briefs in support thereof and in opposition thereto; and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal, and having modified the initial decision to the extent it is contrary to the views expressed in said opinion:

It is ordered, That the following order be, and hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondents, The Lafayette Brass Manufacturing Company, Inc., and The Durst Manufacturing Company, Inc., both corporations, and their officers, and respondents, Pauline D. Kohn and Norman Redlich, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the word "Manufacturing" as part of the corporate or trade names of corporate respondents unless in immediate connection and conjunction with each such name a clear and conspicuous disclosure is made that such corporation is primarily a distributor and assembler of the products it sells.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent David Durst.

It is further ordered, That respondents, The Lafayette Brass Manufacturing Company, Inc., The Durst Manufacturing Company, Inc., Pauline D. Kohn and Norman Redlich, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

In the Matter of

MYTINGER & CASSELBERRY, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket 6962. Complaint, Nov. 26, 1957—Decision, Sept. 28, 1960

Order requiring the nation's largest direct seller of vitamin and mineral food supplements, with main office in Long Beach, Calif., to discontinue making and enforcing unlawful exclusive-dealing agreements with distributors of its "Nutrilite Food Supplement"; canceling contracts of distributors who did not rigidly adhere thereto; and enforcing requirements that distributors, for a two-year period following termination of contracts, not sell their customers any other vitamin-mineral product; and to cease representing falsely, directly and through its distributors, that a consent decree issued by a U.S.

District Court permanently enjoining it from making false claims concerning said "Nutrilite", amounted to endorsement and approval of the product by the U.S. Government, the U.S. District Court, and the Food and Drug Administration; that the allowable claims listed in said decree could be applied only to its product, etc.

Mr. Fredric T. Suss for the Commission.

Rhyne, Mulin, Connor & Rhyne, by *Mr. Charles S. Rhyne*, *Mr. Eugene F. Mullin, Jr.*, and *Mr. W. Dean Wagner*, of Washington, D.C., and *Mr. J. E. Simpson*, of Los Angeles, Calif., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

The complaint in this proceeding alleges that the respondents are and have been, for many years, engaged in the purchase, sale and distribution of a vitamin-and-mineral preparation known as Nutrilite Food Supplement. This food supplement is described as an encapsulated concentrate of alfalfa, watercress and parsley, to which synthetic vitamins are added and which is combined a package with mineral tablets. This product is sold by respondents to approximately 20,000 distributors throughout the United States, who in turn sell it directly to consumers by house-to-house canvassing. In 1956, respondents' total sales approximated $26,000,000, and exceeded in volume the sales of any of respondents' competitors likewise selling vitamin-and-mineral food supplements, by the method of house-to-house canvassing. The specific charges against the respondents are separated in the complaint into three counts.

Count I of the complaint charges that the respondents' sales to their distributors are made on the condition, agreement or understanding that the purchaser thereof shall not sell or otherwise distribute any other vitamin or mineral product of a competitor. As a result of this restrictive agreement, the complaint alleges, the competitors of respondents have been and are now unable to make sales of similar products to respondents' customers, which otherwise could have been made. The complaint further alleges that the customers of respondents have been prevented by respondents' restrictions from purchasing similar vitamin and mineral products at lower prices or upon more favorable terms than those granted by respondents. Count I of the complaint concludes that the effect of such conditions, agreements or understandings" * * * may be to substantially lessen competition in the line of commerce in which respondents are engaged, and in the line of commerce in which the customers and purchasers of respondents are engaged, and may be to tend

to create a monopoly in respondents in the line of commerce in which respondents have been and are now, engaged.", in violation of the provisions of § 3 of the Clayton Act.

Count II of the complaint alleges that the respondents have employed and are now employing threats of cancellation of their contracts with their distributors, and are cancelling such contracts, unless their distributors rigidly adhere to their exclusive-dealing contracts with respondents. Count II further alleges that respondents have threatened and are threatening to enforce, and are actually enforcing, the provisions of their contracts with their distributors, which provide that they shall not, for a period of two years following the termination of such contracts with respondents, solicit the sale of or attempt to sell to their former customers any vitamin or mineral products other than respondents'. Count II of the complaint concludes that the effect of such threats and actual enforcements of the above-described agreements.

