

Complaint

IN THE MATTER OF

DOLLAR VITAMIN PLAN, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8636. Complaint, Aug. 11, 1964—Decision, June 24, 1966*

Order requiring a New York City marketer of "Vitasafe" vitamin capsules, to cease making false and exaggerated claims concerning the efficacy of their vitamin products.

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 Dollar Vitamin Plan, Inc., a corporation, and Vitasafe Corporation, a corporation, and Samuel Josefowitz, Gerald Glaeser, Adolf W. Goldschmidt, individually and as officers of said corporations, and Henry D. Cohen, Benjamin W. Lerner, Leon Potash and William H. Sylk, individually, and Maxwell Sackheim—Franklin Bruck, Inc., a corporation, and Robert Sackheim, individually and as an officer 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 Dollar Vitamin Plan, Inc., is a corporation organized and existing under the laws of the State of New York with its office and principal place of business at 23 West 61st Street, in the city of New York, State of New York.

Respondent Vitasafe Corporation is a corporation organized and existing under the laws of the State of New York with its office and principal place of business at 23 West 61st Street, in the city of New York, State of New York. It is a wholly owned subsidiary of Dollar Vitamin Plan, Inc.

Respondents Samuel Josefowitz, Gerald Glaeser, and Adolf W. Goldschmidt are officers of the corporate respondents Dollar Vitamin Plan, Inc., and Vitasafe Corporation and each participates in the formulation, direction and control of the acts and practices of said corporations including the acts and practices hereinafter

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set forth. Their address is the same as that of said corporate respondents.

Respondents Henry D. Cohen, Leon Potash, Benjamin W. Lerner and William H. Sylk were formerly officers of Vitasafe Corporation during which time they actively participated in the formulation, direction and control of the policies of said corporation in connection with the acts and practices hereinafter set forth. The address of respondents Leon Potash and Henry D. Cohen is 19 West 61st Street in the city of New York, State of New York. The address of respondent Benjamin W. Lerner is 362 Brookway Road, in the city of Merion, State of Pennsylvania. The address of respondent Sylk is 400 Bryn Mawr Avenue, in the city of Bryn Mawr, State of Pennsylvania.

Respondent Maxwell Sackheim—Franklin Bruck, Inc., is a corporation organized and existing under the laws of the State of New York with its office and principal place of business at 545 Madison Avenue in the city of New York, State of New York.

Respondent Robert Sackheim is an officer of the corporate respondent, Maxwell Sackheim—Franklin Bruck, Inc., and formulates, directs and controls the acts and practices of said corporation, including the acts and practices hereinafter set forth. His address is the same as that of said corporate respondent.

PAR. 2. Respondents Dollar Vitamin Plan, Inc., Vitasafe Corporation, Samuel Josefowitz, Gerald Glaeser and Adolf W. Goldschmidt are now, and for some time last past have been, engaged in the advertising, promotion, sale and distribution of preparations containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by said respondents for said preparations, the formulae thereof and directions for use are as follows:

1. *Designation:* Vitasafe Capsules for Men.

Formula:

Vitamin A	12,500 USP Units
Vitamin B ₁	5 mg.
Vitamin B ₂	2.5 mg.
Vitamin B ₆	0.5 mg.
Vitamin B ₁₂	2 mcg.
Vitamin C	75 mg.
Vitamin D	1,000 USP Units
Vitamin E	2 I.U.
Choline Bitartrate	31.4 mg.
Inositol	15 mg.

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Rutin	10 mg.
Sodium Caseinate (18 Amino Acids)	100 mg.
Lemon Bioflavonoid Complex	5 mg.
Niacinamide	40 mg.
Calcium Pantothenate	4 mg.
Folic Acid	0.4 mg.
Calcium	75 mg.
Phosphorus	58 mg.
Iron	30 mg.
Copper	0.45 mg.
Manganese	0.5 mg.
Potassium	2 mg.
Zinc	0.5 mg.
Magnesium	3 mg.
Sulfur	22 mg.

Directions: One Capsule Daily.2. *Designation:* Vitasafe Capsules for Women.*Formula:*

Vitamin A	12,500 USP Units
Vitamin B ₁	5 mg.
Vitamin B ₂	2 mg.
Vitamin B ₆	0.5 mg.
Vitamin B ₁₂	3 mcg.
Vitamin C	100 mg.
Vitamin D	1,000 USP Units
Vitamin E	3 I.U.
Vitamin K	0.05 mg.
Choline Bitartrate	30 mg.
Inositol	10 mg.
d 1-Methionine	10 mg.
Glutamic Acid	50 mg.
Lemon Bioflavonoid Complex	5 mg.
Liver	5 mg.
Niacinamide	25 mg.
Calcium Pantothenate	4 mg.
Folic Acid	0.3 mg.
Calcium	50 mg.
Phosphorus	39 mg.
Iron	30 mg.
Cobalt	0.04 mg.
Copper	0.45 mg.
Manganese	0.5 mg.
Molybdenum	0.1 mg.
Iodine	0.1 mg.
Potassium	2 mg.
Zinc	0.5 mg.
Magnesium	3 mg.

Directions: One Capsule Daily.

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PAR. 3. Respondents Dollar Vitamin Plan, Inc., Vitasafe Corporation, Samuel Josefowitz, Gerald Glaeser and Adolf W. Goldschmidt cause the said preparations, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial. Respondents Henry D. Cohen, Benjamin W. Lerner, Leon Potash and William H. Sylk have engaged in the business described in Paragraphs Two and Three above and have participated in the acts and practices herein described.

Respondent Maxwell Sackheim.—Franklin Bruck, Inc., is now, and for some time last past has been the advertising agency of Vitasafe Corporation. Respondents Maxwell Sackheim—Franklin Bruck, Inc., and Robert Sackheim now prepare and place, and for some time last past have prepared and placed, for publication, advertising material, including the advertising hereinafter referred to, to promote the sale of said preparation. In the conduct of their business, at all times mentioned herein, said respondents have been in substantial competition in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparations, 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 circulars and brochures, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations; and have disseminated, and caused the dissemination of, advertisements concerning said preparations 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 preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

Important Nutritional Discoveries . . . AT LAST! Here's the electrifying news you've hoped for! Here at last you are offered a new improved formula that is truly comprehensive . . .

* * * * *

Many of these folks even tried brand after brand of less comprehensive preparations without getting the benefits they hoped for! Then they discovered the new *improved* Vitasafe formula—one that really worked for them! For in every single high-potency capsule are 27 precious ingredients (29 under Women's plan).

* * * * *

THE MAGIC POWER OF VITAMINS, MINERALS AND LIPOTROPIC FACTORS TO RECHARGE YOUR BODY WITH YOUTHFUL ENERGY * * * THINK OF IT! If you are weak, tired and run down, just one high-potency Vitasafe Capsule a day can make a world of difference in the way you feel. How is it possible? Because every Vitasafe Capsule contains ALL the vitamins and minerals you may need to help you retain youthful pep and vigor plus new important factors: . . . Lemon Bioflavonoid Complex that helps build your resistance to colds and infection.

* * * * *

Are you giving your wife the companionship she craves? . . . Are you giving her what she most expected on the day that you married her? . . . Or are you always "too tired" at the end of a day's work? . . . If so, your condition may simply be due to an easily corrected vitamin and mineral deficiency in your diet.

* * * * *

OUR FIGHTS HAVE TURNED TO KISSES! * * * It's hard to believe that my wife and I used to fight. . . . To correct this condition, each of us started taking Vitasafe High-Potency Capsules—just one a day. It wasn't too long until we began to notice the difference. We had more pep, more energy—and our dispositions improved. Instead of fighting, we were back in each other's arms—just as we were on our honeymoon.

* * * * *

HE MADE ME FEEL LIKE A BRIDE AGAIN * * * Its hard for me to believe that a few weeks ago I actually thought about leaving my husband! He had become so nervous and irritable—so cross with the children and me that there was just no living with him. He was always "too tired" to do anything . . . Just when things looked blackest, we learned about the famous Vitasafe Plan through an ad in our newspaper . . . naturally, we sent for a trial month's supply. What a difference it has made! Vitasafe High-Potency Capsules have helped snap back Jim's youthful vigor and vim. I'm so happy, I feel *like a bride* again!

* * * * *

ADVICE TO TIRED MEN * * * If you suffer from a lack of pep, energy and vitality due to a nutritional deficiency, you may be helped by the special High-Potency Vitasafe Formula for men. Simply check the Men's Formula box in the coupon for your trial supply.

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* * * * *

Psst . . . didn't you know—SHE'S HIS WIFE, NOT HIS MOTHER!
 * * * Imagine how embarrassed I was when I realized that they were talking about Jane. There she sat, looking all worn out . . . not having any fun. Those tired sagging lines in her face made her look years older, and she seemed nervous and irritable . . . to look at her now, you'd never guess she was one of the younger women in the room . . . Jane had nothing to lose, and at my suggestion, she sent in the coupon. Well, I wish you could have seen her at the party last night! Jane was a changed woman . . . dynamic and energetic and looking years younger.

* * * * *

For men and women approaching, or in the middle years, an adequate supply of vitamins in their diets is vital. Not only for energy and vibrant good health, but also to ward off the aches, pains and ailments common through the middle years, many of them "triggered" by prolonged and often *hidden* malnutrition. For the middle aged are particularly prone to malnutrition for many reasons. . . . If you are over 35, do not fail to take your daily supply of vitamins and minerals.

* * * * *

LADIES, AT LAST! A COMPREHENSIVE FORMULA PREPARED TO MEET THE SPECIAL NEEDS AND PROBLEMS OF WOMEN!
 * * * Thousands of women who once felt tired, run-down and irritable—victims of nerve-wracking headaches, frequent colds, moods of melancholia and depression—women who suffered the torment of periodic upsets and women who approached the transitional period of the menopause with neurotic fears and anxieties . . . who dreaded the advance of premature old age . . . *all these women are now bursting with new radiant health and vitality*—enjoying new-found serenity and happiness because of the exclusive new formula now contained in Vitasafe Capsules for Women.

* * * * *

Two new improved Vitasafe formulas—Formula for Men—Formula for Women—Now Include *BRAIN FOOD* and *ANTI-COLD* Factors! IN JUST 30 DAYS YOU TOO MAY EXPERIENCE NEW *MENTAL* AND *PHYSICAL* VIGOR AND VITALITY—thanks to a remarkable new nutritional formula! . . . Like you, perhaps, these men and women always felt tired, run-down and listless . . . plagued with headaches, insomnia and depression. They often found it difficult to cope with their jobs and daily problems without suffering from nervous tension and anxiety. They became forgetful—unable to concentrate without feeling mental strain . . . If you, too, suffer any of the distressing symptoms due to faulty nutrition, you can now look forward to a radiant new outlook on life . . .

* * * * *

Now included in the effective Vitasafe formula is an uncommon 100% pure *natural* nutrient concentrate—*L-Glutamic Acid*—the only one actually known to science which may nourish the human brain cells! Men and women who took this vital substance under careful medical supervision, actually demonstrated keener intelligence and increased mental alertness . . . In addition,

each Vitasafe Capsule now contains wonder 'working *Lemon Bioflavonoid Complex*, recommended by doctors to build resistance against colds and infection.

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication that:

1. Vitasafe Capsules are a new medical and scientific discovery and achievement;
2. Vitasafe Capsules for Men are uniquely and distinctively suited to the needs of men;
3. Vitasafe Capsules for Women are uniquely and distinctively suited to the needs of women;
4. Vitasafe Capsules will be of value in the prevention of colds and other infections;
5. Vitasafe Capsules for Women will be of value to women in the treatment, relief and prevention of melancholia, discomfort due to menstruation and fears and anxieties arising from the onset and contemplation of menopause and old age;
6. Persons over 35 years of age have a particular need for Vitasafe Capsules;
7. Vitasafe Capsules increase and stimulate sexual vitality and activity;
8. The use of Vitasafe Capsules and each ingredient therein will be of benefit in the treatment and relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality and initiative, loss of happiness, loss of a sense of well being, and appearing and feeling older than one should;
9. The use of Vitasafe Capsules will increase a person's intelligence, mental alertness, ability to concentrate, and power to remember.

