

- (b) The debtor's wages attached;
- (c) The debtor's wages garnisheed.

4. Using forms or any other items of printed or written matter which simulate legal process.

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

By the Commission, Commissioner Anderson not participating.

IN THE MATTER OF
STANDARD MILLS, INC., ET AL.

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

Docket 8484. Complaint, May 2, 1962—Decision, Sept. 30, 1963

Order requiring New York City converter jobbers of upholstery fabric—buying from mills the raw, unbleached grey goods which they then contracted with finishing mills to color and pattern and finally sold to furniture manufacturers, department stores, decorators and upholsterers—to cease the unqualified use in their trade name of the word “Mills”, and to accompany the name on letterheads, invoices and labels with the words “Converters, Jobbers, and Distributors of Fabrics—not Textile Manufacturers or Mill Owners” in type $\frac{3}{4}$ the size of that used in the trade name and immediately under the name; and with a choice of using the same qualification as a footnote, preceded by an *asterisk* on all other *printed* matter.

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 Standard Mills, Inc., a corporation, and Arthur J. Smith and Lloyd Smith, individually and as officers of said corporation, hereinafter referred to as respondents, have 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 Standard Mills, Inc., is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 461 Park Avenue South, New York, New York.

Respondents Arthur J. Smith and Lloyd Smith are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of textile fabrics to the upholstery trade including decorators and retail stores.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business in soliciting the sale of, and selling, textile fabrics, respondents do business under the name of Standard Mills, Inc., and use that name on letterheads, invoices, labels and tags and in various advertisements of their products.

PAR. 5. Through the use of the word "Mills" as part of the respondents' corporate name, respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

PAR. 6. Said representation is false, misleading and deceptive. In truth and in fact respondents do not own or operate or control the mills or factories in which the textile fabrics sold by them are manufactured but they buy said textile fabrics from others.

PAR. 7. There is a preference on the part of the purchasers to buy products, including textile fabrics, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of textile fabrics of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead purchasers into the erroneous and mistaken belief that said statements and repre-

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sentations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a) (1) of the Federal Trade Commission Act.

Mr. Charles W. O'Connell for the Commission;
Mr. Lawrence G. Nusbaum, Jr., of New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

OCTOBER 11, 1962

PRELIMINARY STATEMENT

The Federal Trade Commission seeks, in this proceeding under § 5 of the Federal Trade Commission Act¹ to compel respondents to abandon the name under which their business has been conducted since the year 1908 by deleting the word "Mills" from the corporate name "Standard Mills, Inc." The complaint, *inter alia*, alleges:

PARAGRAPH FIVE: Through the use of the word "Mills" as part of the respondents' corporate name, respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

PARAGRAPH SIX: Said representation is false, misleading and deceptive. In truth and in fact respondents do not own or operate or control the mills or factories in which the textile fabrics sold by them are manufactured but they buy said textile fabrics from others.

PARAGRAPH SEVEN: There is a preference on the part of the purchasers to buy products, including textile fabrics, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them * * *.

PARAGRAPH NINE: The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead purchasers * * *.

On June 26, 1962, complaint counsel requested that official notice² be taken:

1. That the use of the word "mills" in a corporate or trade name constitutes a representation that the user owns and operates mills or factories in which products sold by it are manufactured.

¹ 15 U.S.C. § 45.

² See Federal Trade Commission's Rules of Practice for Adjudicative Proceedings Rule 4.8(5); Rule 4.12(c): "Official Notice of Fact." When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

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and

2. That a preference exists on the part of many purchasers to buy directly from mills or factories believing that by so doing lower prices and other advantages thereby accrue to them.

Complaint counsel relied upon a series of legal precedents commencing with *FTC v. Royal Milling Co.*, 288 U. S. 212 (1933); *FTC v. Mid West Mills, Inc.*, 90 F. 2d 723 (1937); *Bear Mill Mfg. Co. v. FTC*, 98 F. 2d 67 (1938); *Herzfeld v. FTC*, 140 F. 2d 207 (1944); *Rudin & Roth, et al. v. FTC*, 53 F.T.C. 207 (1956); *Dexter Thread Mills, Inc., et al.*, 53 F.T.C. 59 (1956); *Amity Mills, Inc.*, 53 F.T.C. 74 (1956); *Wool Novelty Co., Inc., et al.*, 54 F.T.C. 1723 (1958). These decisions are discussed later herein.

On July 5, 1962, the hearing examiner signed and issued his Notice of Intention to Take Official Notice in substantially the form requested by complaint counsel but provided that upon making a timely motion as required by the Rules of the Commission respondents would be afforded an opportunity to disprove the noticed facts at the hearing. Respondents timely notified complaint counsel and the hearing examiner of their intention at the hearing to rebut or disprove the facts of which official notice had been taken. Respondents' answer denied the legally operative allegations in the complaint and the facts which had been officially noticed. The issue here is whether complaint counsel has in this record sustained the burden of proof imposed upon him when his sole evidence to prove the allegations in the complaint is the official notice taken of facts by the examiner, and respondents have nevertheless introduced uncontradicted reliable, probative and substantial evidence contrary to the noticed facts. The hearing examiner's act in taking official notice served only to shift the "burden of going forward" from complaint counsel to respondents. The "burden of proof," as distinguished from the burden of going forward, is always upon the proponent of any factual proposition.³ However, the facts which the examiner had officially noticed were not, by such official noticing, conclusively presumed to be true, but were subject to being contradicted by reliable, probative and substantial evidence. If respondents have contradicted the officially noticed facts by such evidence, and complaint

³ Section 7(c) of the Administrative Procedure Act provides: "* * * except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof * * * But * * * no * * * order shall be issued except * * * in accordance with reliable, probative and substantial evidence."

Section 4.12(a) of the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission, effective June 1962, provides: "(a) *Burden of proof.* Counsel supporting the complaint shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."

Section 4.19(b) provides: "* * * Initial decisions shall be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence."

counsel has adduced no evidence other than the technical noticing by the hearing examiner, complaint counsel has not sustained the burden of proof imposed upon him by the Administrative Procedure Act and the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission. (See footnote 3.)

The record consists of the testimony of Arthur J. Smith, president of the corporate respondent, and its majority stockholder, who was the sole witness offered by complaint counsel, and Commission's Exhibits 1-A through 19. Respondents offered the testimony of Arthur Smith; Joseph Sanders, retired, who had been in the textile business for 60 years, and attested to Standard Mills' reputation for honesty and integrity; Morris Muster, a manufacturer of furniture who had been purchasing merchandise from the respondents for several years past and had been in the upholstery industry for 42 years; Sidney Kisner, for 13 years a buyer of upholstery goods for the upholstery department of Gimbel's Department Store, 33rd and Broadway, New York City, and Lawrence G. Nusbaum, Jr., counsel for respondents.

This complaint issued May 2, 1962. A prehearing conference was held in New York City on July 9, 1962, and hearings were held in New York City also on July 11, 1962, and concluded on July 12, 1962. On the last day of the hearing, the hearing examiner suspended the proceedings for quite some time in order to afford complaint counsel an opportunity to offer evidence to rebut the proof offered by respondents. Complaint counsel did not offer any rebuttal evidence. The following colloquy appears in the record at page 213:

Hearing Examiner Gross. It is now 12:15 p.m. The last witness was excused at 11:35 a.m., at which time the respondent indicated that they were about ready to close their case-in-chief.

Counsel supporting the complaint informs me that he wants to have the Hearing Examiner and all of the parties, including the Court Reporter, stand by even though he doesn't have any witnesses available.

Mr. O'CONNELL. Let me explain that. I have been making a determined effort to contact witnesses.

Hearing Examiner Gross. But you cannot get anyone?

Mr. O'CONNELL. I have not gotten any so far, but I am still working on it.

Hearing Examiner Gross. Must we not assume that you simply cannot get them?

Mr. O'CONNELL. It might turn out that way.

Hearing Examiner Gross. We will come back here at 2 o'clock. We are recessed at this time until 2 p.m.

Proposed findings, conclusions and briefs have been filed. Based upon the entire record, including the exhibits, the examiner makes the findings and conclusions hereinafter set forth. Any finding

proposed by the parties which is not hereinafter made in the form proposed, or in substantially that form, hereby is rejected. The fact that no finding summarizes the evidence in the exact manner which the parties have requested does not mean that such evidence has not been considered. It means merely that the examiner deems the evidence as summarized in his findings to be sufficiently relevant, probative, substantial and material to dispose of the issues presented. All motions which have not previously been ruled upon, and which are not herein specifically ruled upon, are hereby overruled and denied.

Based upon the entire record, the hearing examiner makes the following:

FINDINGS OF FACT AND CONCLUSIONS

1. Respondent Standard Mills, Inc. (a New York corporation), at 461 Park Avenue South, New York, New York, was incorporated under the laws of the State of New York on August 6, 1934. It sells textile fabrics to furniture manufacturers, upholsterers, department stores and interior decorators located throughout the United States. The business since its founding in 1908 by Morris Simon and Joseph Heller has been carried on under the name "Standard Mills". The act of incorporating the company in August 1934, insofar as it is relevant to the issue in this proceeding, served only to add "Inc." to "Standard Mills", the business name which had been in use for 26 years prior thereto. Standard Mills, Inc., has been continuously and uninterruptedly in business as a converter jobber or distributor of textiles for a period in excess of 54 years, and during that time has earned and enjoyed a reputation for honesty and fair dealings with the people with whom it has done business.

2. All of the issued and outstanding shares of stock of Standard Mills are owned by respondent Arthur J. Smith, its president, and Lloyd Smith, his son, is vice president, in a ratio of 75% to 25% respectively.

3. Arthur J. Smith and Lloyd Smith formulate, direct and control the acts and practices of the corporate respondent. Arthur J. Smith, Lloyd Smith and Arthur's wife, Irene Smith, constitute the corporation's Board of Directors. Irene Smith is secretary-treasurer of the corporation (Tr. 14). The address of Lloyd Smith is the same as that of the corporate respondent. Arthur J. Smith resides at 1500 Bay Road, Miami Beach, Florida.

4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products when sold to be shipped from their place of business in New York

State to purchasers thereof in various other States of the United States. They also cause some fabrics to be drop-shipped from Neisler Mills, Inc., Kings Mountain, North Carolina, in interstate commerce with their return address as Kings Mountain, North Carolina, noted on the shipping labels.

5. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in their products in commerce as "commerce" is defined in the Federal Trade Commission Act.

6. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of textile fabrics of the same general kind and nature as that sold by the corporate respondent.

7. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.

8. Arthur Smith, its president and majority stockholder, joined Standard Mills, Inc., in 1938 as a salesman at a starting salary of \$35 per week, and has been with the corporation continuously since then. By dint of hard work, industry and application, Mr. Smith was able to become the sole stockholder. His son, Lloyd Smith, was discharged from the armed services in 1948 and became associated in the business.

