Complaint

IN THE MATTER OF

DOLLAR VITAMIN PLAN, INC., ET AL.

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

Docket 8636. Complaint, Aug. 11, 1964—Decision, June 24, 1966

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Dollar Vitamin Plan, Inc., a corporation, and Vitasafe Corporation, a corporation, and Samuel Josefowitz, Gerald Glaeser, Adolf W. Goldschmidt, individually and as officers of said corporations, and Henry D. Cohen, Benjamin W. Lerner, Leon Potash and William H. Sylk, individually, and Maxwell Sackheim—Franklin Bruck, Inc., a corporation, and Robert Sackheim, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Dollar Vitamin Plan, Inc., is a corporation organized and existing under the laws of the State of New York with its office and principal place of business at 23 West 61st Street, in the city of New York, State of New York.

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

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

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

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

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

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

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

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

1. *Designation:* Vitasafe Capsules for Men.

Formula:

Vitamin A	12,500 USP Units
Vitamin B_1	5 mg.
Vitamin B_2	2.5 mg.
Vitamin B_6	0.5 mg.
Vitamin B_{12}	2 mcg.
Vitamin C	75 mg.
Vitamin D	1,000 USP Units
Vitamin E	2 I.U.
Choline Bitartrate	31.4 mg.
Inositol	15 mg.

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

Directions: One Capsule Daily.

2. *Designation:* Vitasafe Capsules for Women.
Formula:

Vitamin A	12,500 USP Units
Vitamin B_1	5 mg.
Vitamin B_2	2 mg.
Vitamin B_6	0.5 mg.
Vitamin B_{12}	3 mcg.
Vitamin C	100 mg.
Vitamin D	1,000 USP Units
Vitamin E	3 I.U.
Vitamin K	0.05 mg.
Choline Bitartrate	30 mg.
Inositol	10 mg.
d 1-Methionine	10 mg.
Glutamic Acid	50 mg.
Lemon Bioflavonoid Complex	5 mg.
Liver	5 mg.
Niacinamide	25 mg.
Calcium Pantothenate	4 mg.
Folic Acid	0.3 mg.
Calcium	50 mg.
Phosphorus	39 mg.
Iron	30 mg.
Cobalt	0.04 mg.
Copper	0.45 mg.
Manganese	0.5 mg.
Molybdenum	0.1 mg.
Iodine	0.1 mg.
Potassium	2 mg.
Zinc	0.5 mg.
Magnesium	3 mg.

Directions: One Capsule Daily.

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

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

PAR. 4. In the course and conduct of their businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparations, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of circulars and brochures, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations; and have disseminated, and caused the dissemination of, advertisements concerning said preparations by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

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

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

1. Vitasafe Capsules are a new medical and scientific discovery and achievement;

2. Vitasafe Capsules for Men are uniquely and distinctively suited to the needs of men;

3. Vitasafe Capsules for Women are uniquely and distinctively suited to the needs of women;

4. Vitasafe Capsules will be of value in the prevention of colds and other infections;

5. Vitasafe Capsules for Women will be of value to women in the treatment, relief and prevention of melancholia, discomfort due to menstruation and fears and anxieties arising from the onset and contemplation of menopause and old age;

6. Persons over 35 years of age have a particular need for Vitasafe Capsules;

7. Vitasafe Capsules increase and stimulate sexual vitality and activity;

8. The use of Vitasafe Capsules and each ingredient therein will be of benefit in the treatment and relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality and initiative, loss of happiness, loss of a sense of well being, and appearing and feeling older than one should;

9. The use of Vitasafe Capsules will increase a person's intelligence, mental alertness, ability to concentrate, and power to remember.

PAR. 7. In truth and in fact:

1. Vitasafe Capsules are not a new medical or scientific discovery or achievement;

2. Vitasafe Capsules for Men are not uniquely or distinctively suited to the needs of men;

3. Vitasafe Capsules for Women are not uniquely or distinctively suited to the needs of women;

4. Vitasafe Capsules will not be of value in the prevention of colds or other infections;

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

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

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

8. The use of Vitasafe Capsules will not be of benefit in the treatment or relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well being, or appearing or feeling older than one should, except in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide. All the remaining ingredients in Vitasafe Capsules are of no benefit in the treatment or relief of said symptoms;

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

Therefore, the advertisements set forth and referred to in Paragraph Five were and are misleading in material respects and constituted, and now constitute, false advertisements as that term is defined in the Federal Trade Commission Act.

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

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

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

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

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

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 15, 1965

Summary

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

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

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

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

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

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

The examiner reserved decision on the motion to dismiss until after the hearing (TR 58), on the ground that it was a late hour (TR 53) to raise this question, and with the thought that, there being so few witnesses to be called, all of them the Commission's the record might as well be completed in any event (see TR 56). The hearing proceeded accordingly. The only witnesses called, all by the Commission, were the two minor non-medical witnesses (Sylk and Lerner), heard in New York, and three medical witnesses, heard in Washington, D.C., but not cross-examined by respondents' counsel, who appeared, however, by one of their associates.

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

Informal Consolidation of Two Proceedings

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

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

Respondent Advertising Agency (Prior Dismissal)

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

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

Advertising Agency's Officer Sackheim (Prior Dismissal)

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

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

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

Respondent Cohen (Prior Dismissal Denied)

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

Other Respondents (Including Sylk and Lerner)

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

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

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

There are two others, as follows:

Lerner	D. 8636
Sylk	D. 8636

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

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

Hearings Authorized for Two Cities

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

Prehearings. Discovery

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

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

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

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

Waiver of Medical Rebuttal by Respondents

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

Continuances

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

HEARING

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

Motion to Dismiss Because of Court Action

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

Answer Withdrawn re Non-Medical

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

Respondents Waive Cross-Examination of Experts

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

[1] TR 27–28.

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

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

Proposed Stipulation as to Expert Testimony

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

Court of Appeals Decision

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

Main Non-Medical Witnesses Not Present

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

Cohen
Glaeser
Goldschmidt
Josefowitz
Potash

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

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

Medical Witnesses

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

Dr. William James McGanity, University of Texas
Dr. Thomas Stone Sappington, Washington, D.C.
Dr. Robert E. Shank, Washington University School of Medicine, St. Louis, Missouri

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

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

Proposed Findings and Briefs

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

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

[2] That is, res judicata, multiplicity of proceedings, etc.

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

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

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

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

FINDINGS OF FACT (D. 8636)

Re Complaint Par. One [3]

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

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

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

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

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

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

* * * * * * *

Findings First, Second, Third and Fourth, hereinabove set forth, are supported by admissions in the answer filed herein on October 5, 1964, as amended by admissions of record, TR 27:22–25 [4] continuing at TR 28:1–7, TR 30:10–17 (individual responsibility), and TR 31:15–22.

Re Complaint Par. Two

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

* * * * * * *

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

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

1. *Designation:* Vitasafe Capsules for Men.
Formula:

Vitamin A (Palmitate)	12,500 USP Units
Vitamin B_1 (Thiamine Hydrochloride)	5 mg.
Vitamin B_2 (Riboflavin)	2.5 mg.
Vitamin B_6 (Pyridoxine Hydrochloride)	0.5 mg.
Vitamin B_{12} (Cobalamin Conc. N.F.)	2 mcg.
Vitamin C (Ascorbic Acid)	75 mg.
Vitamin D (Irr. Ergosterol)	1,000 USP Units
Vitamin E (from d-Alpha Tocopheryl Acetate Conc. N.F.)	2 I.U.
Niacinamide	40 mg.
Calcium Pantothenate	4 mg.

[4] TR 27:22–25 means transcript, page 27, lines 22 through 25.

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

Directions: 1 Capsule Daily.

2. *Designation:* Vitasafe Capsules for Women.
Formula:

Vitamin A (Palmitate)	12,500 USP Units
Vitamin D (Irradiated Ergosterol)	1,000 USP Units
Vitamin B_1 (Thiamine Mononitrate)	5 mg.
Vitamin B_2 (Riboflavin)	2 mg.
Vitamin B_6 (Pyridoxine Hydrochloride)	0.5 mg.
Vitamin B_{12} (Cobalamin Conc. N.F.)	3 mcg.
Vitamin C (Ascorbic Acid)	100 mg.
Niacinamide	25 mg.
Calcium Pantothenate	4 mg.
Vitamin E (from d-Alpha Tocopheryl Acetate Conc. N.F.)	3 I.U.
Folic Acid	0.1 mg.
Dicalcium Phosphate, Anhydrous (Calcium 50 mg.) (Phosphorous 39 mg.)	174 mg.
Choline Bitartrate	30 mg.
Inositol	10 mg.
Rutin	8 mg.
Lemon Bioflavonoid Complex	5 mg.
Monopotassium Gultamate	20 mg.

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

* * * * * * *

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

Re Complaint Par. Three

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

* * * * * * *

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

Re Complaint Par. Four

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

* * * * * * *

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

Re Complaint Par. Five

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

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

* * * * * * *

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

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

Re Complaint Par. Six

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

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

* * * * * * *

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

Re Complaint Par. Seven

Medical Findings

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

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

* * * * * * *

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

Twenty-Sixth.—The use of Vitasafe Capsules will not be of benefit in the treatment or relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of sense of well-being or appearing or feeling older than one should, except in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide. All the remaining ingredients in Vitasafe Capsules are of no benefit in the treatment or relief of said symptoms.

* * * * * * *

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

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

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

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

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

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

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

* * * * * * *

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

Re Complaint Par. Eight

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

* * * * * * *

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

CONCLUSIONS OF LAW (D. 8636)

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

2. The dissemination by the respondents of the false advertisements, as aforesaid, constitutes unfair and deceptive acts and practices in commerce, in violation of § 5 and § 12 of the Federal Trade Commission Act.

3. The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public.

4. The term respondents, as above used in these Conclusions shall not be deemed to include the following parties named as respondents herein:

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

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

DISCUSSION AS TO MEDICAL EVIDENCE

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

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

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

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

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

Complaint counsel introduced in evidence a lucid and helpful tabulation, CX 51, attested to by their medical advisor, comparing the ingredients of Rybutol with those of the Vitasafe and Life Nutrition preparations in this and the accompanying proceeding. Complaint counsels' doctors testified that, based thereon, the Rybutol and the present products are substantially alike for treating specified symptoms described in advertisements (Dr. McGanity, TR 169; Dr. Shank, TR 223; and Dr. Sappington, TR 197–98), except that, according to Dr. Shank and Dr. Sappington, Rybutol is to be preferred for vitamin B_1 deficiencies.

RES JUDICATA
MULTIPLICITY OF SUITS

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

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

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

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

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

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

The examiner now denies the motion for the following reasons:

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

(2) The defense of *res judicata* is by its nature hardly one to be invoked by the unsuccessful party in the other litigation relied on as a bar. Respondents herein, insofar as they have been defendants in the court litigation, have been conspicuously unsuccessful. The recent ruling by the Court of Appeals confirms this. The two cases [5] relied on by respondents are cases where, as pointed out by complaint counsel here, the defense was raised by parties who had been *vindicated* in the other litigation.

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

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

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

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

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

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

The *Foods Plus* case,[6] cited by respondents in a letter[7] supplementing their briefs, does not hold that labeling encompasses all advertising. It merely holds that even radio announcements may be considered in a Food and Drug case "in determining the general use of the vitamins," *i.e.*, in ascertaining whether labels contain "adequate directions for use" under the Food and Drug Act, § 3.52(f)(1).

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

Form of Order

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

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

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

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

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

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

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

ORDER

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

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

(a) That said preparation is a new medical or scientific discovery or achievement;

(b) That said preparation is uniquely or distinctively suited to the needs of men;

(c) That said preparation is uniquely or distinctively suited to the needs of women;

(d) That said preparation will be of value in the prevention of colds or other infections;

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

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

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

(h) That the use of said preparation will be of benefit in the treatment or relief of the symptoms of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, unless such advertisement expressly limits the effectiveness of the preparation to those persons whose symptoms are due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide, and further, unless such advertisement clearly and conspicuously reveals the fact that in the great majority of persons, or of any age, sex, class or other group thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to treatment by the use of the preparation, and that in such persons the preparation will not be of benefit;

(i) That the ingredients in said preparation other than Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid) or Niacinamide, will be of benefit in the treatment or relief of tiredness, weakness, nervousness, irritability, depression, headaches, insomnia, anxiety, lack of strength, energy, vitality or initiative, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should;

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

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

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

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

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

OPINION OF THE COMMISSION *

BY JONES, *Commissioner:*

I

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

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

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

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

The complaints herein dated August 11, 1964 charged that respondents, in their advertising of "Vitasafe" and "Life Nutrition" vitamin capsules, represented, *inter alia*: (1) that their vitamin capsules are a new medical or scientific discovery and achievement; (2) that the capsules designated "for men" or "Formula M" are distinctively suited to the needs of men, and those designated "for women" or "Formula W" are distinctively suited to the needs of women; (3) that people over 35 years of age have a particular need for "Vitasafe" capsules and people over 40 years of age have a particular need for the "Life Nutrition" capsules; (4) that their capsules will increase or stimulate sexual vitality or activity; and (5) that their capsules will be of benefit in the treatment or relief of a number of symptoms including tiredness, weakness, nervousness and depression. This final claim is alleged to be false generally although the complaints specifically assert that respondents' capsules will be of benefit for the symptoms specified "in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide."

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

> expressly limits the effectiveness of the preparation to those persons whose symptoms are due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide, and * * * clearly and conspicuously reveals the fact that in the great majority of persons, or of any age, sex, class or other group thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to treatment by the use of the preparation, and that in such persons the preparation will not be of benefit.

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

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

II

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

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

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

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

Approximately seven months later, the District Court issued a

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

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

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

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

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

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

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

V

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

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

the product will be of benefit in the relief of tiredness, etc., unless the advertisement limits the effectiveness of the product to those persons whose symptoms are due to a deficiency of Vitamin B_1, B_2, Vitamin C or Niacinamide, and further declares that such symptoms are caused in the great majority of persons by conditions other than those which may respond to treatment by the use of the product. In contrast, Par. A(a)(5) of the temporary injunction prohibits any representations on respondents' labels that the articles are an adequate and effective treatment for lack of energy, lassitude, etc. without permitting any exceptions. The respondents claim, therefore, that the permissive feature of the Commission's order if taken advantage of by the respondents "would constitute a violation of the Court injunction * * *." The short answer to their contention is that the provisions of par. 1(h) of the Commission's orders are permissive not obligatory. Since these orders clearly do not require respondents to advertise that the product will be of benefit to anyone in the relief of such symptoms as tiredness, respondents can avoid any asserted conflict in the orders by simply eliminating from their advertising the language permitted by the exception clause in the Commission orders.

VI

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

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

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

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

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

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

Conclusion

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

Appendix A

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

Products

FDA	*FTC*
"Vitasafe Formula M," "Vitasafe Formula W," "Vitasafe CF" and "Vitasafe Queen Formula with Royal Jelly Formula Supplement for Women."	"Vitasafe Capsules for Men," "Vitasafe Capsules for Women" *(Dollar Vitamin* decision); "Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W," "Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M" *(International Oil* decision).

Misrepresentations Found to Have Been Made

No comparable finding	Respondents in both cases falsely represented that said preparation was a new medical or scientific discovery or achievement (pars. 10th and 19th of *Dollar Vitamin* decision and pars. 8th and 14th of *International Oil* decision).
The labeling falsely represented that a woman has different nutritional needs than a man and Vitasafe Formula W will satisfy those special needs of women as contrasted to Vitasafe Formula M which will satisfy the special needs of men (Finding 1).	Respondents in both cases falsely represented that Vitasafe capsules claimed to be designed for men are unique and distinctly suited to the needs of men (pars. 11th and 20th of *Dollar Vitamin* decision and pars. 9th and 15th of *International Oil* decision). Identical conclusions were reached with respect to the capsules claimed to be designed for women (pars. 12th and 21st of *Dollar Vitamin* decision; pars. 10th and 16th of *International Oil* decision).
The labeling falsely represented that the product is an adequate and effective treatment for lowered resistance to disease, aches and pains and other symptoms and conditions (Finding 5).	Respondents in *Dollar Vitamin* case only falsely represented that their preparation would be of value in the prevention of colds or other infections (pars. 13th and 22nd of *Dollar Vitamin* decision).

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

The labeling falsely represented that the product is an adequate and effective treatment for depression, tension, aches and pains and other symptoms and conditions (Finding 5).	Respondents in *Dollar Vitamin* case falsely represented that their preparation would be of value to women in the treatment, relief or prevention of melancholia, discomfort due to menstruation or fears or anxieties due to contemplation of menopause or old age (pars. 14th and 23rd of *Dollar Vitamin* decision).
The labeling falsely represented that articles are an adequate and effective treatment for aging (Finding 5).	Respondents in both cases are found to have falsely represented that persons over a certain age have a particular need for the products sold (pars. 15th and 24th of *Dollar Vitamin* decision and pars. 11th and 17th of *International Oil* decision).
The labeling falsely represented that articles are an adequate and effective treatment for impotence and lowered vitality (Finding 5).	Respondents in both cases were found to have falsely represented that the preparation would increase or stimulate sexual vitality or activity (pars. 16th and 25th of *Dollar Vitamin* decision and pars. 12th and 18th of *International Oil* decision).
The labeling falsely represented that articles are an adequate and effective treatment for impairment of memory and inability to concentrate (Finding 5).	Respondents in *Dollar Vitamin* case only falsely represented that their preparation would increase a person's intelligence, mental alertness, ability to concentrate and power to remember (pars. 18th and 27th of *Dollar Vitamin* decision).
Labeling falsely represented that articles are an adequate and effective treatment for:	Respondents represented that their products will be of benefit in the treatment and relief of the symptoms listed below; such representations are false "except in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide" (pars. 17th and 26th of *Dollar Vitamin* decision and pars. 13th and 19th of *International Oil* decision):

	Dollar Vitamin	*International Oil*
lassitude, fatigue	tiredness	tiredness
weakness	weakness	—
nervous disorders	nervousness	nervousness

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

—	—
depression	depression
—	—
—	—
—	—
loss of strength, or energy	
—	
loss of happiness	
loss of sense of well-being	
appearing or feeling older than one should	

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

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

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

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

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

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

FINAL ORDER

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

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

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

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

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

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

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

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

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

IN THE MATTER OF

INTERNATIONAL OIL & METALS CORPORATION trading as LIFE NUTRITION ET AL.*

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

Docket 8637. Complaint, Aug. 11, 1964—Decision, June 24, 1966

Order requiring a New York City distributor of "Life Nutrition" vitamin capsules to cease making false and exaggerated claims concerning the efficacy of its vitamin products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that International Oil & Metals Corporation, a corporation, trading as Life Nutrition, and Leon Potash, Henry D. Cohen and Adolf W. Goldschmidt, individually and as officers of said corporation, and Maxwell Sackheim-Franklin Bruck, Inc., a 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 International Oil & Metals Corporation is a corporation, organized and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 19 West 61st Street, in the

* For Commission's opinion in this case, see consolidated opinion of the Commission, *In the Matter of Dollar Vitamin Plan, Inc., et al.*, Docket No. 8636, pp. 933, 969 herein.

city of New York, State of New York. Said corporate respondent conducts its business under the name Life Nutrition.