PAR. 7. In truth and in fact:

1. Vitasafe Capsules are not a new medical or scientific discovery or achievement;
2. Vitasafe Capsules for Men are not uniquely or distinctively suited to the needs of men;
3. Vitasafe Capsules for Women are not uniquely or distinctively suited to the needs of women;
4. Vitasafe Capsules will not be of value in the prevention of colds or other infections;

5. Vitasafe Capsules for Women will not be of value to women in the treatment, relief or prevention of melancholia, discomfort due to menstruation, or fears or anxieties arising from the onset or contemplation of menopause or old age;

6. Neither adults past 35 years of age nor adults of any other age group have a special need for Vitasafe Capsules;

7. Vitasafe Capsules will not increase or stimulate sexual vitality or activity;

8. The use of Vitasafe Capsules will not be of benefit in the treatment or relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well being, or appearing or feeling older than one should, except in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B₁ (Thiamine Mononitrate), Vitamin B₂ (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide. All the remaining ingredients in Vitasafe Capsules are of no benefit in the treatment or relief of said symptoms;

9. The use of Vitasafe Capsules will not increase a person's intelligence, mental alertness, ability to concentrate, or power to remember.

Therefore, the advertisements set forth and referred to in Paragraph Five 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.

PAR. 8. Through the use of the statements in the aforesaid advertisements, and others similar thereto not specifically set out herein, respondents have also represented, and are now representing, directly and by implication to persons of both sexes and all ages who experience feelings of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality and initiative, loss of happiness, loss of sense of well-being, and appearing and feeling older than one should, that there is a reasonable probability that they have symptoms which will respond to treatment by the use of the aforementioned preparations. In the light of such statements and representations, said advertisement are misleading in a material respect and therefore constitute false advertisements as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material facts that in the great majority of persons, or of any age, sex or other group or class thereof, who experience the symptoms of tiredness, weakness, nervousness, irritability,

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depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, such symptoms are not caused by a deficiency of one or more of the nutrients provided by Vitasafe Capsules, and that in such persons the said preparations will be of no benefit.

PAR. 9. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Mr. Joel P. Stern and Mr. Daniel J. Manelli supporting the complaint.

Mr. Milton A. Bass and Mr. Solomon H. Friend, of Bass & Friend, New York, N.Y., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 15, 1965

Summary

The above entitled proceeding, D. 8636, and a companion proceeding, D. 8637 [p. 985 herein], were commenced under § 5 and § 12 of the Federal Trade Commission Act, and involve alleged deceptive advertising of vitamin products. Complaints in these two proceedings issued on August 11, 1964.

In a Food and Drug injunction action commenced in a United States District Court on August 17, 1964, the respondent vitamin companies in the two present proceedings and respondent Cohen, as well as other parties not respondents here, were placed under an injunction, by a temporary restraining order of that date and a preliminary injunction of September 29, 1964, in respect to misbranding of the products involved in the present proceedings.—There was also, as later appeared herein, a prior *in rem* action in respect to said products, and labeling, resulting in a decree of condemnation by the District Court following an opinion dated January 24, 1964. An appeal from the preliminary injunction, and prior condemnation decree, was taken to the United States Court of Appeals, Third Circuit.

Counsel for present respondents, who were counsel for defendants in the court litigation, asked for continuances herein in order to await the decision of the Court of Appeals. Continuances were granted, but the hearing was finally set to commence on

March 1, 1965. On May 27, 1965, long after completion of the testimony herein, an opinion of the Court of Appeals was filed in effect affirming the District Court, with some modification of little comfort to respondents here.

Shortly prior to the commencement of hearings herein, respondents' counsel advised that they would offer no medical experts in their defense, explaining that they would state their position at the commencement of the hearings. At the opening of the hearings, in New York, they made an oral motion for dismissal (TR 4), urging for the first time that the Commission was barred from proceeding in view of the Food and Drug injunction action and the prior *in rem* action. Counsel also stated on the record that, in addition to refraining from offering expert testimony, as announced prior to the hearing, respondents would not even cross-examine complaint counsels' expert witnesses (TR 61).

Counsel further stated on the record that, allegedly in order to put the present proceedings in line with precedents relied on by them, respondents amended the answers interposed in both proceedings so as to admit, in effect, all non-medical allegations, *i.e.*, including individual control and responsibility (TR 11, 13, 30). In the alternative, counsel requested a continuance pending handing down of the Court of Appeals decision.

The examiner reserved decision on the motion to dismiss until after the hearing (TR 58), on the ground that it was a late hour (TR 58) to raise this question, and with the thought that, there being so few witnesses to be called, all of them the Commission's the record might as well be completed in any event (see TR 56). The hearing proceeded accordingly. The only witnesses called, all by the Commission, were the two minor non-medical witnesses (Sylk and Lerner), heard in New York, and three medical witnesses, heard in Washington, D.C., but not cross-examined by respondents' counsel, who appeared, however, by one of their associates.

Details as to matters referred to in this Summary, and as to other matters, are stated below under appropriate captions.

Informal Consolidation of Two Proceedings

The respondent vitamin companies in this and the accompanying proceeding are closely related and appear by the same attorneys, Bass & Friend, Esqs., who represent all the respondents of both proceedings (including Sackheim of the advertising agency), except the advertising agency itself and except the two minor in-

dividual respondents (Sylk and Lerner). Although the two proceedings were never formally consolidated, they have, with the consent of counsel, been handled together for prehearing purposes and were finally tried together.

Respondent Advertising Agency (Prior Dismissal)

It turned out prior to hearing that there was no advertising company bearing the name set forth in the complaint, to wit, Maxwell Sackheim—Franklin Bruck, Inc., that the name had been changed to something quite different over two years before issuance of the complaint, and that the corporation was taken over by entirely new people who, at the time the complaint was issued, no longer even dealt in vitamin products. A motion was made on September 30, 1964, through attorneys other than Bass & Friend, to dismiss the complaint insofar as it was directed against said advertising corporation. The motion was supported by an affidavit. Complaint counsel submitted an answer stating that they were "not opposed," although they did not consent to granting the motion and declined to do so. The examiner did not regard the supporting affidavit as sufficiently comprehensive and by order of November 6, 1964, required an additional affidavit, with further specified details, which was forthcoming, whereupon the motion was granted. The examiner, by order of November 30, 1964, also required an amended notice of appearance to reflect properly the corporate change of name, which was also forthcoming.

Pursuant to § 3.6(e) of the Rules of this Commission, the granting of the motion is taken into account in this decision.

Advertising Agency's Officer Sackheim (Prior Dismissal)

A motion was made by Bass & Friend, Esqs., representing Robert Sackheim, named individually and as an officer of said advertising corporation, to dismiss the complaint insofar as it was directed against him individually. Apart from the unopposed dismissal in favor of the advertising agency, obtained by its attorneys, it turned out, on Sackheim's uncontradicted affidavit, that he had never had anything to do with creating the advertising copy here in question and that he did not in any way formulate, direct or control the practices complained of, nor had he done so. It was also shown by the affidavit that he had left the advertising agency two years prior thereto, and that he was presently engaged, and had been for some time, in selling office supplies. Com-

plaint counsel filed an answer of September 28, 1964, opposing the motion. The hearing examiner certified the matter to the Commission on December 9, 1964, setting forth the facts, and recommending the granting of the motion, particularly in view of Sackheim's offer to submit to compliance procedure. The Commission dismissed the complaint on January 6, 1965, after obtaining a short affidavit from Sackheim of intent to comply if he should return to the advertising business.

Thus the former officer of the advertising agency, as well as the advertising agency itself, were taken out of the proceedings prior to hearing.

Respondent Cohen (Prior Dismissal Denied)

A motion was made, on papers dated January 12 and January 14, 1965, by Bass & Friend, Esqs., to dismiss as to respondent Cohen on the latter's affidavit purporting to show that he had had nothing to do with the alleged acts constituting alleged violation. This motion was opposed by complaint counsel by their signed statement of January 25, 1965. Despite a rather strong showing by the supporting affidavit, the examiner denied the motion on January 27, 1965, on the ground that the true facts could be ascertained with reasonable certainty only after opportunity for cross-examining Mr. Cohen.

Other Respondents (Including Sylk and Lerner)

There were no motions to dismiss, or for other relief, as to the remaining individual respondents in this and the accompanying proceeding.

Four of them, represented by Bass & Friend, are alleged officers or principals of the respondent vitamin companies, or one or more of them, as follows:

Potash	D. 8636 and D. 8637
Goldschmidt	D. 8636 and D. 8637
Josefowitz	D. 8636
Glaeser	D. 8636

There are two others, as follows:

Lerner	D. 8636
Sylk	D. 8636

Neither Sylk nor Lerner are of much significance in this litigation, not having been (as turned out at the hearing) directly connected with the respondent vitamin companies. Apparently nei-

ther of them filed answer, although Mr. Sylk filed an appearance through an attorney. They are both residents of Philadelphia.

Hearings Authorized for Two Cities

Complaint counsel desired a hearing in New York, on basic facts, and in Washington as well as two other cities for medical testimony. However, their medical advisor indicated, on being asked by the examiner, that all medical testimony could be heard in Washington. Accordingly, the examiner, on December 11, 1964, certified to the Commission the necessity for holding hearings in more than one city, but only in two cities. New York was one of the cities certified to be necessary to elicit the non-medical facts, and Washington as the sole city to hear medical testimony, the latter city involving no extra travel expense to the Commission as to the examiner, complaint counsel, and medical advisor. The Commission so ordered on December 16, 1964.

Prehearings. Discovery

There was a prehearing conference on October 22, 1964, with a transcript of 85 pages. This resulted in a detailed prehearing conference order of directions, settled on notice, providing for adequate disclosure by each side in respect to documents and witnesses.

There was a sharp issue as to whether each side, in anticipation of cross-examination by the other, should list and make available unpublished studies and tests of its expert witnesses, which might tend to contradict public studies and tests relied on. The issue was raised by respondents' formal motion filed November 9, 1964, which was opposed by complaint counsels' answer of November 18, 1964, and orally at the prehearing conference. The examiner ruled for disclosure of such unpublished studies and tests, to anticipate cross-examination possibly eliciting their existence and requiring continuances, as appears by his order of December 7, 1964 (see last paragraph, p. 2). However, in making their return on February 12, 1965, complaint counsel omitted any such unpublished studies, simply denying "possession, custody or control of same," and not stating whether they made efforts to procure same. The examiner therefore issued his order of February 15, 1965, directing them to show why they should not be precluded from offering expert testimony, or the matter certified to the Commission under § 3.12 of

the Rules. Complaint counsel filed a response, dated February 18, 1965, claiming compliance on the basis of a constrained construction of the order. The examiner therefore issued his order of February 19, 1965, permitting the expert testimony subject, however, to a motion by respondents to strike, and reserving decision, as to whether the matter should be certified under § 3.12, in the light of future compliance. Any question in respect to this matter has largely, if not entirely, become moot in view of respondents' election, after the hearing commenced, to waive cross-examination of experts, which might have elicited the existence of relevant unpublished studies or tests.

There was no suggestion at the prehearing conference, or at any time prior to hearing, that respondents were raising, or would raise, a question as to the Commission's right to prosecute these proceedings, *i.e.*, in view of the Food and Drug court actions.

Waiver of Medical Rebuttal by Respondents

Respondents, in their return to the prehearing order directing discovery, listed no medical experts as witnesses, and they explained by letter of February 19, 1965, merely that their "position in this regard will be stated at the hearing."

Continuances

On the basis of the forthcoming alleged imminence of the Court of Appeals decision, respondents repeatedly urged, as heretofore stated, that the hearing herein be held off. They made a motion on December 18, 1964 (referring to the undecided Court of Appeals case, but not to any question of Commission "jurisdiction") for a continuance without definite date. Although complaint counsel stated, on December 31, 1964, that they did not oppose the motion, the examiner, by order of January 4, 1965, adjourned the hearing only to February 15, 1965, said date being set peremptorily against respondents. The examiner adhered to this despite respondents' renewed request of January 22, 1965, for a further continuance, also based on the expected Court of Appeals decision. By motion of February 1, 1965, complaint counsel requested a continuance on the ground of the unavailability of expert witnesses. In response to this motion, the examiner changed the hearing date to March 1, 1965, which date was consented to by respondents; the examiner's order of February 3, 1965, recites in full detail all the circumstances.

