

Complaint

IN THE MATTER OF

S & S PHARMACEUTICAL CO., INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8696. Complaint, July 20, 1966—Decision, Oct. 9, 1967*

Order requiring a North Miami Beach, Fla., distributor of a weight-reducing preparation to cease making unordered shipments to retail druggists and using their names in advertising without prior authorization.

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 S & S Pharmaceutical Co., Inc., a corporation, and Samuel Fox and Seymour Rosen, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent S & S Pharmaceutical Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 1400 NE. 131st Street, in the city of North Miami Beach, State of Florida.

Respondents Samuel Fox and Seymour Rosen are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past, have been, engaged in the advertising, offering for sale, sale and distribution of a weight reducing product called "Galaxon" to retailers for resale to the consuming public.

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

PAR. 4. In the course and conduct of their business as aforesaid, respondents have engaged in the practice of making unordered and unauthorized shipments of their said product to retail drug stores located in the various States of the United States, and in the further practice of inserting or causing the insertion of advertisements in newspapers of general circulation in the communities where the retail drugstores to which the aforesaid unordered and unauthorized shipments were made are located. The aforesaid advertisements announced the availability of respondents' product at the local retail drugstores, named therein and to which the aforesaid unordered and unauthorized shipments had been made, and further stated that respondents' product "Galaxon" was guaranteed by the retail drugstores named therein, without prior consent, approval or permission to use the name of such drugstores in such advertisements and without an agreement by such drugstores to guarantee respondents' product "Galaxon." Said advertisements had the false appearance of having been inserted in said newspapers by the local retail drugstores named therein.

The acts and practices of respondents as hereinabove set forth were and are unfair and deceptive.

PAR. 5. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 6. The aforesaid unfair and deceptive acts and practices of respondents have had, and now have the tendency and capacity to induce, and have induced retail drugstores and members of the purchasing public to purchase substantial quantities of respondents' product.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Howard S. Epstein and Mr. John H. Bedford supporting the complaint.

Bass & Friend, New York, N.Y., by Mr. Solomon H. Friend and Mr. Sheldon S. Lustigman for the respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

FEBRUARY 10, 1967

The Federal Trade Commission issued its complaint against the respondents herein on July 20, 1966, charging them with engaging in the practices of making unordered and unauthorized shipments of their product to retail drugstores located in the various States of the United States and of inserting, or causing the insertion of, advertisements in newspapers of general circulation located in the same communities as the retail drugstores to which respondents had made unordered and unauthorized shipments of their product. The complaint alleged that the advertisements had announced the availability of respondents' product at the local retail drugstores named therein, to which respondents had made the aforesaid unordered and unauthorized shipments and that the advertisements had further stated that the retail drugstores named therein had guaranteed respondents' product, "Galaxon," without the prior consent, approval, or permission of such drugstores to use their names and without their agreements with respondents to guarantee respondents' product. The complaint further charged that respondents engaged in the above-alleged practices in an effort to establish their relationships with drugstores instead of making contractual arrangements with them, and it charged that these acts and practices constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. The respondents' answer and amended answer, while admitting some of the factual allegations, denied that the practices they engaged in constituted violations of the Federal Trade Commission Act. Following a prehearing conference, hearings were held at which testimony was adduced from respondent Seymour Rosen and several retail druggists to whom merchandise had been shipped by respondents.

At the close of the case-in-chief, counsel for respondents moved to dismiss the complaint and also moved to dismiss the complaint against respondent Seymour Rosen, individually. The hearing examiner reserved his ruling on these motions until he filed his Initial Decision. The motion to dismiss the complaint is hereby denied; and the motion to dismiss the complaint against respondent Seymour Rosen, individually, is granted, and the dismissal order as to him is a part of the order contained herein.

The parties have filed their proposed findings, and the proceeding is before the hearing examiner for final consideration. Consideration has been given to the proposed findings of fact and conclusions submitted by all parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

1. Respondent S & S Pharmaceutical Co., Inc., is a Florida corporation with its principal office and place of business located at 1400 NE. 131st Street, in North Miami Beach, Florida. (Answer.)