Respondents Leon Potash, Henry D. Cohen and Adolf W. Goldschmidt are officers of the corporate respondent International Oil & Metals Corporation and each participates in the preparation, direction and control of the acts and practices of said corporation, including the acts and practices hereinafter set forth. Their address is the same as that of said corporate respondent.

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

PAR. 2. Respondents International Oil & Metals Corporation, Leon Potash, Henry D. Cohen and Adolf W. Goldschmidt are now, and have been for more than one year last past, engaged in the sale and distribution of preparations containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

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

(1) *Designation:* Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M.

Formula:		*% Min. Daily Req.*
	Vitamin A (Palmitate) 6,700 USP Units	167.5%
	Vitamin D (Irrad. Ergost.) 500 USP Units	125%
	Vitamin B_1 (Mononitt) 5 mg.	500%
	Vitamin B_2 (Riboflavin) 2.5 mg.	208%
	Vitamin B_6 (Pyridoxine Hydrochloride) 0.25 mg.	**
	Vitamin B_{12} 2 mcg.	**
	Vitamin C 55 mg.	183.3%
	Niacinamide 20 mg.	200%
	Calcium Pantothenate 3 mg.	***
	Vitamin E 2 I.U.	**
	Vitamin K (Menadione) 0.5 mg.	**
	Citrus Bioflavonoid Complex 5 mg.	***
	Biotin 2.5 mcg.	***
	Sodium Caseinate 50 mg.	***
	Choline Bitartrate 25 mg.	***

		% Min. Daily Req.
Formula:	Inositol 15 mg.	***
	l-Lysine Monohydrochloride 5 mg.	**
	Calcium (from DiCalcium Phosphate, Anhydrous) 25 mg.	3.3%
	Phosphorus (from Dicalcium Phosphate, Anhydrous) 20 mg.	2.7%
	Copper (from Copper Sulphate, Monohydrate) 0.45 mg.	**
	Iron (from Ferrous Sulfate, Dried) 10.0 mg.	100.0%
	Magnesium (from Magnesium Sulfate, Dried) 1.0 mg.	**
	Manganese (from Manganese Sulfate) 0.3 mg.	***
	Potassium (from Potassium Sulfate) 1.5 mg.	**
	Zinc (from Zinc Sulfate) 0.1 mg.	***
	Sulfur (from the Sulfates) 3.0 mg.	***

* Minimum daily requirement

** Minimum daily requirement not established

*** Need in human nutrition not established.

Directions: Average dosage for Adults: One Capsule Daily. Food Supplement—For Dietary Purposes Only.

(2) *Designation:* Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W.

		% Min. Daily Req.
Formula:	Vitamin A (Palmitate) 6,700 USP Units	167.5%
	Vitamin D (Irrad. Ergost) 670 USP Units	167.5%
	Vitamin B_1 (Mononitt) 4.3 mg.	430%
	Vitamin B_2 (Riboflavin) 2.0 mg.	166%
	Vitamin B_6 (Pyridoxine Hydrochloride) 0.5 mg.	**
	Vitamin B_{12} 3.0 mcg.	***
	Vitamin C 75 mg.	250%
	Niacinamide 15 mg.	150%
	Calcium Pantothenate 5 mg.	***
	Vitamin E 2 I.U.	**
	Vitamin K (Menadione) 0.4 mg.	**
	Citrus Bioflavonoid Complex 5 mg.	***
	Biotin 2.5 mcg.	***
	Sodium Caseinate 50 mg.	***
	Choline Bitartrate 20 mg.	***

		% Min. Daily Req.
Formula:	Inositol 10 mg.	***
	Liver (whole Dessicated) 10 mg.	
	l-Lysine Monohydrochloride 5 mg.	**
	Calcium (from DiCalcium Phosphate, Anhydrous) 25 mg.	3.3%
	Phosphorus (from DiCalcium Phosphate, Anhydrous) 20 mg.	2.7%
	Copper (from Copper Sulfate, Monohydrate) 0.45 mg.	**
	Iron (from Ferrous Sulfate, Dried) 15.0 mg.	150.0%
	Magnesium (from Magnesium Sulfate, Dried) 1.5 mg.	**
	Manganese (from Manganese Sulfate) 0.3 mg.	***
	Potassium (from Potassium Sulfate) 1.5 mg.	**
	Zinc (from Zinc Sulfate) 0.5 mg.	***
	Sulphur (from the Sulfates) 12.0 mg.	***
	* Minimum daily requirement ** Minimum daily requirement not established *** Need in human nutrition not established.	
Directions:	Average Dosage for Adults: One Capsule Daily. Food Supplement—For Dietary Purposes Only.	

PAR. 3. Respondents International Oil & Metals Corporation, Leon Potash, Henry D. Cohen and Adolf W. Goldschmidt cause the said preparations, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparations in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

Respondent Maxwell Sackheim-Franklin Bruck, Inc., is now, and for some time last past has been, the advertising agency of International Oil & Metals Corporation, and now prepares and places, and for some time last past has prepared and placed, for publication advertising material, including the advertising hereinafter referred to, to promote the sale of the said preparations. In the conduct of its business, at all times mentioned herein, res-

pondent Maxwell Sackheim-Franklin Bruck, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparations by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of circulars and brochures, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations; and have disseminated, and caused the dissemination of, advertisements concerning said preparations by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

Important nutritional news . . . at last! Here's the electrifying news you've hoped for! We now offer two remarkable formulas—one for men—one for women—each of which combines the powers of at least 26 precious ingredients to help you achieve a feeling of increased pep and energy if you are otherwise healthy but suffer from a deficiency of these vitamins and minerals.

* * * * * * *

Two truly comprehensive safe high potency vitamin plans including Sodium Caseinate and Citrus Bioflavonoid Complex may help you to increased pep, energy and well-being.

* * * * * * *

Without these precious vitamins and minerals—in sufficient amounts over a long period—you cannot hope to feel your best in mind and body. You lose strength and energy—you feel tired, nervous and depressed, and you may pay dearly in lowered resistance to disease—lowered efficiency and earning power—inability to give your family the loving care and companionship that makes for a happy, successful home life.

* * * * * * *

Two special plans: 1. For men—2. For women—tailored to your needs.

* * * * * * *

Vitamin Additive For Folks Over 40 . . . Tired during the day? Worn out at night? Life Nutrition's exclusive formula brings you high-potency vitamin-mineral capsules for extra pep and energy.

* * * * * * *

"Our fights have turned to kisses." It's hard to believe that my wife and I used to fight . . . To correct this condition we began taking Life Nutrition Capsules—just one a day! Before long we had more pep, our dispositions improved, we were back in each other's arms!

* * * * * * *

"I was so worried . . . my husband slept all day . . . every Sunday". What can you do when your husband acts like an old man . . . when he doesn't enjoy anything better than sleeping all day Sunday, and is always "too tired" to have fun—go visiting, to a movie, dancing? What's the answer for a man who has lost his pep and energy while still young?

Those questions used to worry me all the time. For some unknown reason, my husband had been robbed of his energy and vitality; and I just didn't know what to do. Then I saw a Life Nutrition ad in the newspaper. It told how men—and women (who are otherwise normally healthy)—may feel worn-out, nervous and irritable due to an easily corrected deficiency of vitamins in their diet.

Thousands of people had increased their pep and vigor through the help of the Life Nutrition Plan. I thought perhaps it could help my husband, too, so I sent for a trial supply. They made my husband feel like a new man—as happy and energetic as when we were first married.

If you want to help your husband, send for a 30-day trial supply of Life Nutrition High-Potency Capsules today!

* * * * * * *

I always felt simply "run-down." People were thinking of me as a "spoilsport." I didn't know why until my doctor put me wise. He told me that I acted like a man much older than myself, and explained why I felt "tired" . . . Well, I put off doing anything about my condition—until one day I sent for a 30-day trial supply of high-potency Life Nutrition Capsules . . . In a short time, I began to feel like a new man!

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

1. Life Nutrition High-Potency Vitamin-Mineral Capsules are a new medical and scientific discovery and achievement;

2. Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M are distinctively suited to the needs of men;

3. Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W are distinctively suited to the needs of women;

4. Persons past forty years of age have a particular need for Life Nutrition High-Potency Vitamin-Mineral Capsules;

5. Life Nutrition High-Potency Vitamin-Mineral Capsules increase and stimulate sexual vitality;

6. The use of Life Nutrition High-Potency Vitamin-Mineral Capsules and each of the ingredients therein will be of benefit in

the treatment and relief of tiredness, nervousness, depression, loss of strength and energy, loss of happiness, loss of a sense of well-being, and appearing and feeling older than one should.

PAR. 7. In truth and in fact:

1. Life Nutrition High-Potency Vitamin-Mineral Capsules are not a new medical or scientific discovery or achievement;

2. Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M are not distinctively suited to the needs of men;

3. Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W are not distinctively suited to the needs of women;

4. Neither adults past forty years of age nor adults of any other age group have a special need for Life Nutrition High-Potency Vitamin-Mineral Capsules;

5. Life Nutrition High-Potency Vitamin-Mineral Capsules will not increase or stimulate sexual vitality;

6. Life Nutrition High-Potency Vitamin-Mineral Capsules will not be of benefit in the treatment or relief of tiredness, nervousness, depression, loss of strength or energy, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, except in a small minority of persons whose tiredness, nervousness, depression, loss of strength or energy, loss of happiness, loss of a sense of well-being, or appearing or feeling older than they should is due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide. All the remaining ingredients in these preparations are of no benefit in the treatment or relief of said symptoms.

Therefore the advertisements set forth and referred to in Paragraph Five above were and are misleading in material respects and constituted and now constitute, false advertisements as that term is defined in the Federal Trade Commission Act.

PAR. 8. Through the use of the statements in the aforesaid advertisements, and others similar thereto not specifically set out herein, respondents have also represented, and are now representing, directly and by implication to persons of both sexes and all ages who experience feelings of tiredness, nervousness, depression, loss of strength and energy, loss of happiness, loss of a sense of well-being, and appearing and feeling older than one should, that there is a reasonable probability that they have symptoms which will respond to treatment by the use of the aforementioned preparations. In the light of such statements and representations, said advertisements are misleading in a material respect and

therefore constitute false advertisements as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material facts that in the great majority of persons, or of any age, sex or other group or class thereof, who experience the symptoms of tiredness, nervousness, depression, loss of strength or energy, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, such symptoms are not caused by a deficiency of one or more of the nutrients provided by Life Nutrition High-Potency Vitamin-Mineral Capsules, and that in such persons the said preparations will be of no benefit.

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

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

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

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 15, 1965

Summary

The above entitled proceeding, D. 8637, and a companion proceeding, D. 8636 [p. 933 herein], were commenced under § 5 and § 12 of the Federal Trade Commission Act, and involve alleged deceptive advertising of vitamin products. Although the two proceedings were never formally consolidated they were informally treated as such, both prior to hearing and thereafter, both being tried together.

In the decision in the companion proceeding, D. 8636 [p. 941 herein], also filed this day, there is an extensive review of both proceedings, including procedures prior to hearing. This review may be read in connection with the present decision, and is herewith summarized:

Complaints in both proceedings issued on August 11, 1964. In a Food and Drug injunction action commenced on August 17, 1964, the respondent vitamin companies and respondent Cohen, their defendants, were placed under injunction, with others, on that date and subsequently, by a United States District Court, in respect to the misbranding of products involved in the present two

proceedings. There was also a prior in rem condemnation decree issued by the same court in respect to such products. An appeal, directed against the injunction and prior condemnation, was taken to the U.S. Court of Appeals for the Third District. Respondents in the present proceeding cited this appeal, and the injunction proceedings generally, in order to obtain continuances from the examiner.

Shortly prior to the commencement of hearings herein respondents' counsel advised by letter that they would offer no medical experts as part of their defense, explaining that they would state their position at the commencement of the hearings. At the opening of the hearings respondent made an oral motion for dismissal, urging for the first time that the Commission was barred from proceeding, in view of the court litigation and the alleged multiplicity of suits, as well as principles of res judicata.

Counsel also stated that, in addition to refraining from offering expert testimony, as previously announced, they would not even cross-examine complaint counsels' expert witnesses. They further stated that, in order to bring the present proceedings with precedents relied on by them, they amended their answers to admit all non-medical facts, which would include individual liability of individual respondents represented by them if cease and desist orders should issue.

The examiner reserved decision on the motion until after the hearing should be concluded, when the points might be briefed. He also denied an alternative request for continuance pending handing down of the Court of Appeals decision.

Accordingly, the hearings were more or less pro forma except for the testimony of three medical experts produced by complaint counsel, who, however, were not cross-examined by respondents' counsel.

Prior to the hearing herein, the examiner on affidavits, supplemented as directed by him, and on complaint counsels' statement that they were not opposed, granted a motion to dismiss the complaints in this and the companion proceeding in respect to respondent Maxwell Sackheim—Franklin Bruck, Inc., the advertising agency for respondent vitamin companies. Formal dismissal, pursuant to the Rules, is made by the present decision and accompanying order. Prior to hearing, also, there was a motion to dismiss the complaint in respect to respondent Cohen. The motion was opposed by complaint counsel and denied by the examiner.

There was an extensive prehearing conference herein followed

by a prehearing conference order of directions, including a special direction for discovery, on respondents' motion.

After conclusion of the hearings, complaint counsel submitted separate Proposed Findings and Conclusions of Law for this and the companion proceeding. Respondents submitted a joint document for both proceedings, entitled Proposed Findings and Conclusions of Law but actually being a memorandum of law on their point of res judicata and multiplicity of suits. Complaint counsel submitted an answering memorandum of law on these points, and respondents submitted a reply memorandum of law. Thereafter, on May 17, 1965, the Court of Appeals for the Third Circuit filed its opinion in effect affirming the District Court, in issuing its condemnation and injunction decrees, with some modification.

FINDINGS OF FACT (D. 8637)

Re Complaint Par. One [1]

First.—Respondent International Oil & Metals Corporation is a corporation, organized and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 12 East 46th Street, in the city of New York, State of New York. Said corporate respondent conducts its business under the name Life Nutrition.

Second.—Respondents Leon Potash, Henry D. Cohen and Adolf W. Goldschmidt are officers of the corporate respondent International Oil & Metals Corporation and each participates in the preparation, direction and control of the acts and practices of said corporation, including the acts and practices hereinafter set forth. The addresses of respondents Leon Potash and Adolf W. Goldschmidt are the same as that of said corporate respondent. The address of respondent Henry D. Cohen is 377 Crane Street, in the city of Orange, State of New Jersey.

* * * * * * *

The above Findings First and Second are supported by admissions in the answer filed herein, dated October 5, 1964, as amended by admissions of record, TR 27:22–25,[2] continuing at TR 28:1–7, TR 30:10–17 (individual respondents), and TR 31:15–22.

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

[2] TR 27:22–25 means Transcript of Testimony, page 27, lines 22 through 25.

Re Complaint Par. Two

Third.—Respondents International Oil & Metals Corporation, Leon Potash, Henry D. Cohen and Adolf W. Goldschmidt have for some time last past and up until issuance of the complaint herein, engaged in the sale and distribution of preparations containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act. (Commencing at or about the time of the issuance of the complaint, the business activities of respondent vitamin corporation and respondent Cohen were restrained by an order issued by a U.S. District Court.)

* * * * * * *

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

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

(1) *Designation:* Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M.

Formula:	*% Min. Daily Req.*
Vitamin A (Palmitate) 6,700 USP Units	167.5%
Vitamin D (Irrad. Ergost.) 500 USP Units	125%
Vitamin B_1 (Mononitt) 5 mg.	500%
Vitamin B_2 (Riboflavin) 2.5 mg.	208%
Vitamin B_6 (Pyridoxine Hydrochloride) 0.25 mg.	**
Vitamin B_{12} 2 mcg.	**
Vitamin C 55 mg.	183.3%
Niacinamide 20 mg.	200%
Calcium Pantothenate 3 mg.	***
Vitamin E 2 I.U.	**
Vitamin K (Menadione) 0.5 mg.	**
Citrus Bioflavonoid Complex 5 mg.	***
Biotin 2.5 mcg.	***
Sodium Caseinate 50 mg.	***
Choline Bitartrate 25 mg.	***
Inositol 15 mg.	***
l-Lysine Monohydrochloride 5 mg.	**
Calcium (from DiCalcium Phosphate, Anhydrous) 25 mg.	3.3%
Phosphorus (from Dicalcium Phosphate, Anhydrous) 20 mg.	2.7%
Copper (from Copper Sulphate, Monohydrate) 0.45 mg.	**

Iron (from Ferrous Sulfate, Dried) 10.0 mg.	100.0%
Magnesium (from Magnesium Sulfate, Dried) 1.0 mg.	**
Manganese (from Manganese Sulfate) 0.3 mg.	***
Potassium (from Potassium Sulfate) 1.5 mg.	**
Zinc (from Zinc Sulfate) 0.1 mg.	***
Sulfur (from the Sulfates) 3.0 mg.	***

Directions: Average dosage for Adults: One Capsule Daily. Food Supplement—For dietary Purposes Only.

(2) *Designation:* Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W.