HEARING

The actual hearing was confined to complaint counsels' three medical witnesses, who were not cross-examined, and to the two minor non-medical witnesses, Sylk and Lerner.

Motion to Dismiss Because of Court Action

At the very commencement of the hearing, on March 1, 1965, respondents made an oral motion, asking for the first time, as stated above, for the dismissal of the two proceedings on the ground that, in view of the United States District Court action or actions, the Federal Trade Commission was barred from proceeding, by reason of court decisions directed against multiplicity of suits, and because of res judicata considerations, and that, in any event, there was no public interest, considering the District Court injunction already issued. As also already stated, the examiner pointed out that this was a late hour to make such a motion, although he heard respondents' counsel at length so as to enable counsel to have the points on the record. In reserving decision, the examiner stated that he would rule on the motion as the points might be presented in respondents' brief after the conclusion of the hearings.—As also heretofore stated, respondents at the same time asked in the alternative for a further continuance pending the decision of the Court of Appeals on appeal from the District Court action; the examiner denied the continuance.

Answer Withdrawn re Non-Medical

Respondents' counsel also announced and stipulated that—in order, as he said, to make the present two proceedings identical with adjudicated cases on the res judicata or multiplicity of suits issue—respondents were admitting (TR 11, 13, 30) the non-medical allegations in the two complaints herein, more specifically, paragraphs One, Two, Three, and Four of the complaints.¹ Accordingly, respondents' counsel offered no evidence on these non-medical facts, i.e., to meet such evidence as was submitted by complaint counsel.

Respondents Waive Cross-Examination of Experts

Respondents' counsel also announced (TR 61) that there would be no cross-examination of complaint counsels' medical witnesses, to be heard the following week in Washington—i.e., so as to be consistent with the respondents' theory announced at the hearing

¹ TR 27-28.

that the Federal Trade Commission was barred from proceeding herein. The examiner advised counsel, nevertheless, that the respondents' right to cross-examine still remained, and that respondent might cross-examine the medical witnesses, when they testified, without prejudice (TR 62) to the point being raised as to the Commission's being barred from proceeding.

This waiver at the hearing of cross-examination of medical witnesses was in addition to the letter declaration prior to hearing that respondents would not offer any medical witnesses of their own.

Proposed Stipulation as to Expert Testimony

Respondents' counsel also raised the question, in view of the medical evidence on both sides in the District Court litigation, as to the necessity for complaint counsel to call medical witnesses in the present proceedings and thus subject respondents to the further expense of having their counsel attend the medical part of the hearing herein to be held in Washington. The examiner asked complaint counsel if they would stipulate to receiving the medical testimony in the District Court litigation as the medical testimony in these proceedings (see TR 58). The answer was in the negative.

Court of Appeals Decision

The examiner also volunteered that he would receive in evidence the pleadings in the District Court as well as the opinion and order of the Court of Appeals when it came down. This, of course, was agreeable to respondents and copies thereof were received in evidence as respondents' exhibits, except the opinion of the Court of Appeals, the record being kept open, however, for such reception when it would be issued. As heretofore stated, the opinion was not filed until May 27, 1965; a copy is marked herein as a respondents' exhibit.

Main Non-Medical Witnesses Not Present

Subpoenae were issued herein, on complaint counsels' request, for the following non-medical witnesses, who are the major individual respondents:

Cohen
Glaeser
Goldschmidt
Josefowitz
Potash

None of these five respondents appeared at the hearing. Two of

them were reported to be away on trips, one in California and the other in Switzerland, and apparently there was no service on either but there was service on the other three. However, their non-appearance, and the lack of their testimony, may be ignored in view of the respondents' stipulation, heretofore referred to, amending the answer to admit the non-medical allegations. Sylk and Lerner were the only non-medical witnesses to testify. These two witnesses, brought from Philadelphia under subpoena by complaint counsel, appeared at the hearing unrepresented by counsel. Their testimony established nothing to connect them with the alleged unlawful acts herein. It showed merely that they were connected with a Philadelphia concern which, for a short period, took over the respondent vitamin concerns here, but then withdrew. During this short period, Lerner, but not Sylk, did come to New York to be able to report on the operation of the respondent concerns, but neither he nor Sylk had any direct connection with the false advertising allegation herein.

Medical Witnesses

Complaint counsels' medical witnesses, and the only medical witnesses in this case, all of them well-qualified, are as follows:

Dr. William James McGanity, University of Texas

Dr. Thomas Stone Sappington, Washington, D.C.

Dr. Robert E. Shank, Washington University School of Medicine, St. Louis, Missouri

There was no cross-examination of these witnesses—consistent with respondents' notice that there would be none—although the examiner advised respondents' counsel after the testimony of each of them that there could be cross-examination without waiving the jurisdictional point. (See, for instance, TR 198, 224.) Similarly, there was no rebuttal, although the examiner invited it at the close of complaint counsels' case (TR 225).

Reference is made to the FINDINGS OF FACT as to details of the testimony given by these medical witnesses.

Proposed Findings and Briefs

The following are the submissions, by way of proposed findings or memoranda, made by the parties after the conclusion of the hearing:

1. Proposed Findings of Fact, Conclusions of Law and Proposed Order (with legal discussion, but not on jurisdiction,²

² That is, *res judicata*, multiplicity of proceedings, etc.

etc.), submitted by complaint counsel in two documents, one for each of the two proceedings.

2. Proposed Findings and Conclusions of Law, so-called (but actually a memorandum of law on questions of jurisdiction, etc.), submitted by respondents in one document for both proceedings.

3. Answering Memorandum of Law (on the question of jurisdiction, etc.), submitted by complaint counsel in one document for both proceedings.

4. Reply Memorandum of Law, submitted on the question of jurisdiction, etc., by respondents' counsel, in one document for both proceedings.

FINDINGS OF FACT (D. 8636)

Re Complaint Par. One³

First.—Respondent Dollar Vitamin Plan, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business at 12 East 46th Street, in the city of New York (Borough of Manhattan), State of New York.

Second.—Respondent Vitasafe Corporation is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business at 12 East 46th Street, in the city of New York, State of New York. It is a wholly-owned subsidiary of Dollar Vitamin Plan, Inc.

Third.—Respondent Samuel Josefowitz, Gerald Glaeser and Adolf W. Goldschmidt are officers of the corporate respondents Dollar Vitamin Plan, Inc., and Vitasafe Corporation, and each participates in the formulation, direction and control of the acts and practices of said corporations, including the acts and practices hereinafter set forth. Their address is the same as that of said corporate respondents.

Fourth.—Respondents Henry D. Cohen and Leon Potash were formerly officers of the corporate respondents Dollar Vitamin Plan, Inc., and Vitasafe Corporation, during which time they actively participated in the formulation, direction and control of the policies of said corporations in connection with the acts and practices hereinafter set forth. The address of respondent Leon Potash is the same as that of said corporate respondents. The address of

³ This numbering (One, Two, etc.) follows the numbering of the paragraphs in the complaint. The numbering of each paragraph here (First, Second, etc.) follows the numbering of the Proposed Findings of Fact of complaint counsel.

respondent Henry D. Cohen is 377 Crane Street, in the city of Orange, State of New Jersey.

* * * * *

Findings First, Second, Third and Fourth, hereinabove set forth, are supported by admissions in the answer filed herein on October 5, 1964, as amended by admissions of record, TR 27:22-25⁴ continuing at TR 28:1-7, TR 30:10-17 (individual responsibility), and TR 31:15-22.

Re Complaint Par. Two

Fifth.—Respondents Dollar Vitamin Plan, Inc., Vitasafe Corporation, Samuel Josefowitz, Gerald Glaeser, and Adolf W. Goldschmidt have been for some time last past, and up until issuance of the complaint herein, engaged in the advertising, promotion, sale and distribution of preparations containing ingredients which come within the classification of drugs, as the term "drug" is defined in the Federal Trade Commission Act. (Commencing at or about the time of the issuance of the complaint business activities of the corporations were restrained by an injunction issued by a United States District Court.)

* * * * *

The above Finding Fifth is supported by admissions in the answer filed October 5, 1964, as amended by admissions of record, TR 27:22-25, TR 28:1-7, TR 30:10-17, TR 31:15-22 (conduct to issuance of complaint).

Sixth.—The designations used by said respondents were said preparations, the formulae thereof, and the directions for use are as follows:

1. Designation: Vitasafe Capsules for Men.

Formula:

Vitamin A (Palmitate)	12,500 USP Units
Vitamin B ₁ (Thiamine Hydrochloride)	5 mg.
Vitamin B ₂ (Riboflavin)	2.5 mg.
Vitamin B ₆ (Pyridoxine Hydrochloride)	0.5 mg.
Vitamin B ₁₂ (Cobalamin Conc. N.F.)	2 mcg.
Vitamin C (Ascorbic Acid)	75 mg.
Vitamin D (Irr. Ergosterol)	1,000 USP Units
Vitamin E (from d-Alpha Tocopheryl Acetate Conc. N.F.)	2 I.U.
Niacinamide	40 mg.
Calcium Pantothenate	4 mg.

⁴ TR 27:22-25 means transcript, page 27, lines 22 through 25.

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Folic Acid	0.1 mg.
Rutin	10 mg.
Choline Bitartrate	31.4 mg.
Inositol	15 mg.
Lemon Bioflavonoid Complex	5 mg.
Sodium Caseinate	100 mg.
100 mg. of Sodium Caseinate supplies you with the following approx. amounts of essential Amino Acids: 8 mg. Leucine, 7 mg. Lysine, 6 mg. Valine, 2.8 mg. Histidine, 5 mg. Iso-leucine, 4 mg. Phenylalanine, 4 mg. Threonine, 1 mg. Tyrtophane.	
Iron (from Ferrous Sulfate, Dried)	30 mg.
Copper (from Copper Sulfate, Monohydrate)	0.45 mg.
Manganese (from Manganese Sulfate, Dried)	0.5 mg.
Potassium (from Potassium Sulfate)	2 mg.
Zinc (from Zinc Sulfate, Dried)	0.5 mg.
Magnesium (from Magnesium Sulfate, Dried)	3 mg.
Sulfur (from the Sulfates)	22 mg.
Calcium (from Dicalcium Phosphate)	75 mg.
Phosphorous (from Dicalcium Phosphate)	58 mg.

Directions: 1 Capsule Daily.

2. *Designation:* Vitasafe Capsules for Women.

Formula:

Vitamin A (Palmitate)	12,500 USP Units
Vitamin D (Irradiated Ergosterol)	1,000 USP Units
Vitamin B ₁ (Thiamine Mononitrate)	5 mg.
Vitamin B ₂ (Riboflavin)	2 mg.
Vitamin B ₆ (Pyridoxine Hydrochloride)	0.5 mg.
Vitamin B ₁₂ (Cobalamin Conc. N.F.)	3 mcg.
Vitamin C (Ascorbic Acid)	100 mg.
Niacinamide	25 mg.
Calcium Pantothenate	4 mg.
Vitamin E (from d-Alpha Tocopheryl Acetate Conc. N.F.)	3 I.U.
Folic Acid	0.1 mg.
Dicalcium Phosphate, Anhydrous (Calcium 50 mg.) (Phosphorous 39 mg.)	174 mg.
Choline Bitartrate	30 mg.
Inositol	10 mg.
Rutin	8 mg.
Lemon Bioflavonoid Complex	5 mg.
Monopotassium Gultamate	20 mg.

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1—Lysine Monohydrochloride	7 mg.
Sodium Caseinate	50 mg.
Liver (Whole, dessicated)	10 mg.
Ferrous Sulfate, Dried (Iron 30 mg.)	100 mg.
Copper Sulfate Monohydrate (Copper 0.45 mg.)	1.257 mg.
Manganese Sulfate, Dried (Manganese 0.5 mg.)	1.373 mg.
Potassium Sulfate (Potassium 2 mg.)	4.423 mg.
Zinc Sulfate, Dried (Zinc 0.5 mg.)	1.323 mg.
Magnesium Sulfate, Dried (Magnesium 3 mg.)	21.133 mg.
Sulfur (from the Sulfates)	22 mg.