9. As a result of the growth and progress of its business, Standard moved from its original location in a 1200 square foot dilapidated loft on Broome Street, New York City, to 18 West 30th Street, in the same city where it occupied 4,000 square feet. Commencing in May 1961, and since that time, Standard has rented for \$12,000 per year, a two-story location in New York City at 461 Park Avenue South, with a decorated store front costing \$5,000, display windows professionally trimmed at a cost of \$1,600 per year, a walnut paneled, vinyl-floored sales room, a showroom for private exhibits, executive offices, administrative space, and bins on both floors to hold the inventory of textiles purveyed by it. Standard employs a total of sixteen persons including the Smith family. Its annual sales volume has increased from \$50,000 per year in 1908 to almost \$500,000 in 1961. Arthur J. Smith testified that he and his son had incurred a personal liability of \$80,000 to raise sufficient capital to move the business to its present location.

10. The company keeps an average inventory of \$100,000 on its premises. As converters and distributors, Standard Mills sells upholstery fabric to furniture manufacturers, department stores, decorators and upholsterers and does not sell to persons seeking to buy

upholstery fabric for other than business purposes. Mr. Smith testified (p. 91):

* * * A converter is one that would contract for special woven goods, confined patterns, according to his own specifications style-wise and color-wise, and would be compelled to place a contract for a substantial quantity. That is on the so-called finished yarn-dye goods.

On the piece dry goods, which we also sell, we have to place contracts for quantity goods running to several thousands of yards, and then we send them to our dyers and have them dyed and processed and finished according to our own specifications.

I would say we are a middleman. We are not a manufacturer, not a weaver of goods, but placing substantial contracts with manufacturers who only weave on special contract to converters.

In reply to questions from complaint counsel, Arthur Smith testified further (Tr. 93) that the following statement from the Wall Street Journal of March 31, 1961, is "a fair statement of what a converter does":

The responsibility for this kaleidoscopic world of colors from year to year and season to season rests largely not with apparel designers or textile mills but with business men hardly known at all to the public. They are called textile converters.

Basically, middlemen between the textile producers and the garment makers, converters are merchants and style specialists who do no manufacturing themselves. They buy from mills the raw, unbleached cloth called grey goods, which has no consumer appeal. The mills, however, prepare the grey goods to the converters' specifications, perhaps weaving a design into the cloth.

The converters then contract to have other factories called finishing mills, color and pattern the cloth in styles they think will be popular months ahead.

11. Each year prior to bringing out the company's new sample books, Arthur J. Smith creates new designs and patterns for their fabrics. He causes Neisler Mills, Inc., of Kings Mountain, North Carolina (and to a much lesser extent Virginia Mills in Swepsonville, Georgia, and Sunbury Mills), to produce test patterns of the new designs on their looms. These test patterns may be rewoven as many as six times in order to comply with Mr. Smith's specifications. Neisler Mills and other Southern looms annually weave, under specific contract, approximately 200,000 yards of fabrics of varying and exclusive styles, colors and patterns for Standard Mills. These fabrics are cut into 50-yard lengths and wrapped around cardboard cylinders which are known in the trade as a "bolt." The bolts are shipped to respondents' place of business in New York City. Respondents sometimes buy only grey goods from a mill and thereafter the grey goods are dyed to specified colors. The fabrics are subjected to processes, Scotch guard or sylmerizing, under respondents' direction, which make them water proof and stain resistant. Thereafter the bolts are placed in Standard Mills' bins.

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12. Each year respondents prepare and distribute to their customers and prospective customers at great cost approximately 25,000 professionally laid-out, sample books (of which CX-17 and RX-2 are specimens). The sample books show the patterns, colors and designs of the fabrics which respondents are offering to their customers. Exclusive of postage, shipping costs and labor, the cost of such sample books in 1961 was testified to have been \$82,000. This method of advertising and promoting the sale of its merchandise has been utilized by Standard Mills at least since 1939. They also advertise and promote their name, services and fabrics by means other than sample books. The sample books are forwarded to furniture manufacturers, interior decorators, upholsterers and department stores who exhibit them to their customers. The customer makes his selection from the book and the order is then sent by the furniture manufacturer, interior decorator, upholsterer or department store to the corporate respondent. Standard Mills stocks sufficient inventory so that it is usually able to ship the fabric ordered in the exact yardage required in a matter of hours.

13. The corporate respondent's gross sales for the years indicated were stated to be: 1955, \$264,000; 1956, \$271,000; 1957, \$243,000; 1958, \$296,000; 1959, \$428,000; 1960, \$484,000; 1961, \$427,000. It has approximately 2,500 active accounts on its books to whom it sells its merchandise.

14. In the course and conduct of their business in soliciting the sale of, and selling, textile fabrics, respondents do business under the name of "Standard Mills, Inc." and use that name on letterheads, invoices, labels and tags and various advertisements of their products. In immediate proximity and in juxtaposition to the words "Standard Mills, Inc." respondents have the following legends in clear type so as to be as easily readable as the name: On CX-8, a letterhead: "*Converters and distributors of upholstery fabric*"; on CX-9, a wholesale price list: "*Converters and distributors of upholstery fabrics*"; on CX-10, Arthur Smith's business card: "*Converters of upholstery fabrics*"; on CX-11, an order form: "*Converters and distributors of upholstery fabrics*"; on CX-18, a display card: "*Converters and distributors of decorative upholstery fabrics*"; on CX-19: "*Converters of Decorative Upholstery Fabrics*"; on CX-17, a red-backed sample books: "*Converters of Decorative Woven Fabrics*"; on RX-2, another sample book: "*Converters*." RX-5, which is a report of the National Credit Office issued September 15, 1961, and is usually distributed nationally to the trade, refers to Standard Mills, Inc., as "Conv. & Job. Uphol. Fabrics"

meaning "Converter and Jobber of Upholstery Fabrics." RX-6, a May 2, 1958, report from the National Credit Office, has the same notation as RX-5. RX-7, a billing form, has: "*Converters and Distributors of Upholstery Fabrics*"; RX-8, an order form: "*Converters and Distributors of Upholstery Fabrics*." By using these words juxtaposed to, and in close proximity with, the name "Standard Mills," respondents have prevented and now prevent any deception concerning the true nature of their business operations to any person buying or interested in buying their merchandise.

15. All the witnesses, Joseph Sanders, Morris Muster, Sidney Kisner, and Arthur J. Smith, testified, and are uncontradicted in this record, that respondents have not at any time and do not now, as alleged in the complaint, "represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured." The reliable, probative and substantial evidence in this record does not prove that respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

16. The widely circulated trade and credit publications for the industry in which Standard Mills is engaged, *Lyons Mercantile Agency*, and *Dun & Bradstreet*, have at all times unequivocally negated the representation or any inference that Standard Mills, Inc., owns or operates mills or factories in which the textile fabrics sold by it are manufactured. Joseph Sanders, whose testimony appears at page 97, *et seq.*; Morris Muster, whose testimony appears at page 102, *et seq.*; and Sidney Kisner, whose testimony appears at page 188, *et seq.*, all testified unequivocally that during all the time they did business with Standard Mills they knew it was only a converter and distributor of decorative upholstery fabrics, and not a manufacturer. Respondents are generally known throughout the trade only as converters and distributors.

The examiner finds that complaint counsel has not sustained the burden imposed upon him to prove the allegations in Paragraph 5 of the complaint.

17. Witnesses Muster and Kisner testified (contrary to the allegations in Paragraph 7 of the complaint) that in purchasing textile fabrics for their business, they do not prefer to buy direct from mills but prefer to buy from a business house such as Standard Mills. They further testified that lower prices and other advantages do not accrue to them when they buy directly from mills for the following reasons, among others: (1) When they buy from mills which weave the fabrics they have to buy at least a whole bolt of one pattern

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and color (40-50 yards), whereas when they buy from Standard Mills they can buy the exact yardage required; (2) When they buy from mills which weave the fabrics it may require from four to six weeks to obtain delivery of an order, but when they buy from Standard Mills, Inc., their orders are usually filled within one or two days; (3) They save considerable money purchasing from Standard Mills, Inc., instead of from mills which weave the fabrics because of (a) the prompt delivery; (b) being able to buy the exact yardage needed; (c) being able to avoid stocking a large number of bolts of yardgoods, warehousing them, and taking a loss on the unsold yardage at the end of the season; (d) being able to offer their customers the wide selection of differing patterns, fabrics and designs in respondents' sample books without stocking a single yard of the samples, and (e) being able to put to other uses in their business the large amount of money they would otherwise have to tie up in warehousing large inventories, if they did not have access to Standard Mills' merchandise and service. Witness Muster, who had been buying fabrics from Standard Mills for six years, testified, *inter alia* (Tr. 103):

A. Service, the type of cooperation they give you.

Q. What is the business that Standard Mills is in?

A. They supply us with fabrics.

Q. Do they manufacture any fabrics?

A. No.

Q. How do you know that?

A. Well, I knew it all the time. They never represented themselves as being a mill actually constructing the fabric. They were converters.

Q. Have you always known them to be a converter?

A. Yes.

Q. Have they ever represented to you that they are anything but a converter?

A. No, sir.

Q. Are they also a distributor?

A. That's right.

Q. Have they represented themselves to you as a distributor?

A. That's right.

Q. Do you have any preference with regard to whether you buy from a mill or a distributor-converter?

A. Very strong preferences.

Q. Would you state to the Court exactly what your preferences are and why?

A. When you buy from a mill, sir, you have to buy piece goods. No matter how acute a buyer you think you are, either in fabric selection or color selection, you are always pretty well stuck at the end of the season and you find your profits have been cut to the bone by having to sell off merchandise which is out of style and get it off your shelf because it dies on styles. New things come up all the time.

I have had very, very bad experiences where I have had to dispose of fabrics that cost me five, six and seven dollars a yard, for fifty cents a yard, from off my shelves when the season was over and the goods stopped running.

The difference in dealing with an outfit like Standard Mills is manifold, sir. The books that I have watched being put on display—prior to that, when I bought my merchandise from the mills, I would have to buy fabrics and have them cut into swatches.

I would have the job of putting them together properly, tagging them, putting chains and hooks on them in order to present to my storekeepers a presentation of my line, outside of my actual furniture style, my fabric line. It was costly, time-consuming and pretty hard on a manufacturer's time element.

Another factor is, when I need fourteen and-a-half yards of goods to fulfill an order for a three-piece group, I get fourteen and-a-half yards of goods and no more. I have no waste. I have nothing on the shelf to eat into my profit. That, to me, is of the utmost importance, on top of which the variation that I can have.

The limitation of any manufacturer—if I go to two or three mills, how much of their inventory can I buy? How many colors can I hold? How many styles can I have? It is very limited. Whereas with an operation such as Standard Mills, I have the benefit of a book, a wonderful presentation.

Hearing Examiner Gross. By "book," do you mean a sample book?

The Witness. Yes, a sample book.

Hearing Examiner Gross. Such as has been displayed in the hearing room here today?

The Witness. Yes, sir. That opens a great many doors to me which I was never able to have before.

Hearing Examiner Gross. What do you mean by that statement?

The Witness. Well, if I go to see a buyer of a store and if I don't have a complete line of fabrics to his way of thinking, a range either in color or style, no matter how well styled my product might be he might not buy from me because I don't bat myself up far enough; whereas, when I give him a presentation such as that book and others, I have a fabric story—as it is told in the trade, a fabric story.