2. Respondents Samuel Fox and Seymour Rosen are officers of the corporate respondent and have the same address. Respondent Seymour Rosen merely follows the directions and policies established by respondent Samuel Fox. Although Mr. Rosen does not exercise any control over the operations of corporate respondent, he does actively direct the day-to-day operation of the corporate respondent, which is wholly owned by Mr. Fox. (Tr. 530-638.) Samuel Fox formulates, controls, and directs the policies and operations of the corporate respondent, S & S Pharmaceutical Co., Inc. (Tr. 60, 504.) Samuel Fox also does business as A & M Sales Company and as The Drewand Company.

3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution of a weight-reducing product called "Galaxon" to retailers for resale to the consuming public. (Answer.)

4. In the course and conduct of their business, respondents now cause and for some time last past have caused their said product, when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various other States of the United States, and they maintain and at all times mentioned herein have maintained a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Answer; Tr. 34.)

5. In the course and conduct of their business, as aforesaid, respondents have regularly engaged in the practices of making unordered shipments of their said product to retail drugstores located in the various States of the United States and of inserting, or causing the insertion of, advertisements in newspapers circulated in the same communities where the retail drugstores, to which

respondents had made the unordered shipments, are located. (Tr. 17, 26-42, 57, 64.) Respondents select these drugstores from a list that comprises virtually all the drugstores in the United States, together with their financial ratings, and from this list respondents select only those drugstores that have good ratings. (Tr. 38.)

6. The aforesaid advertisements announced the availability of respondents' product at the local retail drugstores named therein, to which respondents had already made unordered and unauthorized shipments, and further announced that respondents' product, "Galaxon," was guaranteed by the retail drugstores named therein without their prior consent, approval, or permission to use their names in such advertisements and without an agreement by such drugstores with respondents to guarantee respondents' product "Galaxon." (Tr. 28, 223, 426, 474; Com.Exs. 3-8.)

7. Respondents have also engaged in the practice of demanding and exacting payment from the retail druggists to whom unordered and unauthorized shipments of "Galaxon" are made. Whether or not the druggists order or reorder merchandise or evidence any intention or desire to do business with respondents, these demands for and exactment of payment are made in those instances where respondents have reason to believe, because of coupons submitted by consumers, that the druggist has, in fact, made some sales of the product. (Tr. 42, 72, 198, 227, 413.)

Under the literal terms of the original consignment, the drugstore is not obligated to pay until it orders an additional shipment; but, in practice, when the drugstore accepts the order and resells any portion of it, it generally expects to pay for what it has sold, and when respondents learn, through the receipt of discount coupons from consumers, that sales have been made, they bill the drugstore and expect payment for that portion of the shipment that has been sold. (Tr. 42.)

8. Some of the acts and practices, herein found to have been engaged in, were engaged in by Mr. Fox while trading as A & M Sales Company and as The Drewand Company—companies that were merely trade names under which Mr. Fox did business. (Tr. 15, 17, 52, 55; Res.Ex. 6.) At certain times, at least, the original contact with the drugstores was made in the name of A & M Sales Company; the order for running the advertisements in newspapers was sent in the name of The Drewand Company; the product, "Galaxon," was labeled as being the product of S & S Pharmaceutical Co., Inc.; and the consumer coupon was imprinted with the name Samson Pharmaceutical Co.

9. Respondents have contended that the practice of sending unordered merchandise to retail drugstores on consignment pay on reorder terms is a recognized and accepted method of introducing new products in the retail drug industry. The record, however, has not shown that such practice is a recognized and accepted method of introducing new products in this industry. There is evidence that drugstores do have arrangements with certain suppliers whereby these suppliers will ship new drugs to them on a consignment basis, but these arrangements between the suppliers and the drugstores are reached after a course of dealing between them has been established. These consignment sales are made by agreement, whereas respondents' practice of shipping unordered merchandise is engaged in without any agreement or understanding having been reached with the drugstores. (Tr. 162, 217, 410.)