Directions: One Capsule Daily.

* * * * *

The above Finding Sixth, including formulae, reflects the stipulation of counsel (CX 1A-1B). CX 1C and 1E contain the current formulae (given above) for Vitasafe Capsules for Men and for Women, respectively, *i.e.*, instead of the formulae set forth in the complaint. Directions for use are admitted in answer filed October 5, 1964, as amended by admissions of record, TR 27:22-25, TR 28:1-7, TR 30:10-17 and TR 31:15-22.

Re Complaint Par. Three

Seventh.—Respondents Dollar Vitamin Plan, Inc., Vitasafe Corporation, Samuel Josefowitz, Gerald Glaeser and Adolf W. Goldschmidt cause the preparations, when sold, to be transported from their establishment in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Said respondents at all times mentioned herein have maintained a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been substantial. Respondents Henry D. Cohen and Leon Potash have engaged in the business heretofore described and have participated in the acts and practices herein described.

* * * * *

The above Finding Seventh is supported by admissions in the answer filed October 5, 1964, as amended by admissions of record, TR 27:22-25, TR 28:1-7, TR 30:10-17, TR 31:15-22.

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Re Complaint Par. Four

Eighth.—In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparations, 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 circulars and brochures, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations; and have disseminated, and caused the dissemination of, advertisements concerning said preparations by various means, including, but not limited to the aforesaid media, for the purpose of inducing, or which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as “commerce” is defined in the Federal Trade Commission Act.

* * * * *

The above Finding Eighth is supported by admissions in the answer filed October 5, 1964, as amended by admissions of record, TR 27:22–25, TR 28:1–7, TR 30:10–17, TR 31:15–22.

Re Complaint Par. Five

Ninth.—Among, and typical of, the statements and representations contained in said advertisements, and disseminated as hereinafter set forth are the following:

Important Nutritional Discoveries . . . AT LAST! Here's the electrifying news you've hoped for! . . . Here at last you are offered a new improved formula that is truly comprehensive . . .

* * * * *

Many of these folks even tried brand after brand of less comprehensive preparations without getting the benefits they hoped for! Then they discovered the new improved Vitasafe formula—one that really worked for them! For in every single high-potency capsule are 27 precious ingredients (29 under Women's plan) . . .

* * * * *

THE MAGIC POWER of Vitamins, Minerals and Lipotropic Factors to Recharge Your Body with Youthful Energy THINK OF IT! If you are weak, tired and rundown, just one high-potency Vitasafe Capsule a day can make a world of difference in the way you feel. How is it possible? Because every Vitasafe Capsule contains ALL the vitamins and minerals you may need to help you retain youthful pep and vigor plus new important factors: . . . Lemon Bioflavonoid Complex that helps build your resistance to colds and infection.

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* * * * *

Are You Giving Your Wife The Companionship She Craves? . . . Are you giving her what she most expected on the day that you married her? . . . Or are you always "too tired" at the end of a day's work? . . . If so, your condition may simply be due to an easily corrected vitamin and mineral deficiency in your diet.

* * * * *

Our Fights Have Turned to Kisses! IT'S hard to believe that my wife and I used to fight. . . . To correct this condition, each of us started taking Vitasafe High-Potency Capsules—just one a day. It wasn't too long until we began to notice the difference. We had more pep, more energy—and our dispositions improved. Instead of fighting, we were back in each other's arms—just as we were on our honeymoon.

* * * * *

"He Made Me Feel Like A Bride Again" IT'S hard for me to believe that a few weeks ago I actually thought about leaving my husband! He had become so nervous and irritable—so cross with the children and me that there was just no living with him. He was always "too tired" to do anything . . . Just when things looked blackest, we learned about the famous Vitasafe Plan through an ad in our newspaper . . . Naturally, we sent for a trial month's supply. What a difference it has made! Vitasafe High-Potency Capsules have helped snap back Jim's youthful vigor and vim. I'm so happy, I feel like a bride again!

* * * * *

ADVICE TO TIRED MEN If you suffer from a lack of pep, energy and vitality due to a nutritional deficiency, you may be helped by the special high-potency Vitasafe formula for men. Simply check the Man's Formula box in the coupon for your trial supply.

* * * * *

PSST . . . didn't you know—She's his wife, not his mother! IMAGINE how embarrassed I was when I realized that they were talking about Jane. There she sat, looking all worn out . . . not having any fun. Those tired, sagging lines in her face made her look years older, and she seemed nervous and irritable. . . . To look at her now, you'd never guess she was one of the younger women in the room. . . . Jane had nothing to lose, and at my suggestion, she sent in the coupon. Well, I wish you could have seen her at the party last night! Jane was a changed woman . . . dynamic and energetic and looking years younger.

* * * * *

. . . For men and women approaching, or in, the middle years, an adequate supply of vitamins in their diets is vital. Not only for energy and vibrant good health, but also to ward off the aches, pains and ailments common through the middle years, many of them "triggered" by prolonged and often hidden malnutrition. For the middle aged are particularly prone to malnutrition for many reasons. . . . If you are over 35, do not fail to take your daily supply of vitamins and minerals.

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* * * * *

LADIES, At Last! A Comprehensive Formula Prepared to Meet the Special Needs and Problems of Women! . . . Thousands of Women who once felt tired, run-down and irritable—victims of nerve-wracking headaches, frequent colds, moods of melancholia and depression—women who suffered the torment of periodic upsets and women who approached the transitional period of the menopause with neurotic fears and anxieties . . . who dreaded the advance of premature old age . . . all these women are now bursting with new radiant health and vitality—enjoying new-found serenity and happiness because of the exclusive new formula now contained in Vitasafe Capsules for Women.

* * * * *

Two new Improved Vitasafe Formulas—Formula for Men—Formula for Women—Now Include *BRAIN FOOD* and *ANTI-COLD* Factors! IN JUST 30 DAYS YOU TOO MAY EXPERIENCE NEW *MENTAL AND PHYSICAL VIGOR AND VITALITY*—thanks to a remarkable new nutritional formula! . . . Like you, perhaps, these men and women always felt tired, run-down and listless . . . plagued with headaches, insomnia and depression. They often found it difficult to cope with their jobs and daily problems without suffering from nervous tension and anxiety. They became “forgetful”—unable to concentrate without feeling mentally strained. . . . If you, too, suffer any of the distressing symptoms due to faulty nutrition, you can now look forward to a radiant new outlook on life . . .

* * * * *

For included in the amazing new Vitasafe formula is a newly discovered protein ingredient . . . the only one known to science that may have the property of *nourishing the cells of the brain!* A safe 100% pure nutrient—L-Glutamic Acid . . . Men and women who took it under carefully supervised hospital tests, actually demonstrated keener intelligence and increased mental alertness . . . In addition, . . . each Vitasafe Capsule now contains the miracle *natural* anti-cold factor—Lemon Bioflavonoid Complex—believed by doctors to act with Vitamin C to build resistance against infection and disease.

The above quoted statements in Finding Ninth are contained in respondents’ advertising (CX 2A through 12). Respondents’ counsel admitted on the record that these exhibits are true and exact copies of advertisements disseminated in commerce by or through respondents (TR 69:3-12, TR 72:18-25 (commerce), and TR 73:1).

Re Complaint Par. Six

Tenth.—Through the use of said advertisements and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Vitasafe Capsules are a new medical and scientific discovery and achievement.

* * * * *

The above Finding Tenth is supported by the advertising statements, claims, and representations in CX 2A, 3, 11A-11B, and 12, referring to "important nutritional discoveries," "electrifying news," "recent medical findings," "new improved formula," and "newly discovered protein ingredient different from all others."

Eleventh.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Vitasafe Capsules for Men are uniquely and distinctly suited to the needs of men.

* * * * *

The above Finding Eleventh is supported by CX 2A, "Special Plan for Men . . ."; CX 9, "Special Formula for Men . . . nutritional deficiency"; CX 12, 13J and 18B.

Twelfth.—Through the use of said advertisements and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Vitasafe Capsules for Women are uniquely and distinctly suited to the needs of women.

* * * * *

The above Finding Twelfth is supported by CX 2A, "Special Plan . . . for Women"; CX 3, 5 and 7, "Special Formula for Women . . . nutritional deficiency"; 11A-11B, "Special Needs and Problems of Women"; 12, 13J, 13L, 16, 17, 18B, 22A, 23, 24, 25, 27, 28, 33 and 36.

Thirteenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Vitasafe Capsules will be of value in the prevention of colds and other infections.

* * * * *

The above Finding Thirteenth is supported by CX 4A, "helps build your resistance to colds and infections"; CX 6, "anti-cold factor" therein; CX 7, 8, 9, 11A, 12, "miracle natural anti-cold factor"; and 14A, 22, and 24.

Fourteenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Vitasafe Capsules for Women will be of value to women in the treatment, relief or prevention of melancholia, discomfort due to menstruation,

or of fears and anxieties arising from the onset or contemplation of menopause or old age.

* * * * *

The above Finding Fourteenth is supported by CX 11A, "moods of melancholia and depression . . . menopause . . . dreaded advance of premature old age . . . *all these women now bursting with new radiant health and vitality*"; and by CX 22B.

Fifteenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly or by implication, that persons over 35 years of age, and over 40, have a particular need for Vitasafe Capsules.

* * * * *

The above Finding Fifteenth is supported by CX 10, "Why must people over 35 be especially careful to fortify their diet . . .?"; CX 13R; CX 37, "For Folks Over 40."

Sixteenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Vitasafe Capsules increase and stimulate sexual vitality and activity.

* * * * *

The above Finding Sixteenth is supported by CX 2B, "Our fights have turned to kisses"; CX5, "Are you giving her what she most expected on the day that you married her?"; CX 6, 7, "He Made Me Feel Like A Bride Again"; CX 13B-C, 15, 23.

Seventeenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that the use of Vitasafe Capsules and ingredients therein will be of benefit in the treatment and relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality and initiative, loss of happiness, loss of sense of well-being, and appearing and feeling older than one should.

* * * * *

The above Finding Seventeenth is supported by CX 3, "tired, run-down and listless . . . prolonged vitamin-mineral deficiencies"; CX4, "weak, tired, and run-down" and "feel older than you are"; CX 9 and 11A, tired women and men, respectively; and CX 12.

Eighteenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents

have represented, directly and by implication, that the use of Vitasafe Capsules will increase a person's intelligence, mental alertness, ability to concentrate and power to remember.

* * * * *

The above Finding Eighteenth is supported by CX 6, 7, "Increased mental alertness"; CX 8, 9, 11A, 12, "Brain Food"; CX 14A, 22B, and 24.

Re Complaint Par. Seven

Medical Findings

Nineteenth.—Vitasafe Capsules are not a new medical or scientific discovery or achievement.

* * * * *

The above Finding Nineteenth is supported by testimony of Dr. McGanity (TR 148, 149:13, et seq.); Dr. Sappington (TR 186:9, 15); and Dr. Shank (TR 217:16, 21).

Twentieth.—Vitasafe Capsules for Men are not uniquely or distinctly suited to the needs of men.

* * * * *

The above Finding Twentieth is supported by testimony of Dr. McGanity (TR 152:4-9); Dr. Sappington (TR 186:16-23); and Dr. Shank (TR 218:6-10).

Twenty-First.—Vitasafe Capsules for Women are not uniquely or distinctively suited to the needs of women.

* * * * *

The above Finding Twenty-First is supported by testimony of Dr. Sappington (TR 187:6-13); Dr. McGanity (TR 152:9); and Dr. Shank (TR 218:5).

Twenty-Second.—Vitasafe Capsules will not be of value in the prevention of colds or other infections.

* * * * *

The above Finding Twenty-Second is supported by the testimony of Dr. McGanity (TR 168:12-16); Dr. Sappington (TR 193:10); and Dr. Shank (TR 220:21-25).

Twenty-Third.—Vitasafe Capsules for Women will not be of value to women in the treatment, relief or prevention of melancholia, discomfort due to menstruation, or fears or anxieties arising from the onset or contemplation of menopause or old age.