By Mr. NUSBAUM:

Q. Do I understand your testimony to be, then, that you prefer to deal with a converter as opposed to a manufacturer?

A. Definitely.

Q. Do I understand also that you can buy from a converter what you want and when you want, but you cannot do that with the mill?

* * * * *

A. I get, at the utmost, twenty-four-hour service from a converter, whereas sometimes I wait six or eight weeks if I have to order from a mill. Occasionally, I do, because I have to.

18. Several witnesses testified and the examiner finds that the name "Standard Mills" and the continuing right to use it is a valuable property right of respondents. To deprive respondents of this property would cause great and irreparable injury to them. At pages 162 and 163, Arthur Smith testified:

I feel the loss of the name would be a tremendous handicap, with the good will that we built up and the sacrifices that we made all these years. Losing that name is bound to affect our credit status as well as our sales.

No evidence to the contrary is in the record.

19. The southern looms turn out a minimum of 200,000 yards of fabric per year for respondents. The goods are all woven by the mills owning the looms under specific contract with respondents. About 40 yards per day is the maximum production per loom. (Tr. 164 *et seq.*) This means that respondents' orders for fabrics preempt 5,000 loom days per year. To the extent that respondents' orders do preempt the 5,000 loom days per year, it is reasonable to find, and the examiner does find, that respondents do in fact "control" the looms which produce the fabrics for them.

20. Arthur J. Smith, Morris Muster, and Sidney Kisner testified (Tr. 177) that furniture manufacturers are tending more and more to buy their upholstery fabrics from converters (such as Standard Mills) rather than from manufacturers. This statement is uncontroverted in the record, and the examiner, therefore, finds that Standard Mills' customers do not have a preference to buy directly from mills as alleged in Paragraph 7 of the complaint.

21. At page 178, Mr. Smith testified: "There isn't any customer who purchases from us, that buys from us, thinking in any manner that we are a manufacturers [*sic*], because we have never represented ourselves as such." This statement is likewise uncontradicted in the record.

22. Between eight and ten years ago, the Federal Trade Commission inquired about respondents' use of the name "Standard Mills." The letter from the Commission was at that time turned over by Arthur Smith to respondents' accountant, Fred Sanders, and respondents had heard nothing further from the Commission since that time until the investigation which led up to these proceedings was started in the spring of 1961 (Tr. 180 *et seq.*).

The cases relied upon by complaint counsel were cited, *supra* (page 981). In the landmark case, *Royal Milling Co.*, a 1933 decision, respondents were engaged in preparing for the market self-rising flour and plain flour, and selling the same in interstate commerce. None of them ground from the wheat the flour which they prepared and sold, but only mixed and blended different kinds of flour purchased from others engaged in grinding. After being mixed and sifted, the flour, either plain or made self-rising, was packed into bags for the market. Most of the concerns grinding wheat into flour and selling it in the same market also made self-rising flour and blended plain flour ground from different sorts of wheat. In its opinion the Supreme Court found that the respondent had circulated written and printed circulars among the trade which either directly asserted, or were calculated to convey the impression, that the product was composed of flour manufactured by it from

the wheat. The Supreme Court found that these statements and the use of the trade names under which the respondent did business induced many consumers and dealers to believe that respondent was engaged in grinding from the wheat the product which it put out. At page 217 the Court held:

Although we sustain the Commission in its findings and conclusions to the effect that the use of the trade names in question and the misstatements referred to constituted unfair methods of competition within the meaning of the act, and that its proceeding was in the interest of the public, we think under the circumstances the Commission went too far in ordering what amounts to a suppression of the trade names. These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names [citing cases] * * *. This is a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine. And in doing so it will be enough if each respondent be required by modified order to accompany each use of the name or names with an explicit representation that respondent is not a grinder of the grain from which the flour prepared and put out is made, such representation to be fixed as to form and manner by the commission, upon consideration of the present record and any further evidence which it may conclude to take * * *.

In *Mid West Mills*, there was involved, as in this case, a jobber and wholesaler of upholstery fabrics. Respondent in that case also sold wooden frames, padding, felt, springs, etc., and all materials used in construction of furniture. The Court stated (page 725):

We are convinced that respondent may avoid any false impressions and implications arising from the use of the word "Mills" if it uses on all of its stationery, garment labels, tickets, invoices, and other printed matter these words "Jobbers and Converters, Not Mill Owners or Mill Operators." There would then be no possibility of deception. Of course these are not the only words which might be adopted * * *.

In *Bear Mill Mfg.*, the Court, among other things, said (pages 68-69):

While a reading of the record fails to convince us that the prejudice, so far as it may have existed or may continue to exist, is of serious importance, yet we cannot say that the findings are not supported by substantial evidence, or that the order to cease and desist from the use of the words "mill" and "manufacturing" which the Commission issued in consequence of the findings was without foundation. *Federal Trade Comm. v. Pure Silk Hosiery Mills*, 7 Cir. 3 F.2d 105.

[3] The injury to the petitioner by the requirement of the order of the Commission that it should abandon a well known corporate and trade-name of many

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years standing and of evidently excellent repute, seems to us a far too drastic method of remedying a slight and, we believe, unconscious infraction of proper trade practice when the inaccuracy can be cured by requiring the petitioner to append to and use in connection with its corporate name, stationery, folders, labels, cartons and any advertising the words "Converters, Not Manufacturers of Textiles" * * *. We accordingly hold that these words descriptive of the nature of the petitioner's business should be added to the corporate title on all stationery, folders, labels, cartons and advertising without the necessity of amending the certificate of incorporation.

In *Herzfeld*, a stipulation formed the basis for the finding. And the Court said (page 208) :

Obviously the stipulation justified the Commission in finding that a substantial number of retailers were misled by the title, even with the legend added: and the Commission was also right in finding that the title gave an opportunity to retailers to represent to buyers that the petitioners manufactured rugs, and so to make the buyers believe that they were not paying a middleman's profit * * *.

The evidence in the instant case does not support a finding that a substantial number of purchasers from Standard Mills are misled by its title or that the title gives "an opportunity to retailers to represent to buyers that the petitioners manufactured * * * [the fabrics which they sell], and so to make the buyers believe that they were not paying a middleman's profit."

In *Rudin & Roth et al.*, there were two charges in the complaint, (1) a false representation as to the regular and usual retail prices for hosiery (which is not in any way involved in this case), and (2) the deceptiveness of the name "Superbilt Hosiery Mills, Inc.", i.e., whether the use of the word "mills" constituted a misrepresentation. In *Rudin & Roth*, the price deception constituted a substantial portion of the case as tried before the hearing examiner and, therefore, the examiner was, of course, justified in finding as he did,

* * * where persons engaged in unfair and deceptive representations of their products in commerce, the Commission properly may infer that such representations mislead the public into the purchase of such products, thereby unfairly diverting trade from competitors and causing substantial injury to competition * * *.

Moreover, the examiner in *Rudin & Roth* stated:

* * * The Commission and the courts many times have found that a preference exists on the part of purchasers to buy directly from mills or factories, thereby eliminating the middleman and presumably effecting savings * * *.

In the instant record the evidence does not support such a finding and the evidence is to the contrary.

Dexter Thread Mills, *Amity Mills*, and *Wool Novelty Co.* were all disposed under old §§ 3.21 and 3.25, and the agreement containing a

consent order to cease and desist provided that it was "for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint. *Georgia Mills, Inc.*, and *United States Mills, et al.*, also cited by complaint counsel, are the same sort of consent dispositions in the year 1962 under the Commission's current rules and do not rest upon adjudication after the introduction of evidence.

Siegel v. FTC, 327 U. S. 608 (1946), although loosely alluded to in connection with the specific issue involved, in this case is not relevant. It is true that the Supreme Court in the *Siegel* case cites *Rolay Milling, supra*, but the issue before the Supreme Court was whether the Commission's finding that the use of the word "Alpacuna" as a trade name was misleading and deceptive in representing or implying to prospective purchasers that respondents' coats contained a material which they did not in fact contain, was supported by the evidence. All that *Siegel* held was: since the Commission had not abused its discretion in concluding that any change "short of the excision" of the trade name would not give adequate protection, the Commission was not legally obligated to consider whether a less drastic remedy than complete excision would accomplish the desired results. Excising a label such as Alpacuna is totally different from compelling abandonment of a business name which has been used from the time a business was started, over half a century ago, and which has acquired irreplaceable business value as good will.

In *Elliot Knitwear, Inc.*, Docket No. 6637, the decision of the hearing examiner, upon remand by the Court of Appeals, refers also to *Royal Milling, Jacob Siegel*, and *Algoma Lumber Co.* (291 U. S. 67). *Elliot* involved an alleged violation of the Wool Products Labeling Act through the use of the word "Cashmore." Neither *Elliot* nor *Jacob Siegel* involved complete abandonment of the name under which a business had been conducted since its founding, as in this case. Neither the form nor the substance of the deceptions in the "mill" cases are the same as in the brand name cases.

See also the initial decision of June 19, 1962, in *Top Form Mills, Inc., et al.*, Docket No. 8454, in which the hearing examiner refused to excise the word "mills" in the corporate name.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding. Corporate respondent Standard Mills, Inc., is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

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2. The corporate respondent Standard Mills, Inc., is and has been in substantial competition in commerce with corporations, firms and individuals which sell textile fabrics of the same general kind and nature as that sold by the corporate respondent.

3. Arthur J. Smith and Lloyd Smith formulate, direct and control the acts and practices of the corporate respondent.

4. Counsel supporting the complaint has not proven by reliable, probative and substantial evidence in this record the material allegations of the complaint which would support the issuance of a cease and desist order.

5. The continued use by respondents of the name "Standard Mills, Inc." in the manner and form in which it is currently being used does not now have nor will it have the capacity and tendency to mislead purchasers or textile fabrics from respondents in the manner alleged in the complaint.

6. The mere taking of official notice of facts by a hearing examiner does not constitute the proof required when such facts are contradicted by reliable, probative and substantial evidence in the record which is not rebutted.

7. On the basis of the evidence in this record, the hearing examiner hereby finds and concludes that this complaint and the proceedings thereunder ought to be dismissed. Therefore,

It is ordered, That this complaint and the proceedings thereunder be and hereby are dismissed.

OPINION OF THE COMMISSION

By HIGGINBOTHAM, *Commissioner*:

This is an appeal from an initial decision of the hearing examiner that respondent Standard's use of the word "mills", in its name, "Standard Mills, Inc.," and on its letterheads, invoices, tags, and in advertisements, was not misleading and deceptive. § 5(a) of the Act, 15 U.S.C. § 45(a). We have reversed the initial decision, entered our own findings and conclusions that a violation has been committed, and entered an order regarding the use of the word "Mills" in accordance with certain representations or stipulations counsel made during oral argument before us.

