio, television, or newspapers. The principal medium utilized is newspapers, which account for 75 percent of respondent's advertising expenditures.

National prescribes the wrapper in which the baker-licensee must market "Hollywood" bread. In the event a bakery wishes to engage in advertising in addition to the advertising placed by respondent, it must submit advance copies of the proofs to respondent for approval. Thus, respondent controls and directs all advertising of "Hollywood" bread.

The respondent supplies its licensees with formulas to produce both light and dark "Hollywood" bread. The advertising makes the same claims for both types and such differences as exist between them are, for the purposes of this proceeding, immaterial.¹

The most common form in which bread is marketed in the United States is in loaves of one-pound weight, sliced into approximately 20 slices of one-half inch thickness, with each slice weighing 23 grams. White bread is usually enriched by the addition of the nutrient elements thiamine, riboflavin, niacine and iron—elements which are diminished or lost when wheat is made into white flour. Such enrichment brings the nutrient level of white bread closer to that of whole wheat bread, with riboflavin content slightly higher than in whole wheat bread. The minimum specifications of commercial white and whole wheat bread are fixed by Federal and State laws, with the result that these breads are remarkably standardized throughout the

¹ "Dark Hollywood" bread is apparently not a whole wheat bread for the calorie content of standard whole wheat bread is significantly lower than the calorie content of respondent's bread.

United States. Of course, bakers are free to, and do, add additional elements such as vitamin B, wheat germ, calcium and milk products.

Bread produced from respondent's formula meets the basic requirements of Federal and State laws and is enriched by the addition of a "special mix" formulated by respondent. National contends that "Hollywood" bread contains between 37 percent and 42 percent "extra protein" when compared to standard commercial white and whole wheat bread. Respondent admits that there is no significant difference in the calorie content of "Hollywood" bread and commercial white bread. Both contain approximately 276 calories per 100 grams. Standard whole wheat bread at 240 calories per 100 grams is the lowest calorie wheat flour bread produced.

There is a superficial difference between the finished form in which "Hollywood" bread and standard white and dark breads are presented to the consumer. While standard breads are normally sold sliced into twenty 23-gram slices per one-pound loaf, "Hollywood" bread is sliced into twenty-five 18-gram slices per one-pound loaf. Because it is smaller, and for no other reason, the 18-gram slice of "Hollywood" bread contains approximately 46 calories as compared to the approximately 63 calories contained in the 23-gram slice of standard white bread. This thinner slice is the only significant difference that exists between "Hollywood" bread and most other commercial breads. While respondent protests that its bread is additionally enriched by the addition of proteins, the record clearly indicates that it is common practice in the United States for bakers to add additional enrichment of various kinds, including proteins, to their bread.

All of the advertising disseminated by respondent is directed and designed to appeal to the figure and weight conscious consumer. The advertisements stress "weight control," being "figure wise," "watching weight," and keeping "slim," "slender," "vital," "trim," and "lithe." All of these desirable ends are represented as attainable the "Hollywood way"—in the words of one of the advertisements, "a good figure is more than luck when a lady watches her weight the famous Hollywood way." The advertisements do not explain the "Hollywood way" except to point out that "Hollywood" bread has "46 CALORIES PER 18 GRAM SLICE."

The complaint, as amended by order of the hearing examiner, alleges that respondent's advertising contains three false representations: (1) that "Hollywood" bread is a "low calorie food"; (2) that it is lower in calories than ordinary breads; and (3) that eating "Hollywood" bread will cause the consumer to lose weight or prevent gaining weight. We shall consider these charges seriatim.

With respect to the first complaint allegation, the hearing examiner

found that respondent's advertising conveyed to consumers the impression that "Hollywood" bread was a "low-calorie food." As to the truth or falsity of this representation, he found: "There is substantial, credible expert testimony in the record that bread is not a low-calorie food, and therefore such representation of Hollywood Bread as a low-calorie food is false, misleading and deceptive." (Initial Decision at page 1128.) This is, of course, not a factual finding at all, but merely a summary conclusion. We are left in the dark as to the identity of the expert or experts who supplied the convincing testimony. Our review of the record reveals that the two experts called to testify in support of the complaint did indeed state on direct examination that bread is not a low-calorie food. However, on cross-examination, these experts testified that bread was not a high-calorie food." Neither expert could give a definition of the term "low-calorie food." In the opinion of one expert, bread is in the "intermediate zone." The two experts called by respondent testified in essence that the term "low-calorie" had little or no scientific meaning since whether a food is of a high or low caloric value depends upon the norm to which it is compared.