10. Respondents contend that they do not cause the insertion of newspaper advertisements without the prior knowledge or approval of the retail drugstores. The evidence is, however, that they do cause the insertion of advertisements without prior knowledge of the drugstores, even though respondents send the prospective new customer a letter stating that the respondents propose to run an advertisement over the name of such customer; and respondents send the order for the advertisement directly to the newspaper with instructions to "*Please check with dealer to make sure mdse. has been received before releasing this advertising.*" (Tr. 241 386, 426, 474; Res.Ex. 4.) There is evidence that respondents also send a letter which instructs the newspaper to check with the dealer to get authorization to release these advertisements. (Res.Ex. 5.) It is, of course, true that if the prospective customer did, in fact, receive and read respondents' letter (Com.Ex. 1), he could stop the advertisement from being run. It is also true that if the newspaper did, in fact, seek authorization from the proprietor of the drugstore to run the advertisement but failed to get such authorization, the advertisement would not be run. However, the record shows instances of the running of advertisements where the prospective customers did not know that respondents planned to run advertisements until they actually saw them in the newspapers. It is unreasonable for respondents to assume that the obligations they impose on prospective customers and on newspapers will be accepted and followed. These obligations impose unreasonable burdens on the druggists, and only a few druggists advised respondents that they did not want the advertisements to be published. (Tr. 49, 74.)

11. Respondents urge that their practices are not deceptive, because they impose no obligation of any kind on the druggist. The

way the plan operates, however, is to impose a situation upon the druggist in which he must take affirmative action to avoid having respondents' product foisted upon him. It is a means by which some become reluctant customers without having actually agreed to become customers. There is oppression and imposition in these practices which are opposed to good conscience.

The Commission has not flatly prohibited the shipment of unordered merchandise in any fully litigated case, although in *Norman Co., et al.*, 40 F.T.C. 296, it prohibited unordered shipments that respondents had made for the purpose of inducing a purchase through mistake. Since the respondents in the instant case have coupled the practice of shipping unordered merchandise with that of placing unauthorized advertisements in a drugstore's name, it seems that an outright prohibition is called for in this case. It is inherently unfair for any seller to push a retailer into buying its product or becoming its sales agent under the circumstances found here. It is correct that, if the druggist exercised all his rights, he would not become a buyer or agent; but it appears that for him to be required to take affirmative actions to avoid becoming involved is grossly unfair.

12. Respondents assert that "the best that can be said about the evidence is that the aggrieved drugstore has a private course [*sic*] of action and that a private complaint doesn't give rise to a violation of the Federal Trade Commission Act." (Tr. 526.) Since respondents have engaged in the methods described above to attempt to open accounts with more than two thousand druggists, this is a matter in which the public has a substantial interest. (Tr. 23.)

13. The aforesaid unfair and deceptive acts and practices of respondents have had and now have the tendency and capacity to induce and have induced retail drugstores and members of the purchasing public to purchase substantial quantities of respondents' product.

CONCLUSION

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

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

Opinion

72 F.T.C.

ORDER

It is ordered, That respondents S & S Pharmaceutical Co., Inc., a corporation, and its officers, and Samuel Fox, individually, and Samuel Fox and Seymour Rosen, as officers of said corporation, and respondents' officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of "Galaxon" or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Shipping or sending any merchandise to any retail establishment without the prior authorization or prior consent of the person, company, or corporation to whom such merchandise is sent.

2. Placing any newspaper advertisement, or causing the dissemination of an advertisement in any other manner, for the purpose of publicizing such product, which advertisement uses the name of any drugstore or retail establishment without having previously obtained the authorization or consent of the druggist or retail establishment whose name appears in the advertisement.