(1) has a tendency to make respondents' distributors subservient to respondents' wishes and will as to the conduct of their business, lest said distributors be subjected to the onerous and oppressive provisions of said contracts, to the prejudice of competitors of respondents' customers and purchasers of respondents' products and of the public;

(2) has a tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of vitamin and mineral products in commerce; and

(3) constitutes unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of § 5 of the Federal Trade Commission Act.

Count III of the complaint alleges that respondents have, directly and by implication, falsely represented, and have caused and are now causing their distributors to make false representations, as follows:

(1) that a consent decree of injunction issued by the United States District Court for the Southern District of California amounted to an endorsement and approval of Nutrilite Food Supplement by the United States Government, the United States District Court, and the Food and Drug Administration;

(2) that the allowable claims contained in the above-described injunction applied only to Nutrilite Food Supplement and to no other vitamin or mineral supplement product; and

(3) that no other seller of vitamin or mineral food supplement products has a right to submit its promotional literature to the Food and Drug Administration for inspection and comment.

Count III concludes that the use by the respondents of the aforementioned false representations has had and now has a capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were and are true and into the purchase of a substantial number of respondents' products because of such erroneous and mistaken belief, with the result that trade in commerce has been unfairly diverted to the respondents from their competitors, and injury has thereby been done to competition in commerce. Count III concludes, further, that respondents' acts and practices, just described, have the tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of vitamin and mineral products in commerce, and have a tendency to obstruct, and have obstructed and restrained such commerce, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce, within the intent and meaning of § 5 of the Federal Trade Commission Act.

THE ANSWER

On February 6, 1958, respondents submitted their answer, in which, in addition to other statements, they denied that they have in any manner violated the Clayton Act, the Federal Trade Commission Act, or any other law of the United States. Respondents further deny that the Commission has reason to believe that they have violated any of the above-mentioned statutes, and specifically deny that the Commission has sufficient information in its files to justify the issuance of the complaint herein.

THE HEARINGS

Subsequent to the submission of respondents' answer, hearings were held, at which evidence was presented in support of the complaint, in Los Angeles, California; Chicago, Illinois; Detroit, Michigan; and Washington, D.C. Thereafter hearings were also held on behalf of respondents, in Los Angeles, California, and in Washington, D.C.

RULING ON PROPOSED FINDINGS

Proposed findings as to the facts and proposed conclusions, and replies thereto, were thereafter submitted by both counsel supporting the complaint and counsel for the respondents. Each of such proposals has been separately considered by the hearing examiner, and those accepted have been adopted and embodied in substance herein. All other proposed findings as to the facts and all other proposed conclusions are hereby rejected.

The hearing examiner, having considered the entire record herein, now finds the relevant facts and conclusions warranted thereby to be as hereinafter set forth.

FINDINGS AS TO THE FACTS

Identity of Respondents:

Mytinger & Casselberry, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located in the city of Long Beach, Calif. Respondent William S. Casselberry is president of the corporate respondent, and Respondent Lee S. Mytinger is secretary-treasurer thereof. Both of these individuals have at all times controlled and directed the policies and practices of the corporate respondent.

Respondents' Product and Method of Distribution:

Respondents are now and for many years have been engaged in the purchase, sale and distribution in commerce, among and between the several States of the United States, of a product known as Nutrilite Food Supplement.

Nutrilite is a multiple-vitamin mineral dietary food supplement composed of an encapsulated concentrate of alfalfa, watercress and parsley, to which synthetic vitamins have been added, and which is combined in a package with mineral tablets. Since 1945 the respondent corporation has purchased the entire production of Nutrilite from the producer thereof, Nutrilite Products, Inc., of California. Respondents sell Nutrilite to distributors only. Such distributors are located throughout the United States, and they, in turn, sell to other distributors and to the consuming public. The distributors of Nutrilite sell this product exclusively by house-to-house canvassing, as distinguished from retail sales through drugstores and other over-the-counter sales.