Formula:	*% Min. Daily Req.*
Vitamin A (Palmitate) 6,700 USP Units	167.5%
Vitamin D (Irradiated Ergost.) 670 USP Units	167.5%
Vitamin B_1 (Mononitt) 4.3 mg.	430%
Vitamin B_2 (Riboflavin) 2.0 mg.	166%
Vitamin B_6 (Pyridoxine Hydrochloride) 0.5 mg.	**
Vitamin B_{12} 3.0 mcg.	***
Vitamin C 75 mg.	250%
Niacinamide 15 mg.	150%
Calcium Pantothenate 5 mg.	***
Vitamin E 2 I.U.	**
Vitamin K (Menadione) 0.4 mg.	**
Citrus Bioflavonoid Complex 5 mg.	***
Biotin 2.5 mcg.	***
Sodium Caseinate 50 mg.	***
Choline Bitartrate 20 mg.	***
Inositol 10 mg.	***
Liver (whole Dessicated) 10 mg.	
l-Lysine Monohydrochloride 5 mg.	**
Calcium (from DiCalcium Phosphate, Anhydrous) 25 mg.	3.3%
Phosphorus (from DiCalcium Phosphate, Anhydrous) 20 mg.	2.7%
Copper (from Copper Sulfate, Monohydrate) 0.45 mg.	**
Iron (from Ferrous Sulfate, Dried) 15.0 mg.	150%
Magnesium (from Magnesium Sulfate, Dried) 1.5 mg.	**
Manganese (from Manganese Sulfate) 0.3 mg.	***
Potassium (from Potassium Sulfate) 1.5 mg.	**
Zinc (from Zinc Sulfate) 0.5 mg.	***
Sulphur (from the Sulfates) 12.0 mg.	***

Directions: Average Dosage for Adults: One Capsule Daily. Food Supplement—For Dietary Purposes Only.

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* Minimum daily requirement.
** Minimum daily requirement not established.
***Need in human nutrition not established.

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

Re Complaint Par. Three

Fifth.—Respondents International Oil & Metals Corporation, Leon Potash, Henry D. Cohen and Adolf W. Goldschmidt cause the said preparations, when sold, to be transported from their establishment in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents at all times mentioned herein have maintained a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been substantial.

* * * * * * *

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

Re Complaint Par. Four

Sixth.—In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparations by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of circulars and brochures, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations; and have disseminated, and caused the dissemination of, advertisements concerning said preparations by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

* * * * * * *

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

Re Complaint Par. Five

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

Important Nutritional News . . . AT LAST! Here's the electrifying news you've hoped for! We now offer two remarkable formula—one for men and one for women—each of which combines the powers of at least 26 precious ingredients to help you achieve a feeling of increased pep and energy if you are otherwise normally healthy but suffer from a deficiency of these vitamins and minerals.

* * * * * * *

TWO Truly Comprehensive Safe High Potency Vitamin Plans including SODIUM CASEINATE and CITRUS BIOFLAVONOID COMPLEX MAY HELP YOUR BODY TO INCREASED PEP, ENERGY, and WELL-BEING.

* * * * * * *

Without these precious vitamins and minerals—in sufficient amounts over a long period—you cannot hope to feel your best in mind and body.

You lose strength and energy—you feel tired, nervous, and depressed, and you may pay dearly in lowered resistance to disease—lowered efficiency and earning power—inability to give your family the loving care and companionship that makes for a happy, successful home life.

* * * * * * *

TWO SPECIAL PLANS: [1] For MEN [2] For WOMEN—Tailored to Your Needs.

* * * * * * *

VITAMIN ADDITIVE For Folks Over 40 . . . TIRED DURING THE DAY? . . . WORN OUT AT NIGHT? LIFE NUTRITION'S EXCLUSIVE FORMULA BRINGS YOU HIGH-POTENCY VITAMIN-MINERAL CAPSULES FOR EXTRA PEP AND ENERGY.

* * * * * * *

"Our Fights Have Turned to Kisses" It's hard to believe that my wife and I used to fight. . . . To correct this condition we began taking Life Nutrition Capsules—just one a day! Before long we had more pep, our dispositions improved, and we were back in each other's arms! . . .

* * * * * * *

"I Was So Worried . . . MY Husband Slept All Day . . . Every Sunday" What can you do when your husband acts like an old man . . . when he doesn't enjoy anything better than sleeping all day Sunday, and is always "too tired" to have fun—go visiting, to a movie, dancing? What's the answer for a man who has lost his pep and energy while still young?

Those questions used to worry me all the time. For some unknown reason, my husband had been robbed of his energy and vitality; and I just didn't know what to do. Then I saw a Life Nutrition ad in the newspaper. It told how men-and women (who are otherwise normally healthy)-may feel worn-out, nervous and irritable due to an easily corrected deficiency of vitamins in their diet.

Thousands of people had increased their pep and vigor through the help of the Life Nutrition Plan. I thought perhaps it could help my husband, too, so I sent for a trial supply. They made my husband feel like a new man-as happy and energetic as when we were first married.

If you want to help your husband, send for a 30-day trial supply of Life Nutrition High-Potency Capsules today!

* * * * * * *

I always felt simply "run-down." People were thinking of me as a "spoil-sport." I didn't know why until my doctor put me wise. He told me that I acted like a man much older than myself, and explained why I felt "tired" . . . Well, I put off doing anything about my condition-until one day I sent for a 30-day trial supply of high-potency Life Nutrition Capsules . . . In a short time, I began to feel like a new man! . . .

The above Finding Seventh is supported by the evidence herein. The above statements and representations are contained in respondents' advertising in evidence as CX 38C through 39D. Respondents' counsel admitted on the record that said exhibits, pertaining to D. 8637, are true and exact copies of advertisements disseminated and caused to be disseminated by respondents. (See TR 71:12–25, TR 72: 1–8, 18–25, and TR 73:1.)

Re Complaint Par. Six

Eighth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Life Nutrition High-Potency Vitamin-Mineral Capsules are a new medical and scientific discovery and achievement.

* * * * * * *

The above Finding Eighth is supported by the advertising statements, claims and respresentations in CX 38C ("electrifying news," "new improved formula," "finally a formula that really works"), CX 38D ("New Improved Life Nutrition Formula"), CX 39A and 39B.

Ninth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M are distinctively suited to the needs of men.

* * * * * * *

The above Finding Ninth is supported by CX 38C ("Special Plan For Men and one For Women"), CX 38D ("TWO SPECIAL PLANS: (1) For MEN (2) For WOMEN"), CX 38E ("High Power Formula for Men . . ."), and by CX 39A, B, C.

Tenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W are distinctively suited to the needs of women.

* * * * * * *

The above Finding Tenth is supported by CX 38C and 38D (see Finding Ninth, supra), CX 38E ("Special High-Potency Formula For Women"), and CX 38H ("LIFE NUTRITION PLAN FOR WOMEN").

Eleventh.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that persons past forty years of age have a particular need for Life Nutrition High-Potency Vitamin-Mineral Capsules.

* * * * * * *

The above Finding Eleventh is supported by CX 38G ("VITAMIN ADDITIVE For Folks Over 40," and statements under said caption).

Twelfth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that Life Nutrition High-Potency Vitamin-Mineral Capsules increase and stimulate sexual vitality.

* * * * * * *

The above Finding Twelfth is supported by CX 38E (Heading, "Our Fights Have Turned to Kisses" and sentence under next heading, "What can you do when your husband acts like an old man. . . ?"); CX 38H and 39C.

Thirteenth.—Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, directly and by implication, that the use of Life Nutrition High-Potency Vitamin-Mineral Capsules and each of the ingredients therein will be of benefit in the treatment and relief of tiredness, nervousness, depression, loss of strength and energy, loss of happiness, loss of a sense of well-being, and appearing and feeling older than one should.

* * * * * * *

The above Finding Thirteenth is supported by CX 38C ("ashamed to always to be so tired," "I began to feel like a new

man,!" "feel ten years younger in just 30 days," "have the pep and glow I last had years ago"), and CX 38D ("Without these precious vitamins . . . you feel tired, nervous and depressed . . ."). See also 38E, G and H, 39A, B and C.

Medical Findings

Re Complaint Par. Seven

Fourteenth.—Life Nutrition High-Potency Vitamin-Mineral Capsules are not a new medical or scientific discovery or achievement.

* * * * * * *

The above Finding Fourteenth is supported by the testimony of Dr. McGanity (TR 148–49), Dr. Sappington (TR 186), and Dr. Shank (TR 217).—Their testimony in regard to Vitasafe products is also applicable to Life Nutrition products.

Fifteenth.—Life Nutrition High-Potency Vitamin-Mineral Capsules Formula M are not distinctively suited to the needs of men.

* * * * * * *

The above Finding Fifteenth is supported by the testimony of Dr. McGanity (TR 153), Dr. Sappington (TR 187–88), and Dr. Shank (TR 218).

Sixteenth.—Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W are not distinctively suited to the needs of women.

* * * * * * *

The above Finding Sixteenth is supported by the testimony of Dr. McGanity (TR 153), Dr. Sappington (TR 188), and Dr. Shank (TR 219).

Seventeenth.—Neither adults past forty years of age nor adults of any other age group have a special need for Life Nutrition High-Potency Vitamin-Mineral Capsules.

* * * * * * *

The above Finding Seventeenth is supported by the testimony of Dr. McGanity (TR 164), Dr. Sappington (TR 188–89), and Dr. Shank (TR 219).

Eighteenth.—Life Nutrition High-Potency Vitamin-Mineral Capsules will not increase or stimulate sexual vitality.

* * * * * * *

The above Finding Eighteenth is supported by the testimony of Dr. McGanity (TR 166), Dr. Sappington (TR 189), and Dr. Shank (TR 220).

Nineteenth.—The use of Life Nutrition High-Potency Vitamin-Mineral Capsules will not be of benefit in the treatment or relief of tiredness, nervousness, depression, loss of strength or energy, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, except in a small minority of persons whose tiredness, nervousness, depression, loss of strength or energy, loss of happiness, loss of a sense of well-being, or appearing or feeling older than they should is due to a deficiency of Vitamin B_1 (Thiamine Monoitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide. All the remaining ingredients in these preparations are of no benefit in the treatment or relief of said symptoms.

* * * * * * *

The above Finding Nineteenth is supported by the testimony of the three experts called by complaint counsel:

Dr. McGanity—TR 127, 129 (neuroses, infections, etc.), and 147, et seq. (less than 1%;. Also TR 133 (small percentage); the Vitasafe testimony applying also to Life Nutrition preparations, which contain essentially the same ingredients as Vitasafe, at generally lower dosage levels.

Dr. Shank—TR 212–13 (vitamin content of inadequate quanity), TR 215 (iron content of inadequate quantity), TR 215, 213 (3 to 5%), TR 216, 217 (vitamin deficiency very infrequent).

Dr. Sappington—TR 184, 194 (inadequate Vitamin A for advertised symptoms), TR 190:6–9, 192 (insufficient dosage levels, Vitasafe), TR 194 (iron amount clinically insignificant). See, however, TR 192–93 (possible benefit over long period if vitamin deficiency).

Complaint counsel, as part of their Proposed Findings and Conclusions of Law, have submitted an extended discussion of the testimony of these doctors insofar as it supports this Proposed Finding Nineteenth. Although the examiner does not regard the testimony of the doctors, read as a whole, as absolutely conclusive to support the proposed finding in every detail, it is definitely persuasive in support of the proposed finding, which has been adopted by the examiner as proposed, particularly since there is no contradictory medical testimony, respondents having submitted none.

Re Complaint Par. Eight

Twentieth.—Through the use of the statements in the aforesaid advertisements, and others similar thereto not specifically set

herein, respondents have also represented, and are now representing, directly and by implication to persons of both sexes and all ages who experience feelings of tiredness, nervousness, depression, loss of strength and energy, loss of happiness, loss of a sense of well-being, and appearing and feeling older than one should, that there is a reasonable probability that they have symptoms which will respond to treatment by the use of the aforementioned preparations. In the light of such statements and representations, said advertisements are misleading in a material respect and therefore constitute false advertisements as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material facts that in the great majority of persons, or of any age, sex or other group or class thereof, who experience the symptoms of tiredness, nervousness, depression, loss of strength or energy, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, such symptoms are not caused by a deficiency of one or more of the nutrients provided by Life Nutrition High-Potency Vitamin-Mineral Capsules, and that in such persons the said preparations will be of no benefit.

* * * * * * *

The above Finding Twentieth is supported by advertised statements, claims and representations in CX 38, 39. See also Finding Nineteenth, supra.

CONCLUSIONS OF LAW (D. 8637)

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

2. The dissemination by the respondents of the false advertisements, as aforesaid, constitutes unfair and deceptive acts and practices in commerce, in violation of § 5 and § 12 of the Federal Trade Commission Act.

3. The aforesaid acts and practices of the respondents are all to the prejudice and injury of the public.

4. The term respondents as above used in these conclusions shall not be deemed to include respondent Maxwell Sackheim—Franklin Bruck, Inc. A motion to dismiss in respect to this respondent was granted by the examiner prior to the hearing, and is duly taken into account in this decision, as provided for by § 3.6(e) of the Rules. The complaint must be and is dismissed in respect to said respondent.

NOTE ON MEDICAL EVIDENCE

The "Discussion as to Medical Evidence" appearing after the Findings and Conclusions in the companion case, D. 8636, may be read in connection with the present decision.

Summarizing, it is believed that the consideration that the medical testimony in the two proceedings was not subjected to cross-examination or exposed to defense medical testimony, should not, by indirection, be utilized to weaken this testimony, which is sufficient on its face. The medical testimony also receives support, in an indirect way, from the decrees and opinions of the District Court and the Court of Appeals in the court litigation.

Moreover, it is the examiner's opinion that *Matter of Lanolin Plus, Inc.* (Rybutol), D. 8150 (1962) [61 F.T.C. 534], cited and quoted by complaint counsel, is pertinent, if only on the question of inferences or conclusions to be drawn from the expert testimony. Complaint, counsels' Chart (CX 51) shows that the ingredients of respondents' products are much like those of Rybutol.

RES JUDICATA

MULTIPLICITY OF SUITS

Respondents moved to dismiss at the commencement of the hearing herein on the ground that the court litigation and decrees are res judicata and also that there is multiplicity of suits or proceedings.

The motion is hereby denied in the present proceeding on the grounds and reasoning stated in the decision rendered in the accompanying proceeding, D. 8636. Summarized, the reasons are:

(1) The motion made after hearing commenced, after Commission personnel had gone to New York City, and after witnesses proceeded from Philadelphia to New York City, where respondents and their counsel are located, is untimely, a violation of orderly prehearing procedure, and vexatious.

(2) The defense of *res judicata* is by its nature hardly one to be invoked by the unsuccessful party in the other litigation. Here respondents have been unsuccessful both in the District Court actions and the Court of Appeals. In the two cases [3] relied on by them the res judicata defense was raised by parties vindicated in the other litigation.

(3) The defense of multiplicity of suits is hardly available where, as here, different and further relief with wider application

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

is available in the challenged forum. The Food and Drug Act applies only to labeling, and advertising, or the like, "accompanying" the articles. The *Foods Plus* [4] case relied on by respondents does not hold to the contrary, but merely that radio talks may be resorted to in a Food and Drug case to ascertain if proper directions, considering medical claims in the talks, appear on the labels, as required by statute. Respondents cannot claim sanctuary from the Commission's jurisdiction over misrepresentation and advertising generally, merely by reason of having been found to have mislabeled under the Food and Drug Act.

(4) The defenses invoked here by respondents involve equitable considerations, and no such considerations urged by respondents outweigh the equities on the other side.

Form of Order

The order issued here will follow the order proposed in the complaint. All the allegations have been proved, and indeed are hardly controverted. The misrepresentations are in a dangerous field, exploiting human suffering and complaints, and possibly even diverting users from competent medical attention. The drastic U.S. District Court injunction in the Food and Drug litigation, rather than being an argument for no order here at all, is an argument for a broad and drastic order here, but one covering both general advertising and misrepresentation, not merely mislabeling. It may be noted that respondent Vitasafe Corporation has been in trouble with the Federal Trade Commission before, and apparently was ordered in 1964 by another U.S. District Court to pay $18,000 in civil penalties for nine violations of a Commission cease and desist order issued in 1957.

ORDER

It is ordered, That respondents International Oil & Metals Corporation, a corporation, trading as Life Nutrition or under any other name, or names, and its officers; and Leon Potash, Henry D. Cohen, and Adolf W. Goldschmidt, individually and as officers of said corporation; and said respondents' agents, representatives and employees do forthwith cease and desist from, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Life Nutrition High-Potency Vitamin-Mineral Capsules Formula W" or "Life

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

Nutrition High-Potency Vitamin-Mineral Capsules Formula M" or any other preparation of substantially similar composition or possessing substantially similar properties, under whatever name or names sold:

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

1. That said preparation is a new medical or scientific discovery or achievement;

2. That said preparation is distinctively suited to the needs of men;

3. That said preparation is distinctively suited to the needs of women;

4. That adults of any age group have a special need for said preparation;

5. That said preparation will increase or stimulate sexual vitality;

6. That the use of said preparation will be of benefit in the treatment or relief of tiredness, nervousness, depression, loss of strength or energy, loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should, unless such advertisement expressly limits the effectiveness of the preparation to those persons whose symptoms are due to a deficiency of Vitamin B_1 (Thiamine Mononitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid), or Niacinamide, and further, unless such advertising clearly and conspicuously reveals the fact that in the great majority of persons, or of any age, sex, class or other group thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to treatment by the use of the preparation and that in such persons the preparation will not be of benefit;

7. That the ingredients in said preparation other than Vitamin B_1 (Thiamine Monitrate), Vitamin B_2 (Riboflavin), Vitamin C (Ascorbic Acid) or Niacinamide, will be of benefit in the treatment or relief of tiredness, nervousness, depression, loss of strength or energy,

loss of happiness, loss of a sense of well-being, or appearing or feeling older than one should.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in or which fails to comply with any of the affirmative requirements of Paragraph A hereof.

It is further ordered, That the complaint herein is dismissed, and hereby declared to be dismissed, as to the following respondent Maxwell Sackheim—Franklin Bruck, Inc., a corporation.

