

## 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 participated in the formulation, direction and control of the policies of said corporation in connection with the acts and practices hereinafter set forth. The address of respondents Leon Potash and Henry D. Cohen is 19 West 61st Street in the city of New York, State of New York. The address of respondent Benjamin W. Lerner is 362 Brookway Road, in the city of Merion, State of Pennsylvania. The address of respondent Sylk is 400 Bryn Mawr Avenue, in the city of Bryn Mawr, State of Pennsylvania.

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

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

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

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

1. *Designation:* Vitasafe Capsules for Men.

*Formula:*

|                               |                  |
|-------------------------------|------------------|
| Vitamin A .....               | 12,500 USP Units |
| Vitamin B <sub>1</sub> .....  | 5 mg.            |
| Vitamin B <sub>2</sub> .....  | 2.5 mg.          |
| Vitamin B <sub>6</sub> .....  | 0.5 mg.          |
| Vitamin B <sub>12</sub> ..... | 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.           |

933

## Complaint

|  |          |
|--|----------|
| Rutin .....                                | 10 mg.   |
| Sodium Caseinate<br>(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 <sub>1</sub> .....     | 5 mg.            |
| Vitamin B <sub>2</sub> .....     | 2 mg.            |
| Vitamin B <sub>6</sub> .....     | 0.5 mg.          |
| Vitamin B <sub>12</sub> .....    | 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 hereinaabove set forth are the following:

933

## Complaint

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.

## Complaint

69 F.T.C.

\* \* \* \* \*

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<sub>1</sub> (Thiamine Mononitrate), Vitamin B<sub>2</sub> (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,



933

## Initial Decision

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

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

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

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

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 15, 1965

*Summary*

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

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

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

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

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

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

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

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

#### *Informal Consolidation of Two Proceedings*

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

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

*Respondent Advertising Agency (Prior Dismissal)*

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

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

*Advertising Agency's Officer Sackheim (Prior Dismissal)*

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

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

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

*Respondent Cohen (Prior Dismissal Denied)*

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

*Other Respondents (Including Sylk and Lerner)*

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

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

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

There are two others, as follows:

|        |         |
|--------|---------|
| Lerner | D. 8636 |
| Sylk   | D. 8636 |

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

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

*Hearings Authorized for Two Cities*

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

*Prehearings. Discovery*

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

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

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

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

#### *Waiver of Medical Rebuttal by Respondents*

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

#### *Continuances*

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