Respondents designate their distributors of Nutrilite Food Supplement as "sponsors", "agents", "key agents" and "group heads". All distributors are under contract to the corporate respondent. Direct sales are made, however, by the corporate respondent to certain favored distributors, who are designated as "key agents" or "group heads". As of December 31, 1958, there were 1,420 individual distributors who were thus privileged to purchase directly from the corporate respondent. During the same period the total number of individual distributors was 80,700. Respondents' product is distributed to their key agents and group heads from their warehouses in Long Beach, Calif., and Joliet, Ill.

Respondents' Restrictions Upon Their Distributors:

Although, as we have stated, the corporate respondent sells Nutrilite directly to a relatively small group of its leading distributors, all distributors, regardless of how they may be classified by the respondents, are required by the respondents to submit to them an application for distributorship and secure respondents' expressed approval thereof before they are permitted to buy Nutrilite from any source. Each application describes the relationship to be established between the applicant and the corporate respondent in part as follows:

I understand and agree that I am not an employee, servant, agent, or legal representative of Mytinger & Casselberry, Inc., and that the relationship between us is not that of joint venture or similar arrangement, but that as a Nutrilite Distributor I am in business on my own account as an independent contractor who purchases and sells Nutrilite Food Supplement.

I agree that during the time I am distributing Nutrilite Food Supplement: (1) I will not sell, give away, or otherwise distribute any other vitamin and/or mineral products, (2) I will not disclose to any person, firm or corporation other than authorized distributors and/or personnel of Mytinger & Casselberry, Inc. the names and/or addresses of Nutrilite customers unless Mytinger & Casselberry, Inc. gives me written permission to do so.

I agree that for a period of two years following the termination of my relationship with Mytinger & Casselberry, Inc., I will not use or disclose to any person whomsoever any information I obtained while I was a Nutrilite Distributor concerning the names and/or addresses of Nutrilite customers, or any other trade secrets, nor will I, on my own behalf, or on behalf of any other person solicit or in any manner attempt to induce Nutrilite customers to purchase any other vitamin and/or mineral product or to cease using Nutrilite Food Supplement.

I have read and understand that I must meet and uphold the requirements set forth *on the back of this application* if I wish to maintain my status as a Nutrilite Distributor, and that if I do not meet and uphold said requirements my authorization as a Distributor of Nutrilite Food Supplement is subject to cancellation upon written notice from Mytinger & Casselberry, Inc.

On the back of the application there appears a list of items designated A to H, which is headed "DISTRIBUTOR REQUIREMENTS". The first two of such requirements are as follows:

A. While waiting for authorization from Mytinger & Casselberry, Inc., the prospective Distributor will secure a Sales Kit from his Sponsor and proceed with a study of the material therein. He will not be allowed to purchase any Nutrilite Food Supplement at the Distributor's discount, nor make any effort to sell Nutrilite Food Supplement until his formal approval as a Distributor has been received.

B. When authorized as a Distributor, Nutrilite for sale to the consumer and Nutrilite for the Distributor's personal consumption may be purchased at the Distributor's basic discount.

When the applicant for a distributorship is accepted by the corporate respondent, a letter is written to the successful applicant by the corporate respondent, which reads in part as follows:

YOU ARE NOW A NUTRILITE DISTRIBUTOR . . . and we welcome you as the newest member of the Nutrilite family. We know this is the beginning of a long, pleasant and profitable business association between us.

This authorization is our acceptance of your application and evidences that a contract exists between you and Mytinger & Casselberry in accordance with this letter and the provisions of your Distributor Application.

In a general letter addressed to key agents and qualified sponsors, respondents describe the contractural relationship so established as follows:

The Nutrilite Distributor's contract with M&C is legal and binding. It is a common and usual form of contract. In it M&C agrees to honor certain promises to the Distributor, and the Distributor agrees to honor certain promises to M&C. This is the basis of all contracts. A competitor is not afraid to urge a Nutrilite Distributor to violate this contract because the responsibility is principally the Distributor's—not his would-be recruiters'. His name is on the contract—not theirs. What kind of business would ask him to break a legal contract? The Distributor should remember this: HOW SECURE WOULD HIS CONTRACTUAL ARRANGEMENT BE WITH A BUSINESS THAT ALREADY HAS SHOWN ITS CONTEMPT FOR SUCH CONTRACTS?