Since about 1907, respondent Standard and its predecessor have continuously been doing business as textile jobbers and converters under the name "Standard Mills".¹ It has built up, it asserts, substantial good will in the name, in part the result of "many millions of dollars in advertising its corporate identity". Respondent now

¹ In 1934 the company was incorporated under the laws of New York State and "Inc." was added to the firm name.

has a half million dollar annual business volume, which it is said, would be irreparably injured if respondent lost the right to use its trade name.²

On the other hand, we have little doubt that a false representation by respondent that it operates a mill violates § 5, to the prejudice both of purchasers who believe that they will receive lower prices by buying directly from the mill, and of competitors whose business may thus be diverted. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933); *Bear Mill Mfg. Co. v. Federal Trade Commission*, 98 F. 2d 67 (2d Cir., 1938); *Federal Trade Commission v. Mid West Mills, Inc.*, 90 F. 2d 723 (7th Cir., 1937). The examiner concluded from the testimony of certain witnesses for respondents, who stated that they had not been deceived and were aware that Standard was a jobber and converter rather than a mill, that no deception had occurred. We reverse this finding as unsupported by the evidence. Respondents' isolated evidence was insufficient to rebut the *prima facie* case made out by the showing of a false claim of source of origin of the goods in the corporate name. Although the sophisticated may be aware of the true nature of respondents' operations, that is no protection for the less wary. At the same time, the practice inevitably places an unfair burden upon respondents' more scrupulous competitors who must choose between adopting this practice and the risk of loss of business. *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304, 312-313 (1934); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 78-79 (1934); see *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

The hearing examiner also found that respondents' preemption of "5000 loom days per year" formed the basis for a conclusion that respondents did "in fact 'control' the looms which produce the fabrics for them." If this was intended to signify that respondents' representations that they operated a mill were in fact true, then we must categorically reject the proposition. Even if respondents pre-empted 100% of any mill's output (which they did not) by a requirements contract or any other integration arrangement than out-and-out ownership, or its substantial equivalent, they would still commit a deceptive practice by styling themselves a "mill."³

² Thus, respondent Arthur J. Smith, an officer of Standard, testified that "without the name Standard Mills, Inc., I practically have to start a business going all over again."

³ This does not mean that to call itself a "mill" a firm must own the mill, from which its goods come, in fee simple. For example, if a firm leases a mill and operates, manages, and controls it exclusively, then there is nothing deceptive and misleading in the firm's styling itself a "mill." We hold only that want of ownership or exclusive control over the mill disqualifies one who resells the total or partial output of the mill from doing business unqualifiedly under the mill name.

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We find, then, that respondents' unqualified use of the term "Mill" in their name and other activities is false and misleading and deceives their purchasers, in violation of § 5. At the same time, we find a substantial probability of harm to respondents' business if they are forced to abandon their trade name. Respondents represent that since 1959, when they received inquiries from the Commission staff as to their practices, they have qualified their use of their trade name with phrases such as "converters of * * * fabrics." During oral argument of this appeal, respondents' counsel declared that an order requiring the use of certain language of qualification of "Mills," as compared with a requirement that respondents abandon it, would be acceptable. Tr. 21-22, 27-29. We find that the public interest will be adequately protected in this case if we accept counsel's proposal. We therefore enter an order requiring respondents not to use "Mills" in their trade name unless they also use the following language of qualification:

1. As to letterheads, invoices and labels: "Converters, Jobbers, and Distributors of Fabrics—Not Textile Manufacturers or Mill Owners" in type no smaller than $\frac{3}{4}$ the size of the type used in the trade name, and immediately under the trade name.
2. In all other printed matter, either the foregoing or in lieu thereof, preceded by an asterisk (*) or equivalent, the same qualification, at the foot of each sheet of printed matter upon which the trade name appears, said trade name being followed by an asterisk (*) or equivalent each time it appears in said printed matter, and said qualification being printed in type no smaller than $\frac{3}{4}$ the size of the type used in the trade name.⁴

The appeal of counsel supporting the complaint is allowed to the foregoing extent, and the initial decision will be modified to conform with this opinion.

FINAL ORDER

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and on briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision ruling on said exceptions, and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying

⁴ See *Federal Trade Commission v. Mid West Mills, Inc.*, *supra*, 90 F. 2d at 725; *Bear Mill Mfg. Co. v. Federal Trade Commission*, *supra*, 98 F. 2d at 68. In permitting the use in this case of an asterisked disclaimer in lieu of a disclaimer in immediate conjunction with the name, we are not to be understood as indicating the general acceptability of such disclaimers in all contexts. In the particular circumstances of this case, including the fact that the respondent deals only with the trade, rather than the general public, we believe that this form of disclaimer is adequate to prevent deception.

opinion, and as so modified, adopted as the decision of the Commission:

It is ordered, That paragraphs 14 through 22 be stricken and that the following paragraphs, numbered 14 through 16, be inserted after paragraph 13:

14. Recently respondents have qualified their name with legends such as "Converters and distributors of upholstery fabrics" or "Converters of Decorative Upholstery Fabrics".

15. Respondents do not manufacture the goods they sell and distribute. Nor do they own or operate any mill.

16. Respondents' use of the word "Mills" in their trade name has the capacity to and does deceive others into the belief that respondents do own, operate, or control mills or factories in which their fabrics are made. That Standard Mills and other jobbers or converters have provided certain witnesses better service than manufacturers in terms of faster delivery, eliminating the need for stocking of a large inventory of yard goods, or even in terms of price, does not mean that other purchasers do not prefer to buy direct from factories or mills, believing that lower prices or other advantages may accrue.

It is further ordered, That the conclusions of law numbered 4 through 7 contained in the initial decision be stricken and replaced with the following paragraphs:

4. The facts which were officially noticed by the examiner—that many purchasers prefer to buy directly from mills rather than jobbers and converters, because they believe they will obtain a lower price or other benefits—were not contradicted by respondents. The use by respondents of the name "Standard Mills, Inc." alone or qualified with the legend "Converters and Distributors of Upholstery Fabrics" or other legends of similar import has had, and may have, the capacity and tendency to mislead and cause some purchasers erroneously to believe that respondents own and operate the mills or factories in which their products are manufactured and thus unfairly and deceptively induce said persons into the purchase of respondents' products by reason of said erroneous and mistaken belief.

5. The acts and practices of respondents, as found herein, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of § 5(a) of the Federal Trade Commission Act. The proceeding is in the public interest.

It is further ordered, That the initial decision be modified by striking therefrom the order dismissing the complaint and substituting therefor the following:

It is ordered, That Standard Mills, Inc., a corporation, and its officers, and Arthur J. Smith and Lloyd Smith, individually and as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of textile fabrics in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from the use of the name "Standard Mills, Inc.," unless and until there be used, the following language of qualification in the manner set out below:

1. As to letterheads, invoices, and labels: "Converters, Jobbers, and Distributors of Fabrics—Not Textile Manufacturers or Mill Owners" in type no smaller than $\frac{3}{4}$ the size of the type used in the trade name, and immediately under the trade name.

2. In all other printed matter, either the foregoing or in lieu thereof, preceded by an asterisk (*) or equivalent, the same qualification, at the foot of each sheet of printed matter upon which the trade name appears, said trade name being followed by an asterisk (*) or equivalent each time it appears in said printed matter, and said qualification being printed in type no smaller than $\frac{3}{4}$ the size of the type used in the trade name.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with order to cease and desist. Rule 3.26(a), 16 C.F.R. § 3.26(a).

IN THE MATTER OF

DRUG RESEARCH CORPORATION ET AL.

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

Docket 7179. Complaint, June 30, 1958—Decision, Oct. 3, 1963

Order dismissing complaint upon consideration *de novo* of matters concerned, after vacating the initial decision dismissing the complaint on staff counsel's motion as not within the hearing examiner's authority since there were involved administrative matters which could be decided only by the Commission itself.

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 Drug Research Corporation, a corporation, John Andre and Timoleon T. Andre, individually and as officers of said corporation, Harriet Andre, individually, Kastor, Farrell, Chesley & Clifford, Inc., a corporation, all hereinafter referred to as respondents, have 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 Drug Research Corporation is a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 369 Lexington Avenue, New York, New York. Respondents John Andre, also known as John Andreadis, and Timoleon T. Andre, also known as Timoleon T. Andreadis, are the officers of this corporate respondent. Harriet Andre, also known as Harriet Andreadis, is the wife of John Andre and a stockholder of the said corporate respondent. These individuals dominate, control and direct the policies, acts and practices of this corporate respondent, including the acts and practices hereinafter set out. The address of these individual respondents is the same as that of the said corporate respondent.

PAR. 2. The respondents referred to in Paragraph 1, above, are now, and have been for some time, engaged in the sale and distribution of a preparation which is a drug as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by these respondents for their said preparation, the formula thereof and directions for use, according to its label, are as follows:

Designation: Regimen-Tablets

Formula: Each enteric-coated Pink tablet contains 0.648 gm. of Ammonium Chloride to aid loss of excess fluids.

Three Green tablets contain:

Benzocaine -----	22.5 mg.
together with	
Vitamin D (Irradiated Yeast) -----	400 U.S.P. Units
Vitamin B ₁ (Thiamin Chloride) -----	1.0 mg.
Vitamin B ₂ (Riboflavin) -----	2.0 mg.
Vitamin C (Ascorbic Acid) -----	30.0 mg.
Vitamin B ₆ (Pyridoxine Hydrochloride) -----	0.1 mg.
Calcium Pantothenate -----	1.0 mg.
Niacinamide -----	10.0 mg.
Diastase of Malt -----	100.0 mg.

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Three Yellow tablets contain:

Caffeine Alkaloid Anhydrous -----	90.0 mg.
and	
Phenyl-Propanolamine Hydrochloride -----	75.0 mg.
together with	
Iron (as Ferrous Sulfate) -----	10.0 mg.
Copper (as Cupric Sulfate) -----	0.1 mg.
Iodine (as Potassium Iodide) -----	0.1 mg.
Manganese (as Manganese Sulfate) -----	7.5 mg.

Directions: (Unless directed otherwise by physician)

1. For the first three days swallow two Pink, one Yellow tablets and allow one Green tablet to dissolve (do not chew) in your mouth, one-half hour before meals, three times daily.

2. After the first three days, and for a period of one week, swallow one Yellow tablet and allow one Green tablet to dissolve (do not chew) in your mouth, one-half hour before meals, three times daily.

3. When hungry, one additional Green tablet may be taken between meals.

Thereafter, to continue reducing program, repeat above dosage.

IMPORTANT: Individuals who suffer from heart disease, high blood pressure, diabetes or thyroid disease should omit Yellow tablet or take only upon advice of a physician. Do not exceed recommended dosage. Pink and Green tablets may be continued as directed. Avoid excessive use of salt.

PAR. 3. The respondents referred to in Paragraph 1, above, cause the said preparation when sold, to be transported from within the State of New York to purchasers thereof located in various States of the United States. These respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Kastor, Farrell, Chesley & Clifford, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 400 Madison Avenue, New York, New York. This corporate respondent is the advertising agency of the respondents referred to in Paragraph 1, above, and prepares and places for publication advertising material as hereinafter set forth, to promote the sale of the aforesaid drug preparation.