* * * * *

The above Finding Twenty-Third is supported by the testimony of Dr. McGanity (TR 153-54, 155, 157, 162), as well as Dr. Sappington (TR 188:10-16, 190-91), Dr. Shank (TR 219:7-13).

Twenty-fourth.—Neither adults 35 years of age or 40, or adults of any other age group, have a special need for Vitasafe Capsules.

* * * * *

The above Finding Twenty-Fourth is supported by the testimony of Dr. McGanity (TR 163:12, 164-65); Dr. Sappington (TR 188:17-22); Dr. Shank (TR 219:14-19).

Twenty-Fifth.—Vitasafe Capsules will not increase or stimulate sexual vitality or activity.

* * * * *

The above Finding Twenty-Fifth is supported by the testimony of Dr. McGanity (TR 166:6-16); Dr. Sappington (TR 189:10-14); Dr. Shank (TR 220:9-13).

Twenty-Sixth.—The use of Vitasafe Capsules will not be of benefit in the treatment or relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of sense of well-being or appearing or feeling older than one should, except in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B₁ (Thiamine Mononitrate), Vitamin B₂ (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide. All the remaining ingredients in Vitasafe Capsules are of no benefit in the treatment or relief of said symptoms.

* * * * *

The above Finding Twenty-Sixth is supported by the testimony of the three experts called by complaint counsel:

Dr. McGanity (TR 127-133, 147, et seq., 164-65, 176-77, and see in particular TR 129 (neuroses, infections, etc.), TR 133 (not vitamin deficiencies), and TR 147-48 (except for 1%)).

Dr. Sappington (TR 182-85, 190:6-9 (insufficient dosage), 192, 194-96. See, however, TR 185 (except for 5%) and TR 192-93 (possible benefit over long period, if vitamin deficiency)).

Dr. Shank (TR 210, 211 (cause not vitamin deficiencies), 213 (3 to 5%), 216 (vitamin deficiency very infrequent), 217, 221-22 (prior answers qualified), also TR 185, 216).

Complaint counsel, as part of their Proposed Findings and Conclusions of Law, have submitted an extended discussion of the testimony of these doctors insofar as it supports their Proposed Finding Twenty-Sixth. Although the examiner does not regard

the testimony of the doctors, read as a whole, as absolutely conclusive to support the proposed finding in every detail, it is definitely persuasive in support of the proposed finding, which has been adopted as proposed, particularly since there is no contradictory medical testimony, respondents having submitted none.

Twenty-Seventh.—The use of Vitasafe Capsules will not increase a person's intelligence, mental alertness, ability to concentrate, or power to remember.

* * * * *

The above Finding Twenty-Seventh is supported by the testimony of Dr. Sappington (TR 189:20); Dr. McGanity (TR 168-69); and Dr. Shank (TR 220:19).

Re Complaint Par. Eight

Twenty-Eighth.—Through the use of the statements in the aforesaid advertisements, and others similar thereto not specifically set out herein, respondents have also represented, directly and by implication, to persons of both sexes and all ages who experience feelings of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality and initiative, loss of happiness, loss of a sense of well-being, and appearing and feeling older than one should, that there is a reasonable probability that they have symptoms that will respond to treatment by the use of the aforesaid Vitasafe Capsules, and preparations. In the light of such statements and representations, such advertisements are misleading in a material respect and therefore constitute false advertisements, as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material facts that, in a great majority of persons, of any age, sex, or other group or class thereof, who experience the symptoms of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well-being, or appear or feel older than one should, such symptoms are not caused by a deficiency of one or more of the nutrients provided by Vitasafe Capsules, and that in such persons the said preparations will be of no benefit.

* * * * *

The above Finding Twenty-Eight is supported by CX 2 through 37, as well as other exhibits, and by Finding Twenty-Sixth, supra.

CONCLUSIONS OF LAW (D. 8636)

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The dissemination by the respondents of the false advertisements, as aforesaid, constitutes unfair and deceptive acts and practices in commerce, in violation of § 5 and § 12 of the Federal Trade Commission Act.
3. The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public.
4. The term respondents, as above used in these Conclusions shall not be deemed to include the following parties named as respondents herein:

Maxwell Sackheim—Franklin Bruck, Inc., a corporation.
Robert Sackheim, individually and as an officer of said corporation.
Benjamin W. Lerner
William H. Sylk

As to these respondents the complaint herein is declared dismissed in the order issued herein.

DISCUSSION AS TO MEDICAL EVIDENCE

In view of the sufficiently impressive qualifications of complaint counsels' three medical witnesses, and of their detailed testimony, unimpaired by any cross-examination or any contradictory medical evidence—respondents having neither cross-examined them nor offered medical witnesses or medical evidence of their own—it would be difficult to find that the medical allegations of the complaints in this and the accompanying proceeding have not been proved. Certainly the absence of cross-examination and opposing medical testimony should in no esoteric way be utilized to weaken or question the medical testimony submitted by complaint counsel. Respondents have not contended, or even suggested, that they withheld medical cross-examination and defense medical testimony because they questioned the sufficiency, or anticipated sufficiency, of complaint counsels' medical testimony. Respondents' challenge, on the issue of res judicata or multiplicity of suits, should be considered as something quite apart from the adjudication here of the merits of the medical issues in these two proceedings—assuming, of course, that there is no merit to the challenge. Respondents, at least the respondent vitamin companies and respondent Cohen, have already had adverse and rather peremptory decisions issued against them by the United

States District Court on the medical issues in the District Court litigation, and the recent Court of Appeals opinion, on appeal, does not disturb any of the medical findings.

However, it is pertinent, if only on the question of inferences or conclusions to be drawn from the expert testimony—to put some reliance on *Matter of Lanolin Plus, Inc.*, D. 8150 (1962) [61 F.T.C. 534], cited and discussed by complaint counsel on pp. 27 ff of their Proposed Findings and Conclusions (D. 8636). The case involves the vitamin-mineral product “Rybutol”, the attributes of which were advertised with less exuberant claims than the instant vitamin products. The Commission in that case was of the opinion (page 550) that it was a salient consideration that, as found by Hearing Examiner Bennett:

the great majority of people suffer from symptoms such as tiredness, loss of sense of well-being, loss of happiness, and appearing and feeling older than one should, due to disorders other than vitamin deficiency.

The quoted symptoms are among those highlighted in the advertising of the respondents in this and the accompanying proceeding, and the medical testimony here is that most people suffering from them do not have a vitamin deficiency, such a deficiency not being characteristic of American consumers with their high standards of diet.

Complaint counsel introduced in evidence a lucid and helpful tabulation, CX 51, attested to by their medical advisor, comparing the ingredients of Rybutol with those of the Vitasafe and Life Nutrition preparations in this and the accompanying proceeding. Complaint counsels’ doctors testified that, based thereon, the Rybutol and the present products are substantially alike for treating specified symptoms described in advertisements (Dr. McGanity, TR 169; Dr. Shank, TR 223; and Dr. Sappington, TR 197–98), except that, according to Dr. Shank and Dr. Sappington, Rybutol is to be preferred for vitamin B₁ deficiencies.

RES JUDICATA MULTIPLICITY OF SUITS

As already stated, complaint in this and the accompanying proceeding issued August 11, 1964. On August 17, 1964 an injunction action was commenced by the United States of America in a U.S. District Court against the same corporate respondents, respondent Cohen, and other defendants, involving the products herein, by alleging violation of the misbranding provisions of the Food

and Drug Act. A temporary restraining order issued on the same day, without notice, and a temporary injunction, after hearing evidence, issued on September 29, 1964. Appeal was taken therefrom (as well as from a prior condemnation action) to the Court of Appeals for the Third Circuit. In the meantime the hearings in the present proceedings commenced and concluded. On May 27, 1965 the Court of Appeals issued its opinion in effect affirming the decrees of the court below, except as to scope of order, particularly as directed against several million copies of advertising circulars in a Vitasafe warehouse, *i.e.*, which had not entered into commerce (and had not accompanied the products so as to constitute labeling by statutory definition).

Despite extensive prehearing proceedings herein, fully described in the first part of this decision, respondents never raised any question that the proceedings were barred by the court actions or the appeal, and were subject to dismissal. On the contrary, they relied on the pending appeal in the court litigation as a basis for obtaining continuances in the present proceedings.

It was only at the commencement of the hearings herein on March 1, 1965, in New York City, that respondents for the first time asserted their claim that these proceedings were barred by the court litigation and subject to dismissal.

They did so by oral motion, "for the dismissal of this proceeding" (TR 4), an alternative request for a stay not being emphasized. Respondents urged that the Federal Trade Commission is "barred from a litigation of the issues in this case which constitute a re-litigation of the issues which have been raised with respect to the claims for these products which are claimed to be misleading in the Commission complaint" (TR 4). Counsel made direct reference to the Food and Drug actions and the pending appeal. This was the *res judicata* point (TR 5:22). Reference was also made to "multiplicity of actions" (TR 16:3).—Counsel also dealt with equitable considerations, such as the expense and burden of having to go through hearings on the same issues already tried in another forum (TR 7:17), and also the lack of necessity of a cease and desist order in view of the pending injunction.

The examiner, although agreeing with complaint counsel that the motions were made at a "late date" and even after coming to New York from Washington (TR 53:6–12), nevertheless reserved decision so that, for one thing, the questions might possibly be dealt with after the Court of Appeals ruled in the court litigation.

The examiner now denies the motion for the following reasons:

(1) The motion was made far *too late*—*i.e.*, after the hearing commenced, and after it commenced in another city, at much expense to the Commission, including the bringing of witnesses from Philadelphia to New York City, and inconvenience to the Commission and witnesses, actually for the accommodation of respondents and counsel, all located in New York City or vicinity. As to timeliness, the motion was a complete break with the spirit of prehearing procedures carefully set up by the Commission in its Rules and fully availed of here by the examiner and counsel on both sides. Entirely apart from the Rules, the defenses of *res judicata* and multiplicity of suits or proceedings are matters to be raised affirmatively and timely. They do not operate automatically, nor were they raised timely in these proceedings.

(2) The defense of *res judicata* is by its nature hardly one to be invoked by the unsuccessful party in the other litigation relied on as a bar. Respondents herein, insofar as they have been defendants in the court litigation, have been conspicuously unsuccessful. The recent ruling by the Court of Appeals confirms this. The two cases⁵ relied on by respondents are cases where, as pointed out by complaint counsel here, the defense was raised by parties who had been *vindicated* in the other litigation.

Where parties have issues adversely decided against them by the other forum, as here, all they have to do, in order to avoid the burden of re-litigation, is simply to admit the allegations in the second forum, *i.e.*, if the evidence necessary to prove the allegations and charges are the same in both forums, as respondents try to suggest is the case here. It is not for them to foreclose the second forum from having before it all the facts deemed necessary, by Government counsel under a different statute, as here, nor is it for them to force Government counsel to gamble on whether the facts, including as here medical facts and medical representations, in the first forum are sufficient for the second forum to invoke the full force of its juridical power.

It may be noted that respondents' counsel, in their present briefs at least, make the claim that they understand that their *res judicata* defense, even if sustained, would call not for dismissal of the present proceedings, but for barring further litigation of issues already decided in the court litigation (Reply Brief, p. 3).

(3) The defense of *multiplicity of suits*, or proceedings, is additionally inapplicable where, as here, the heretofore unsuccessful

⁵ *Lee Company v. Federal Trade Commission*, 113 F. 2d 583 (8th Cir. 1940). *United States v. 14 Cartons***AYDS*, not officially reported (E.D. Mo., 1946).

ful parties are subject to essentially different sanctions in the second forum, namely, sanctions under the Federal Trade Commission Act against general advertising, rather than just labeling or advertising "accompanying" the product (21 U.S.C. 321(m)). Indirectly this point has already been slightly touched on in (2), *supra*.

What respondents seek here, as complaint counsel well put it, is sanctuary for false drug advertising generally, even radio and TV advertising, as distinguished from false labeling or advertising accompanying drug products. They wish escape from the Federal Trade Commission and its authority, conferred by Congress, over general advertising and misrepresentation generally.

The *Foods Plus* case,⁶ cited by respondents in a letter⁷ supplementing their briefs, does not hold that labeling encompasses all advertising. It merely holds that even radio announcements may be considered in a Food and Drug case "in determining the general use of the vitamins," *i.e.*, in ascertaining whether labels contain "adequate directions for use" under the Food and Drug Act, § 3.52(f) (1).