Bread is definitely low in calories when compared to peanut butter, chocolate, salad oil or lard, but is quite high in relation to water cress or cucumbers. The caloric value of food ranges in a continuum from the extremely low 12 calories per 100 grams contained in raw cucumbers to the 902 calories per 100 grams found in lard. Bread, at approximately 276 calories per 100 grams occupies a place in the scale which cannot be accurately described by relative words such as "high" or "low."

An official publication of the United States Department of Agriculture, placed in evidence in this record, contains the following declaration:

Bread has a place in the well-balanced diet, including the reducing diet. The fact that five slices of white bread supply only 10 percent of the calories recommended for a man 25 years of age (National Research Council recommended allowances) indicates that bread should not be considered a high calorie food.

While we do not read this statement as indicating that bread is, in fact, a "low-calorie food," we feel that an explicit finding that it is not would be difficult to reconcile with the quoted statement.

Of course, we recognize that the term "low-calorie" is in common usage but there is no showing in this record that the term has a common, accepted meaning. Apparently it means different things to different people. From the testimony in this record, it appears that consumers are almost wholly ignorant of the exact, or even approximate, caloric content of the various foods. In spite of the wide variety

of authoritative and factually sound published data available at little or no cost on this subject, the public appears to entertain many misconceptions and prejudices and their buying habits are probably motivated in accordance with such erroneous beliefs. For example, it is popular to consider bread as quite high in caloric content when compared to raw beef. In actual fact, the opposite is true. Most beef cuts are considerably higher in caloric content than bread. For example, a medium-lean porterhouse steak will contain 342 calories per 100 grams of weight; a rib roast contains 319 calories per 100 grams; and hamburger contains 364 calories per 100 grams. On the other hand, it is doubtful that very many consumers would label apple pie as low in calories and yet it contains less calories per 100 grams than ordinary white bread, 246 calories compared to 276 calories for bread.

Thus, as we view it, this record does not support a finding as to the exact meaning of the term "low-calorie" and we are, as a consequence, unable to find as a fact that "Hollywood" bread rating approximately 276 calories per 100 grams is not in that category. The hearing examiner's contrary finding on this point must be reversed.

The second of the three complaint charges is the most important by far. In our view, the other two charges are variations on this central theme that respondent has represented its bread to be lower in calories than ordinary commercial bread. If respondent has made this representation and it is found to be false or misleading, then an order coping with all possible methods of capitalizing upon the misrepresentation can be entered.

There is not the slightest doubt but that respondent's advertisements are intended to, and do, convey the impression that "Hollywood" bread is lower in calories than standard breads. While the whole of each of the advertisements is directed to this deception, the particular language used to hammer home the point is "ONLY ABOUT 46 CALORIES PER 18 GRAM SLICE."

The record reveals that the consuming public has no conception of the gram weight or calorie content of standard commercial bread and that this statement when made in the context of the other statements advocating "keeping slim," conveys and forces the conclusion that "Hollywood" bread is lower in calories. Respondent's clear intention to convey this impression is indicated *inter alia* by the fact that it frequently places the legend "UP TO 42% EXTRA PROTEIN" in close proximity to the "46 CALORIES PER 18-GRAM SLICE" representation. One of the advertisements joins these two representations by enclosing them within a dotted-line box. The respondent's experts testified that the thin slice of "Hollywood" bread does not con-

tain 42 percent more protein but, in fact, contains approximately the same amount of protein as a standard slice of ordinary bread. The protein representation would be truthful only if the "Hollywood" bread and standard breads were similarly sliced. No matter how the housewife reads these two representations, she must receive a false impression. The consumers are not informed by the advertising that the calorie comparison implied is between units of unequal weight while the protein comparison is between units of the same weight. Quite naturally they assume, as intended, that units are of the same size and that on this basis respondent's bread is both lower in calories and higher in protein.