FINAL ORDER

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

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

It is ordered, That the findings of fact in the initial decision be, and they hereby are, adopted as the findings of the Commission with the following exceptions:

1. Paragraph Second shall be, and it hereby is, modified to strike the name of Henry D. Cohen from the first line thereof;

2. Paragraph Third be, and it hereby is, modified to strike the name of Henry D. Cohen from the second line thereof;

3. Paragraph Fifth be, and it hereby is, modified to strike the name of Henry D. Cohen from the second line thereof;

4. A new paragraph First (a), reading as follows be, and it hereby is, inserted after the conclusion of Paragraph First:

"In January, 1960, prior to joining respondent International Oil & Metals Corporation, respondent Henry D. Cohen became the president of Knoll Pharmaceutical Corp., a manufacturer of ethical drugs. Under his employment contract with Knoll Pharmaceutical Corp., which runs until Novem-

ber 4, 1971, he is required to devote his full working time to the interests of that company. Early in 1961, he became a secretary and director of respondent International Oil & Metals Corporation, which position he held until December, 1964, when he resigned. During this period he played no active part in the management of the corporation and did not participate in its policy decisions."

It is further ordered, That the conclusions of law in the initial decision be, and they hereby are, adopted as the conclusions of law of the Commission except that Paragraph 4 thereof be, and it hereby is, modified to read as follows:

"The term respondents as above used in these conclusions, except where specifically noted, shall not be deemed to include respondents Henry D. Cohen and Maxwell Sackheim-Franklin Bruck, Inc. The motion to dismiss in respect to respondent Maxwell Sackheim-Franklin Bruck, Inc. was granted by the examiner prior to the decision, and is duly taken into account in this decision, as provided for by §3.6(e) of the Rules. The complaint must be and is dismissed with respect to this respondent. With respect to respondent Henry D. Cohen the complaint is dismissed without prejudice."

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

"*It is further ordered,* That the complaint herein be, and it hereby is, dismissed as to Henry D. Cohen, without prejudice to the right of the Commission to take such further corrective action as future events may warrant."

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

Complaint

IN THE MATTER OF

CLAIROL INCORPORATED

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket 8647. Complaint, Sept. 15, 1964—Decision, June 24, 1966

Order requiring a New York City manufacturer of beauty preparations to cease paying discriminatory promotional allowances to competing customers in two channels of trade, beauty salons and regular retailers selling to consumers for home use, in the sale of its hair coloring products, in violation of Section 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Clairol Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1290 Avenue of the Americas, New York, New York. Respondent Clairol Incorporated is a wholly owned subsidiary corporation of Bristol-Myers Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 630 Fifth Avenue, New York, New York.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of beauty preparations, principally hair coloring products, hereinafter collectively referred to as beauty products. Respondent is now and has been, at all times referred to herein, one of the largest concerns in the United States in volume of sales of hair coloring products. Respondent sells its beauty products to a large number of customers throughout the United States. Respondent's customers include beauty salons, beauty supply dealers, beauty schools, department stores, drug wholesalers and drug retailers.

PAR. 3. Respondent sells and distributes its beauty products in

commerce by causing said products to be shipped from its manufacturing plant located at Stamford, Connecticut, and to and from a warehouse located at Los Angeles, California, to purchasers thereof located in the several States of the United States and the District of Columbia. There is now and has been, at all times mentioned herein, a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, respondent is now, and has been in substantial competition with other corporations, individuals, partnerships and firms, engaged in the manufacture, sale and distribution of beauty products, many of which are also engaged in commerce between and among the various States of the United States and the District of Columbia.

Many of the purchasers of respondent's products, and customers of said purchasers, are in substantial competition with each other within the trading areas where such purchasers or customers of purchasers are located.

PAR. 5. In the course and conduct of its business in commerce, and particularly since April of 1959, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation for services or facilities furnished by or through such customers in connection with the processing, handling, sale or offering for sale of respondent's products, including incorporation by such customers of said products in beauty or hair care treatments; and such payments for services or facilities have not been made available on proportionally equal terms to all other customers competing with such favored customers, including customers who resell to purchasers who compete with said favored customers.

For instance, respondent has engaged in cooperative advertising programs with certain of its beauty salon customers whereby advertisements have been placed in newspapers, linking said beauty salon customers' names with respondent's products, to the value and benefit of said customers. Payment for these advertisements has been made by respondent to said beauty salon customers, or their agents. Payments in 1960 to one favored beauty salon organization, operating beauty salons in leased space in a substantial number of department stores and ladies' specialty stores located throughout the United States, approximated the amount of the said customer's purchasers for the same calendar year.

In another instance, a retail drug chain located in Cleveland, Ohio, was paid several thousand dollars, approximately, in 1961 and 1962 as a promotional allowance on certain of respondent's products purchased by said retail drug chain, and for demonstrators furnished by and utilized by said retail drug chain in a hair care clinic.

Respondent has not offered to pay, or paid, or otherwise made such allowances available on proportionally equal terms to all customers competing with said favored customers, including customers who resell to purchasers who compete with said favored customers.

PAR. 6. The foregoing alleged payments and allowances made by respondent in the sale of its products are in violation of subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. Ernest G. Barnes, Mr. Thomas P. Athridge, Jr., and *Mr. Charles A. Price* supporting the complaint.

Mr. Gilbert H. Weil and *Mr. J. Richard Edmondson*, 60 East 42nd St., New York 17, N.Y. for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

JULY 16, 1965

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I. THE COMPLAINT

1. The complaint herein was issued on September 15, 1964, charging respondent, Clairol Incorporated, with violations of subsection (d) of Section 2 of the Clayton Act as amended, which subsection provides, as follows:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

2. In particular the complaint alleges that since April of 1959, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation for services or facilities furnished by or through such customers in connection with the processing, handling, sale, or offering for sale of respondent's products, including incorporation by such customers of said products in beauty or hair care treatments; and such payments for services or facilities have not been made available on proportionally equal terms to all other customers competing with such favored customers, including customers who resell to purchasers who compete with said favored customers.

II. THE ANSWER

3. Respondent, in its answer filed October 22, 1964, admitted making certain payments to certain beauty salon customers toward their cost of advertising certain hair coloring services of their salons, which payments for such advertising have not been made available on proportionally equal terms to all other beauty salon customers who competed in rendering such hair coloring services with the beauty salons that received such payments. Respondent also admitted that such payments were not made on proportionally equal terms to customers of respondent who resold respondent's products to beauty salons who thus competed with the beauty salons that received such payments. (Answer, Para. 2.)

4. Respondent further admitted that certain sums of money were paid, in 1961 and 1962, to a retail drug chain located in Cleveland, Ohio, as promotional allowances on certain of respondent's products purchased by that retail drug chain, and that certain sums of money were also paid to that retail drug chain for demonstrators furnished by and utilized by that retail drug chain in a hair care clinic. Only insofar as the payments for the demonstrators are concerned, respondent admitted that such payments were not offered, paid or otherwise made available on proportionally equal terms to all of respondent's customers competing with the favored retail drug chain, or to respondent's customers who resold to purchasers who competed with that retail drug chain. (Answer, Para. 2.)

5. Respondent, however, denied that any of the acts alleged in the complaint to have been performed by respondent, and which respondent did in fact perform, are, as a matter of law, violations of Section 2 of the Clayton Act, as amended. (Answer, Para. 3.)

III. STIPULATIONS AS TO THE FACTS

6. On April 30, 1965, counsel for both parties signed a stipulation as to the facts incorporating therein 113 attachments or exhibits which, together with the complaint and answer herein, constitute the entire record in this proceeding.

IV. PROPOSED FINDINGS AS TO THE FACTS AND RULINGS THEREON

7. On June 15, 1965, opposing counsel submitted proposed findings as to the facts, proposed conclusions, and briefs in support thereof. In addition, oral argument thereon was heard by the hearing examiner on June 28, 1965. All proposed findings have

been considered by the hearing examiner, and those not incorporated in this initial decision either verbatim or in substance are hereby rejected.

V. RESPONDENT CORPORATION AND ITS PRODUCTS IN GENERAL

8. Respondent herein is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 1290 Avenue of the Americas, New York, New York. It is a wholly-owned subsidiary corporation of Bristol-Myers Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 630 Fifth Avenue, New York, New York. (Complaint, Para. 1; Answer, Para. 1.)

9. Respondent is now, and has been, engaged in the manufacture, sale, and distribution of beauty preparations, principally hair coloring products. At all times referred to herein, it has been one of the largest concerns in the United States in volume of sales of hair coloring products. (Complaint, Para. 2; Answer, Para. 1.) Its product line as of the time the complaint herein issued, consisted almost entirely of hair care products, principally hair coloring products and items used in connection with the application of said hair coloring products. Respondent at one time marketed a mascara product which was discontinued in 1960, and, during 1964, a shaving aid preparation, Ultra Smooth, was introduced. During or about March 1965, respondent introduced a line of cosmetic products for uses other than the care or coloring of hair. (Stipulation, Para. 3.)

10. Respondent's sales are substantial, exceeding twenty (20) million dollars in 1964. (Stipulation, Para. 2.) Respondent sells its beauty products to a large number of customers throughout the United States, including independent beauty salons, beauty salon chains, beauty supply dealers, beauty schools, department stores, drug wholesalers, rack jobbers, drug retailers and other retailers. (Complaint, Para. 2; Answer, Para. 1; Stipulation, Para. 1.)

VI. COMMERCE

11. Respondent sells and distributes its beauty products in commerce by shipping them from its manufacturing plant located at Stamford, Connecticut, and to and from a warehouse located at Los Angeles, California, to purchasers thereof located in the several States of the United States and the District of Columbia.

There is now and has been, at all times mentioned herein, a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended. 38 Stat. 730 (1914); 15 U.S.C. § 12 (1965). (Complaint, Para. 3; Answer, Para. 1.)

12. In the course and conduct of its business in commerce as aforesaid and as hereinafter referred to, respondent is now, and has been in substantial competition with other corporations, individuals, partnerships and firms engaged in the manufacture, sale and distribution of beauty products, many of which are also engaged in commerce between and among the various States of the United States and the District of Columbia. Many of the purchasers of respondent's products, and customers of said purchasers, are in substantial competition with each other within the trading areas where such purchasers or customers of purchasers are located. (Complaint, Para. 4; Answer, Para. 1.)

VII. RESPONDENT'S SALE DISTRIBUTIONAL ORGANIZATION—ITS POLICIES AND PRODUCTS

13. During the period 1960 through 1964, respondent sold, and it now sells, its products in interstate commerce to independent beauty salons, beauty salon chains and beauty supply dealers; hereafter sometimes collectively referred to as the beauty trade. Respondent's products purchased by the beauty trade are ultimately incorporated into hair care treatments rendered to customers of beauty salons on the premises of such beauty salons. (Stipulation, Para. 1A.) During this same period respondent also sold, and it now sells, its products in interestate commerce to drug wholesalers, rack jobbers, department stores, drug retailers, and to other retailers; hereinafter sometimes collectively referred to as the drug trade. Respondent's products purchased by the drug trade are primarily purchased for ultimate resale to consumers for hair care treatments in the home. (Stipulation, Para. 1B.)

14. Respondent's sales and distributional organization and policies, with respect to the products involved in the discriminations alleged in the complaint, are divided into two distinct and separate divisions. One division is concerned with the beauty trade and its channels of distribution which lead to the purchase of respondent's products by beauty salons for incorporation into hair care or hair coloring treatments. The other division is concerned with the drug trade and its channels of distribution which lead to

the purchase of said products by consumers for self-application in the home. (Stipulation, Para. 17A.)

15. Respondent is, however, an integrated corporation. Both the beauty and drug trade "divisions" report to the corporate president who is the chief executive officer. Until December 31, 1964, the corporate executive vice-president was the principal operating officer responsible for advertising and sale of all products in respondent's beauty trade and drug trade divisions. (Stipulation, Para. 17B1; Attachments 99–100.)

16. With the exception of the aforementioned corporate officers who have primary responsibility for the advertising, sale and distribution of respondent's products, the sales organizations for the beauty trade and the drug trade are generally operated as separate and distinct divisions of respondent. (Stipulation, Para. 17B2–3.) Respondent's prices for its products sold to the beauty trade are different from those for the same products sold to the drug trade; such prices in each customer category being determined in accordance with the traditional and competitive pricing practice distinctive to each particular field. (Stipulation, Para. 17C.) Respondent's sales, merchandising and promotional methods, strategy, and programs, including cooperative promotional activities, differ as between the beauty trade and the drug trade field.

17. From 1960 through 1964, respondent sold almost all of its different product items to both the beauty trade and the drug trade. As of 1964, the products sold only to the beauty trade were: Blue Lightening Powder Bleach; Salon Formula Regular oil shampoo tint; Remov-Zit; Sylk; and Clairfill. Products sold only the drug trade, introduced during the year 1964, were: Ultra Smooth, and Miss Clairol hair Spray. (Stipulation, Para. 4A.)

18. Respondent's products which were and are sold to the beauty trade and to the drug trade have identical chemical formulas, with the exception of shampoos, which are sold to the beauty trade in a more concentrated form than when sold to the drug trade. (Stipulation, Para. 4B.) Many of respondent's products, including some of respondent's largest selling products, sold to both the beauty trade and the drug trade, are packaged in identical packaged sizes, and, in some instances, in identical packages. (*Ibid.*)

19. Respondent's principal selling product, Miss Clairol Hair Color Bath (Regular and Creme Formula) was, prior to July of 1963, sold to the beauty trade and to the drug trade in identical

packaging. Subsequent to July of 1963, Miss Clairol Hair Color Bath has been sold to the drug trade in individual two (2) ounce bottles (see Attachments 6A, 6B) packaged one dozen (12) bottles to a unit pack, and to the beauty trade in individual two (2) ounce bottles (see Attachment 7B) packaged six (6) bottles to a carton, a so-called "six-pack" (see Attachment 7A). (Stipulation, Para. 4C 1.) The two (2) ounce bottle and the contents thereof are identical for both the beauty trade package and the drug trade package. (Stipulation, Para. 4B.) Both the box in which the two (2) ounce Miss Clairol product intended for the drug trade is contained and the carton in which the six (6) two (2) ounce bottles intended for the beauty trade is contained carry warnings against use prior to application of a preliminary "patch" test for skin irritation which is recommended by respondent. (Attachments 6A and 7A.) Labels placed on each two (2) ounce bottle intended for the drug trade and on each two (2) ounce bottle intended for the beauty trade identify the particular shade of Miss Clairol. (Attachments 6B and 7B.) A direction leaflet packaged in the six (6) bottle carton intended for the beauty trade sets forth the details of the preliminary patch or skin test for hypersensitivity recommended by respondent. (Attachment 7C.) Similarly, each container box of two (2) ounce Miss Clairol intended for the drug trade contains a set of directions for use and application of the product. (Attachments 6C, 103A, 103H.) These drug trade instruction leaflets for both Miss Clairol Regular and Creme Formula contain detailed instructions concerning the patch or skin hypersensitivity test, the preparation of the hair coloring mixture, and the variants in application procedure depending upon whether the hair has or has not been previously colored. (*Ibid.*) These leaflets also contain a detailed "color selector" chart informing the reader as to the proper Miss Clairol color which should be used to achieve the desired result. (*Ibid.*)

20. The primary difference in packaging Miss Clairol Hair Color Bath (Regular or Creme Formula), subsequent to July 1963, is that *each* two (2) ounce bottle intended for the drug trade is packaged with a complete instruction leaflet, whereas the "six-pack" beauty trade package contains only one leaflet with each unit of six (6) two (2) ounce bottles, and that leaflet sets forth only the skin hypersensitivity test. (Stipulation, Para. 4C 1; compare Attachments 6C, 103A, 103H, with Attachment 7C.)

21. Respondent's products Silver Drops, Red Fashion Colors, Salon Formula Creme Toner, Applicators, Born Blonde, Kind-

ness, Creme After Rinse Packettes, Instant Whip Lady Clairol, Lady Clairol Whipped Creme, and Lady Clairol Lightening Boosters are packaged in identical packages for both the beauty trade and the drug trade. (Stipulation, Paras. 4C 2, 4C 5, 4C 6.)

22. Other of respondent's products, while of identical chemical formulas (Stipulation, Para. 4B.), are packaged in different size containers, depending upon whether sold to the beauty trade or to the drug trade.

23. Whether hair coloring treatments incorporating respondent's products are administered at home or in a beauty salon, the chemical changes which respondent's products undergo when applied to the hair are identical. It is the molecular alteration of the original color molecules or "intermediates" that, when mixed with a dilute hydrogen peroxide solution or "developer," impart color to the hair by becoming embedded within the hair shaft whenever and wherever applied. (Stipulation, Para. 18.)

VIII. "PUSH MONEY" PAYMENTS (DRUG TRADE)

24. Respondent now sells, and during the three-year period 1961–1963, sold its products to Gray Drug Stores, Inc., a large retail drug chain located in Cleveland, Ohio, operating approximately 150 retail drug outlets, many of which are located in and surrounding the Cleveland, Ohio, trading area. Respondent commenced certain "push money" payments to Gray Drug Stores, Inc., in October of 1959, and continued such "push money" payments through 1962. "Push money" payments are payments which are made to sales people for selling a particular product. (Stipulation, Para. 12B; Attachments 86–88.) During the period 1961–1962, respondent made the following "push money" payments to Gray Drug Stores, Inc.:

Period	*Year*	*Amount*
First Quarter	1961	$354.63
Second Quarter	1961	401.26
Third Quarter	1961	604.38
Fourth Quarter	1961	886.14
First Quarter	1962	551.27
Second Quarter	1962	417.92
Third Quarter	1962	597.45
Fourth Quarter	1962	439.03

(Stipulation, Para. 12B.)

The payments made by respondent during the year 1961 were equivalent to ten per cent of the retail price of respondent's product Pure White Creme Developer, and five per cent of the retail price of respondent's shampoo products. (Attachment 86.) The payments made by respondent during the year 1962 were equivalent only to ten per cent of the retail price of respondent's Pure White Creme Developer. All of these payments were made as push money payments. All such push money payments were discontinued at the end of 1962. (Stipulation, Para. 12B.)