PAR. 5. In the course and conduct of their said businesses, respondents have 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 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 have 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. 6. Among the typical of the statements contained in said advertisements disseminated as hereinabove set forth are the following:

NO—DIET REDUCING

with New Wonder Drug for Fat People

No diet, no special eating, no giving up the kinds of food you like to eat—yet new wonder drug acts directly on the cause of your overweight—It's safe * * * automatic.

You must reduce up to 6 pounds in 3 days * * * up to 10 pounds the first week * * *.

YOU EAT WHAT THE FAMILY
EATS * * * WHEN THEY EAT!

Now with complete confidence in their safety and effectiveness you can take REGIMEN TABLETS—a combination of wonder drugs never before available except perhaps in a doctor's prescription. But now this formula has been made so safe, so sure that no prescription is needed.

This was Lester Morris * * * tipping the scale at 270. And here I am today * * * just four weeks later. Look (pulls out collar). Now look at my weight. Only 242 pounds. A loss of 28 pounds. Verified by my doctor. I did it without dieting, food restrictions or super will power!

REGIMEN TABLETS * * * work on an amazingly new principle guaranteed to act in these 3 most important ways necessary to obtain * * * effective weight loss:

* * * * *

2. They force your body to lose weight automatically by removing "Fluid Weight", the excess bloat-like fluid that accounts for up to 70% of your fatty tissue. You'll benefit the very first day, and start to lose weight so fast that by the third day you will have lost pound after pound!

PAR. 7. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and are representing, directly and by implication, that:

1. The preparation is safe to use by all obese persons;
2. Obese persons can lose weight by use of the preparation without dieting, that is, while consuming the same kinds and amounts of food they ordinarily consume;

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3. Obese persons can expect the preparation to cause a weight loss of six (6) pounds in three (3) days, ten (10) pounds in one week and twenty-eight (28) pounds in four (4) weeks;

4. The preparation, by the removal of excess body fluids, causes significant weight loss of more than temporary duration.

PAR. 8. The said advertisements 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:

1. The preparation is not safe to use by all persons having heart disease, high blood pressure, diabetes, or thyroid disease;

2. Obese persons will not lose weight through use of the preparation without dieting, that is, if they continue to consume the same kinds and amounts of food they ordinarily consume;

3. A weight loss of six (6) pounds in three (3) days, ten (10) pounds in one week, or twenty-eight (28) pounds in four (4) weeks through use of the preparation is substantially in excess of any loss that may result in a majority of instances, and no specific predetermined weight reduction can be achieved by using respondents' preparation for a prescribed period of time;

4. Any loss of weight resulting from increased excretion of body fluids will, in most cases, be of short duration.

PAR. 9. The dissemination by the respondents, as aforesaid, of said false advertisements constitutes an unfair and deceptive act and practice within the intent and meaning of the Federal Trade Commission Act.

Mr. Berryman Davis for the Commission.

Davies, Richber, Tydings, Landa and Duff by *Mr. James T. Welch* for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

This matter is before the undersigned on motion of complaint counsel filed November 8, 1962, for a dismissal of the complaint herein. The motion is vigorously opposed by counsel for respondents in a 38 page answer duly filed on November 30, 1962. Counsel supporting the complaint has not sought leave to reply to the objections in respondents' answer to the motion. The motion and the answer thereto adequately set forth the grounds for and against the motion. The request of counsel for the respondents for leave to present oral argument is denied. Since the conclusion reached by the examiner on the motion to dismiss the complaint is dispositive of the matter, an initial decision is being entered in the case.

The complaint in this matter, issued on June 30, 1958, appears to be one of the oldest cases on the dockets of the Commission awaiting disposition on the hearing examiner level. The present examiner is the fourth successive hearing examiner to whom the matter has been assigned for handling. At one time it appeared that the case had been disposed of through consent procedure by an order of the Commission issued April 17, 1959, adopting an initial decision entered February 27, 1959, by a prior examiner, now deceased, under a consent agreement, but the Commission upon reconsideration in an order dated June 8, 1959, "concluded that the order contained in the aforesaid initial decision is not appropriate", and accordingly vacated its prior order adopting the initial decision and remanded the case to the hearing examiner for further proceedings. The case was reassigned to the present examiner on September 11, 1961.

The complaint herein, issued under the provisions of the Federal Trade Commission Act, charges the respondents with false advertisements in connection with the sale and distribution in commerce of a drug preparation sold under the name of "Regimen-Tablets". The crux of the charges, stated in summary form, is that respondents have falsely represented that the preparation has certain merits when taken internally for reducing the weight of obese individuals without dieting.

The complaint sets forth the formula for the preparation which the respondents in their answers admit is correctly stated. The preparation consists of pink, green and yellow tablets to be taken in accordance with printed directions on the label of the preparation. The pink tablet consists of a quantity of ammonium chloride which according to the label is "to aid loss of excess fluids". The green tablets contain nine well known ingredients, including five different kinds of vitamin of which even the lay public has some knowledge. The yellow tablets similarly contain mostly well known ingredients such as iron, copper and iodine but also includes as one of its major ingredients a drug known as "phenylpropanolamine hydrochloride". Leaving out for the time being any reference to phenylpropanolamine hydrochloride, which appears to have been only recently tried as a weight reducing agent, it is not believed that there would be any dispute among well qualified physicians or other experts on such matters as to the value or lack of value of any of the other ingredients shown in the formula for each of the three colored tablets as agents for reducing human weight without dieting.

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Specifically, the complaint charges the respondent with *falsely* representing that:

1. The preparation [Regimen-Tablets] is safe to use by all obese persons;
2. Obese persons can lose weight by use of the preparation without dieting, that is, while consuming the same kinds and amounts of food they ordinarily consume;
3. Obese persons can expect the preparation to cause a weight loss of six (6) pounds in three (3) days, ten (10) pounds in one week and twenty-eight (28) pounds in four (4) weeks;
4. The preparation, by the removal of excess body fluids, causes significant weight loss of more than temporary duration.

Respondents (except Harriet Andre, in an "Agreement Containing Consent Order To Cease and Desist" filed on February 20, 1959, agreed to forthwith cease and desist making the above representations, provided in effect that its said agreement is accepted by the Commission. The agreement carried the usual, standard paragraph incorporated in all such agreements that "This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the amended complaint".

Based on the above agreement by respondents, the aforementioned initial decision by the hearing examiner then in charge of the case, was entered on February 27, 1959, which as seen was adopted by the Commission as its decision in the order dated April 17, 1959, but which the Commission upon reconsideration on June 8, 1959, vacated due to its conclusion that the cease and desist order contained in the decision was not appropriate, presumably because it was not inclusive enough to afford maximum protection to the public.

Following this action by the Commission, the case was in due course set down for hearing on October 5, 1959, by another hearing examiner to whom the case had been reassigned following the death of the preceding hearing examiner. On September 16, 1959, counsel supporting the complaint moved for a cancellation of the scheduled hearing and a suspension of further proceedings on the basis of newly discovered evidence on one of the major ingredients of the involved preparation, to wit, the above-mentioned phenylpropanolamine hydrochloride, "in order that this newly discovered evidence may be properly evaluated, with the possible undertaking of additional scientific studies of some duration of time, with a view to seeking amendment of the complaint in a material respect." The newly discovered evidence referred to was an article published in

the Journal of American Medical Association about a year after the date of the issuance of the complaint herein. The motion quotes the article as reporting "on the results of clinical testing done with phenylpropanolamine hydrochloride for the purpose of appraising it as an agent for controlling the appetite and in the reduction of weight of obese subjects" and sets forth the conclusion reached therein that the drug does not "effect a statistically significant reduction in weight." In further support of his motion for a suspension of the hearing scheduled for October 5, 1959, counsel supporting the complaint stated:

This newly-discovered evidence, not available at the time the Commission issued its complaint, tends strongly to indicate that Regimen-Tablets may be completely worthless for the purposes for which it is extensively advertised to the general public.

The hearing examiner granted the motion of complaint counsel for a cancellation of the hearing scheduled for October 5, 1959.

As heretofore noted, the case was reassigned to the present examiner on September 11, 1961. The undersigned by an order dated September 26, 1961 scheduled a prehearing conference in the matter for November 13, 1961, later continued to January 15, 1962. On December 29, 1961, counsel supporting the complaint moved for cancellation of the scheduled prehearing conference and a suspension of further proceedings herein on the ground, among others, that the corporate respondent and two other respondents in the present matter were scheduled for trial as defendants in a criminal proceeding on January 22, 1962, in the State of New York under the laws of that State on criminal charges containing more than 130 counts involving issues of fact similar to those involved in the instant case.

The motion for the cancellation of the scheduled hearing for January 15, 1962, was granted. This action, one in the discretion of the examiner, was taken because it is the undersigned's settled belief that a criminal proceeding should be given precedence over a quasi-civil proceeding, such as the present case, where both matters involve similar issues of fact, in order that the persons charged with crime may not be prejudiced by possible adverse decisions against them in the quasi-civil proceedings. In granting the motion, the examiner was also mindful of the merits of complaint counsel's argument that he believed it important "that the Commission have the benefit of knowing what the evidence is that the State of New York allegedly has in its possession, and which evidence will be made public in the forthcoming trial, before participating in a pre-hearing conference."

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Although the present examiner in his order of January 10, 1962, granting complaint counsel's motion for a cancellation of the scheduled prehearing conference stated that the motion was unopposed, it now appears that a timely answer in opposition to the motion had been duly filed on the same date as the examiner's said order of January 10, 1962. This answer, if it had been considered, would not have caused the examiner to change the conclusion stated in his order that the motion be granted. The objections raised in the said answer are also made in respondents' answer to complaint counsel's present motion for a dismissal of the complaint here under consideration.

One year later on September 26, 1962, the present examiner again scheduled the case for a prehearing conference, fixing December 10, 1962, for its commencement, and also set the case down for hearing proper on January 7, 1963. On November 8, 1962, complaint counsel filed his present motion to dismiss the complaint. Pending consideration of the motion, orders were issued cancelling the prehearing conference set for December 10, 1962, and the hearing scheduled for January 7, 1963.

In substance complaint counsel's motion for a dismissal of the complaint herein is based on the contention that (a) the heretofore mentioned New York criminal action against the principal respondents involving criminal charges arising out of alleged false representations with respect to the Regimen-Tablets similar to the false representations charged in the instant proceeding and (b) the subsequently inaugurated seizure and condemnation by the Federal Government of a number of boxes of Regimen-Tablets under the Federal Food, Drug and Cosmetic Act arising out of alleged false representations by misbranding with respect to such tablets similar to the misrepresentations charged in the instant proceeding—will effectually dispose of the issues present in the instant proceeding and effectually bar the alleged false and misleading representations charged by the complaint if they are found to be false by the indicated tribunals other than the Federal Trade Commission. For more complete detail, the full text of complaint counsel's motion is set forth below:

COMES NOW counsel supporting the complaint and respectfully moves that the Hearing Examiner dismiss the complaint in this matter for the reasons hereinbelow set out.

1. There is now pending in the State of New York a criminal case by the State against respondents Drug Research Corporation, its president John Andre, and the advertising agency Kastor, Hilton, Chesley, Clifford and Atherton, Inc.