(4) No other equitable considerations urged by respondents have sufficient substance to outweigh the heavy equities on the other side. The fact that equitable considerations are advanced, however, points up the essentially equitable reasoning which must underlie cases relied on by respondents in the briefs.

Form of Order

It seems obvious from the proof in this case, which is hardly controverted, that no order narrower in scope than the one proposed in the complaint can suffice. The case is fully proved as against respondents liable at all, and they have perpetrated gross misrepresentations, exploiting human suffering and complaints by offering spurious vitamin "cures," which may even serve to divert users from competent medical attention.

The fact that some of the respondents are restrained from mislabeling by a U.S. District Court is hardly any argument for framing an order of narrower scope than the complaint proposes. If anything, the drastic and peremptory decrees issued by the District Court, as affirmed in substance by the Court of Appeals, suggest the correctness of a comparable order here but one cover-

⁶ *United States v. Articles of Drug . . . Foods Plus, Inc.*, 239 F. Supp. 465,68 (U.S.D.C. N.J., 1965).

⁷ The letter, dated June 4, 1965, significantly foregoes further argument in the light of the Court of Appeals opinion in the court litigation herein.

ing general advertising and misrepresentation, not merely labeling as defined in the Food and Drug Act.

Further support for a broad order here is that this is not the first time that respondent Vitasafe Corporation, at least, has been in trouble with the Federal Trade Commission, even to the extent of being in violation of a Federal Trade Commission order. A Commission news release of September 25, 1964, copy of which was submitted to respondents' counsel as an attachment to a brief herein, states that by order of the United States District Court for the Southern District of New York, dated September 18, 1964, Vitasafe Corporation was directed to pay civil penalties of \$18,000 for nine violations of a cease and desist order issued by the Federal Trade Commission in 1957.

The order here issued provides for or declares a dismissal as to certain respondents, as heretofore indicated.

ORDER

It is ordered, That respondents Dollar Vitamin Plan, Inc., a corporation, and its officers, and Vitasafe Corporation, a corporation, and its officers, Samuel Josefowitz, Gerald Glaeser, and Adolf W. Goldschmidt, individually and as officers of said corporations, Henry D. Cohen and Leon Potash, individually; and said respondents' representatives, agents and employees, do forthwith cease and desist from, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Vitasafe Capsules for Men" or "Vitasafe Capsules for Women," or any other preparation of substantially similar composition or possessing substantially similar properties, under whatever name or names sold:

1. Disseminating or causing the dissemination of, 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 represents directly or by implication:

- (a) That said preparation is a new medical or scientific discovery or achievement;
- (b) That said preparation is uniquely or distinctively suited to the needs of men;
- (c) That said preparation is uniquely or distinctively suited to the needs of women;
- (d) That said preparation will be of value in the prevention of colds or other infections;

(e) That said preparation will be of value to women in the treatment, relief or prevention of melancholia, discomfort due to menstruation, or of fears or anxieties arising from the onset or contemplation of menopause or old age;

(f) That adults of any age group have a special need for said preparation;

(g) That said preparation will increase or stimulate sexual vitality or activity;

(h) That the use of said preparation will be of benefit in the treatment or relief of the symptoms of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, unless such advertisement expressly limits the effectiveness of the preparation to those persons whose symptoms are due to a deficiency of Vitamin B₁ (Thiamine Mononitrate), Vitamin B₂ (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide, and further, unless such advertisement clearly and conspicuously reveals the fact that in the great majority of persons, or of any age, sex, class or other group thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to treatment by the use of the preparation, and that in such persons the preparation will not be of benefit;

(i) That the ingredients in said preparation other than Vitamin B₁ (Thiamine Mononitrate), Vitamin B₂ (Riboflavin), Vitamin C (Ascorbic Acid) or Niacinamide, will be of benefit in the treatment or relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should;

(j) That the use of said preparation will increase a person's intelligence, mental alertness, ability to concentrate or power to remember.

2. Disseminating or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce directly or indirectly, the purchase of any such prepara-

tion in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in, or which fails to comply with any of the affirmative requirements of Paragraph 1 hereof.

It is further ordered, That the complaint herein is dismissed, and hereby declared to be dismissed, as to the following respondents:

Maxwell Sackheim—Franklin Bruck, Inc., a corporation, now known as Bruck & Lurie, Inc., Robert Sackheim, individually and as an officer of said corporation, Benjamin W. Lerner, individually, William H. Sylk, individually.

OPINION OF THE COMMISSION *

BY JONES, *Commissioner*:

I

These two cases are before the Commission on respondents' appeals from initial decisions of the hearing examiner in which he found that respondents have engaged in the dissemination of false and misleading advertising of certain drugs sold by them, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Respondents are Dollar Vitamin Plan, Inc., International Oil & Metals Corporation and Vitasafe Corporation, three affiliated corporations engaged in the business of selling vitamin capsules by mail order; seven of their present or former officers; an advertising agency, Maxwell Sackheim-Franklin Bruck, Inc.; and one of its officers, Robert Sackheim.¹

*Consolidated opinion *In the Matter of Dollar Vitamin Plan, Inc., et al.*, Docket No. 8636 and *In the Matter of Life Nutrition et al.*, Docket No. 8637, p. 985 herein.

¹Prior to the hearing, both complaints were dismissed by the hearing examiner with respect to Maxwell Sackheim-Franklin Bruck, Inc., without opposition by complaint counsel, on the grounds that the control and management of the agency had been assumed by individuals who had no connection with the previous practices and that the agency no longer represented the other corporate respondents or indeed any other clients who dealt in vitamin products (See Initial Decision, *Dollar Vitamin Plan, Inc., et al.*, p. 943). The complaint in *Dollar Vitamin Plan, Inc., et al.* was dismissed by the Commission with respect to Robert Sackheim on the grounds, *inter alia*, that "he had never had anything to do with creating the advertising copy here in question *** that he had left the advertising agency two years prior thereto, that he was presently engaged, and had been for some time, in selling office supplies" and that he had filed an affidavit of intent to comply if he should return to the advertising business (*Id.*, p. 943). In his initial decision the examiner dismissed the complaint in *Dollar Vitamin Plan, Inc., et al.* with respect to two of the other individuals named, Benjamin W. Lerner and William H. Sylk, since it had not been established that either had any responsibility for the practices alleged in the complaint and since each had resigned from their positions with the corporate respondents several years prior to the issuance of the complaints and were employed by other unrelated companies. Complaint counsel has not appealed from these dismissals by the examiner.

The complaints herein dated August 11, 1964 charged that respondents, in their advertising of "Vitasafe" and "Life Nutrition" vitamin capsules, represented, *inter alia*: (1) that their vitamin capsules are a new medical or scientific discovery and achievement; (2) that the capsules designated "for men" or "Formula M" are distinctively suited to the needs of men, and those designated "for women" or "Formula W" are distinctively suited to the needs of women; (3) that people over 35 years of age have a particular need for "Vitasafe" capsules and people over 40 years of age have a particular need for the "Life Nutrition" capsules; (4) that their capsules will increase or stimulate sexual vitality or activity; and (5) that their capsules will be of benefit in the treatment or relief of a number of symptoms including tiredness, weakness, nervousness and depression. This final claim is alleged to be false generally although the complaints specifically assert that respondents' capsules will be of benefit for the symptoms specified "in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B₁ (Thiamine Mononitrate), Vitamin B₂ (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide."

The two cases were tried together before the same hearing examiner and a separate decision was rendered by him in each case on June 15, 1965. In his decisions, the examiner found that respondents had made the representations as charged and that these representations were false. The hearing examiner entered orders identical to the proposed orders issued with the complaints, requiring respondents to cease and desist from making the challenged representations but permitting respondents to represent that their vitamins could be used for the relief of tiredness, weakness, nervousness and depression, and other enumerated symptoms if the advertisement:

expressly limits the effectiveness of the preparation to those persons whose symptoms are due to a deficiency of Vitamin B₁ (Thiamine Mononitrate), Vitamin B₂ (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide, and * * * clearly and conspicuously reveals the fact that in the great majority of persons, or of any age, sex, class or other group thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to treatment by the use of the preparation, and that in such persons the preparation will not be of benefit.

Respondents have appealed from the examiner's decisions solely on the grounds that the Commission action is barred under

principles of *res judicata*² because the issues involved have already been determined in two prior District Court proceedings brought against some of the respondents by the Food and Drug Administration under the Federal Food, Drug and Cosmetic Act, and that the action involves a multiplicity of proceedings, subjecting respondents to "great expense and hardship without cause" and to possible inconsistent orders.

II

The Food and Drug Administration proceedings on which respondents rely involved a libel of information filed against respondent Vitasafe Corporation's vitamin capsules and labeling by the FDA in October 1960 in the United States District Court for the District of New Jersey and a subsequent injunction action filed by the FDA in the same Court against Vitasafe Corporation, The Dollar Vitamin Plan, Inc., International Oil & Metals Corporation and Henry D. Cohen, all of whom are respondents herein,³ as well as four additional parties not respondents herein. The injunction proceeding was commenced in August, 1964, on approximately the same date on which the instant Commission complaints were served.

The libel action was decided on January 24, 1964 (*United States v. "Vitasafe Formula M,"* 226 F. Supp. 266), sustaining the FDA's seizure of Vitasafe's capsules and labeling on the ground that the labeling contained a number of false representations, including the following which are relevant here:

(1) "Formula M" capsules are designed to meet the special needs of men as contrasted to "Formula W" capsules which are designed to satisfy the special needs of women;

(2) The capsules are "an adequate and effective treatment of or preventive for" a list of symptoms including depression, tension, weakness and nervous disorders.⁴

Approximately seven months later, the District Court issued a

² While utilizing the term "*res judicata*" respondents' argument appears to be grounded upon principles of collateral estoppel. Strictly speaking the doctrine of *res judicata* refers to the merger or bar of a subsequent action based on the same cause of action as opposed to the doctrine of collateral estoppel under which the determination of a question of fact essential to a judgment is conclusive between the parties (and their privies) in a subsequent action on a different cause of action. *Restatement of Judgment*, § 68. It is in this sense that the terms are referred to in this opinion except where they may be used in quoted court opinions or to denominate respondents' argument.

³ Five of the individual respondents named in the instant complaints, Samuel Josefowitz, Gerald Glaeser, Adolf W. Goldschmidt, Leon Potash and Robert Sackheim, and one of the corporate respondents, Maxwell Sackheim-Franklin Bruck, Inc., were not named as defendants in the injunction action.

⁴ A comparison of the findings in the libel proceedings with those herein may be found in Appendix A attached hereto.

temporary restraining order in the FDA's injunction suit against the named defendants (RX 2), and on September 29, 1964, it issued a preliminary injunction (RX 3) which, *inter alia*, prohibited defendants from introducing into commerce certain vitamin capsules accompanied by any written matter containing the representations found in the libel proceedings to have been falsely made in the labeling of Vitasafe Corporation. *United States v. Vitasafe Corporation*, 235 F. Supp. 84. The findings in the libel action and the decision issuing the preliminary injunction were affirmed on appeal with modifications which are not of material relevance here (345 F. 2d 864 [3rd Cir. 1965]) and the Supreme Court denied certiorari (382 U.S. 918 [1965]). No permanent injunction has yet been issued by the District Court.

III

A. Respondents' Contention of Bar Because of Res Judicata and Collateral Estoppel

Contrary to respondents' assertions, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel is applicable to the instant complaints so as to render the prior Food and Drug proceedings operative as a bar to Commission action against these respondents.

The doctrine of *res judicata* is inapplicable since the causes of action in the Food and Drug proceedings, which involved alleged misbranding of defendants' products, are distinct from those herein which relate to advertising. In *United States v. Five Cases * * * of Capon Springs Water*, 156 F. 2d 493, 496 (2nd Cir. 1946), the Court pointed out that the remedies under the Federal Food, Drug and Cosmetic Act and the Federal Trade Commission Act "are plainly cumulative and not exclusive" and held that a final judgment in an action under one of these statutes does not in and of itself preclude a subsequent action under the other statute involving the same subject matter. See also to the same effect, *Sekov Corporation v. United States*, 139 F. 2d 197 (5th Cir. 1943).