It is further ordered, That the complaint be, and the same hereby is, dismissed against respondent Seymour Rosen in his individual capacity.

OPINION OF THE COMMISSION

OCTOBER 9, 1967

BY DIXON, *Commissioner*:

This matter is before the Commission on the appeal of respondents from an initial decision of the hearing examiner dismissing the complaint against respondent Seymour Rosen, individually, and holding that the remaining respondents had violated Section 5 of the Federal Trade Commission Act¹ and ordering respondents to cease and desist from the practices found to be unlawful.

The complaint in this matter charged respondents with engaging in the practices of making unordered and unauthorized shipments of their over-the-counter weight reducing product called "Galaxon" to retail drugstores located throughout the United States and of inserting, or causing the insertion of, advertisements in newspapers of general circulation located in the same communities as the retail drugstores to which respondents had made unordered and un-

¹ 66 Stat. 631 (1952); 15 U.S.C. 45 (1964).

authorized shipments of their product. The complaint alleged that the advertisements had announced the availability of respondents' product at the local retail drugstores named therein, to which respondents had made the aforesaid unordered and unauthorized shipments and that the advertisements had further stated that the retail drugstores named therein had guaranteed respondents' product without the prior consent, approval, or permission of such drugstores to use their names and without their agreements with respondents to guarantee respondents' product. The complaint further charged the respondents engaged in the alleged unfair and deceptive acts and practices in an effort to induce retail drugstores to make substantial purchases of respondents' product.

The Commission has given careful consideration to respondents' objections to the hearing examiner's initial decision. After a thorough examination of the record in this matter, we find that the record fully substantiates each and every one of the examiner's findings as to the facts and conclusions. However, subparagraph 1. of the examiner's order to cease and desist lacks sufficient clarity and must be modified.²

Respondents' method of operation is to select the names of retail druggists with good credit ratings from a drug industry directory and then ship the selected drugstore one dozen packages of "Galaxon." The druggist is also sent a form letter³ describing the product and the purported terms. There is evidence respondents generally enclose an invoice⁴ and a sample advertisement⁵ in the initial letter. At the time the merchandise is shipped, respondents also send to the local newspaper an insertion order,⁶ a "mat" of the advertising copy, and a check for the cost of the advertising.⁷

Generally within a week to ten days after the initial letter to the druggist is mailed and the merchandise shipped, and advertisement appears in the local newspaper indicating that the druggist is offering "Galaxon" for sale.⁸

The hearing examiner found that the way respondents' method of sale operates " * * * is to impose a situation upon the druggist in which he must take affirmative action to avoid having respondents' product foisted upon him. It is a means by which some become

² Counsel for respondents conceded that subparagraph 2. of the order was proper if the Commission found that advertisements using druggists' names were placed in newspapers without the knowledge or consent of the druggists. Oral Argument Before the Commission, p. 20.

³ RX 30(a); CX 1.

⁴ RX 30(c); CX 24.

⁵ RX 30(b); CX 7, 8.

⁶ CX 9(a)-(b).

⁷ Tr. 19, 50.

⁸ Tr. 57-59; RX 1, 2, 3, 4; 30(a)-(c); CX 44(a)-(c); but see n. 17, *infra*.

reluctant customers without having actually agreed to become customers."⁹

Respondents claim that affirmative action by the individual druggist is unnecessary because the insertion order requests the newspaper to get the druggists' prior approval before publishing the advertisement. It is argued that if the druggist doesn't want the merchandise, he merely has to tell the newspaper not to run the advertisement. Respondents assumed that if the newspapers ran the advertisements, the druggists must have approved.¹⁰ No compelling reason has been presented to show any basis for such an assumption, or why respondents rely upon a third party rather than directly contacting the druggist for approval.