25. During the three-year period 1961–1963, respondent contemporaneously sold Pure White Creme Developer and shampoo products to other retailers, including department stores, located in the Cleveland, Ohio, trading area which were, and are, in substantial competition with Gray Drug Stores, Inc., in the resale of such products to consumers. (Stipulation, Paras. 1B, 12C.) Respondent did not pay, and has never paid, offered to pay, or otherwise made available on proportionally equal terms, or on any terms, to competing retailers any equivalent or substantially equivalent promotional payment, or push money payment, on such products, or on any of respondent's products. (Stipulation, Para. 12C.)

26. During the three-year period 1961–1963, respondent contemporaneously sold Pure White Creme Developer and shampoo products to the drug wholesalers and to rack jobbers located in the Cleveland, Ohio, trading area. Those wholesalers and jobbers resold said products to retailers, including department stores, located in the Cleveland, Ohio, trading area. The retailers were and are in substantial competition with Gray Drug Stores, Inc., in the resale of respondent's products to consumers. (Stipulation, Paras. 1B, 12D.) During said three-year period, 1961–1963, respondent did not pay, and has never paid, offered to pay, or otherwise made available on proportionally equal terms, or on any terms, to the wholesalers and rack jobbers, located in the Cleveland, Ohio, trading area purchasing respondent's Pure White Creme Developer and shampoo products, any promotional payments, or push money payments. Also, during the aforesaid period, respondent did not pay, and has never paid, offered to pay, or otherwise made available on proportionally equal terms, or on any terms, any equivalent or substantially equivalent promotional payment, or push money payment, to retailers purchasing respondent's Pure White Creme Developer and shampoo products from such wholesalers or rack jobbers. (Stipulation, Para. 12E.)

IX. "DEMONSTRATOR" PAYMENTS (DRUG TRADE)

27. During the two-year period 1961–1962, respondent made payments to Gray Drug Stores, Inc., Cleveland, Ohio, as follows:

Year	*Amount*
1961	$1,500
1962	1,500

Those payments were made to cover the cost of demonstrators used by Gray Drug Stores, Inc., in hair care clinics. (Stipulation, Para. 13.) During this period 1961–1962, payments for demonstrators were not offered, paid, or otherwise made available by respondent on proportionally equal terms to all other of respondent's customers competing with Gray Drug Stores, Inc., in the distribution of respondent's products, or to respondent's customers who resold to purchasers who compete with Gray Drug Stores, Inc. (Complaint, Para. 5; Answer, Para. 2.) The customers of respondent and purchasers from customers of respondent who compete with Gray Drug Stores, Inc., and to whom such payments for demonstrators were not paid, offered, or otherwise made available on proportionally equal terms by respondent, included department stores, drug and other retailers, and wholesalers and rack jobbers who resell respondent's products to consumers, or whose customers resell respondent's products to consumers. (Stipulation, Para. 1B; 12A; 12C; 12D; 12E; Attachment 85.)

X. DIRECT-PURCHASING RETAILER PROMOTIONAL ALLOWANCES (DRUG TRADE)

28. Commencing on or about May 1, 1964, respondent made available to all of its direct-purchasing retailer drug trade customers in the Baltimore, and Washington, D.C., trading areas, such as department stores and chain drug stores, a promotional allowance equivalent to five per cent of each such customer's total purchases of respondent's products. (Stipulation, Para. 14.) Commencing on or about August 1, 1964, such allowance was also made available by respondent to its direct-purchasing retailer customers in the Philadelphia trading area. Stipulation, Para. 15.) The terms and conditions of such allowances are set forth in written agreements entered into by respondent and its direct-purchasing retailer drug trade customers in the aforesaid trading areas who have elected to qualify for such allowances by agreeing to perform certain promotional services and facilities in connec-

tion with the resale of respondent's products to consumers. (Attachments 89–90, 92; Stipulation, Paras. 14A, 15A.) Payment of this promotional allowance is made each four month calendar period, upon proof of performance submitted by each such retailer customer.

29. In the Baltimore, Philadelphia, and Washington, D.C. trading areas, respondent has sold and now sells its products to drug wholesalers and rack jobbers, which products are identical to the products respondent contemporaneously sold and now sells to those direct-purchasing retailer drug trade customers to whom respondent has agreed to pay and now pays promotional allowances as described in the preceding paragraph. The unfavored wholesalers and rack jobbers resell respondent's products to department stores, drug stores, and to other retailers who were, and are, in substantial competition in the resale and distribution of respondent's products with the direct-purchasing retailer customers receiving promotional allowances from respondent pursuant to the written agreements, as aforesaid. (Stipulation, Para. 14C, 15B.) Respondent has not paid, offered to pay, or otherwise made available to its wholesaler and rack jobber customers in the Baltimore, Philadelphia, and Washington, D.C. trading areas, the five per cent promotional allowance paid to direct-purchasing drug trade customers in said trading areas, nor has any proportionally equal promotional plan or payment been offered, or otherwise made available, to such wholesaler and rack jobber customers. Furthermore, respondent has not paid, offered to pay, or otherwise made available to the retailers purchasing respondent's products through wholesalers and rack jobbers the five per cent promotional allowance paid to direct-purchasing retailer drug trade customers in the areas cited, who compete with the retailers purchasing respondent's products through wholesalers and rack jobbers in the resale of respondent's products to consumers, nor has any proportionally equal promotional plan or payment been offered, or otherwise made available, by respondent to such retailers purchasing respondent's products through said wholesalers and rack jobbers. (Stipulation, Para. 14D, 14C, 15B, 1B.)

XI. ALLOWANCES FOR NEWSPAPER ADVERTISING (BEAUTY TRADE)

30. During the period 1960 through 1964, respondent made substantial payments for newspaper advertising to some but not all of its beauty salon customers who contemporaneously purchased products of like grade and quality from respondent. The

payments that were made by respondent to its beauty salon customers were not made, offered, or otherwise made available, on proportionally equal terms to all such customers. (Stipulation, Para. 5.) The purchases of some of respondent's beauty salon customers, and the payments or allowances received by such customers for newspaper advertising during 1962 and 1963 are substantially in excess of figures set forth below:

1962			*1963*	
Purchases	and *Allowances*	*Name and Address*	*Purchases*	and *Allowances*
$ 8,000	$ 2,000	Abraham & Strauss *Brooklyn, New York*	$ 9,000	$ 2,500
10,000	800	Charles of the Ritz *New York, New York*	15,000	6,000
6,000	2,000	Michael Kazan *New York, New York*	8,000	2,000
15,000	5,000	Maxim Kunin *New York, New York*	20,000	5,000
4,000	1,500	Martin's *Brooklyn, New York*	5,000	1,000
100,000	10,000	The Glemby Co., Inc. (Salon Service, Inc.) *New York, New York*	100,000	100,000
200,000	200,000	Seligman & Latz, Inc. *New York, New York*	200,000	200,000

(Stipulation, Para. 5A)

XII. SPECIAL "LINE" OR "CO-OP" ALLOWANCES (BEAUTY TRADE)

31. In addition to the payments or allowances set forth above, respondent made a payment of $18,000 each year for the four years from 1961 through 1964 to Seligman & Latz, Inc., as a special "line" or "co-op" payment for newspaper advertisements placed by Seligman & Latz, Inc., which did not feature respondent's products, but which did include a small "line" in the advertisements which mentioned respondent's products by name. (See attachments 39–41.) No other customers were paid, offered, or in fact received such payments or allowances from respondent, although contemporaneously purchasing from respondent products of like grade and quality as those purchased from respondent by Seligman & Latz, Inc. (Stipulation, Para. 5C.)

XIII. COMPETITION BETWEEN FAVORED AND NONFAVORED BEAUTY SALONS PURCHASING FROM RESPONDENT

32. In many trading areas during the five-year period from 1960 to 1964, beauty salons purchasing products from respondent

and receiving payments for newspaper advertising from respondent, as aforesaid, were and are in substantial competition with other beauty salons who were contemporaneously purchased identical products from respondent, but not receiving any advertising allowances or payments from respondent and who were not, in fact, offered such advertising payments or allowances by respondent on proportionally equal terms, or on any terms. Also, in many trading areas, beauty salons that were and are in substantial competition with each other and which did receive advertising payments or allowances from respondent, did not receive, and were not in fact offered, such payments or allowances by respondent on proportionally equal terms to those referred to above, although they contemporaneously purchased identical products from respondent. Beauty salon customers of respondent receiving such payments or allowances and beauty salon customers of respondent not receiving such payments or allowances, or not receiving such payments or allowances on proportionally equal terms, were and are in substantial competition with each other in their handling of products purchased from respondent. (Stipulation, Para. 7.)

XIV. COMPETITION BETWEEN FAVORED BEAUTY SALON CUSTOMERS PURCHASING FROM RESPONDENT AND BEAUTY SALONS PURCHASING FROM BEAUTY SUPPLY DEALERS

33. The most substantial part of respondent's total sales to the beauty trade during the period 1960 through 1964 was to beauty supply dealers who purchased respondent's products contemporaneously with purchases of identical products by those beauty salons who purchased directly from respondent. These beauty supply dealers resell respondent's products to almost all beauty salons in the United States, and such beauty salons would thereby be purchasing respondent's products contemporaneously with purchases of identical products by beauty salons purchasing directly from respondent. During the period 1960 through 1964, many of the beauty salons purchasing respondent's products from beauty supply dealers were and are in substantial competition with beauty salons purchasing identical products directly from respondent. Furthermore, many of the beauty salons purchasing respondent's products from beauty supply dealers were and are in substantial competition with beauty salons purchasing identical products directly from respondent and receiving advertising

payments or allowances from respondent. Beauty salons purchasing respondent's products from beauty supply dealers were and are in subtsantial competition in their handling of respondent's products with beauty salons purchasing identical products directly from respondent and receiving such payments or allowances, as aforesaid. (Stipulation, Para. 9A.) Respondent does not, and has never, paid, offered to pay, or otherwise made available to beauty supply dealers any payments or allowances for newspaper advertising. Furthermore, respondent does not, and has never, paid, offered to pay, or otherwise made available, on terms proportionally equal to those referred to hereinbefore, any payments or allowances for newspaper advertising to beauty salons purchasing respondent's products from said beauty supply dealers. (Stipulation, Para. 9B.)

XV. BEAUTY SALONS AND THEIR FEES

34. Respondent's products purchased by beauty salons, including the beauty salons purchasing respondent's products from beauty supply dealers, are purchased for incorporation into hair care treatments administered by beauty operators, or beauticians, to customers of said beauty salons. Said hair care treatments are provided on the premises of such beauty salons. The bills rendered by the beauty salons to their customers specify a unitary charge for the hair care treatments rendered, without itemizing charges for the separate product and labor components; but such charges are ordinarily intended by the beauty salons to cover their costs for all such components, as well as some portion of their total operational costs and some amount of profit. (Stipulation, Para. 11.)

XVI. BEAUTY SALON PFRSONNEL

35. Respondent's products which are distributed through the beauty trade are applied to the hair of consumers on the premises of beauty salons by employees who are either beauticians or hair colorists. Beauticians are ordinarily trained in a beauty school or with the equivalent of a beauty school education in a vocational high school. The fifty States of the United States, the District of Columbia and Puerto Rico, have minimum requirements ranging from 1,000 to 2,500 hours in beauty schools, or two years in a vocational high school, to become eligible for a license to practice as

a beautician. Several of the states permit apprenticeship training rather than in-school training, requiring the same or a greater number of hours of training. Little formal education is required to become a licensed beauty operator or beautician. An eighth grade education complies with the requirements established by many of the states, some states requiring no formal education whatsoever. (Stipulation, Paras. 21B, 21C; Attachment No. 106.)

36. Only 50 to 100 hours of the above-described schooling of operators is devoted to hair coloring, the major emphasis being placed on hair styling. Much of the hair coloring instruction involves the practical application of hair coloring on live models. (Stipulation, Para. 21C.) While beauticians who then intend to specialize in hair coloring may attend further classes offered by leading manufacturers of hair coloring products, for a period of two weeks, or two months at the rate of one day or evening a week, upon the completion of which they will receive a specialization certificate from the manufacturer, there is no requirement that beauticians using respondent's products have any such special training. (Stipulation, Para. 21D.) A beauty salon may have one or two such "specialists" to advise as to hair coloring in the salon. Larger salons may employ more. (Stipulation, Para. 21E.)

XVII. BEAUTY SALONS AND HAIR COLORING

37. Customers of beauty salons often specify the brand of hair coloring product that is used on their hair in the beauty salon. While beauticians may suggest a particular shade for the customers, many customers also specify the color or shade they desire. (Stipulation, Para. 21E.)

38. Charges by beauty salons for treatments incorporating various of respondent's products are as low as $3.50 and as high as $50. While the cost of respondent's products to be applied is not, as a general rule, the determinative factor in the amount charged by the beauty salon, such charges may be varied to cover additional product costs and services where the customers have long hair, or desire a color that requires blending of two or more of the standard coloring mixtures, particularly in the case of the lower-priced treatments. (Stipulation, Para. 19A.) Hair coloring treatments intended to produce highly specialized or stylized effects may cost customers considerably more than the lower-priced treatments. (Stipulation, Para. 19A.)

39. The procedures and mechanics of applying respondent's products are the same whether they are applied by beauticians or

colorists in beauty salons, or by consumers at home. (Attachments 101A–I, 6C, 103A–H, 104.) While hair colorists have a dexterity and skill in applying hair care products (Stipulation, Para. 21B.), respondent's products, whether applied by colorists in salons or by consumers themselves, have the overriding characteristic, as respondent itself insists, of ease and simplicity of use. (Attachments 6C, 102, 103A–H, 107–113.)

40. Special color effects and stylings, such as "Picture Framing," "Tortoise Shelling," "Winging," "Jewel Toning," require extra effort and time to tint the various parts or strands of the hair different colors, and some judgment to achieve a harmonious result. The manner in which the customer's hair is currently being styled may also be a consideration. (Stipulation, Para 21E.) In tinting various parts or strands of the hair, however, application techniques in getting the color on the hair do not vary. (Attachments 101A–H.)

41. Although many of respondents's products used in beauty salons are applied by colorists, some of respondent's products are applied in beauty salons by beauticians who are not skilled colorists. Respondent's shampoos, conditioners, rinses ("Come Alive Gray"), and semipermanent colorings ("Loving Care," "Silk & Silver," and "Sparkling Color"), do require very little skill and experience. (Stipulation, Para. 21F.) These products which require little skill and experience for application are some of the products concerned in advertising by beauty salon chains for which respondent has made payments not offered, accorded, or made available to competing beauty salons or not offered, accorded, or made available to said competing beauty salons on proportionally equal terms. (Attachments 10–38; Stipulation, Para. 19A.)

XVIII. FAVORED BEAUTY SALONS' ADVERTISING OF RESPONDENT'S PRODUCTS

42. Attachments to the stipulation of facts, numbers 10 through 38, are representative samples of the newspaper advertisements for which payments or allowances were made by respondent to favored beauty salons. These attachments vividly demonstrate that the particular Clairol product or products involved are always featured prominently in such advertisements. Said advertisements indicate that the Clairol product or products being advertised are of equal importance in the advertisement to the concomitant application or treatment with the product, or collat-

eral services advertised with the hair coloring, such as a shampoo and set. The gravamen of said representative advertisements is not at all that consumers should get a hair coloring application or treatment, but that they should get a "Clairol" product application or treatment. (Attachments 10–38.)

43. For instance, Attachment 10 advises consumers "no matter what the natural color of your hair, let us WASH AWAY CREEPING GRAY with CLAIROL LOVING CARE now in ELEVEN glowing shades, ranging from the sheer delicacy of PALE SHINING BLONDE TO NEW, YOUNG 'NATURAL BLACK' and all this week . . . to introduce you to Loving Care"; less prominently featured in the advertisement is the fact that the price of the Loving Care application includes a free shampoo and set. The primary purpose of this advertisement is clearly to introduce consumers to respondent's product Loving Care. Similarly, Attachment 14 advises: "YOUR HAIR SHOULD BE HANDLED WITH TENDER LOVING CARE by CLAIROL"; the free shampoo and set are less prominently featured. It is respondent's product as a product, rather than its application, that is the dominant part of said Loving Care advertisements, occupying the greater space and given the most prominent treatment.

44. Attachment 12 is also illustrative; the pitch of the advertisement is to the product rather than the application:

> Color me young with wonderful CLAIROL LOVING CARE . . . Light a bright and fantastic glow in your hair naturally with tender . . . "Loving Care"! Gently brighten away greying years . . . let your true color shine with the subtle help of Miss Clairol's fountain of youth. There's a shade deftly created to light the sleekest coif or the swirliest bob with a new and lovely brilliance. Let us take away the dingy cloud of grey with Loving Care. Clairol Loving Care with shampoo and set only $5 . . . for this week only.

45. Representative advertisements by beauty salon chains of respondent's other products, for which advertisements respondent has made payments to favored customers, establish that such products are also advertised with emphasis on the product itself. For instance, respondent's product, Miss Clairol, has in representative advertisements by said beauty salon chains been advertised to consumers as:

1. . . . Your head start on fashion
GLORIOUS MISS CLAIROL
COLOR FOR NEW
HAIR BEAUTY
Coming in clear and bright . . . dazzling Miss Clairol. The color

miracle that brightens your hair, the beautiful way to color grey, give hair a youthful glow, a fabulous new look. (Attachment 20)

2. *ONE TOUCH OF COLOR FROM MISS CLAIROL*
A SPECIAL MID-SUMMER PRICE FOR A FAMOUS MISS CLAIROL HAIR COLOR BATH. A MISS CLAIROL TOUCH UP BRINGS A NEW AND LOVELY LOOK TO YOUR HAIR, COVERS DRABNESS FROM GREY OR TOO MUCH SUN. IF YOU'VE THOUGHT OF TRYING A COLOR, THIS IS THE TIME. ONE-COLOR *SPECIAL* $6.50.
(Attachment 17.)