Our conclusion concerning the misleading impression created by respondent's advertisements is not based solely upon the use of the term "ONLY 46 CALORIES PER 18-GRAM SLICE" but also upon a viewing of the advertisements as a whole as they would be viewed by the average consumer.² Viewed in this manner, the advertisements definitely create the impression that "Hollywood" bread is specially concocted by formula which results in a bread of lower caloric content. The consumer and expert testimony in the record supports this conclusion and, indeed, there is nothing in the record which rebuts the evidence of consumer deception. Respondent attempts to make much of the quite obvious fact that the deception principally arises from the ignorance of the public as to the weight and caloric content of a standard slice of commercial bread. But this fact was known to respondent when it prepared and promulgated its advertising and the advertisements were designed to capitalize on the public ignorance. They are, therefore, clearly deceptive. That they would not mislead trained nutritionists is immaterial, for they were not directed to the esoteric few but to "* * * the public—that vast multitude which includes the ignorant, the unthinking, and the credulous * * *"³

Here, as in *Bakers Franchise Corporation* (Docket No. 7472, Order to Cease and Desist, July 19, 1961) [59 F.T.C. 70], we must conclude that respondent's failure to disclose in the advertisements the fact that its bread was sliced thinner is significant but not essential to the decision. As we pointed out in that matter, the mere disclosure within the context of advertisements of this stripe that the bread is thinly sliced may heighten rather than lessen the misleading impression created.

The arguments advanced by the respondent in this matter are sub-

² *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 182 [3 S. & D. 378] (6th Cir. 1941).

³ *Earl Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 [3 S. & D. 528, 531] (7th Cir. 1942).

stantially similar to those considered and rejected on similar facts in *Bakers Franchise*.

We come now to the third and final allegation, that respondent falsely represented "* * * that eating said bread will cause the consumer to lose weight or prevent the consumer from gaining weight." The wording of this allegation gives us a good deal of trouble. We assume at the outset that we cannot interpret it literally as meaning that "eating" respondent's product will have some druglike effect upon the body and effect a weight loss, with the result that the more consumed the thinner you become. Such an interpretation would do violence to common sense and was probably not intended by the drafter of the complaint or by the hearing examiner who approved this amended allegation. As we understand it, this charge is a ramification of the second and central charge that respondent has falsely advertised its bread as being lower in calories than standard commercial bread. The allegation must be read as though the words "in lieu of standard commercial bread" were inserted after the phrase "eating said bread." As so interpreted, the charge means that respondent has falsely represented that the substitution of "Hollywood" bread for standard bread in the normal diet will effect a weight loss or prevent a gain in weight.

Of course, since "Hollywood" bread contains approximately the same number of calories as standard bread, the only way in which a consumer can reduce with "Hollywood" bread is by eating less of it. But respondent's advertisements do not inform the consumer of this unvarying fact and therein lies their deceptiveness. The implication of the advertisement is that "Hollywood" bread contains less calories and that a consumer can eat an equal amount of it as other breads and yet effect a weight loss. This implication is false and respondent must be enjoined from its dissemination.

We are not persuaded that all deception ceases when the consumer takes a loaf of "Hollywood" bread home and discovers that the slices are, in fact, thinner than those to which she is accustomed. She is never told in the advertisements or on the bread wrapper itself that "Hollywood" bread is not intrinsically lower in calories than other breads. There is nothing in the thinner slice to suggest that "Hollywood" bread is not a lower calorie bread, and in all probability the consumer would consider the smaller slice as merely an additional weight-reducing faculty.

THE ORDER

There are several changes which must be made in the hearing examiner's order. Section 1(a) forbidding representing "Hollywood"

bread as a low calorie food cannot stand, for the allegation was not proved. Section 1(b) we consider redundant to the prohibition in Section 1(c) against representing that "Hollywood" bread is lower in calories than standard bread. Section 1(b) would not be redundant could we foresee or imagine that respondent would ever wish to represent that its bread is higher in calories than ordinary bread, but as we view it such a possibility is too remote to warrant the entry of an order.

Respondent contends that the order to cease and desist promulgated by the hearing examiner is punitive and that while no order at all is warranted, the Commission could accomplish its ends by an order limited to the single provision contained in Section 1(d) of the hearing examiner's order. This provision would require respondent to cease disseminating advertisements which represent:

A slice of Hollywood Bread contains fewer calories than a slice of ordinary breads, unless it is clearly and conspicuously disclosed in immediate conjunction therewith that Hollywood Bread is sliced thinner than some ordinary breads.