On January 14, 1960, a Grand Jury of the Court of General Sessions of the County of New York, State of New York, returned an information against these

corporations and individual charging them in 134 counts with the crime of conspiracy to commit crimes and with other crimes in violation of New York laws by disseminating advertisements for Regimen Tablets representing that the preparation effected loss of weight without dieting and that clinical tests proved the claimed effectiveness, and that the advertisements contained other assertions of fact which were untrue, deceptive and misleading as to the effectiveness of the preparation.

Trial was to have begun January 22, 1962, but there has been no trial because of the filing of a motion for dismissal of the criminal information on the ground that the State of New York could not assume jurisdiction over the accused because the matters involved were pre-empted by Federal legislation giving the Federal Trade Commission jurisdiction over the parties, and because of subsequent events.

The accused applied to the Supreme Court of New York for issuance of a Writ of Prohibition to the Court of Special Sessions which would prohibit the latter from going forward with trial. Argument on the application is to be heard this month of November 1962.

2. There is now pending, as the result of a filing of a Libel of Information on February 13, 1962, in the United States District Court for the District of Colorado a case (Civil No. 7450) in which Drug Research Corporation has come forward as claimant to resist the seizure and condemnation, by the United States of America, of several dozens of boxes of Regimen-Tablets alleged to be misbranded in violation of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301, et seq.) because of the use of advertisements in conjunction with the offering for sale of the preparation which, allegedly, resulted in a misbranding of the preparation.

Misbranding was alleged through use of numerous representations essentially the same as those alleged to be false or misleading in the complaint issued by the Commission, to wit, that Regimen Tablets "can help you reduce as much as 6½ pounds in 7 days—19 pounds in 6 weeks without planned dieting!"; and by use of such statements as: "Reduce with Regimen Plan * * *"; "New! Regimen-Tablets for Appetite Control * * *"; and "Leading Physicians show Regimen Tablets Can Help You Reduce As Much As 6½ Pounds in 7 Days—19 Pounds in 6 Weeks without Planned Dieting!"; and by use of other statements representing and suggesting that the preparation will satisfy hunger, control and inhibit appetite, shrink one's appetite causing pounds and inches to melt away, and was proved amazingly effective in clinical tests on overweight people, etc., etc., in similar vein.

The case has been removed to the Eastern District of New York and is to be tried in Brooklyn. Drug Research Corporation, we being informed, having filed an answer to the libel which places in issue all the alleged untruthfulness of the statements asserted by the Government to constitute misbranding. Interrogatories were, we also are informed, filed October 15, 1962, by the Assistant United States Attorney in Brooklyn.

3. Except for indication that the criminal proceeding by the State of New York and the seizure action by the United States Government do not accuse any respondent named in the Commission's complaint with a violation of law by reason of having represented Regimen-Tablets to be "safe", and do not accuse respondents Timoleon T. Andre and Harriet Andre with guilt, and the seizure action does not involve the advertising agency named in the Commission's complaint, all the essential parties and charges named and specified in the Commis-

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sion's complaint are receiving the attention of, and the issues presented by advertising which the Commission stated it had reason to believe were questionable, will be completely treated with and disposed of by State and/or Federal action.

Counsel supporting the complaint states that no advertisement of Regimen-Tablets has come to his attention in over two years in which an improperly unqualified representation of safety in use of the preparation has been noted.

4. There is a multiplicity of actions involving the same essential issues.

WHEREFORE, counsel supporting the complaint moves that the Hearing Examiner dismiss the complaint without prejudice to the right of the Commission to initiate further proceedings against respondents, or any of them, should future events so warrant.

As heretofore noted, respondents oppose the motion to dismiss the complaint in their 38 page answer. Their opposition is essentially based on two grounds. In substance respondents take the position that the issues of fact arising out of the pleadings herein are triable before the Federal Trade Commission and not before any other forum.

Bearing in mind that complaint counsel contends that the involved issues of fact will be resolved in large part by the criminal action in New York under New York State law against the principal respondents herein, respondents contend and argue here, as well as before the Courts of New York, that the "Federal Trade Commission has exclusive jurisdiction of false and misleading advertisement in interstate commerce with respect to drug products and the Courts of New York are precluded from exercising jurisdiction over such subject matter". No less than 25 pages of respondents' 38 page answer to the motion to dismiss are devoted to this argument and it appears altogether likely that they were copied verbatim from briefs filed in the New York Courts in support of efforts to enjoin the New York State criminal action against respondents.

The gist of respondents' arguments are (1) that under the Constitution of the United States the Congress is vested with supreme legislative power to regulate commerce among the several states, (2) that the Congress has exercised this legislative power to regulate commerce in the matter of false and misleading advertisements by the enactment of the Federal Trade Commission Act; (3) that under the Federal Trade Commission Act the Federal Trade Commission has exclusive jurisdiction of false and misleading advertisements in interstate commerce; (4) that where there is a state statute with provisions similar to those in the Federal Trade Commission Act against false and misleading advertisements and action has been brought by the Federal Trade Commission under the Federal Trade Commission Act, the latter pre-empts the state statute;

and (5) that the "Federal Trade Commission has exercised jurisdiction with respect to the alleged false and misleading advertising of the drug product 'Regimen' and, hence, the State Courts have no jurisdiction with respect to false and misleading advertising of Regimen" in view of the admitted fact that the representations charged by the complaint were made in interstate commerce.

It should be noted at this point that the New York Statute referred to, Section 421 of the Penal Law of the State of New York, is not aimed at false and misleading advertisements made in interstate commerce but only at such false advertisements made "in this state".

Although respondents in their answer cite numerous cases in an endeavor to support their contention that the Federal Trade Commission has exclusive jurisdiction to act on all false and misleading advertisements to the exclusion of all state actions, it is significant that respondents have been unable to cite a single case by any court, state or federal, which so holds despite respondents' volunteer statement, based upon a law review article, that "there are statutes similar to Section 421 of the Penal Law of the State of New York in effect in some forty-four (44) States and in the District of Columbia."

The cases cited by respondents deal with state statutes which conflict with federal statutes where the national interest is so paramount—as in the matter of prescribing uniform national safety regulations for railroads or assuming jurisdiction over certain labor controversies—as to require pre-emption of the federal statute over the state statute in order to avoid the confusion, national havoc, or even national danger that might develop if concurrent jurisdiction with state legislation were allowed. This is obviously not the case in the instant matter. Respondents in their answer refer to three criteria cited by the Supreme Court in *Pennsylvania v. Nelson*, 350 U.S. 497, for determining whether a federal statute should supercede a state statute. These are

(1) Whether "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it."

(2) Whether "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject'."

(3) Whether the enforcement of a state statute, as in the *Pennsylvania v. Nelson* case, supra, a state sedition acts, "presents a serious danger of conflict with the administration of the federal program."

Respondents in their answer to the motion to dismiss quoted the first and third criteria shown above, or "tests" as the Supreme Court

describes them, but neglected to quote or otherwise make reference to the second criteria. The answer to all three criteria in the instant case must be in the negative. On the matter of fighting false and misleading advertisements there can be no "dominant" interest as between the federal and state governments; the fight must go on all fronts; the federal government and the state governments can look benignly on each other's efforts to fight the evil. It's like the fight against cancer; help is welcome from all sides, although the Federal Government foots the major part of the bill for cancer research. There are many more instances of allowable concurrent federal and state legislation on the same subject matter than there are of cases in which the courts have held that a state statute must give way to federal legislation.

The second half of respondents' first ground for opposing the motion to dismiss the complaint relates to complaint counsel's contention that the issues of fact here involved will also receive judicial determination from a United States District Court on a Libel of Information action now pending before that court on misbranding charges under the Federal Food, Drug and Cosmetic Act, involving misrepresentations by misbranding essentially the same as the misrepresentations charged in the complaint herein.

Respondents in their answer admit that the Federal Trade Commission under the Federal Trade Commission Act and the Food and Drug Administration under the Federal Food, Drug and Cosmetic Act have concurrent jurisdiction as to misbranding but respondents appear to argue from their interpretation of the legislative history of the Wheeler-Lea Amendment to the Federal Trade Commission Act that it was the Congress' "intention to allow the Commission to exercise exclusive control over the advertising here involved". The difficulty with this argument, assuming arguendo it is correct, is that it does not squarely answer complaint counsel's contention that the *issues of fact as to the truthfulness of the involved representations* in the present proceeding are also involved in the libel action. This is apparent from the motion to dismiss which states that in the libel action "*Misbranding was alleged through numerous representations essentially the same as those alleged to be false or misleading in the complaint issued by the Commission, to wit, that Regimen-Tablets 'can help you reduce as much as 6½ pounds in 7 days—19 pounds in 6 weeks without planned dieting!'*" (Emphasis supplied.) It is also clear from a Supreme Court opinion cited by respondents in their answer, *Kordel v. United States*, 335 U.S. 345, that the Federal Food, Drug and Cosmetic Act gives the United States District Courts full authority to decide whether the "labels" of any drug contain

false advertising *even though the pamphlets containing the advertisements are shipped separately and at different times.* In the *Kordel* case, as here, it was argued that the Federal Trade Commission had exclusive jurisdiction over false advertisements. The Supreme Court in that case disposed of the argument as follows: "Petitioner points out that in the evolution of the Act the ban of false advertising was eliminated, the control over it being transferred to the Federal Trade Commission. * * * We have searched the legislative history in vain, however, to find any indication that Congress had the purpose to eliminate from the Act advertising which performs the function of labeling. Every labeling is in a sense an advertisement. The advertising which we have here performs the same function as it would if it were on the article or on the containers or wrappers. As we have said, physical attachment or continuity is unnecessary under Section 201(m)(2)."

Thus we may state in summary that the issue of fact with respect to the alleged misrepresentations present in the instant case are also present in the libel action and that the United States District Court before whom the libel action is pending has concurrent jurisdiction with the Federal Trade Commission in its own proceeding to decide such issues of fact.

As an outgrowth of the arguments made by respondents that the Commission has "exclusive" jurisdiction of the issues of fact present under the pleadings in this case, they next argue that the Commission does not have the authority "to delegate this duty to any state" or "to the Food and Drug Administration, the Department of Justice or any other agency or department of the Federal Government."

The difficulty with this argument, aside from its erroneous assumption that the Commission has exclusive jurisdiction of the involved issues of fact, is that there is no proposal from complaint counsel or before this examiner for a "delegation" of the powers now residing in the Commission to decide these issues of fact; in fact there is no statutory authority for such delegation. All that complaint counsel is saying is that the issues of fact here present will be decided in the Courts of New York and in the United States District Court and that, therefore, the public interest would be adequately served without the necessity of having the same issues of fact decided for the third time in the instant proceeding. Just as the Federal Trade Commission Act gives the Commission wide discretion in the issuance of the complaints, by the same token and authority the Commission has wide discretion in the matter of dismissing complaints. Complaint counsel in his motion for a dismissal of the complaint is

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simply asking that the examiner dismiss the complaint under his authority to make an initial exercise of this discretion.