46. Respondent's hair color lotions, in representative advertisements by beauty salon chains, are advertised as:

. . . NEW CLAIROL HAIR COLOR LOTIONS . . . .
. . . FOR EVERY WOMAN WHO EVER DREAMED OF HAVING LOVELY HAIR COLOR . . . .
Not permanent tints—these exciting Hair Color Lotions penetrate just enough to shine naturally, beautifully and last through a month of shampoos. If you hate that gray, let us wash it away with CLAIROL LOVING CARE! If you ever wished your gray hair would gleam like purest silver, we'll bring out all its lovely potential with CLAIROL SILK & SILVER. If mousey (non-gray) hair has you in the doldrums, we'll give it an exciting color "pick-me-up" with CLAIROL SPARKLING COLOR. Even if you've never tried hair coloring, try it now! You'll love it. HAIR COLOR LOTION TREATMENTS, 3.50 . . . .
(Attachment 21.)

47. It is clear that respondent's products constitute the greatest attraction in the advertisements and that the primary purpose of said advertisements is to sell consumers on the availability of respondent's products at the beauty salons.

XIX. RESPONDENT'S GENERAL ADVERTISING TO CONSUMERS

48. Respondent does substantial advertising of its products in national magazines such as Ladies Home Journal, McCall's, and Good Housekeeping, magazines directed primarily to women. Respondent also advertises in other magazines of general public circulation, such as Life. (Stipulation, Para. 16.) The advertising of respondent's products through national magazines is designed to stimulate drug trade sales of its products by "preselling" women on hair coloring which will be purchased through the drug trade as well as influence the choice of products selected by patrons in beauty salons. (Stipulation, Para. 20; Attachment 102, p. 5; Stipulation, Para 21E(4); Attachments 93A–B, 96A–B.) Indeed, the market for respondent's products is so extensive that according to respondent consumers purchasing respondent's products through the drug trade do so 10–12 times per year, spend an average of

$40 per year on hair coloring products alone, and are ready and willing to buy a host of related items. (Attachment 102, p. 5.)

49. Respondent's product, "Condition," is advertised in national magazines as "easy and quick to use," and available at beauty salons and cosmetic counters. (Exhibit 93A–B.) Respondent's product, "Born Blonde," is similarly advertised as "surprisingly easy to use," neither containing nor requiring peroxide, "just poured on," also "[T]here's no sectioning, and the color 'takes' quickly." (Exhibit 95.) "Lady Clairol" is advertised as "a breeze," "[s]o quick and easy." (Exhibit 94.) "Come Alive Gray" is advertised as "Clairol's New Miracle Rinse," "[t]akes just minutes to rinse in glowing gray color," and is available "[a]t cosmetic counters and beauty salons." (Attachment 96A–B.) The advertising slogan for Loving Care is: "Hate That Gray? *Wash* It Away!" Consumers are advised that the product comes in ten shades and that they need only choose the tone most like their own. (Attachment 97A–E.) "Miss Clairol Hair Color Bath" is advertised as "Quick and Easy," and "[t]akes only minutes." Consumers are encouraged by "the fresh, young, even color you get *every time* with Miss Clairol." (Attachment 98A–E.)

XX. APPLICATION OF RESPONDENT'S PRODUCTS BY CONSUMERS

50. Products packaged by respondent to be distributed through the drug trade for home application contain instructions setting forth the procedures to be followed in such applications.

51. For instance, the leaflet packaged with Clairol Creme Toner (Salon Formula Oil Shampoo Tint) has the preliminary patch or skin test for hypersensitivity recommended by respondent, a Color Strand test to predetermine the final color which will result, a check list of "Do's and Don't's" to be followed prior to application, mixing directions, detailed instructions for first application and for retouch applications, both for lighter and darker shades. In addition, respondent's leaflet contains a Color Selector and Lightening Guide for the purpose of harmonizing the necessary lightening of the hair with the Creme Toner color selected. Respondent's other preparations have similar accompanying instructions.

XXI. BEAUTY TRADE—DISCRIMINATION BETWEEN FAVORED AND NON-FAVORED COMPETING BEAUTY SALONS

52. We must now determine whether respondent's acts in granting advertising allowances to some of its direct-purchasing

beauty salon customers during the period of 1960 to 1964, while not making such advertising allowances available on proportionally equal terms to competing beauty salon customers constitutes a violation of Section 2(d) of the Clayton Act.

53. Counsel for the respondent contends that although respondent's favored and nonfavored beauty salons operating in the same geographical and market area are in general competition with each other, they do not compete with each other in the distribution of respondent's products. This rather surprising result occurs, according to respondent, because the hair dye preparations which the competing beauty salons have purchased from respondent are ". . . used up and decharacterized by the salon as a necessary part of the personal service salons perform. . . ." Respondent further contends that such products having been "used up and decharacterized by the beauty salon" are not sold by the beauty salon to its customers but rather a hair dyeing service is sold. Respondent contends that "respondent's products cease to exist in the hands of the salon, and become incapable of being further redistributed." Relying upon such contentions, respondent avers that "The *sine qua non* of a Section 2(d) violation is missing."

54. To the contrary, counsel supporting the complaint contends that the advertising allowances furnished by respondent to its favored beauty salon customers were furnished ". . . in connection with the processiong, handling, sale, or offering for sale . . ." of such products and that the favored and nonfavored customers have been ". . . competing in the distribution . . ." of such products with the clear result that respondent has violated Section 2(d) of the Clayton Act as alleged.

55. A reexamination of Section 2(d) of the Clayton Act reveals that in order to constitute a violation of that Act, the advertising services furnished to respondent's favored customers must have been furnished ". . . in connection with the processing handling, sale, or offering for sale" of respondent's products. It is important to observe that the statutory words "processing, handling, sale, or offering for sale" are stated disjunctively with the logical effect that the statute covers any factual situation embraced in the meaning of any one of the four concepts or meanings included therein. We find that none of the words—processing, handling, sale, or offering for sale—are defined by the Clayton Act itself, and, with the sole exception of "processing" defined by the Supreme Court in the context of Section 2(e) of the Clayton Act in *Corn Products Refining Company* v. *Federal Trade Commission,*

324 U.S. 726, 744 (1945), none of those words in the context of Section 2(d) of the Clayton Act has ever been expressly defined by the Commission or the courts.

56. In interpreting such statutory words we are aided by two guiding principles. First, the words employed in the statute should be read in " . . . their normal and customary meaning," *Schwegman Bros.* v. *Calvert Corporation,* 341 U.S. 384, 388 (1951). Second, in interpreting a statute such as the Clayton Act, a result should be sought which is compatible with the legislative history, economic realities and fundamental purpose of that law, *Federal Trade Commission* v. *Sun Oil Company,* 371 U.S. 505, 516, 518 (1963).

57. "Processing," as defined in the *Corn Products* case, ". . . is a mode of treatment of materials to be transformed or reduced to a different state or thing," *supra.* This definition very clearly resembles the definition of "process" in Black's Law Dictionary and Webster's Dictionary.

58. "Handling" is defined in Black's Law Dictionary (4th edition, 1951) as meaning ". . . to control, direct, to deal with, to act upon, to perform some function with regard to or to have passed through one's hands, to buy and sell or to deal or trade in . . ." Webster's New international Dictionary (3rd edition, 1963) defines "handling" as "1. b. process by which something is handled especially in a commercial transaction, (The problem was not the sale but the handling of the merchandise.). . . ."

59. "Sale," or "offering for sale," is defined in the Uniform Sales Act in Section 1 (2) as ". . . an agreement whereby the seller transfers property and goods to the buyer for a consideration called the price." Many similar authoritative definitions might be cited.

60. From what we believe to be the "normal and customary meaning" of the word "sale," a sale is a transaction which contains the following elements: a. competent parties; b. mutual assent; c. property in which title is transferred; and d. consideration, generally in the form of money paid.

61. The facts in our present case meet all the requirements of a sale. There are competent parties, mutual consent, money is paid, and title to property in the form of hair dye or similar preparation is transferred from a beauty salon to a customer. Although a unitary fee is paid for the application of the hair dye, and although the larger part of that fee is for the service rendered, nev-

ertheless a part of the fee is unquestionably paid in consideration of the material or dye furnished. That part of the fee constitutes consideration for the sale of respondent's hair dye preparation.

62. The mere fact that the products in question have been, as respondent contends, "decharacterized" in the process of their application by the beauty salon technician, does not change the simple truth that a part of the fee paid by the customer was paid for respondent's product. For example, in *Frontier Asthma Co., Inc.*, 43 F.T.C. 117, 127 (1946), the Commission summarily rejected an argument by physicians that they were engaged only in the practice of medicine and had nothing to do with the sale of certain asthma preparations. Similarly, in *Sidney J. Mueller t/a Mueller Hair Experts*, 49, F.T.C. 586, 594 (1952), *aff'd*, 262 F. 2d 443, 447–448 (5th Cir. 1958), the Commission and the Court of Appeals for the Fifth Circuit rejected respondent's argument that he was only engaged in rendering a service of treatments for baldness, and was not engaged in the sale of any cosmetics or the other preparations used in administering such treatments.

63. We are convinced that respondent's favored beauty salon customers do in fact as well as in law sell respondent's products to their customers in the course of administering various hair care and coloring treatments, and that respondent's acts of discrimination between its beauty salon customers constitute violations of Section 2(d) of the Clayton Act, as amended.

XXII. BEAUTY TRADE—DISCRIMINATION BETWEEN NONFAVORED WHOLESALERS WHOSE NONFAVORED BEAUTY SALON CUSTOMERS COMPETE WITH FAVORED BEAUTY SALON CUSTOMERS

64. As one of the alleged beauty trade discriminations, we must next determine whether respondent's acts in granting advertising allowances to some direct-purchasing beauty salons while failing to make such allowances available to wholesalers whose beauty salon customers compete with the favored beauty salons, in the sale of respondent's products, constitute a violation of Section 2(d) of the Clayton Act.

65. Since we have determined in the preceding section of this opinion that beauty salons in the same market area not only compete with each other in general, but compete with each other in the sale of respondent's products, we need here only determine whether respondent's favored beauty salon customers and its unfavored wholesale customers doing business in the same market area are "competing in the distribution" of respondent's products within the meaning of Section 2(d) of the Clayton Act.

66. The word "distribution" as used in Section 2(d) is a relatively simple word which Webster's New International Dictionary (2nd edition) defines as "1. act of distributing; apportionment among several or many; . . . 8. econ. a. physical conveyance of commodities from producers to consumers; . . ." We believe that the word distribution was clearly intended in Section 2(d) of the Act to include all the channels of commerce by which products travel from a manufacturer to the ultimate consumer. The Commission's recent decision in *Fred Meyer, Inc.*, 1963 Trade Reg. Rep., ¶ 16,368 at 21,214–21,216 (F.T.C. Dkt. 7492, March 29, 1963) [63 F.T.C. 1, 42, 43], and the district court's opinion in *Krug* v. *International Tel. & Tel. Corp.*, 142 F. Supp. 230, 236 (D.C.N.J. 1956), supports such a practical and realistic construction of Section 2(d) of the Clayton Act. In the *Meyer* case, the Commission stated that:

> . . . we see nothing in the words of that provision [Clayton Act §2(d), as amended] to support the proposition that wholesalers whose retailer-customers compete with direct-buying "chains" are not entitled to a fair share of the promotional allowances received by the latter. As noted, Section 2(d) declares that such allowances are unlawful unless they are made available, on proportionally equal terms, to "all other customers competing in the distribution of such products." These wholesalers, like respondents themselves, buy directly from the discriminating suppliers and are, therefore, unquestionably "customers" of those discriminators. And we think that, insofar as those wholesalers resell to retailers who, in turn, resell to consumers in competition with respondents, the wholesalers are competing with respondents in the "distribution" of the goods in question. It is true, of course, that only the retailer-customers of these two wholesalers compete with respondents in the direct resale of the goods to consumers. But the statutes speaks of competition in the "distribution" of the products, not merely of competition in their "resale". These wholesalers, through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after. Every time an independent retailer loses a sale to respondents, the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would necessarily be finished in that market. Id. at 21,215.

67. Respondent's counsel contends, however, that the holding of the Court of Appeals for the Ninth Circuit in the *Tri–Valley Packing Association* v. *Federal Trade Commission*, 329 F. 2d 694, 702 (1964), and the conceptual essence of the Supreme Court's determination in the *Federal Trade Commission* v. *Sun Oil Company*, 371 U.S. 505 (1963), rejects the theory of the Commission in its *Meyer* decision. It is our opinion, however, that the facts in the two cases cited are to different from the present case to jus-

tify respondent's contention. Moreover, the logic in the Commission's statement and the obvious economic harm which the Commission's decision seeks to prevent, commends it to us as the correct interpretation of Section 2(d) of the Clayton Act. Accordingly, we conclude that the discrimination between the nonfavored wholesaler whose beauty salon customers compete with favored beauty salons constitute a violation of Section 2(d) of the Clayton Act.

XXIII. DRUG TRADE—"PUSH MONEY" AND "DEMONSTRATOR" DISCRIMINATIONS

68. As we have seen from the findings as to the facts herein, respondent during the years 1961 and 1962 expended approximately $4,250 to the Gray Drug Stores, Inc. of Cleveland, Ohio, for the payment of "push money" in connection with the sale of respondent's Pure White Creme Developer and its shampoo products without making such payments available on proportionally equal terms to its other customers who, contemporaneously with Gray, purchased such products from respondent and who compete with Gray in the distribution of such products including those drug trade whosesale customers of respondent who sold respondent's products to purchasers who directly compete with Gray in the retail sale of such products.

69. In view of our conclusions in sections XXI and XXII, it seems only necessary here to point out that it is well settled that "push money" payments accorded to a favored customer as hereinabove described constitutes a violation of Section 2(d) of the Clayton Act. In *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1053–1054 (1960, *aff'd but modified on other grounds,* 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied,* 369 U.S. 888 (1962), the statement was made, as follows:

> The record discloses in this connection [push money] that respondent transmitted a check to Rosenbaum's, of Plainfield, New Jersey, by letter dated July 19, 1957, advising that "This check represents the prize monies due your Sales Personnel for the Exquisite Form P.M. Contest that was run in your store for the period of 4/15 thru 6/8/7." Since this payment was granted by respondent to or, at least, "for the benefit of" a customer for promotional services furnished respondent, it clearly comes within the scope of Section 2(d). The record also reveals that this payment was not made available on proportionally equal terms to other customers of respondent in the Plainfield, New Jersey, area. This showing is sufficient to sustain the charge in the complaint that respondent violated Section 2(d) of the amended Clayton Act.

70. In addition to the push money payments, the record also shows that during 1961 and 1962 respondent paid $1,500 to the Gray Drug Stores, Inc., to finance the cost of demonstrators employed by Gray in hair care clinics without making such payments available on proportionally equal terms to its other customers who compete with Gray in the distribution of respondent's products including those drug trade wholesale customers of respondent who sold respondent's products to purchasers who directly compete with Gray in the retail sale of such products.

71. It is firmly established that a seller who makes discriminatory payments as compensation to a customer for demonstrator services provided by the customer in connection with the sale or offering for sale of the seller's products, and who does not make such payments available on proportionally equal terms to its other customers who, contemporaneously with the favored customer, purchase the seller's products of like grade and quality and who compete with the favored customer in the distribution of such products, violates Section 2(d) of the Clayton Act, as amended. See *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 990 (8th Cir. 1945), *cert. denied*, 326 U.S. 773 (1945); *Elizabeth Arden, Inc.* v. *F.T.C.*, 39 F.T.C 288, 298—302 (1944), *aff'd*, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); *Exquisite Form Brassiere, Inc.* v. *F.T.C.*, 57 F.T.C. 1036, 1054 (1960), *aff'd but modified on other grounds*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

XXIV. DRUG TRADE—PROMOTIONAL SERVICES

72. As we have previously observed, the respondent, commencing in the year 1964, entered into formal sales promotional agreements with certain selected chain drug stores and department stores in the market areas of Baltimore, Philadelphia, and Washington, D.C. Under those agreements, respondent has paid substantial sums of money for promotional services performed by those customers in connection with the sale of respondent's products. All the other drug retailers in the areas cited purchased their requirements of respondent's products from wholesalers and jobbers that purchased from respondent. Respondent has not made its promotional allowances available on proportionally equal terms, or on any terms, to either the wholesalers or to their customers who do business in the market areas described and who compete with respondent's favored customers in the distribution of respondent's products of like grade and quality.

73. Under the authority cited in section XXII, and for similar reasons there stated, we must conclude that the respondent's acts in granting the promotional allowances as above described constitute a violation of Section 2(d) of the Clayton Act.

XXV. SCOPE OF THE ORDER

74. Respondent's counsel contends that if the two major promotional allowance programs in issue herein are not adjudged to be violations of the Clayton Act, that the Commission should not subject respondent to a cease and desist order based merely on the violations involving "push money" payments and "demonstrator" payments made to the Gray Drug Stores, Inc., in 1961 and 1962. Counsel contends further that when respondent recognized that such payments were unlawful, it voluntarily discontinued them prior to the issuance of the complaint herein. In addition, respondent's counsel also contends that if any order to cease and desist is issued against the respondent, it should be fashioned to the type of conduct found to be unlawful.

75. In considering the scope of the Commission's order, it should be remembered that the respondent has been found in this proceeding to have violated Section 2(d) of the Clayton Act in four different ways: through discriminatory payments for demonstrators; through discriminatory payments of push money; through discriminatory payments for promotional allowances; and through discriminatory payments for newspaper advertisements. It must also be remembered that respondent is one of the largest concerns in the United States in volume of sales of hair coloring products. Respondent's favored, direct-purchasing customers are all large, independent beauty salons or very large beauty salon chains. Two of these favored customers each operated more than 300 beauty salons. The payments granted to these favored beauty chain customers are extremely substantial. The advertising which respondent's allowances finance clearly benefited the favored customer in his entire business, and enabled them to shift a large part of their advertising cost to the respondent. On the other hand, the nonfavored customer who can not secure such allowances consist of small independent beauty salons who must expend their own monies in order to secure such advertising.

76. Under all of the facts and circumstances herein found to exist, we believe that the public interest requires that the Commission should issue a cease and desist order prohibiting future vi-

olations of Section 2(d) through disproportional payments of any nature whatsoever.