In the instant case not only are the causes of action involved in the Food and Drug and the Commission proceedings different because brought under different statutes, but the respondents in the proceedings are not identical,⁵ the relief sought in the instant

⁵ Six of the respondents named in the Commission's complaint herein were not named as parties either in the libel or in the injunction proceedings of the FDA: Samuel Josefowitz, Leon Potash, Adolf W. Goldschmidt, Gerald Glaeser, Maxwell Sackheim-Franklin Bruck, Inc. and Robert Sackheim. Moreover, only one of the respondents named in the Commission action, The Vitasafe Corporation, appeared in the FDA's libel action.

actions is different from that sought in the FDA actions,⁶ and the substantive allegations of deception also differ somewhat in the two proceedings.⁷

Nor does the doctrine of collateral estoppel give any greater support to respondents' argument. The sole effect of this doctrine is to estop the party against whom an issue has been decided from relitigating the identical issue in a subsequent suit between the same parties involving a different cause of action.

Respondents contend, however, that this issue of bar has already been determined in their favor by the Courts in two cases, *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583 (8th Cir. 1940) and *United States v. 14 Cartons * * * of * * * "AYDS"* (E.D. Mo. 1946). (Not officially reported.) We do not agree.

In both the *Lee* and *Ayds* cases, relied upon by respondents, the Courts held that the "underlying issue" before them had previously been decided adversely to the Government and therefore the court in the subsequent proceeding was foreclosed from reaching an opposite conclusion with respect to such issue. In the instant case the situation is precisely the reverse of that before the courts in the *Lee* and *Ayds* cases. All of the factual issues which respondents contend are substantially the same as those raised herein were decided not in respondents' favor as in the cases cited but in favor of the Government. The Second Circuit has expressly ruled that in this situation, a subsequent action brought by another Government agency is not barred by the prior suit. *United States v. Capon Springs, supra*, 156 F. 2d at 495-496. In *Capon Springs*, the Commission had entered an order against the Capon Water Company based on findings that its spring water would not cure various diseases as represented in its advertising. Subsequently the Food and Drug Administration brought a libel proceeding against five cases of this spring water and the Capon Water Company intervened as claimant and interposed a plea of *res judicata*. The District Court held that the FDA action was barred by the prior suit by the Commission. The Second Cir-

⁶ *E.g.*, the injunction proceedings sought to restrain mislabeling and misbranding of respondents' products whereas the instant actions seek to prohibit any advertising by respondents of these misrepresentations.

⁷ *E.g.*, the *Dollar Vitamin* complaint charged that respondents representations that the Vitasafe capsules are a "new medical or scientific discovery or achievement" and that "persons over 35 years of age have a particular need for Vitasafe capsules" were false; no comparable allegations were made in either the libel or the injunction proceedings. Again, the libel and injunction complaints charged that the products were not "an adequate and effective" treatment for certain symptoms whereas the instant complaints charged the products were not "of benefit" in the treatment of such symptoms.

cuit, through Judge Augustus Hand, reversed, holding that the FDA was neither barred nor estopped by reason of the prior Commission proceeding. The Court stated:

In *George H. Lee Co. v. Federal Trade Commission*, 8 Cir., 113 F. 2d 583, and *United States v. Willard Tablet Co.*, 7 Cir. 141 F. 2d 141, 152 A.L.R. 1194, it was held that an estoppel by judgment existed against the United States and the Federal Trade Commission in respect to findings of fact rendered in a prior proceeding which were in favor of the defendant. But in the case at bar no findings in favor of the claimants were made in the prior proceeding. They are here attempting to use the findings formerly rendered in favor of the United States for their benefit. The reason for such a contention we cannot comprehend (156 F. 2d 495-496).

B. Respondents' Contention of Bar Because of Multiplicity of Actions

Respondents also contend that even if the present proceedings were not completely barred under the principles of *res judicata* or collateral estoppel, the Commission nevertheless erred in retrying the same issues which had already been considered in the prior FDA libel and injunction proceedings and could and should have relied upon the findings in those proceedings relating to the nature of their representations and the efficacy of their products, which were the only issues in controversy, rather than introduce independent evidence in proof of these issues.

While respondents conceded in oral argument before the Commission that the issue of multiplicity is moot since the hearings did take place (Tr. 3-4), they are apparently seeking an expression from the Commission on its views of the procedure used by complaint counsel in insisting on putting in his own case as if no prior findings on these issues had ever been made. We are convinced that as a matter of law there is no requirement, nor should there be, that a party must rely upon findings rendered in a prior suit even when these findings determine the issue involved in favor of that party. The *Lee* or *Ayds* cases, cited by respondents, make clear that the doctrine of collateral estoppel operates to prevent the unsuccessful party from attempting to secure a contrary result in a subsequent proceeding; it cannot be utilized to restrict the successful party's presentation of the subsequent case. As the hearing examiner declared in his initial decision in *Dollar Vitamin*:

The defense of *res judicata* is by its nature hardly one to be invoked by the unsuccessful party in the other litigation relied on as a bar * * *. It is not for [respondents] to foreclose the second forum in having before it all the

facts deemed necessary, by Government counsel under a different statute, as here, nor is it for them to force Government counsel to gamble on whether the facts, including as here medical facts and medical representations, in the first forum are sufficient for the second forum to invoke the full force of its juridical power (p. 965).

If a respondent wishes to avoid the time and expense involved in trial of a case involving issues of fact which he is ready to concede he can readily do so either by admitting these facts in his answer or by offering to stipulate these facts sufficiently in advance of the hearing to afford his adversary time to study and evaluate the legal effects of his proposal. In the instant case respondents made no such admissions in their answers. Nor did they offer to enter into a stipulation of facts. Rather, on the eve of the hearing when complaint counsel's case was fully prepared and his expert medical witnesses ready to testify, respondents first moved to dismiss the complaint on the grounds of *res judicata* and multiplicity of actions and then announced that in the alternative they would agree to the entry of an order against them based on the findings in the food and drug cases, provided that the instant proceedings would be continued until the "final decision" in the Food and Drug cases, which were then pending in the Court of Appeals.⁸ We think complaint counsel was well within his rights and the bounds of discretion to refuse to enter into such an agreement at that point in the hearing. By waiting to make this offer until the hearing, respondents deprived complaint counsel of any real opportunity to evaluate the prior judgment and determine the extent to which it was applicable to support the allegations contained in the instant proceedings. Since not all respondents were parties to the FDA actions, it would have clearly been necessary to negotiate a stipulation which would establish the precise extent to which all respondents were agreed that the findings in the prior proceedings would be applicable and could be used in support of the allegations in the instant case. Respondents did not offer to enter into such a stipulation and there was clearly no time at the eve of trial to halt the proceedings for this purpose. Moreover, by such time whatever expense or inconvenience to respondents which might have been avoided by a stipulation were minimal,⁹ and unnecessary delay as well as substantial prejudice to the Commission's case may have resulted. Under the circum-

⁸ On this appeal respondents make no reference to this proposed agreement and have not renewed their offer.

⁹ The hearings were completed in a period totaling less than four hours on the mornings of March 11 and 15, 1965.

stances it would appear that complaint counsel did not abuse his discretion by rejecting the agreement proffered by respondents' counsel.

IV

Respondents further contend that the proceedings should be dismissed because there is no public interest justifying either these proceedings or the issuance of orders hereunder in view of their claim that they are under an injunction absolutely forbidding them from shipping or selling their products to which the representations challenged here relate and further they have been enjoined from making the very representations which the proposed orders here seek to restrain.

Contrary to respondents' assertion, the injunction in the FDA suit does not prohibit respondents from shipping or selling their products; it merely forbids them from selling their products when misbranded in a certain manner. As the District Court put it, the injunction "does not close down the companies, but requires that they use properly labeled products" (235 F. Supp. 84, 89 (D.N.J. 1964)). Moreover, the injunction is temporary and could be vacated or substantially modified at any time. Consequently, it cannot be said that an order here is unnecessary because respondents have been put out of business.

Respondents' argument as to the lack of necessity for an order must also be rejected because of the lack of any real identity both as respects the substantive and jurisdictional scope of the injunction and the proposed orders here and as respects the parties covered by these proceedings.

In the first place, the injunction refers to labeling and, unlike the proposed orders herein, contains no direct prohibitions against inserting the representations found to be false and misleading in respondents' advertising.¹⁰ Respondents argue, however, that it is immaterial whether the injunction by its terms actually reaches advertising since in any event any false advertising by the respondents can be reached by the Food and Drug Administration under Section 502(f)(1) of the Federal Food, Drug and Cosmetic Act.¹¹ Respondents reason that if the statements cov-

¹⁰ It is not correct, as respondents claim, that all of their advertising consists of "labeling" and therefore is directly covered by the Court injunction. The record demonstrates that respondents' advertising was not limited to brochures and other literature which could in certain cases be deemed to be "labeling" as well as advertising, but also included newspaper advertising (CX 5, 6).

¹¹ Under Section 502(f)(1) [21 U.S.C. 352 (f)(1)] "a drug or device shall be deemed to be misbranded * * * Unless its labeling bears * * * adequate directions for use." As interpreted by the Food and Drug Administration (21 Code Fed. Regs. § 1.106[ol]), and by the

ered by the injunction are set forth both in advertising and labeling they will be in violation of the injunction and if they are set forth in the advertising but not the labeling they will be in violation of Section 502(f)(1); in either case they will be prohibited from making such representations. Thus, in effect, respondents are confusing their specific liability under an order with their more general liability under the law. It is hardly an answer to this Commission's right to issue an order in instances where its statutes have been violated to contend that an order is unnecessary because the conduct sought to be prohibited is already prohibited under the law.

Second, the injunction does not cover four of the individual respondents named in the orders herein, who would therefore be free from any limitation if the Commission failed to issue its orders. Third, the injunction is limited to misbranding of articles shipped in interstate commerce, in contrast to the instant orders which cover the dissemination of false advertisements "by means of the United States mails or by any means in commerce," whether or not the drugs themselves enter interstate commerce. Thus, to ensure that respondents will not succeed in immunizing themselves from all effective sanctions by the simple expediency of avoiding interstate shipments of their products, this fact alone requires that our orders issue. See *Sidney J. Mueller v. United States*, 262 F. 2d 443 (5th Cir. 1958).

We hold, therefore, that the public interest requires that orders issue in the instant cases to make certain that all of the misrepresentations found to have been made will in fact be discontinued by all of the respondents and, if not discontinued, that they can be proceeded against in an enforcement proceeding based solely on the orders rather than by a new action.

V

Respondents maintain that there are inconsistencies between the provisions of the Court injunction and the cease and desist order issued by the hearing examiner which will put them in a position where, by complying with the Commission order, they would be in violation of the Court injunction. The result, they insist, would be "utter chaos." In support of this claim they point to a single provision in paragraph 1(h) of the proposed order in the *Dollar Vitamin* case which prohibits the representation that

Courts (e.g., *Nature Food Centers, Inc. v. United States*, 310 F. 2d 67 [1st Cir. 1962], cert. denied, 371 U.S. 968 [1963]), this section requires a statement in labeling of all conditions, purposes or uses for which it is recommended or suggested in respondents' advertising.

the product will be of benefit in the relief of tiredness, etc., unless the advertisement limits the effectiveness of the product to those persons whose symptoms are due to a deficiency of Vitamin B₁, B₂, Vitamin C or Niacinamide, and further declares that such symptoms are caused in the great majority of persons by conditions other than those which may respond to treatment by the use of the product. In contrast, Par. A(a)(5) of the temporary injunction prohibits any representations on respondents' labels that the articles are an adequate and effective treatment for lack of energy, lassitude, etc. without permitting any exceptions. The respondents claim, therefore, that the permissive feature of the Commission's order if taken advantage of by the respondents "would constitute a violation of the Court injunction * * *." The short answer to their contention is that the provisions of par. 1(h) of the Commission's orders are permissive not obligatory. Since these orders clearly do not require respondents to advertise that the product will be of benefit to anyone in the relief of such symptoms as tiredness, respondents can avoid any asserted conflict in the orders by simply eliminating from their advertising the language permitted by the exception clause in the Commission orders.