Based on their original erroneous premise that the Commission has exclusive jurisdiction of the involved issues of fact, respondents' second objection to the motion to dismiss is essentially a counter proposal not only for a denial of the motion to dismiss but for an early setting of the matter for hearing and prompt progression of the matter to final decision on the ground that respondents have been damaged by the delay in having the issues here involved determined. In respondents' answer of January 10, 1962, to complaint counsel's then motion to cancel the prehearing conference set for January 15, 1962, respondents state that the delay in going to trial before the Commission on the present matter "has greatly damaged Respondents in the conduct of their business, because some television networks have declined to disseminate Respondents' advertising material, such declination being based directly upon the mere issuance of the complaint, wholly irrespective of whether the charges therein set forth will ever be sustained." Similarly in their answer to the instant motion to dismiss the complaint, respondents claim that during the four years that the instant proceeding has been pending they "have been denied access to many radio and television channels previously available for its advertising." If business damage accrues to a respondent merely from the issuance of a complaint that cannot be avoided. The Commission under the statute issues complaints only where it has "reason to believe" that a person or corporation "is using any * * * unfair or deceptive act or practices in commerce" and then only if it deems that the issuance of a complaint is "in the interest of the public". Corroboration for the soundness of the Commission's judgment in issuing the complaint is seen in the criminal action brought by the State of New York against the principal respondents and by the proceedings commenced by the Food and Drug Administration, both arising out of the same misrepresentation of fact charged in the instant complaint.

Nor can it be seen that the delay in bringing this matter to trial has been the direct cause of any damage to respondent. If respondents have been denied access as claimed "to many radio and television channels previously available for its advertising", this may be properly ascribed to the formal agreement respondents filed with the Commission within eight months after the issuance of the complaint herein in which they agreed to an order requiring them to cease and desist from disseminating the misrepresentations charged by the complaint. It may also be ascribed to the criminal proceedings against the respondents by the State of New York and the

action taken in the libel proceedings by the Food and Drug Administration.

Our analysis in summary shows that there is no merit to the objections raised by respondents to complaint counsel's motion to dismiss the complaint.

On the other hand it is our opinion that the motion to dismiss the complaint is meritorious. As indicated there is wide discretion in both the issuance and dismissal of complaints. The Commission has limited funds. A case such as this calling for expert medical witnesses is costly to try. If the New York criminal action against the respondents and the libel action in the federal courts had been pending in the precomplaint stage of this proceeding, it is doubtful that the complaint would have been issued as the Commission could have well come to the conclusion that the public interest would have been adequately protected in forums other than their own. For similar reasons, we believe that the present proceedings should be dismissed. We are not concerned by the fact that the New York action and the libel proceedings could not result in action as broad as would result from the present proceedings before the Federal Trade Commission if the case went to trial and all of the charges of the complaint were sustained. We believe that for all practical purposes the libel proceeding and the New York criminal action, if decided adversely to the respondents, would put a stop to the misrepresentations. An adverse decision in the New York criminal action would be particularly devastating to the respondents since both the corporate respondent and the advertising-company respondent have their principal places of business in New York City; such an adverse decision would be bound to have unfavorable economic repercussions far beyond the geographical borders of the State of New York. If on the other hand, the New York State Courts and the United States District Court came to the conclusion that respondents' representations were not false as charged in their respective jurisdictions, it is not likely that the examiner or Commission would come to a different conclusion.

The motion to dismiss the complaint is granted. An order directing dismissal is entered below, subject to the initiation of further proceedings as may be warranted by future circumstances.

ORDER

It is ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, without prejudice to the right of the Commission to initiate further proceedings against respondents, or any of them, should future events so warrant.

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ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter is before the Commission on respondents' appeal from the hearing examiner's initial decision, filed January 22, 1963, dismissing the complaint on the ground that further proceedings herein would not be in the public interest.

The Commission issued its complaint on June 30, 1958. Thereafter, numerous actions of an interlocutory nature were taken, but, for various reasons which need not be elaborated, evidentiary hearings were not begun. On September 26, 1962, the examiner scheduled the prehearing conference for December 10, 1962, and the commencement of evidentiary hearings, for January 7, 1963. However, on November 8, 1962, complaint counsel filed a motion to dismiss the complaint. This motion was based not on grounds relating to the merits of the allegations of the complaint, but upon an alleged lack of public interest in the further prosecution of the case.

On January 22, 1963, the hearing examiner issued his initial decision, in which he found the motion to dismiss the complaint "meritorious" and dismissed the complaint accordingly. In support of his finding, the examiner made such observations as: "The Commission has limited funds. A case such as this calling for expert medical witnesses is costly to try". Referring to other proceedings pending in state and federal courts, proceedings in which respondents herein but not the Commission are parties, the examiner stated that if these cases "had been pending in the precomplaint stage of this proceeding, it is doubtful that the complaint would have been issued as the Commission could have well come to the conclusion that the public interest would have been adequately protected in forums other than their [*sic*] own".

The Commission agrees with respondents that the dismissal of the complaint on the grounds set forth in the initial decision was *ultra vires* the hearing examiner. Complaint counsel's motion to dismiss the complaint was addressed to the Commission in its administrative capacity, as the complainant in this proceeding, and not in its adjudicative capacity; no question going to the merits of the violations of law alleged in the complaint was raised by the motion. In considering such administrative matters as whether to issue a complaint, or, as here, whether to go on with further proceedings in a case that has already been commenced by issuance of a complaint, the Commission is required to take into account a broad range of considerations bearing upon the public interest. In order to discharge its responsibility to make the most effective possible alloca-

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tion of its necessarily limited resources of funds and personnel, the Commission must consider—as a matter of administrative judgment and discretion—which of the various courses of action open to it should be followed.

Thus, the factors appropriate to the Commission's decision in such a matter are not within the authority and competence of the hearing examiner, whose duty it is, in such a case, to certify the motion to the Commission for its consideration and disposition rather than to act upon it himself. For, as stated in Section 8 of the Commission's Statement of Organization, "Hearing examiners are officials to whom the Commission, in accordance with law, delegates the initial performance of its *adjudicative fact-finding* functions to be exercised in conformity with Commission decisions and policy directives and with its rules of practice". (Emphasis added.) Disposition of a motion such as that filed by complaint counsel in this matter is not an "adjudicative fact-finding" function. Since the examiner had no authority to rule upon the motion, he should promptly have certified it to the Commission, pursuant to Section 3.6(a) of the Commission's Rules of Practice.

Although the initial decision must be vacated, the Commission has undertaken to consider *de novo* the motion to dismiss the complaint in this matter as if the motion had been properly certified to the Commission by the examiner. Upon consideration of all the relevant factors bearing upon the public interest in the further prosecution of this case, the Commission has concluded that there exist at this time special and unique circumstances requiring dismissal of the complaint. The factors weighed by the Commission in reaching this conclusion include, but are not necessarily limited to, the longevity of the case, the prospect that evidentiary hearings would have to be deferred for an indefinite period, and the necessity for amending the complaint should the case go forward to hearing. In the circumstances here presented, the Commission specifically does not rely, as a ground for dismissing the complaint, upon the pendency of related proceedings in other tribunals. Nor, in dismissing the complaint, does the Commission thereby intend to affect in any manner the jurisdiction of any other tribunal, in any other case, in respect to respondents or the subject-matter of this proceeding.

It is ordered, That the hearing examiner's initial decision, filed January 22, 1963, be, and it hereby is, vacated.

It is further ordered, That the complaint in this proceeding, issued by the Commission June 30, 1958, be, and it hereby is, dismissed.

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IN THE MATTER OF

NATIONAL HOME FOOD SERVICE COMPANY, INC.,
ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-605. Complaint, Oct. 10, 1963—Decision, Oct. 10, 1963*

Consent order requiring Wilkes-Barre, Pa., sellers of freezers, food and a freezer-food plan, operating at nine locations in New York and Pennsylvania, to cease making a variety of misrepresentations in advertising in newspapers, by radio and television and otherwise, to induce sale of their products, including false claims as to cost, services, quantities of food supplied, service warranty, food quality guarantee, free gifts, bait advertising, etc., as in the order below in detail set forth.

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 Home Food Service Company, Inc., a corporation, and Andrew Carol and Marvin Rayfield, individually and as officers of said corporation, hereinafter referred to as respondents, have 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 Home Food Service Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 61 East Market Street in the city of Wilkes-Barre, State of Pennsylvania.

Respondents Andrew Carol and Marvin Rayfield are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of freezers, food and a freezer-food plan under the aforesaid corporate name at the following locations:

61 East Market Street, Wilkes-Barre, Pennsylvania.
60 State Street, Binghamton, New York.
221 West Water Street, Elmira, New York.
746 West Fourth Street, Williamsport, Pennsylvania.

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221 North Center Street, Pottsville, Pennsylvania.
 132 Adams Avenue, Scranton, Pennsylvania.
 104 North Second Street, Harrisburg, Pennsylvania.
 336 West Broad Street, Hazleton, Pennsylvania.
 164 East Market Street, York, Pennsylvania.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, freezers and food, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in the State of New York. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said freezers and food in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of freezers, food and freezer-food plans.

PAR. 5. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said food and freezer-food plan, 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 brochures, circulars and letters, and by television and radio broadcasts transmitted by television and radio stations located in the States of New York and Pennsylvania, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of food as the term "food" is defined in the Federal Trade Commission Act; and have disseminated, and cause the dissemination of advertisements concerning the said food and freezer-food plan by various means, including but not limited to those aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of food and freezer-food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of advertisements disseminated as aforesaid, and by the oral statements of sales representatives, respondents have represented, directly or by implication:

1. That a home economist will assist purchasers of the aforesaid freezer-food plan in planning their food orders;
2. That respondent corporation is a member of the Better Business Bureau in all areas where respondents do business;

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3. That purchasers of the aforesaid freezer-food plan will receive the same amount of food and a freezer for the same amount of money that they have been paying for food alone;

4. That respondents will pay the moving expenses for the freezer and food if purchasers of the aforesaid freezer-food plan move to different locations or areas;

5. That purchasers of the freezer-food plan receive a three year free service warranty on the freezer;

6. That the flavor and quality of all food sold in connection with the freezer-food plan is unconditionally guaranteed;

7. That purchasers of the aforesaid freezer-food plan receive a free or bonus gift;

8. That for \$15.95 a week purchasers of the aforesaid freezer-food plan will receive a four month supply of food for an average size family and a 21 cubic foot combination refrigerator-freezer or a 21 cubic foot freezer, plus metal shelving and a bonus gift;

9. That respondents will supply purchasers of the aforesaid freezer-food plan with all their food requirements;

10. That meat products sold in connection with the aforementioned freezer-food plan are processed at respondent corporation's meat processing plant.

PAR. 7. In truth and in fact:

1. The individuals sent to help purchasers of the aforesaid freezer-food plan in planning their food orders are not home economists. They have not had sufficient or proper training to warrant being called home economists.

2. Respondent corporation is not a member of the Better Business Bureau in all the areas where respondents are engaged in the sale of freezers, food and freezer-food plans.

3. Purchasers of the aforementioned freezer-food plan do not receive the same amount of food and a freezer for the same amount of money that they have been paying for food alone. The price of the food and the freezer is more than the price purchasers previously paid for food alone.

