

Complaint

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

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

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

By the Commission, Commissioner Anderson not participating.

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

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

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Standard Mills, Inc., a corporation, and Arthur J. Smith and Lloyd Smith, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Standard Mills, Inc., is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 461 Park Avenue South, New York, New York.

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

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

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

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

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

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

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

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

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

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

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

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

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

OCTOBER 11, 1962

PRELIMINARY STATEMENT

The Federal Trade Commission seeks, in this proceeding under § 5 of the Federal Trade Commission Act<sup>1</sup> to compel respondents to abandon the name under which their business has been conducted since the year 1908 by deleting the word "Mills" from the corporate name "Standard Mills, Inc." The complaint, *inter alia*, alleges:

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

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

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

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

On June 26, 1962, complaint counsel requested that official notice<sup>2</sup> be taken:

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

<sup>1</sup> 15 U.S.C. § 45.

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

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and

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

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

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

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

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

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

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

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

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

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

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

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

Hearing Examiner Gross. But you cannot get anyone?

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- A. Service, the type of cooperation they give you.
- Q. What is the business that Standard Mills is in?
- A. They supply us with fabrics.
- Q. Do they manufacture any fabrics?
- A. No.
- Q. How do you know that?
- A. Well, I knew it all the time. They never represented themselves as being a mill actually constructing the fabric. They were converters.
- Q. Have you always known them to be a converter?
- A. Yes.
- Q. Have they ever represented to you that they are anything but a converter?
- A. No, sir.
- Q. Are they also a distributor?
- A. That's right.
- Q. Have they represented themselves to you as a distributor?
- A. That's right.
- Q. Do you have any preference with regard to whether you buy from a mill or a distributor-converter?
- A. Very strong preferences.
- Q. Would you state to the Court exactly what your preferences are and why?
- A. When you buy from a mill, sir, you have to buy piece goods. No matter how acute a buyer you think you are, either in fabric selection or color selection, you are always pretty well stuck at the end of the season and you find your profits have been cut to the bone by having to sell off merchandise which is out of style and get it off your shelf because it dies on styles. New things come up all the time.
- I have had very, very bad experiences where I have had to dispose of fabrics that cost me five, six and seven dollars a yard, for fifty cents a yard, from off my shelves when the season was over and the goods stopped running.

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

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

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

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

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

The Witness. Yes, a sample book.

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

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

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

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

By Mr. NUSBAUM:

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

A. Definitely.

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

\* \* \* \* \*

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

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

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

No evidence to the contrary is in the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### CONCLUSIONS

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

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

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

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

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

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

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

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

## OPINION OF THE COMMISSION

By HIGGINBOTHAM, *Commissioner*:

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

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

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

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

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

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

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

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

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

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

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

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

## FINAL ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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IN THE MATTER OF

DRUG RESEARCH CORPORATION ET AL.

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

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

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Drug Research Corporation, a corporation, John Andre and Timoleon T. Andre, individually and as officers of said corporation, Harriet Andre, individually, Kastor, Farrell, Chesley & Clifford, Inc., a corporation, all hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Drug Research Corporation is a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 369 Lexington Avenue, New York, New York. Respondents John Andre, also known as John Andreadis, and Timoleon T. Andre, also known as Timoleon T. Andreadis, are the officers of this corporate respondent. Harriet Andre, also known as Harriet Andreadis, is the wife of John Andre and a stockholder of the said corporate respondent. These individuals dominate, control and direct the policies, acts and practices of this corporate respondent, including the acts and practices hereinafter set out. The address of these individual respondents is the same as that of the said corporate respondent.

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

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

*Designation:* Regimen-Tablets

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

Three Green tablets contain:

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

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Three Yellow tablets contain :

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

*Directions:* (Unless directed otherwise by physician)

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

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

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

Thereafter, to continue reducing program, repeat above dosage.

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

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

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

PAR. 5. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various

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

PAR. 6. Among the typical of the statements contained in said advertisements disseminated as hereinabove set forth are the following:

NO—DIET REDUCING

with New Wonder Drug for Fat People

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

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

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

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

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

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

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

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

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

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

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

PAR. 8. The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

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

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

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

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

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

*Mr. Berryman Davis* for the Commission.

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

## INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

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