VI

Henry D. Cohen, who was named individually and as an officer of International Oil and Metals Corporation, Dollar Vitamin Plan, Inc. and Vitasafe Corporation, has filed a separate appeal, claiming that he had no responsibility for the policies of International Oil & Metals Corporation and that as respects the other corporate respondents he had long since discontinued the practices alleged in the complaint and would not resume them. He has appeared on this appeal by separate counsel but was not represented by separate counsel at the hearing below.

Prior to the hearing Mr. Cohen moved before the examiner to dismiss the proceedings against him on the basis of an affidavit in which he recited that he had terminated all connections with Dollar Vitamin Plan, Inc. and Vitasafe Corporation in 1960, and that although he was still at the time on the board of International Oil & Metals Corporation, he was largely inactive in that company. Complaint counsel opposed this motion, and it was denied by the examiner who stated that "the true facts as to Mr. Cohen's connections with the alleged violations can be ascertained with reliable certainty only after hearing, subject to cross-examination." However, at the hearing Mr. Cohen failed to appear and respon-

dents' counsel declared that Mr. Cohen had agreed that if an order was entered against the corporate respondents he would waive any objection to the entry of an order against him. Mr. Cohen now claims that this agreement was entered into without his knowledge and requests the Commission in the exercise of its discretion to disregard the agreement and consider Mr. Cohen's appeal on the merits on the basis of the facts contained in his prior affidavit as well as two supplemental affidavits. Complaint counsel does not dispute the facts recited in these affidavits but only the implications which should be drawn from them. The facts involved in Mr. Cohen's appeal, therefore, are largely of record and undisputed. In view of the emotional strain under which Mr. Cohen claims to have been laboring at the time of the hearing and the apparent misunderstanding which occurred between Mr. Cohen and respondents' counsel, we have decided to disregard the agreement entered into by his prior attorney and to review the facts set forth in the affidavits submitted in support of his appeal.

Mr. Cohen does not dispute that prior to his departure from Dollar Vitamin Plan, Inc. and Vitasafe Corporation in January, 1960, he actively participated in the direction and control of said corporations and may be held responsible for the advertisements of their products during the previous period. Since his resignation from these corporations, Mr. Cohen has been serving as president of a manufacturer of ethical drugs under a contract which runs until 1971 and which requires him to devote his full working time to the interests of that company. He maintains, and we agree, that, due to the severance of his relations with the respondent firms and his long-term employment contract with a wholly independent firm engaged in the sale of distinct products, it will be highly unlikely that he will again engage in the practices prohibited by the orders herein. Consequently, we do not believe that the public interest requires the issuance of an order to cease and desist directed at him at this time in the *Dollar Vitamin Plan, et al.* proceeding. However, if it should appear hereafter that Mr. Cohen has engaged in practices similar to those dealt with by the evidence herein, thus indicating that our conclusions with respect to his good faith are misplaced, the Commission will reopen said proceeding, utilize the record therein as presently constituted, together with the evidence of such future violations, and, if appropriate, issue an order to cease and desist. *Furr's, Inc.* (Dkt. 8581, 1965) [68 F.T.C. 584].

The facts relating to the *International Oil & Metals Corp., et*

al. proceeding are somewhat different. Mr. Cohen became secretary and director of respondent International Oil & Metals Corporation early in 1961. According to his affidavit he never performed any services for this company except to attend annual stockholders' and directors' meetings and did not participate in policy decisions. He severed all connections with this company in December, 1964. The examiner found that Mr. Cohen had participated in the direction and control of the acts and practices of the corporation including those alleged in the complaint and disseminated and caused the dissemination of the advertisements referred to in the decision. Since no facts were introduced pertaining to Mr. Cohen at the hearing, this conclusion was apparently based solely on the concession made at the hearing by respondents' counsel that Mr. Cohen would be bound by any order entered in this case, which agreement we have decided to disregard for the reasons set forth above. The only facts in this record respecting Mr. Cohen's responsibility for the advertising of this respondent, therefore, are those recited in his affidavit which deny any participation or responsibility. We do not believe that these facts justify the issuance of an order nor even a finding that this respondent violated the law. Nevertheless, we are aware that had it not been for the concession of respondents' counsel relating to Mr. Cohen, complaint counsel might well have offered evidence to refute the affidavit's recitals. In this situation we believe the only equitable course of action is for us to dismiss the complaint against Mr. Cohen in *International Oil & Metals Corp., et al.* without prejudice so that in the event it may be necessary in the future to bring further proceedings against Mr. Cohen, Commission counsel will not be foreclosed from presenting facts relating to Mr. Cohen's relationship with International Oil & Metals Corporation.

Conclusion

Appropriate orders will issue requiring all respondents, with the exception of Henry D. Cohen, to cease and desist from making misrepresentations in their advertising concerning the efficacy of vitamin products sold by them. The complaint in *International Oil & Metals Corporation, et al.* will be dismissed against Mr. Cohen, without prejudice. The proceedings in *Dollar Vitamin Plan, Inc., et al.* will be closed with respect to Mr. Cohen, and no order will issue against him at this time subject to the right of the Commission to reopen the proceedings against him at any time.

Appendix A

*Comparison of Findings in Food and Drug Libel Proceedings (United States v. "Vitasafe Formula M," 226 F. Supp. 266 [D.N.J. 1964]) and in Initial Decisions Herein**

*Products**FDA*

"Vitasafe Formula M," "Vitasafe Formula W," "Vitasafe CF" and "Vitasafe Queen Formula with Royal Jelly Formula Supplement for Women."

FTC

"Vitasafe Capsules for Men," "Vitasafe Capsules for Women" (*Dollar Vitamin* decision); "Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W," "Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M" (*International Oil* decision).

*Misrepresentations Found
to Have Been Made*

No comparable finding

Respondents in both cases falsely represented that said preparation was a new medical or scientific discovery or achievement (pars. 10th and 19th of *Dollar Vitamin* decision and pars. 8th and 14th of *International Oil* decision).

The labeling falsely represented that a woman has different nutritional needs than a man and Vitasafe Formula W will satisfy those special needs of women as contrasted to Vitasafe Formula M which will satisfy the special needs of men (Finding 1).

Respondents in both cases falsely represented that Vitasafe capsules claimed to be designed for men are unique and distinctly suited to the needs of men (pars. 11th and 20th of *Dollar Vitamin* decision and pars. 9th and 15th of *International Oil* decision). Identical conclusions were reached with respect to the capsules claimed to be designed for women (pars. 12th and 21st of *Dollar Vitamin* decision; pars. 10th and 16th of *International Oil* decision).

The labeling falsely represented that the product is an adequate and effective treatment for lowered resistance to disease, aches and pains and other symptoms and conditions (Finding 5).

Respondents in *Dollar Vitamin* case only falsely represented that their preparation would be of value in the prevention of colds or other infections (pars. 13th and 22nd of *Dollar Vitamin* decision).

*The two decisions are respectively referred to as "*Dollar Vitamin* decision" (Docket 8636) [p. 933 herein] and "*International Oil* decision" (Docket 8637) [p. 985 herein].

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The labeling falsely represented that the product is an adequate and effective treatment for depression, tension, aches and pains and other symptoms and conditions (Finding 5).

Respondents in *Dollar Vitamin* case falsely represented that their preparation would be of value to women in the treatment, relief or prevention of melancholia, discomfort due to menstruation or fears or anxieties due to contemplation of menopause or old age (pars. 14th and 23rd of *Dollar Vitamin* decision).

The labeling falsely represented that articles are an adequate and effective treatment for aging (Finding 5).

Respondents in both cases are found to have falsely represented that persons over a certain age have a particular need for the products sold (pars. 15th and 24th of *Dollar Vitamin* decision and pars. 11th and 17th of *International Oil* decision).

The labeling falsely represented that articles are an adequate and effective treatment for impotence and lowered vitality (Finding 5).

Respondents in both cases were found to have falsely represented that the preparation would increase or stimulate sexual vitality or activity (pars. 16th and 25th of *Dollar Vitamin* decision and pars. 12th and 18th of *International Oil* decision).

The labeling falsely represented that articles are an adequate and effective treatment for impairment of memory and inability to concentrate (Finding 5).

Respondents in *Dollar Vitamin* case only falsely represented that their preparation would increase a person's intelligence, mental alertness, ability to concentrate and power to remember (pars. 18th and 27th of *Dollar Vitamin* decision).

Labeling falsely represented that articles are an adequate and effective treatment for:

Respondents represented that their products will be of benefit in the treatment and relief of the symptoms listed below; such representations are false "except in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B₁ (Thiamine Mononitrate), Vitamin B₂ (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide" (pars. 17th and 26th of *Dollar Vitamin* decision and pars. 13th and 19th of *International Oil* decision):

lassitude, fatigue
weakness
nervous disorders

<i>Dollar Vitamin</i>	<i>International Oil</i>
tiredness	tiredness
weakness	—
nervousness	nervousness

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lowered vitality, impotence	lack of vitality	—
—	irritability	—
depression	depression	depression
headaches	headaches	—
insomnia	insomnia	—
tension	anxiety	—
lack of energy, lethargy	lack of strength, energy	loss of strength, or energy
—	lack of initiative	—
—	loss of happiness	loss of happiness
—	loss of sense of well-being	loss of sense of well-being
aging	appearing or feeling older than one should	appearing or feeling older than one should

aches and pains, impaired digestion, loss of appetite, skin infections, lesions and scaliness, night blindness, photophobia, diarrhea, edema of the legs, hypersensitivity to noise, swelling, redness, soreness and burning of the tongue, dermatitis, cracking of the lips, lesions at the corner of the mouth, growth failure in children, sore, swollen and bleeding gums, defective calcification of the bones, and lowered resistance to disease.

The following additional representations were found to have been falsely made in the labeling:

Finding 1: The nutritional value of the articles are enhanced by the presence of certain listed ingredients including Vitamin K, Lencin, Supine and Histidine;

Finding 3: "Minimum Daily Requirements" are a recommendation of the Food and Nutrition Board, National Academy of Science, National Research Council;

Finding 4: Large amounts of common foods must be consumed in order to furnish the quantities of the nutrients present in one Vitasafe capsule.

There is also a finding that the labeling fails to contain adequate directions for use of the articles as a "lipotropic factor" (Finding 6).

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FINAL ORDER

This matter having been heard by the Commission on an appeal by respondents from the initial decision of the hearing examiner, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision that the findings of fact and conclusions of law in the initial decision, and the order proposed by the hearing examiner, should be adopted as the findings, conclusions and order of the Commission, except as hereinafter set forth.

It is ordered, That the findings of fact in the initial decision be, and they hereby are, adopted as the findings of fact of the Commission, except that the following language be, and it hereby is, inserted after the final sentence in Paragraph Fourth:

“Respondent Henry D. Cohen severed all connections with said corporate respondents in January, 1960; since said date he has been serving as president of Knoll Pharmaceutical Corp., a manufacturer of ethical drugs. Under his employment contract with Knoll Pharmaceutical Corp., which runs until November 4, 1971, he is required to devote his full working time to the interests of that company.”

It is further ordered, That the conclusions of law in the initial decision be, and they hereby are, adopted as the conclusions of law of the Commission, except that the following language be, and it hereby is, inserted after the final sentence in Paragraph 4:

“Due to Henry D. Cohen’s resignation from respondents Dollar Vitamin Plan, Inc. and Vitasafe Corporation in January, 1960 and his long-term contract with Knoll Pharmaceutical Corp., we believe that it will be highly unlikely that he will again engage in the practices enumerated in the findings of fact. Consequently, we are of the opinion that the public interest does not require the issuance of a cease and desist order against him at this time; with respect to this respondent, the matter will be closed, without prejudice.”

It is further ordered, That the order proposed by the hearing examiner be, and it hereby is, adopted as the order of the Commission, except that the name of Henry D. Cohen shall be deleted from the first paragraph thereof and an additional paragraph shall be inserted in the order following the final paragraph in the proposed order:

Complaint

"It is further ordered, That with respect to Henry D.Cohen the matter be, and it hereby is, closed, without prejudice to the right of the Commission to take such further action as future events may warrant."

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.