XXVI. THE ORDER

It is ordered, That respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale, or distribution of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

> Paying, or contracting for the payment of promotional or advertising allowances, or anything of value, to or for the benefit of any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of respondent's products, including the incorporation of said products in beauty or hair care treatments, unless such compensation or consideration is offered, or otherwise made available, on proportionally equal terms to all other customers competing in the distribution of respondent's products, including all other customers who resell respondent's products to purchasers who compete in the distribution of said products with those customers receiving such compensation or consideration, or who compete in the incorporation of said products in beauty or hair care treatments with those customers receiving such compensation or consideration.

OPINION OF THE COMMISSION

JUNE 24, 1966

BY MACINTYRE, *Commissioner:*

Clairol Incorporated, a wholly owned subsidiary of the Bristol Myers Company and a leading distributor in the United States of hair coloring products, is charged with violating Section 2(d) of the Clayton Act, as amended, in connection with the sale of its hair coloring preparations. The hearing examiner found that respondent had violated the Act in its sales of these products both to the beauty trade and to the drug trade. The proceeding is now before us on Clairol's appeal from the initial decision.

Because of commendable cooperation between counsel and the hearing examiner, the record before us is confined to the facts

stipulated by the parties and a number of documents attached to the stipulation. As a result, this proceeding, which might well have turned into a "big" case, is characterized by a concise record and the resolution of Clairol's appeal does not hinge on a debate about the facts documented by the record, but, rather, the legal conclusions which may properly be drawn therefrom, namely, whether the respondent's promotional payments are within the remedial scope of the statute.

The three questions presented to the Commission on Clairol's appeal are the following:

1. Are beauty salons, when in the course of rendering hair coloring services to their patrons they utilize respondent's products, engaged "in the distribution of" such articles within the meaning of Section 2(d) of the Robinson-Patman Act?

2. Must the supplier who accords promotional allowances to his retail customers make them available on proportionally equal terms to wholesalers who resell to retailers that compete with the supplier's retailer customers?

3. Is the scope of the order proposed in the initial decision too broad?

Of the issues raised by respondent's appeal, the first, presenting the question of whether beauty salons are engaged in the distribution of products within the meaning of Section 2(d) of the Robinson-Patman Act, is a question of first impression. We will turn first to this novel and interesting issue, which is obviously of considerable importance to the beauty trade and its suppliers.

In view of the examiner's careful and detailed findings on the subject, only a general outline of the circumstances involved in respondent's sales to the beauty trade is necessary as an introduction to the consideration of whether these advertising payments come within the scope of the statute. As the examiner found, in the period 1960 through 1964 respondent made substantial payments for newspaper advertising to some, but not all, of its beauty salon customers who contemporaneously purchased products of like grade and quality from the respondent. These payments for cooperative advertising, as the record discloses, were substantial, ranging in the years 1962 to 1963 from eight hundred to two hundred thousand dollars in the case of certain beauty salon chains. The magnitude of such discounts in relation to

the purchases made in the case of certain of these customers in this period is set forth in the margin.[1]

The examiner found that certain beauty salon customers of Clairol who received such payments or allowances and other beauty salon customers, purchasing from the respondent, to whom such payments were not offered on proportionally equal terms, were and are in substantial competition with each other in the handling of products purchased from respondent. Clairol contends strenuously, however, that beauty salons neither resell Clairol's hair coloring products nor distribute such products within the meaning of Section 2(d) of the Clayton Act, as amended. Basic to Clairol's position is the contention that hair coloring products utilized by the beauty salons in treatments of their customers are for the salon's own use and not for resale as such. Respondent's counsel contends that beauty salons use the product themselves in the course of hair coloring treatments and therefore cannot be in competition with each other in the distribution of such commodities.[2] It is further Clairol's position that what the customer buys is not the hair coloring product but, rather, a hair dyeing service. In short, it is respondent's contention that Clairol's hair coloring products cease to exist in the hands of the salon and therefore become incapable of being further redistributed. Clairol does concede, however, that beauty salons do compete in the sale of hair coloring services.

The findings in the initial decision show that respondent's products distributed through beauty salons are applied to the hair of consumers on the premises of the salons by employees who are

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[1]

1962			*1963*	
Purchases and Allowances		*Name and Address*	*Purchases and Allowances*	
$ 8,000	$ 2,000	Abraham & Strauss *Brooklyn, New York*	$ 9,000	$ 2,500
10,000	800	Charles of the Ritz *New York, New York*	15,000	6,000
6,000	2,000	Michael Kazan *New York, New York*	8,000	2,000
15,000	5,000	Maxim Kunin *New York, New York*	20,000	5,000
4,000	1,500	Martin's *Brooklyn, New York*	5,000	1,000
100,000	10,000	The Glemby Co., Inc. (Salon Service, Inc.) *New York, New York*	100,000	100,000
200,000	200,000	Seligman & Latz, Inc. *New York, New York*	200,000	200,000

(Stipulation, para. 5A.)

[2] See pp. 4 and 5 of the oral argument.

either beauticians or hair colorists.[3] The examiner further finds that customers of beauty salons often specify the brand of hair coloring product which is used on their hair and that while a beautician may suggest a particular shade for the customer, many customers also specify the color or shade they desire.

The charges for the treatments incorporating hair coloring by a beauty salon, which are unitary charges for services and hair coloring products, may vary from $3.50 to a high of $50. The cost of respondent's products to be applied is not, as a general rule, the determinative factor in the amount charged by the salon but such charges may be varied to cover additional product costs and services in those cases where the customer has particular hair problems or desires more elaborate services.

The procedures for applying respondent's products, as the examiner found, are the same whether applied at home or by the beautician or colorist in the salon. The examiner further found that respondent's products, whether applied by the colorist in the salon or by consumers themselves, have the overriding characteristic, as respondent itself insists, of ease and simplicity of use. The record further shows, as the examiner found, that although many of respondent's products used in beauty salons are applied by colorists, some of respondent's products are applied in beauty salons by beauticians who do not have special skills as colorists. Certain of respondent's products requiring little skill and experience for their application, according to the examiner's finding, are among the products included in the advertising by beauty salon chains for which respondent has made the payments challenged in this proceeding.

The foregoing, then, is the setting in which respondent's products are distributed to consumers in the beauty salons. The determination which must be made is whether such distribution is within the scope of that term as it is set forth in Section 2(d) of the Clayton Act, as amended. That decision cannot be made solely on the basis of the procedures followed in the salons. Also pertinent to such a determination is the relationship of the beauty salon customers to Clairol, the nature of the advertising for which cooperative payments were made and, finally, the objectives which both Clairol and the cooperating beauty salons hope to achieve through such advertising.

Scrutiny of certain of the cooperative advertising under consid-

[3] The qualifications for beauticians and hair colorists are set forth in Findings 35 and 36 of the initial decision.

eration in this proceeding makes it clear that it was designed to sell Clairol hair coloring products. Representative of cooperative advertising by Clairol's beauty salon customers, and for which respondent made payments, is the following, run by Abraham & Strauss of New York City, which states in pertinent part:

> . . . your head start on fashion
> GLORIOUS MISS CLAIROL
> COLOR FOR NEW
> HAIR BEAUTY
>
> Coming in clear and bright . . . dazzling Miss Clairol. The color miracle that brightens your hair, the beautiful way to color grey, give hair a youthful glow, a fabulous new look. (Attachment 20.)

Another representative advertisement makes the following appeal:

> *ONE TOUCH OF COLOR FROM MISS CLAIROL*
> A SPECIAL MID-SUMMER PRICE FOR A FAMOUS MISS CLAIROL HAIR COLOR BATH. A MISS CLAIROL TOUCH UP BRINGS A NEW AND LOVELY LOOK TO YOUR HAIR, COVERS DRABNESS FROM GREY OR TOO MUCH SUN. IF YOU'VE THOUGHT OF TRYING A COLOR, THIS IS THE TIME. ONE-COLOR *SPECIAL* $6.50. (Attachment 17.)

Clearly, it is the purpose of these advertisements to sell Clairol to the prospective consumer. As the examiner aptly stated, the pitch of such advertisements is directed to the product rather than to the application.[4]

The correspondence between Clairol and certain of its beauty salon customers further supports the finding that the purpose of the advertising is to enable the particular beauty salon to sell Clairol products. The correspondence makes it clear that this is the understanding of both the cooperating beauty salons and Clairol. For example, by letter of October 23, 1962, the advertising and publicity director of Charles of the Ritz, writing to Clairol, states:

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[4] Certain advertisements do make a reference to the skill and artistry of the salon's hair colorist. For example, a cooperative advertising with Charles of the Ritz states in pertinent part:

> *"CLAIROL MAKES BLONDES TO ORDER!*
> . . . aided and abetted by our Mr. Gerald. Be your own blend of blonde . . . or almost any other hair color in the spectrum . . . with a custom blend shade of Miss Clairol. Mr. Gerald, master hair colorist, will lovingly create a very particular shade to suit your personality or change it! For a most exciting fashion marriage of Clairol hair color and Charles of the Ritz styling. You must meet Mr. Gerald. Consultations are complimentary . . . ." (Attachment 34.)

Here the advertisement does recognize the expertise of the hair stylist, but equally prominent is the appeal to the customer to go to the salon and ask for Clairol. In other words, while the advertisement does give recognition to the skill and artistry of the hair colorist, the advertisement is expressly concerned with selling respondent's product to the consumer.

How astray the best laid plans do get, for it was last Spring that I most sincerely intended to meet with you and discuss a cooperative advertising program.

Now I really mean it, particularly in the light of the fact that we have employed a most marvelous hair colorist in our Chicago salon. . . . and we feel *he can make many new friends for both Clairol and ourselves given some advertising exposure.* (Emphasis supplied.)

Here, clearly, the salon recognizes it is the purpose of the advertisements to sell Clairol cooperatively by a joint appeal to the desirability of the product and the virtues of the particular hair styling colorist.

This is also documented by correspondence from Clairol to certain beauty salon customers, indicating that in the particular case the amount of cooperative advertising money to be paid was to be determined on the basis of the amount of the product purchased.[5] In some cases it was based on a percentage of annual sales. If Clairol advises its customers that advertising monies to be made available are a function of the purchases made by the customers on an annual or some other basis, it is clear Clairol did not intend to merely get general advertising exposure but that it expected the particular salon receiving advertising monies to sell respondent's hair coloring preparations to its customers in the course of hair coloring treatments. In short, it is clear Clairol intended that beauty salon operators, aided by these advertisements, sell or distribute its hair coloring products to the consumer.

This is further documented by the fact that respondent insists that Clairol's message be prominently featured in any cooperative advertising. For example, one beauty salon customer was advised by Clairol:

As I told you we require the Clairol name appear prominently in the caption and that we will want to see a proof of the ad prior to insertion . . . . (Attachment 66.)

The conclusion that the advertisements are designed to induce customers to ask for, and pay for, Clairol products in the salons must also be drawn from the copy requirements for Clairol advertising. For example, respondent insists that the name Clairol must appear in the headline of every ad, that it must be carried in a size and weight of type at least equal to the rest of the headline and that Clairol ads must feature a salon service with a Clairol product and that it must be clearly an ad which sells the service incorporating respondent's product, explaining what it is, and of-

[5] For example, see Attachment 65 and Attachment 70.

fering promise of beauty results. Mere mention of the Clairol service is not sufficient.[6] If a permanent wave special is included in the advertisement, respondent required that it must be a subordinate offer and occupy no more than 25 percent of the Clairol ad space and, further, that prices for Clairol services offered in the advertisements are not to be made to appear at a price disadvantage as compared to other services listed in the ad. Thus, the price of the permanent wave special may not be lower than that for a Clairol coloring service listed.[7]

On the basis of these facts, the determination must be made whether Clairol's payments for the newspaper advertising of the type outlined above come within the scope of Section 2(d) of the Clayton Act, as amended. Essentially, Section 2(d) provides that it shall be unlawful for a seller to make payments in consideration for services or facilities furnished by or through a customer in connection with the processing, handling, sale or offering for sale of any products sold by the vendor unless such payments or consideration are made available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.[8] Clearly, the cooperative advertising under consideration here is a service or facility furnished in connection with the processing, handling, sale or offering for sale of Clairol's products. The question remaining is: Do the favored and nonfavored beauty salons compete in the distribution of these products and commodities?

There is no precedent directly in point. Counsel for both sides, however, have been diligent in searching for decisions which may have a bearing on the problem under other sections of the Robin-

[6] An exception is made in the case of advertisements announcing the opening of a beauty salon but even here, while more weight may be given to the event involved, at least 50 percent of the ad should be about hair coloring and Clairol should be in the headline.

[7] The stipulation in the copy requirements to the effect that cooperative advertisements are to be scheduled only to promote Clairol products used professionally in the salon but "not to promote Clairol products for resale to the consumer" does not vitiate the finding on the basis of Clairol's copy requirements as a whole that the advertisements are designed to induce consumers to purchase hair preparations included in the salon's beauty treatments. Clairol's labeling of the beauty salon's handling of the product as a "use" as distinguished from a "resale" to consumers cannot be permitted to obscure the realities of the situation apparent from the record as a whole.

[8] The requirements of Section 2(d) as set forth in the text of the statute are the following:

"That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

son-Patman Act and the Federal Trade Commission Act—cases dealing with seller's liability for product defects, the Fair Labor Standards Act, and even the narcotics statutes. A review of the cases cited by both sides compels the conclusion that, with the exception of the Supreme Court decision in *Corn Products* v. *Federal Trade Commission,* 324 U.S. 726 (1945), none of the precedents relied on by either side has sufficient bearing on the problem with which we are confronted here to be decisive. Precedents dealing with statutes covering problems not within the scope of the legislation under consideration in the particular case must be interpreted with caution. As the Supreme Court held:

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. . . . *Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349, 353 (1941).

We turn first to the Fifth Circuit's decision in *Sidney J. Mueller* v. *United States,* 262 F. 2d 443 (5th Cir. 1958), ruling on a district court action for violation of a Commission order prohibiting deceptive claims for baldness cures. In that precedent, both sides apparently find some support for their position. Respondent relies on this case to support its position that beauty care treatments involve solely the sale of a service. Complaint counsel, on the other hand, cites the case for the proposition that although a service is performed by the salon as part of the overall transaction with the customer, this does not preclude a finding that respondent's products were sold in the course of being incorporated into hair care treatments. In fact, the *Mueller* case does not lay down any hard and fast rules on whether products dispensed in connection with hair care treatments are to be regarded as simply part of the service or whether they are also to be regarded as sold to the consumer receiving the treatment. Ruling on defendant's claim of immunity under the Federal Trade Commission Act on the ground that he advertised treatments and not products, the court held:

> . . . Here, however, we do not have to draw any fine distinction between the sale of a service and the sale of a product along with a service. In this case the advertisements show that Mueller represented the chief thing he had to offer was the miraculous effect produced by his cosmetic preparations. The sale of the office treatment was a transaction where an appreciable part of the consideration for the service was a payment for the material. . . . (262 F. 2d, *supra* at 448.)

Clearly, the court does not purport to definitively spell out criteria for determining whether a transaction is to be considered a sale under the Federal Trade Commission Act or any other stat-

ute. The decision does stand for the proposition that the determination of whether a transaction constitutes a sale of a product must be decided on the basis of all the surrounding circumstances in the particular proceeding, and it is on the basis of the facts in this case that the question of the coverage of Section 2(d) must be decided here.

Respondent also relies on a number of products liability cases to sustain its position that beauty salons do not sell hair coloring preparations when they are distributed to customers in the course of beauty treatments. These cases, involving issues quite different from those involved here—such as privity, implied warranty, and a balancing of risks between vendor and vendee—are of no assistance in determining whether the transactions under consideration in this case meet the criteria of Section 2(d) of the Robinson-Patman Act, as amended.[9]

Similarly, respondent's citation of dicta in various cases under the Fair Labor Standards Act that beauty parlors and barber shops are service establishments under the terms of that statute, does not afford persuasive support for respondent's position in this case. None of these cases throw light on the issue of what criteria govern the determination of whether a particular transaction is to be considered a sale or the performance of the distributive function.[10]

[9] The rationale in these cases involving claims for injuries arising out of the use of hair coloring preparations or blood transfusions have no application here. For example, in *Perlmutter* v. *Beth David Hospital*, 308 N.Y. 100, 123 N.E. 2d 792 (1954), the decision that a hospital does not give its patients an implied warranty for blood was evidently to a considerable degree governed by the court's aversion to holding a hospital as an insurer. Consequently, the holding that a blood transfusion is not to be construed as a sale has little pertinence here. This is particularly the case where the decision turns on express recognition of the fact that the art of healing calls for a balancing of risks and that absent negligence, liability should not be imposed upon institutions seeking to assist or save patients. Nor can we be governed by a decision of the Court of Common Pleas of Connecticut, in *Epstein* v. *Giannatasio*, 25 Conn. Sup. 109, 197 A. 2d 342 (1963), which relied on *Perlmutter* to some extent, holding that a beauty treatment was not the sale of a product within the terms of the Uniform Commercial Code as adopted by the State of Connecticut. The third products liability case cited by respondent, and which also involved Clairol, did not involve a suit against a beauty salon, the court merely ruling in that proceeding that wholesalers or distributors of hair preparation products could be held on the basis of implied warranty and that privity of contract in the ordinary sense was not necessary to establish liability in such cases. *Graham* v. *Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d. 413 (Sup. Ct. Kan. 1954).

[10] This is evident simply from an examination of the factual issues facing the courts in these cases. For example, in one case the court decided that the services of a building engineer and similar employers were vital to the production of the goods of tenants in a building and therefore such employees came within the scope of the Fair Labor Standards Act and that the business of leasing a building was not a service establishment exempt from the requirements of the Act. *Fleming* v. *Kirshbaum Co.*, 124 F. 2d 567 (3d Cir. 1941), *aff'd, sub nom., Kirshbaum Co.* v. *Walling*, 316 U.S. 517 (1942). Similarly, in *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W.D. Tenn. 1940), another case relied on by respondent, the court held a night watchman was engaged in production of goods for

Finally, we turn to the cases under the Robinson-Patman Act cited in this appeal.[11] The case most directly in point is the Supreme Court's decision in *Corn Products Refining Co.* v. *Federal Trade Commission,* 324, U.S. 726 (1945), ruling on a similar issue under Section 2(e), which has been recognized as the companion provision to Section 2(d) of the statute.[12] That decision, ruling squarely on the question of whether processing in connection with the handling of a product precludes the finding under Section 2(e) of a resale of that product, is decisive here.