We can understand the respondent's attenuated objections to the entry of this sole provision since it would permit advertising of substantially the same content as has been used in the past. Moreover, it is our view that the Commission order should contain no provision of this nature, since its effect is to sanction calorie comparisons when accompanied by disclosure of the thinner slice. We do not feel that such disclosure will have any appreciable clarifying effect on the deceptive advertisements and may well serve to heighten and not eliminate the deception. Therefore, the order which we shall issue will contain no provision of this type.

While the hearing examiner's order goes a long way toward enjoining the unlawful aspects of respondent's advertising, we are not convinced that it is completely adequate. Respondent's advertising is designed to appeal to weight-conscious consumers. The basic deception and unfairness here involved is the creation of the impression that "Hollywood" bread is more appropriate in a reducing diet than other breads because of its lower calorie content. Thus, the image is created that "Hollywood" bread is a reducing food possessed of special slenderizing properties. It seems to us basically unfair to present a bread which is exactly like other commercial bread in caloric content as being of special utility to a person desiring to lose weight.

We are not unconscious of the fact that the consumers in this country are today more weight and figure conscious than ever before. Whether this is due to publicity concerning the increased incidence of certain diseases in obese persons or because of the emphasis on glamour and attractiveness now prevalent is unimportant. The fact is that weight

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loss or weight stabilization claims have a very potent and irresistible appeal to a significant section of our population. Thus, as never before, we feel that advertising of this type should be completely truthful and undeceptive.

At the same time, the respondent has a legitimate interest in pursuing business by advertising and all other legitimate methods. It should be permitted to truthfully represent such special properties as its bread may have without the constricting bands of a punitive order. Doubtless respondent's bread can be truthfully advertised as a specially enriched bread which is thinner sliced in order to give the consumer an opportunity to serve smaller individual portions.

We have attempted to prepare an order which will meet the desirable end of coping with the basic deception found in respondent's advertising, but which will permit it to continue to advertise such special merits as its product actually possesses. We feel that these ends can be accomplished by an order which enjoins the dissemination of advertising which represents or implies that:

(a) "Hollywood Bread" contains fewer calories than other commercial breads;

(b) Substituting "Hollywood Bread" for other commercial breads in the normal diet will cause a loss of weight or prevent a gain in weight, or that "Hollywood Bread" is useful in a reducing or weight control diet, unless it is clearly and affirmatively disclosed in immediate conjunction therewith that "Hollywood Bread" has no less calories than other commercial breads and its only usefulness in a reducing or weight control diet derives from the fact that its thinner slices enable the consumer to conveniently serve and consume smaller individual portions.

The initial decision of the hearing examiner is adopted as the decision of the Commission, except that: (1) such findings and conclusions as are in conflict with this opinion are vacated and set aside; (2) the order proposed by the hearing examiner is not adopted and in lieu thereof the Commission will issue its own order to cease and desist as described above.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter.

ORDER PROVIDING FOR THE FILING OF EXCEPTIONS TO PROPOSED
FINAL ORDER

FEBRUARY 1, 1963

The Commission having rendered its decision, in part adopting and in part modifying the hearing examiner's initial decision, and having

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determined that pursuant to § 4.22(c) of the Commission's Rules of Practice respondent should be afforded the opportunity to file exceptions to the Commission's Proposed Final Order:

It is ordered, That respondent may, within twenty (20) days after service upon it of this order and the attached Opinion of the Commission, file with the Commission its exceptions to the Proposed Final Order herein set out, a statement of its reasons in support thereof, and a proposed form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondent's exceptions, file a statement in reply thereto supporting the Proposed Final Order.

It is further ordered, That if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Proposed Final Order shall then become the final order of the Commission.