Moreover, the evidence establishes that the wording of respondents' instructions to the newspapers¹¹ is such that the newspapers either do not understand the purpose or do not recognize any obligation to seek approval from the dealers. Thus, complaint counsel called eight witnesses, all of whom were principals of drugstores located in small towns in Northern Alabama. Five witnesses testified that they were never contacted *for any purpose* by the local newspaper.¹² The first knowledge these witnesses had of any advertising involving respondents' products occurred after the advertising appeared and customers came into their stores asking for the product.¹³ At that point, the record is clear that, because the advertisements placed them in an embarrassing position with customers responding to the advertisements, the druggists felt compelled to sell the unauthorized and unordered merchandise.¹⁴

Not only is immediate affirmative action by the druggist required in order to avoid selling respondents' product, but also the evidence establishes that respondents' communications are so misleading that it is almost impossible for the druggists to realize in sufficient time that such action is necessary in order to avoid becoming unwilling customers or agents.

Every druggist witness testified that he had never done business with respondents and never heard of respondents' companies or

⁹ Initial Decision, p. 771.

¹⁰ Tr. 48.

¹¹ Respondents merely ask the newspapers to "*CHECK WITH DEALER TO MAKE SURE MDSE. HAS BEEN RECEIVED BEFORE RELEASING THIS ADVERTISING.*" RX 4; CX 9(a)-(b) (emphasis in original).

¹² Tr. 141-142, 148; 221-223, 241; 384-387; 423-424, 427; 475. A sixth witness was not contacted for the reason that the local newspaper went out of business shortly before respondents shipped their merchandise to the witness. Tr. 209; RX 15(b).

¹³ Tr. 223-225; 383-384; 473-475.

¹⁴ Tr. 224-225; 384. However, one druggist, who did not generally sell nonprescription items, refused to sell the merchandise and forced the newspaper to print a retraction. Tr. 474-475; CX 53.

products prior to the receipt of the unauthorized merchandise and covering letter.¹⁵ Under these circumstances, it is indeed conceivable that, as several druggists testified, the initial letter might be disregarded and never opened.¹⁶ Even if the letter is opened, there is no logical reason why such a communication must be carefully scrutinized and read, or, at the druggist's peril, an unauthorized and unwarranted sale or agency will be forced upon him.¹⁷ Moreover, even if respondents' initial communication is read by the druggist, the letter and other documents enclosed are not sufficiently clear and informative to allow a druggist to decide what respondents' proposal is and whether to accept or reject it.

Respondents' actual terms can be learned from respondents' *actions* (not words), but only long after the druggists have become unwilling customers.

Respondents' initial letter to the druggist states in part:¹⁸

As a leading Drug Store outlet in your city, you will be interested to learn that we are releasing a campaign of advertising in your city for GALAXON \$3.00 Reducing Tablets which will appear in your local newspaper. We enclose proof showing sample of advertising which will appear.

Since you will undoubtedly receive numerous calls for this preparation as a result of this advertising campaign, we have taken the liberty of forwarding to you a CONSIGNMENT of (1) doz. GALAXON \$3.00 (list \$24.00 doz.) with PAY-ON-REORDER TERMS.

This letter does not tell the druggist that the advertising is going to appear under the druggist's name instead of respondents'. The letter does not ask for the druggist's approval of the publication of the advertisements or of the dates on which they are to appear. The letter does not ask for approval of the guarantees made in the advertisement. The letter does not ask the druggist whether he even wants to keep and sell the merchandise.

Furthermore, the druggist is not told what "consignment with pay-on-reorder terms" means. The examiner found that consignment arrangements are frequently used in the drug industry. Such arrangements are reached by *prior agreement* between the suppliers and their established drugstore customers.¹⁹ "Consignment with *pay-on-reorder*" is not generally understood, however, nor is

¹⁵ Tr. 108; 141; 198-199; 220-222; 376; 409-410; 415; 471.

¹⁶ Tr. 212; 226.

¹⁷ Three druggists testified that the first letter from respondents was received *after* the receipt of the unordered merchandise. Tr. 108; 410, 423. A fourth druggist testified that he *never* received respondents' letter and that the advertisement appeared before he had even received the merchandise. Tr. 473-474, 476, 485-486.