The facts in the *Corn Products* case parallel in many respects the factual situation in this proceeding. In this connection, Corn Products was charged with violating Section 2(e) by advertising expenditures made for the Curtiss Candy Company in order to promote the sale of dextrose or corn sugar for use in candy manufacture. For this purpose, Corn Products, in the years 1936 to 1939, advertised Curtiss candy as "rich in dextrose." At the same time, Curtiss, in its own advertising, described its candy as being rich in dextrose and also made statements to that effect on its labels. The Court held, in connection with the advertising for which Corn Products paid, that the Commission could properly

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commerce within the meaning of the Fair Labor Standards Act of 1938 and that a cement and gravel company was not a service or retail establishment within the meaning of the Act. In the third case cited by respondent, *Stucker* v. *Roselle,* 37 F. Supp, 864 (W.D. Ky. 1941), the court held a hat cleaning business to be a service establishment coming within an exception to the Act.

[11] Respondent places considerable reliance on *General Shale Products Corporation* v. *Struck Construction Co.,* 132 F. 2d 425 (6th Cir. 1942), *cert. denied, 318 U.S. 780* (1943), which involved a treble damage action under Section 2(a) of the Robinson-Patman Act. In that suit, a building materials manufacturer alleged unlawful price discrimination in the sale of brick to a municipal agency as well as a conspiracy to discriminate by a contractor and a brick manufacturer. In the course of the construction job, the contractor was to supply the necessary brick at a specified price. Respondent contends the holding of the court in *General Shale* that there was no sale of brick but, rather, that the facts disclosed a service agreement and not an arrangement for the transfer of chattels or sale of personal property, is dispositive here. That case, however, is not decisive in our consideration of the issue of whether beauty parlors distribute Clairol's beauty preparations within the meaning of Section 2(d). The circumstances surrounding the transactions alleged unlawful here and the facts of *General Shale* are obviously distinguishable. *General Shale* simply did not deal with the problem of determining whether there was a resale or distribution by the customer to third parties. The court had before it one transaction and not a course of dealing, as in this case, indicating that both seller and purchaser looked upon the latter as part of the former's system of distribution. As a result, the court's decision has no bearing on the weight to be given the advertising arrangements here in effect, which indicate that it was the parties' intent to view the critical transactions involving the beauty salons and the consumers as a sale. This evidence indicating that Clairol viewed the beauty salons as part of its chain of distribution we view as crucial.

[12] In this connection, respondent has brought to our attention the comment that both provisions are: "reciprocal bans of coextensive scope irrespective of minor textual variations." (See Rowe, *Price Discrimination Under The Robinson-Patman Act,* p. 390 (1962).) And, as the Report of the Attorney General's National Committee To Study the Antitrust Laws (1955) has stated, at page 189, minor discrepancies in the twin provisions were ironed out by the courts in order to resolve the two subsections into a harmonious whole.

infer that it "contemplated the offering for sale of the candy by Curtiss."

Among other contentions, Corn Products argued that the advertising arrangement was not forbidden because it was not made with Curtiss Candy Company as a purchaser of a commodity bought for resale with or without processing within the meaning of the statute. It was the contention of Corn Products that, although Curtiss purchased dextrose from it, the processing and combination with other ingredients resulted in candy, an entirely new commodity, which the candy manufacturers then sold. On that basis Corn Products argued there could be no resale of dextrose within the meaning of Section 2(e).

The Court held that in view of the purpose of the statute to prevent the enumerated discriminations attending the sale of a commodity for resale, the precise nature or extent of the processing before resale is immaterial, stating:

> . . . The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased and resold. (324 U.S., *supra* at 744.)

In short, the Supreme Court, looking to the intent of the parties evidenced by the advertisements and the purpose of the statute to assure equality to a vendor's customers, held that Curtiss was a purchaser for resale within the contemplation of Section 2(e). Since Curtiss was a purchaser for resale, it is obvious that the Court must have found that, in fact, under these circumstances the candy manufacturer had resold dextrose even though after processing it had assumed an entirely different form. Clearly, the Court, in construing the factual prerequisite for a finding of "resale" under Section 2(e), refused to frustrate the purpose of the statute, which is to prevent discriminations attending the sale of a commodity by an overly technical definition of that term.

Under the analogous facts here, the Commission, too, must find a resale, as did the examiner.[13] First, the cooperative advertising, as noted above, was meant to sell Clairol's hair coloring products to the customer. The fact that the product was processed or decharacterized is, under the holding of the Supreme Court in *corn Products,* Immaterial to the question of whether, in fact, a resale

[13] Although we find that the transactions here are a "resale" under the holding of *Corn Products* and therefore satisfy the requirements of the term "distribution" in Section 2(d), this, of course, does not mean that for Section 2(d) to apply there must necessarily be a "resale" in all cases. We merely hold here that once the Commission finds that a transaction may be equated with a resale, it necessarily satisfied the requirement of distribution under Section 2(d).

occurred. The production of candy is analogous to the hair coloring service performed in the beauty salons purchasing Clairol's hair coloring products. Under the logic of respondent's argument, however, the Supreme Court, in *Corn Products*, should therefore have ruled there had been no resale of dextrose since that ingredient became lost in Curtiss' manufacture of candy. The Supreme Court, of course, expressly refused to adopt that rationale in *Corn Products*. In order to construe the two companion provisions, Sections 2(d) and 2(e), in conformity to each other, the Commission, too, will avoid frustrating the purpose of the Act by a hypertechnical definition of the Term "sale" but, rather, will, as the Supreme Court in *Corn Products*, look to all the surrounding circumstances and the purpose of the statute to determine whether a resale has taken place. Applying that test, the challenged advertising payments are necessarily within the scope of Section 2(d).

Respondent seeks to distinguish the facts of this proceeding from those in *Corn Products* on the ground that the beauty salons who are Clairol's customers did not resell respondent's hair coloring preparations even as components. In this connection, respondent argues that the distribution of the products sold to the beauty salons comes to rest within the salons "when they open the bottles, pour out the contents, mix, blend, alter and chemically decharacterize them. [And that] Respondent's products cease to exist while still in the hands of the salon and become incapable of being further redistributed." [14] Relying heavily on the fact that the products had become "decharacterized," respondent argues there can be no redistribution and therefore the *Corn Products* doctrine cannot apply.[15]

Respondent's contention cannot be reconciled with the holding of the Court in *Corn Products*, which, as noted above, held precisely that the processing of a product, whether it results in little or much alteration in the nature of a product, does not preclude a finding that the product has subsequently been redistributed or resold. Further, respondent's argument is simply not consonant with the realities of the situation as documented by this record. It would have the commission segmentize the transaction between Clairol and its beauty salon customers into two distinct phases: the first, sale of the preparation to the beauty salon brought to a

[14] Respondent's appeal brief, p. 10.

[15] If the Supreme Court properly held that candy embodying the ingredient dextrose was a resale of the dextrose, certainly then logic compels us to hold that here, where the ingredients of the hair coloring preparations are far more apparent to the customers, there is, *a fortiori*, a resale of Clairol's products.

termination by pouring the product out of its bottle and whatever chemical changes then take place at that time; and, the second, a completely distinct phase, beginning with service to the customer once the processing of the product has begun. This abstruse argument simply cannot be reconciled with the holding of *Corn Products*. Further, it is completely at variance with the actual intent of the parties, as noted above, which obviously contemplated a movement of hair preparations from respondent through the beauty salon to the heads of the consumers, generated by the cooperative advertisements directed to consumers, which are the subject of this proceeding.

Finally, respondent contends that the explicit inclusion of the phrase "use and consumption" in Section 2(a), which prohibits price discriminations to different purchasers where such commodities are "sold for use, consumption or resale", governs the outcome of this issue. For the reasons stated above, we have found that the hair preparations in question were not sold to beauty salons by Clairol merely for use or consumption; rather, they were sold for resale or distribution. The mere inclusion of those terms in Section 2(a), of course, cannot be determinative of whether the customer distributes within the meaning of Section 2(d) without reference to the facts of the particular case. It might be noted, moreover, that the inclusion of these terms in Section 2(a) compels the conclusion that an overly technical rule for deciding what transactions come within the category of resale or distribution under Sections 2(d) and 2(e) would clearly negate an important objective of these two sections, which is to prevent evasion of Section 2(a) by hidden or indirect price discriminations. Sections 2(c), 2(d) and 2(e) were drafted as unqualified prohibitions of a number of discriminatory practices without certain of the defenses applicable under Section 2(a) simply to give sellers an incentive to confine discriminations to price differentials coming within that section of the Act. See *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959). Accepting respondent's argument that the question of distribution or resale under Section 2(d) and 2(e) is to be governed by a concept such as decharacterization would give a very restricted meaning to the terms "resale" or "distribution" under those sections. In effect, sellers would be afforded a haven from the proscription of Section 2(a) by virtue of such an unrealistic appraisal of such transactions. Congress intended precisely the opposite, namely, that sellers should be encouraged to keep their discriminations out in the

open where they can be readily appraised under Section 2(a). The result urged by respondents would nullify the legislative scheme envisaged by Congress. Simply by changing the label of the transaction and relying on an overly simplified construction of the statute, the Act could be readily evaded.

The remaining issue on appeal relating to the coverage of the Act is whether a failure to make available promotional payments to wholesalers whose customers compete with direct purchasers receiving such payments is actionable under Section 2(d). A decision on this issue is not decisive on the question of whether an order should issue. Actionable discriminations between customers purchasing directly from Clairol are documented on this record, both with respect to cooperative advertising payments to beauty salons and to payments for push money and demonstrators to Gray Drug Stores in Cleveland, Ohio.[16] Nevertheless, an expression of the Commission's views on this subject is required in the light of two recent decisions by the Ninth Circuit, namely, *Fred Meyer, Inc.* v. *Federal Trade Commission,* 359 F. 2d 351 (9th Cir. 1966), and *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694 (1964). We recognize that the decision of the Ninth Circuit in those cases sustains the position of respondent on this point and, if upheld, will prevent further action by the Commission under Section 2(d) to ensure equality of treatment with respect to promotional payments for a wholesaler and his customers who compete with direct buying retailers receiving such payments. The Commission nevertheless believes that in veiw of the importance of this issue it should adhere to the position originally taken in its decision in *Fred Meyer, Inc.,* Docket No. 7492 (1963), *modified,* 359 F. 2d 351 (9th Cir. 1966) [63 F.T.C. 1]. There we held that the statute is applicable to actual competitors without limitation by differences in the functional levels at which they operate. This construction of the statute, we believe, is in accordance with the language of the Act, is necessary to effectuate the Congressional purpose in enacting it, and is supported by the decision in *Krug* v. *International Telephone & Telegraph Corp.,* 142 F. Supp. 230, 236 (D.N.J. 1956). In this connection, we note again that Section 2(d) speaks of competition

[16] It is only in the case of the promotional payments amounting to 5% of the purchases made available to Clairol's direct purchasing chain drug store customers in the Baltimore, Washington and Philadelphia areas but not made available to wholesalers whose customers compete with such favored customers where a ruling granting respondent's appeal and reversing the hearing examiner on this point would preclude the imposition of a cease and desist order. The initial decision fully covers this promotion as well as the payments to Gray Drug Stores and there is no need to again go over that ground in this opinion.

in the distribution of products and not merely of their resale. A narrower construction of the statute would inevitably lead to inequitable discrimination and place in peril the entire structure of independent food merchandising, including the traditional wholesaler and his numerous small retailer customers who would be placed completely outside the pale of the Act insofar as their competition with direct buying chains is concerned. As we noted heretofore, in *Fred Meyer*, it would conflict with economic reality to apply the prohibitions of Section 2(d) to direct buying retailers only and to ignore the fact that wholesalers compete in redistribution with integrated chains and that customers of such wholesalers compete with direct buying chains on the retail level. It would be a strange result where, as a practical matter, in this case and in other cases the protection of the statute would be applicable only to the chains but denied their smaller competitors. In view of the importance of the issue, the Commission has requested the Solicitor General to file a petition for certiorari in the Supreme Court on this point in *Fred Meyer*. In the meantime, we will adhere to our earlier ruling on this issue announced in that case.*

In addition to its contention that the statute does not apply to the discriminations documented in the record, Clairol asks the Commission, as a matter of discretion, to dismiss that phase of the proceeding relating to payments of push money and for demonstrations to Gray Drug Stores of Cleveland on the basis of discontinuance. We have reviewed the record on this point and are unable to conclude that the unlawful practices have been surely stopped or that a dismissal is warranted because of unusual circumstances. As respondent itself admits, it was aware of the Commission's investigation prior to terminating these payments. The fact that the Gray situation was not brought to respondent's attention in connection with this investigation and that respondent was unaware of the Commission's knowledge of the Gray allowances until it received the complaint herein is immaterial. Respondent was well aware of the statutory areas involved in the investigation. As a result, the Commission, rather than accepting Clairol's contention that such discontinuance had been entirely spontaneous, would be equally justified in inferring that the abandonment was timed to anticipate the Commission proceeding in this matter. No justification has been shown for a dismissal of the

* Commissioner Elman did not concur in the request to the Solicitor General asking him to file a petition for a writ of certiorari for the Commission in *Fred Meyer*.

proceeding as far as the Gray payments are concerned on that basis. See *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 333 (1952).

The question remaining is whether the order should be modified. Respondent would have the order limited specifically to the violations of law documented by the record as well as to the trade channel in which it occurred. In this case, it appears that the public interest can be safeguarded and resumption of these practices and like practices adequately prohibited by provisions directed specifically against discriminatory payments to customers in the particular channels of trade involved in this proceeding, namely, beauty salons and retailers selling Clairol's preparations to the consumer for home use. There is some justification for limiting the order in this fashion in the case of the discriminatory promotional payments to beauty salons and in application of the requirement in *Fred Meyer* that payments be made available to wholesalers whose customers compete with direct buying retailers. The application of the Act to situations of this nature is not of such long standing as other discriminations hitherto prohibitied under Section 2(d). Further, since the record on the basis of this stipulation necessarily gives us an insight only into Clairol's merchandising of hair care preparations, the application of this order will be limited to those products.

In this connection, the cease and desist order will specifically prohibit discriminatory promotional payments to customers engaged in the resale of respondent's hair care products to consumers for home use as compensation or consideration for services or facilities furnished in connection with the processing, handling, sale or offering for sale of respondent's products. The services furnished by Clairol's retailer customers selling respondent's products to consumers for home use, for which discriminatory payments were made, were not so novel so as to justify limiting the prohibition's scope to services of sales employees or demonstrators, or promotional services rendered within the store. The order will specifically prohibit in this connection, as respondent suggests, by an additional paragraph, payments for promotional services to such direct buying retailers unless such payments are available on proportionally equal terms to all other customers of respondent reselling such products to persons competing in the distribution of such merchandise with those of respondent's retailer customers to whom promotional payments have been made.

The order will be specifically directed against discriminations

in respondent's payments for cooperative advertising to Clairol's beauty salon customers. The order will expressly prohibit payments for advertising services in connection with hair care products distributed by beauty salon customers to consumers in the course of hair care treatments unless such payments are made available on proportionally equal terms to all other customers of respondent competing in the distribution of hair care products in the course of such treatments. An additional paragraph, in accordance with respondent's suggestion, will expressly prohibit payments of this nature unless they are also available on proportionally equal terms to all other customers who resell such products of respondent to persons competing with those customers to whom such payments were made.

Accordingly, respondent's appeal is denied except to the extent set forth herein and the initial decision of the hearing examiner, as modified and supplemented by this opinion, is adopted as the decision of the Commission. An appropriate order will issue.

Commissioner Elman dissented.

FINAL ORDER

This matter is before the Commission on respondent's appeal from the initial decision of the hearing examiner and upon briefs and oral argument in support of such appeal and in opposition thereto. The Commission has determined, for the reasons stated in the accompanying opinion, that respondent's appeal should be denied except to the extent noted therein, that the order of the hearing examiner should be modified, and that the initial decision, as modified and supplemented by the accompanying opinion, shall be adopted as the decision of the Commission. Accordingly,

It is ordered, That the order entered by the hearing examiner in his initial decision filed July 16, 1965, shall be modified to read as follows:

It is ordered, That respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith:

1. (a) Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers as compensa-

tion or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of respondent's products unless such payment or consideration is available on proportionally equal terms to all other retailer customers of respondent competing with the favored retailer customer in the distribution of such products to the consumer for home use.

(b) Cease and desist from making or contracting to make any such payment to or for the benefit of any such retailer customer unless such payment is available on proportionally equal terms to all other customers of respondent who resell such products of respondent to retailers who compete with the favored retailer customer in the resale of respondent's hair care products to consumers for home use.

2. (a) Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products unless such payment or consideration is available on proportionally equal terms to all beauty salon customers of respondent competing with the favored customer in the rendering of hair care services and the use of respondent's hair care products.

(b) Cease and desist from making or contracting to make any such payment to or for the benefit of any such customer unless such payment is available on proportionally equal terms to all other customers of respondent who resell such products of respondent to beauty salons who compete with the favored customer in the rendering of hair care services and the use of respondent's hair care products.

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

It is further ordered, That respondent, Clairol Incorporated, a corporation, shall, within sixty (60) days after service upon it of

this order, file with the Commission, a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Elman dissenting.

IN THE MATTER OF

WILLIAM D. YARNELL doing business as NATIONAL ALUMINUM COMPANY

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

Docket C-1076. Complaint, June 24, 1966—Decision, June 24, 1966

Consent order requiring a Columbia, S.C., dealer in aluminum siding and related home improvement products to cease using fictitious pricing and savings claims, misrepresenting payment of commissions, source of products, business affiliation, and maintenance of such products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that William D. Yarnell, an individual trading and doing business as National Aluminum Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, William D. Yarnell, is an individual trading and doing business under the name of National Aluminum Company, with his principal place of business located at 2200 Main Street, in the city of Columbia, State of South Carolina.

PAR. 2. Respondent is now, and for some time last past been, engaged in the advertising, offering for sale, sale and distribution of aluminum siding and related home improvement products to the public.

PAR. 3. In the course and conduct of his business, respondent