PROPOSED FINAL ORDER

It is ordered, That respondent, National Bakers Services, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the food product designated as "Hollywood Bread" or "Hollywood Special Formula Bread," or any other products of substantially similar composition, whether sold under the same name or under any other name or names, do forthwith cease and desist from:

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

(a) "Hollywood Bread" contains fewer calories than other commercial breads;

(b) Substituting "Hollywood Bread" for other commercial breads in the normal diet will cause a loss of weight or prevent a gain in weight, or that "Hollywood Bread" is useful in a reducing or weight control diet, unless it is clearly and affirmatively disclosed in immediate conjunction therewith that "Hollywood Bread" has no less calories than other commercial breads and its only usefulness in a reducing or weight control diet derives from the fact that its thinner slices enable the consumer to conveniently serve and consume smaller individual portions.

2. Disseminating or causing to be disseminated any advertise-

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ment, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any such food product, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the hearing examiner's initial decision, as modified by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

Commissioners Anderson and Higginbotham not participating.

ON RESPONDENT'S EXCEPTIONS TO THE PROPOSED FINAL ORDER

APRIL 10, 1963

By the Commission:

Pursuant to § 4.22(c) of the Commission's Rules of Practice, respondent has filed exceptions to the proposed order to cease and desist issued by the Commission on February 1, 1963. Complaint counsel has filed an answer opposing allowance of respondent's exceptions and requests the Commission to reconsider its action dismissing one of the complaint charges. The Commission has considered the viewpoints of both parties and in this memorandum states its conclusions and announces its decision thereon.

Respondent's first exception is to paragraph 1(a) of the order which prohibits it from representing that "Hollywood Bread" contains fewer calories than other commercial breads. Respondent requests a proviso which would permit representing that a *slice* of "Hollywood Bread" contains less calories than a *slice* of ordinary bread when it is affirmatively disclosed that the "Hollywood" slice is thinner.

It is the Commission's view that allowing this exception would permit respondent to continue its advertising in much the same form as that found to be deceptive. For example, if we should allow this first exception, the order would not cover an advertising representation of this type: "THINNER-SLICED HOLLYWOOD BREAD CONTAINS ONLY FORTY-SIX CALORIES PER SLICE." Such a representation is still capable of deceiving a substantial segment of the public. The Commission has found that the public has no conception of the exact number of calories contained in a slice of bread and the adjective phrase "thinner sliced" will not necessarily serve to obviate the deception created by the calorie representation.

Respondent claims that provision 1(b) of the order fails as a matter of law because it requires an affirmative disclosure that Hollywood bread has no less calories than other bread. Respondent cites *Alberty v. Federal Trade Commission*, 182 F. 2d 36 [5 S. & D. 184]

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(D.C. Cir. 1950), and *United States Association of Credit Bureaus v. Federal Trade Commission*, 299 F. 2d 220, 223 [7 S. & D. 358] (7th Cir. 1962), in support of its contention. All that *Alberty* requires is that an order requiring affirmative disclosure must be buttressed by a finding “* * * that failure to make such statements is misleading because of the things claimed in the advertisements.” (182 F. 2d at 39.) In its opinion, the Commission found “There is not the slightest doubt but that respondent’s advertisements are intended to, and do convey the impression that ‘Hollywood’ bread is lower in calories than standard breads.” It is our view that this finding effectively disposes of *Alberty*.

In the *Credit Bureaus* case, the Court refused to affirm the part of our order which required an affirmative disclosure that the purpose of the skip-tracing forms used was the collection of debts. The case is inapposite. The Court’s decision was based upon a failure of the Commission or the hearing examiner to find that the forms used by the respondent were deceptive and, in fact, the petitioner’s forms were not attacked in the complaint as deceptive.

In its third exception, the respondent objects to the provision of paragraph 1(b) of the order which would require it, when making reducing or weight control claims, to disclose that the “only usefulness” of Hollywood bread in a diet derives from the fact that its thinner slices enable the consumer to serve and consume smaller portions. Respondent contends that “The record is uncontradicted that the usefulness of Hollywood Bread on a reducing diet derives *not only* from the fact that its thinner slices enable the consumer to conveniently serve and consume smaller individual portions, *but also* from the fact that these smaller individual portions still provide as much nutrition as the larger slice of ordinary commercial bread.” We do not agree with respondent’s major premise. In the first place, the difference in protein content is not significant in relation to the body’s daily needs. Secondly, while the respondent’s expert did testify that a slice of Hollywood bread contained as much protein as a standard slice of ordinary bread, protein is certainly not the only nutrient found in bread. Bread is a source of other nutrients including minerals and vitamins. A person reducing his bread intake by eating a slice of “Hollywood Bread” when it has been his custom to eat a slice of ordinary bread, would deprive himself of all of the food value, except for protein, of the amount of bread not consumed.