¹⁸ Several druggists testified that the sample advertisement was never enclosed. Tr. 378; 473-474, 476. RX 30(a), CX 1 (emphasis added).

¹⁹ Initial Decision, p. 770.

it a recognized and accepted industry term or practice.²⁰ Under the literal terms of respondents' offer contained in the initial letter and invoice, the drugstore could reasonably assume it is not obligated to pay until or unless an additional shipment is ordered.²¹ Contrary to that assumption, respondents regularly demand payment for any merchandise sold.²²

It becomes clearer after examining respondents' later letter demanding payment for merchandise sold that respondents' initial documents are deceptively vague and misleading. The letter states:

This merchandise shipped to you *in conjunction with an advertising campaign featuring the name of your store as authorized local distributor*. This shipment made to you *with consignment terms*.²³

There is no longer any mention of "pay-on-reorder" terms.

It is also significant that respondents' initial letter vaguely tells the druggist that an "advertising campaign" will appear in the local newspaper, while respondents' later letter emphasizes that the druggist's store name was featured in the advertisement.²⁴

Respondents' apparently calculated obscurantism is further demonstrated by the way in which the terms and conditions of the product guarantee are disclosed. Respondents have no difficulty in phrasing the newspaper advertisements so that the consuming public clearly understands the terms of the guarantee. " * * * if not satisfied for any reason, just return the package to your druggist and get your full money back. No questions asked."²⁵ The druggist, however, has not been asked by respondents to agree to honor the guarantee. The question of honoring the guarantee is presented to the drugstore as a *fait accompli*. Since the druggist has been intimidated into selling the product in the first place, he is also intimidated into honoring the guarantee.²⁶

On the other hand, respondents do not clearly phrase communi-

²⁰ *Id.*; Tr. 218.

²¹ Tr. 123; 157; 431.

²² Tr. 42. The record also indicates that druggists received demands for payment even though respondents' merchandise was never sold by them. Tr. 206-208; 412.

²³ CX 2; 41(b) (emphasis added).

²⁴ Compare the initial invoice:

" * * * THE ADVERTISING CAMPAIGN WHICH WE ARE PLANNING TO RUN IN YOUR LOCAL NEWSPAPER * * *". (RX 30(c); CX 24.)

with reorder invoice:

"To tie in with this shipment we have sent direct to your newspaper new ads featuring the name of your store as authorized local distributor." (CX 37; emphasis added.)

²⁵ CX 25, 28, 42.

²⁶ N. 14, *supra*. However, one druggist testified that since the advertisement and the guarantee it contained appeared without his approval, he refused to honor the guarantee. He told one customer " * * * as far as I am concerned the guarantee is between you and the people that make it." Tr. 282.

cations to druggists concerning how they propose to compensate the druggist for guarantees honored. Respondents initially tell the druggist: "We stand behind you 100% on this guarantee."²⁷ That can hardly be characterized as informative. The record shows that druggists have had to specifically request information on respondents' policy²⁸ and that the respondents do not always readily "stand behind" their guarantee.²⁹

Another example of respondents' method of clarifying the exact terms of the arrangement only after it is too late for the druggist to decline can be seen by comparing the initial letter's words relating to honoring discount coupons, to respondents' actual practice. The *only* reference to discount coupons is made in the initial letter which states:

SPECIAL DISCOUNT COUPON is packed in every unit of GALAXON. This coupon invites purchasers to write us and receive a \$1.00 discount certificate to be redeemed at your store as a \$1.00 discount on the purchase of 2 Packages of GALAXON. * * * We *reimburse* you for full amount of the \$1.00 discount by rebate to you when you send *the certificate* to us.³⁰

Long after the druggist has made a sale, and his customer has written for and received the discount coupon, the druggist finally learns how respondents "stand behind" the discount coupon. When, for the first time, the discount certificate is presented to the druggist, it states:

NOTE TO DRUGGIST—You are authorized to redeem this coupon. We will *replace* 1 package GALAXON for 2 coupons properly endorsed * * *.³¹

The placement of the initial advertisement in the local paper under the drugstore's name is essential to respondents' scheme to "foist" the unauthorized and unwanted merchandise upon the druggists. It must be emphasized that at no time prior to the publication of the advertisement has the druggist approved its actual appearance or its terms. The advertisements placed by respondents make no reference to respondents' companies, but rather appear solely under the local drugstore's name. The advertisements refer to "our product called Galaxon."³²

The advertisements further contain a guarantee to return the full purchase price if the consumer is unsatisfied. The guarantee is to be honored by the named drugstore.³³ The public is led to believe

²⁷ RX 30(a); CX 1.

²⁸ RX 9(a); 10.

²⁹ Tr. 149-150; 153-154; CX 26(a)-(b).

³⁰ RX 30(a); CX 1 (emphasis added).

³¹ RX 6 (emphasis added).

³² CX 25, 28, 42.

³³ *Id.*

that respondents' product is endorsed by the local drugstore and that the advertisement was placed by that store. Thus, the druggists testified that to avoid embarrassment and antagonization of their customers, they felt compelled to sell Galaxon to customers who came into their stores requesting the merchandise which the "store" had advertised.³⁴

As one witness stated:

The merchandise was received unordered and placed in the back room. We don't normally * * * accept unordered merchandise.

The notation on the original invoice referred to a planned advertising campaign which didn't register with us. There are all kinds of advertising campaigns.

* * * [A]n ad was run in the local paper over our name which there was no mention of on this document that the advertising would be by us, so to speak, it would be over our signature.

We got calls for the merchandise from good customers, the advertising had our name on it, so we put the merchandise out and sold it on call.³⁵

It is clear that the druggists are not generally informed by the newspapers that the advertisements will appear. It is also clear that respondents do not utilize any other method which would adequately inform the druggists of the impending publication of advertisements under the druggists' names.

Respondents have created a method whereby they have succeeded in confusing and misleading retail drugstores as to the terms and conditions under which respondents' products are delivered to the stores. This confusion, coupled with the almost immediate appearance of respondents' unauthorized and misleading newspaper advertisements, is an inherently unfair method of competition which "pushes" a misinformed retailer into becoming an unwilling buyer or agent.

Respondents have utilized their unfair methods in attempting to open accounts with over two thousand druggists located throughout the United States.³⁶ To prevent further deception, we are modifying the order issued by the hearing examiner to insure that, in the future, respondents will, prior to shipment of their merchandise, fully disclose all the terms and conditions under which their products are offered.

An appropriate order will be issued.

³⁴ N. 14, *supra*.

³⁵ Tr. 383-384.

³⁶ Tr. 23.

Final Order

FINAL ORDER

This matter has been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel supporting the complaint, and having determined that the hearing examiner's order to cease and desist should be modified and that respondents' appeal should be denied:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondents S & S Pharmaceutical Co., Inc., a corporation, and its officers, and Samuel Fox, individually, and Samuel Fox and Seymour Rosen, as officers of said corporation, and respondents' officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of "Galaxon" or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Shipping or sending any merchandise to any retail establishment without having previously obtained the written and express authorization or consent to the complete terms and conditions of sale or consignment, and resale, of any merchandise by the person, company, or corporation to whom such merchandise is sent.
2. Placing any newspaper advertisement, or causing the dissemination of an advertisement in any other manner, for the purpose of publicizing such product, which advertisement uses the name of any drugstore or retail establishment without having previously obtained the written and express authorization or consent of the druggist or retail establishment whose name appears in the advertisement.

It is further ordered, That the complaint be, and the same hereby is, dismissed against respondent Seymour Rosen in his individual capacity.

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

It is further ordered, That respondents S & S Pharmaceutical Co., Inc., and Samuel Fox shall, within sixty (60) days after

service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.