4. Respondents do not pay for the moving expenses of the freezer of the food purchased in connection with the aforementioned freezer-food plan if purchasers move to different locations or areas.

5. Purchasers of the aforementioned freezer-food plan do not receive a three year free service warranty on the freezer. Purchasers receive only a one year manufacturer's warranty on the freezer.

6. Neither the flavor nor quality of the food sold in connection with the freezer-food plan is unconditionally guaranteed. Respond-

ents often do not promptly and scrupulously fulfill their obligations under this guarantee.

7. The purchasers of the aforementioned freezer-food plan do not receive a "free" or "bonus" gift. The price of the "free" or "bonus" gift has been added to the price of the freezer.

8. The offer of four months supply of food for an average size family and a 21 cubic foot combination refrigerator-freezer or a 21 cubic foot freezer, plus metal shelving and a bonus gift, all for \$15.95 a week is not a bona fide offer but, on the contrary, it is made for the purpose of inducing the public to contact respondents' place of business to obtain said \$15.95 per week freezer-food plan. When a customer responds to such advertisement, respondents' representative visits his home. Said representative disparages the \$15.95 offer in such a manner as to discourage acceptance of the offer, and attempts to, and frequently does, sell a much higher priced freezer-food plan to such customers.

9. Respondents do not supply purchasers of the aforesaid freezer-food plans with all their food requirements.

10. The meat products sold in connection with the aforementioned freezer-food plan are not processed at a processing plant owned and operated by respondent corporation.

Therefore, the advertisements referred to in Paragraph 5 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, and the statements and representations referred to in Paragraph 6 were and now are false, misleading and deceptive.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of freezers, food and freezer-food plans from the respondents by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, including the dissemination by respondents of false advertisements as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce.

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within the intent and meaning of the Federal Trade Commission Act, and in violation of Sections 5 and 12 of said Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent National Home Food Service Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 61 East Market Street, in the city of Wilkes-Barre, State of Pennsylvania.

Respondents Andrew Carol and Marvin Rayfield are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

PART I

It is ordered. That respondent National Home Food Service Company, Inc., a corporation, and its officers, and Andrew Carol and Marvin Rayfield, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of freezers, food or a freezer-food

plan in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that:

a. Home economists or other formally trained individuals will assist purchasers of the freezer-food plan in planning their food orders.

b. Respondent corporation is a member of the Better Business Bureau in all areas where respondents sell their freezer-food plan unless respondent corporation is so affiliated in all such areas; or representing, directly or by implication, that respondent corporation holds a membership in the Better Business Bureau in any designated area when corporate respondent is not so affiliated.

c. Purchasers of a freezer-food plan receive the same amount of food and a freezer for the same or less money than they previously paid for food alone.

d. Respondents will pay the moving expenses of the freezer or the food if a purchaser of respondents' freezer-food plan moves to a different location or area of the country.

e. Freezers or any parts thereof are guaranteed in any manner unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction with any such representation.

f. The flavor or quality of the food sold in connection with a freezer-food plan is guaranteed unless in every instance respondents promptly and scrupulously fulfill their obligation under the guarantee.

g. Any article of merchandise or product is being given free as a gift or bonus or without cost with the purchase of a freezer, food or a freezer-food plan.

2. Advertising or offering for sale any freezers, food or freezer-food plans at specific prices, or otherwise, for the purpose of obtaining leads or prospects for the sale of freezers, food or freezer-food plans at higher prices unless respondents maintain an adequate and readily available stock of said freezers, and food.

3. Disparaging in any manner or refusing to sell any advertised freezer, food or freezer-food plan.

4. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or repre-

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sentations which are designed to obtain leads or prospects for the sale of a freezer-food plan or merchandise other than that advertised.

5. Representing directly or by implication that any freezer-food plan is offered for sale at a specific price when such offer is not a bona fide offer to sell said freezer-food plan at the specified price.

6. Representing directly or by implication that respondents supply purchasers of the aforesaid freezer-food plan with all their food requirements.

7. Representing directly or by implication that purchasers of respondents' freezer-food plan receive food or other items which are not available under said plan.

8. Representing directly or by implication that meat is processed at respondent corporation's processing plant or that respondent corporation processes its own meat products.

9. Misrepresenting in any manner the savings realized by the purchasers of respondents' freezer-food plan, freezer or food.

PART II

It is further ordered, That respondent National Home Food Service Company, Inc., a corporation, and its officers and Andrew Carol and Marvin Rayfield, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any food or any purchasing plan involving food, 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 contains any representation or misrepresentation prohibited in Paragraphs 1 through 9 of Part I of this order.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any food, or any purchasing plan involving food, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs 1 through 9 of Part I of this order.

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Complaint

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

IN THE MATTER OF

BRONDABROOKE PUBLISHERS, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8546. Complaint, Nov. 29, 1962—Decision, Oct. 11, 1963*

Order issued in default requiring New York City publishers of a tabloid size bimonthly newspaper known as "United Labor Management Press", to cease representing falsely—through their agents contacting industrial and business concerns by telephone and seeking to induce them to purchase advertising space—that said paper was affiliated with, or an official publication of, a labor union.

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 Brondabrooke Publishers, Inc., a corporation, Joseph Harrow and Harry Brenner, individually and as officers of said corporation, and Max Strier, individually and as advertising manager of said corporation, hereinafter referred to as respondents, have 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 Brondabrooke Publishers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 140 Nassau Street, New York City, New York.

Respondents Joseph Harrow and Harry Brenner are individuals and officers of the corporate respondent. Max Strier is the advertising manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the publication of a tabloid size newspaper known

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as United Labor Management Press. Said newspaper is published bi-monthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other states of the United States.

Further, respondents in the course and conduct of their business engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. A large part of the corporate respondents' income is derived from the sale of advertising space in "United Labor Management Press" to industrial and other business concerns. Respondents, through their duly authorized agents and representatives, contact said industrial and other business concerns by telephone and seek to induce them to purchase advertising space in said publication. In the course of said telephone solicitations, respondents' agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication was endorsed by, affiliated with or an official publication of a labor union.

PAR. 4. In truth and in fact, United Labor Management Press is not endorsed by, affiliated with or an official publication of a labor union, or in any manner connected with a labor union, but is independently organized and operated. Therefore, the statements and representations referred to in Paragraph 3 hereof are false, misleading and deceptive.

PAR. 5. In the course and conduct of their business respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and

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now has, the capacity and tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of nonexistent debts.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. William A. Arbitman supporting the complaint.

Mr. Spencer M. Beresford, Washington, D.C., for respondents.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

AUGUST 7, 1963

The complaint herein, charging respondents with violation of Section 5 of the Federal Trade Commission Act, was issued November 29, 1962, and was duly served upon respondents.

On January 4, 1963, respondents filed their answer, denying generally the allegations of the complaint and admitting minor factual allegations. A prehearing conference was held on January 24, 1963, to consider the orderly disposition of the proceedings. At that time, a hearing date of March 5, 1963, was agreed upon by all parties.

On February 26, 1963, respondents filed a motion for cancellation of the hearing scheduled for March 5, 1963, and for leave to negotiate a consent order agreement, and requested that the question be certified to the Commission. The hearing was cancelled subject to rescheduling upon notice, and on March 15, 1963, the hearing examiner denied respondents' motion for leave to negotiate a consent agreement for the reasons that respondents had failed to show good cause why the Rules of Practice should be waived, and why the matter should be certified to the Commission.

Subsequently, several hearing dates were cancelled because of the unavailability of the respondents or respondents' counsel and the illness of one of the respondents.

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On July 12, 1963, four days before the commencement of the most recently scheduled hearing, respondents filed a Motion to Withdraw Answer, which was not opposed by counsel supporting the complaint.

By order of July 18, 1963, the hearing examiner granted respondents' Motion to Withdraw Answer, ordered said Answer stricken from the record and declared the respondents in default.

Counsel supporting the complaint submitted proposed findings, conclusion, and order, and requested that the hearing examiner find the facts as alleged in the complaint.

Pursuant to § 3.5(c) of the Commission's Rules of Practice for Adjudicative Proceedings, effective August 1, 1963, the hearing examiner finds that facts to be as alleged in the complaint and issues such findings, conclusion, and order to cease and desist, as follows:

FINDINGS OF FACT

1. Respondent Brondabrooke Publishers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 140 Nassau Street, New York City, New York.

2. Respondents Joseph Harrow and Harry Brenner are individuals and officers of the corporate respondent. Max Strier is the advertising manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

3. Respondents are now, and for some time last past have been engaged in the publication of a tabloid size newspaper known as United Labor Management Press. Said newspaper is published bimonthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other States of the United States.

Further, respondents in the course and conduct of their business engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. A large part of the corporate respondent's income is derived from the sale of advertising space in "United Labor Management

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Press" to industrial and other business concerns. Respondents, through their duly authorized agents and representatives, contact said industrial and other business concerns by telephone and seek to induce them to purchase advertising space in said publication. In the course of said telephone solicitations, respondents' agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication was endorsed by, affiliated with or an official publication of a labor union.

5. In truth and in fact, United Labor Management Press is not endorsed by, affiliated with or an official publication of a labor union, or in any manner connected with a labor union, but is independently organized and operated.

6. In the course and conduct of their business respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of nonexistent debts.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

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ORDER

Is is ordered, That respondents Brondabrooke Publishers, Inc., a corporation, and its officers and Joseph Harrow and Harry Brenner, individually and as officers of said corporation; and Max Strier, individually and as advertising manager of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the soliciting, offering for sale or sale in commerce of advertising space in the newspaper now designated as "United Labor Management Press," or any similar publication, whether published under that name, or any other name, and in connection with the offering for sale, sale, or distribution of said newspaper, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that said newspaper is endorsed by, affiliated with, or an official publication of, or otherwise connected with a labor union.
2. Placing, printing or publishing any advertisement on behalf of any person or firm in said paper without a prior order or agreement to purchase said advertisement.
3. Sending bills, letters or notices to any person or firm with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person or firm, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

FINAL ORDER

The Commission on September 24, 1963, having issued an order staying the effective date of the decision herein, and the Commission now having determined that the case should not be placed on its own docket for review:

It is ordered, That the initial decision of the hearing examiner, filed August 7, 1963, be, and it hereby is, adopted as the decision of the Commission.

ORDER

It is ordered, That respondents Brondabrooke Publishers, Inc., a corporation, and its officers and Joseph Harrow and Harry Brenner, individually and as officers of said corporation; and Max Strier, individually and as advertising manager of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the soliciting, offering for sale or sale in commerce of advertising space in the

newspaper now designated as "United Labor Management Press," or any similar publication, whether published under that name, or any other name, and in connection with the offering for sale, sale, or distribution of said newspaper, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that said newspaper is endorsed by, affiliated with, or an official publication of, or otherwise connected with a labor union.
2. Placing, printing or publishing any advertisement on behalf of any person or firm in said paper without a prior order or agreement to purchase said advertisement.
3. Sending bills, letters or notices to any person or firm with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person or firm, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

It is further ordered, That respondents Brondabrooke Publishers, Inc., a corporation, and Joseph Harrow, Harry Brenner and Max Strier shall, within sixty (60) days after service upon them of this