Further, the opinion makes perfectly clear that the respondent may truthfully represent the ingredients, including the protein content of its bread. We held in the opinion “It should be permitted to truthfully represent such special properties as its bread may have * * *”

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and "Doubtless respondent's bread can be truthfully advertised as a specially enriched bread which is thinner sliced in order to give the consumer an opportunity to serve smaller individual portions."

In his reply to respondent's exceptions, complaint counsel asks the Commission to reconsider its decision not to enjoin the respondent from representing that "Hollywood Bread" is a low-calorie food. While Rule 4.22(c) does not provide for complaint counsel's request at this stage, it has been advanced with such earnestness and sincerity that the Commission is forced to conclude that its opinion does not adequately explain the reasons for its dismissal of this charge. Thus, in the belief that some additional clarification is needed on this point, the Commission here discloses other factors which motivated its decision. In the first place, it was not at all clear that the respondent had in fact represented that "Hollywood Bread" was a low-calorie food. The only evidence to support the charge was found in one of its newspaper advertisements and in a small brochure which the consumer can obtain by writing to respondent. The statements in both advertisement and brochure were on the innocuous side. In the advertisement it was stated "There is only one sure way to reduce—your low-calorie foods must be nutritious and healthful. Millions of beauty-conscious women include Hollywood Bread in their daily menus." The brochure contains several pages of sample daily menus and on the last page advises that the diets were designed "to help you like low-calorie foods." Of course, each of the menus included Hollywood bread. These oblique references are not substantial evidence that the respondent has advertised its bread to be a low-calorie food.

Thus, it is the Commission's view that the allegation failed on two factual grounds: As described in the Commission's opinion, for failure to establish that Hollywood bread is, in fact, not a low-calorie food, and for the above-described failure to show that it was, in fact, advertised as a "low-calorie food." Moreover, another and equally important reason for dismissing this charge exists. In its opinion the Commission found that "Hollywood Bread" is indistinguishable, insofar as calorie content is concerned, from the ordinary white bread sold by thousands of small and large bakeries throughout the United States. Therefore, a finding that Hollywood bread is a high-calorie food or merely that it is not a low-calorie food would reflect unfavorably on all bread. If such a finding were necessary to this case and the evidence in support thereof were substantial and convincing, then, of course, the Commission would make the finding. But, the finding is neither necessary nor appropriate in these premises. The public is afforded adequate relief by the order as it now stands. The additional protection sought by complaint counsel can only be obtained at the

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risk of harming the business of all bakers, a risk not worth the gain.

It is the Commission's conclusion that no showing of error or injustice has been made by either party and that the proposed order to cease and desist should remain unchanged and issue as the final order of the Commission.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter.

FINAL ORDER

APRIL 10, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, respondent was served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondent having made timely filing of its exceptions to the order proposed which were opposed by a reply filed by counsel supporting the complaint and the Commission upon review of these pleadings having determined that respondent's exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It is ordered, That respondent, National Bakers Services, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the food product designated as "Hollywood Bread" or "Hollywood Special Formula Bread," or any other products of substantially similar composition, whether sold under the same name or under any other name or names, do forthwith cease and desist from:

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

(a) "Hollywood Bread" contains fewer calories than other commercial breads;

(b) Substituting "Hollywood Bread" for other commercial breads in the normal diet will cause a loss of weight or prevent a gain in weight, or that "Hollywood Bread" is useful in a reducing or weight control diet, unless it is clearly and affirmatively disclosed in immediate conjunction therewith that "Hollywood Bread" has no less calories than other commercial breads and its only usefulness in a reducing or weight control diet derives

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from the fact that its thinner slices enables the consumer to conveniently serve and consume smaller individual portions.

2. Disseminating or causing to be disseminated any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any such food product, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

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

It is further ordered, That respondent National Bakers Services, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order set forth herein.

Commissioner Anderson not participating for the reason that he did not hear oral argument, and Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

IN THE MATTER OF

FORTE-FAIRBAIRN, INC., ET AL.