Effects and Extent of Control

By means of the quoted agreements, the respondents restrict all of their distributors to sales of Nutrilite Food Supplement exclusive of any other vitamin-and-mineral preparation. Thus respondents deprive their distributors, from the inception of their contractural relationship, of the freedom of choosing any other vitamin or mineral products for resale. Not only do respondents forbid their distributors to sell any vitamin-and-mineral preparation other than Nutrilite during the life of their distributorship, but they exact from their distributors a promise to refrain, for a period of two years after the termination of their distributorship, from endeavoring in any way to sell any vitamin-and-mineral product to those customers to whom the distributor, under his contract with respondents, formerly sold Nutrilite. In other words, if a distributor wishes to withdraw from his relationship with the corporate respondent and continue in the business of selling vitamin-and-mineral preparations, he must forthwith abandon the customers to whom he formerly sold Nutrilite, sacrifice the good-will which he has built up with them, and seek and establish good-will among a new group of customers. It is probable that in many of the smaller sales areas, such reestab-

lishment of good-will would be difficult, if not impossible. It would appear that the prospect of such a consequence renders respondents' distributors afraid to terminate their contracts with respondents, thereby rendering such contracts or agreements a strong instrument for respondents' control of their distributors.

Respondents have enforced these exclusive-dealing agreements with their distributors at various times by cancelling, or threatening to cancel, distributorships; by refusing to supply their distributors with Nutrilite Food Supplement; and occasionally by actual litigation for breach of contract. They have also enforced the two-year restrictive clause in such agreements. Counsel for respondents have freely admitted on the record that respondents have enforced their exclusive-dealing agreements, and have declared that respondents intend to continue doing so in the future. In fact, one of respondents' attorneys, who also appeared as a witness for the respondents in this proceeding, testified that he advised the respondents to adopt their present exclusive-dealing contracts, following the issuance of the consent decree which is the subject matter of Count III of the complaint herein, in order to insure obedience by the distributors to that decree. It seems to us, however, that although an exclusive-dealing arrangement might aid in keeping the advertising claims of competitors out of the possession of respondents' distributors, the primary purpose of such exclusive-dealing contracts was not and is not to promote compliance with that decree, but rather to insure obedience by the distributors to respondents' wishes for the economic and financial benefit of the latter. Respondents' extension of such control for two years after the distributor's relationship with the corporate respondent has terminated indicates, we think, that the true purpose of the restrictions is to advance the sale of Nutrilite, to the prejudice of respondents' competitors and former distributors. By December 31, 1958, respondents had established, through their exclusive-dealing contracts and policies, 100% control over the purchase and resale of vitamin-and-mineral preparations by 1,420 direct purchasers and 80,700 indirect purchasers or distributors of Nutrilite, who sold Nutrilite at retail during that year for a grand total of over nineteen million dollars.

"*Line of Commerce*" *Defined*:

As we have previously observed, Count I of the complaint alleges that the effect of the conditions and agreements above described may be "to substantially lessen" competition in the "line of commerce" in which respondents are engaged, and in the line of commerce in which the purchasers of respondents' products are engaged, and may tend to create a monopoly in the respondents, in violation of the

provisions of § 3 of the Clayton Act, the pertinent parts of which are as follows:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, * * * or other commodities, * * * or fix a price charged therefor, * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, * * * or other commodities of a competitor * * * of the lessor or seller, where the effect of such * * * sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Since the facts hereinabove found clearly show that respondents have made and enforced restrictive contracts with their distributors of the type described in the above-quoted Act, we must now determine whether the result of such contracts * * * may be substantially lessen competition or tend to create a monopoly in any line of commerce". Clearly the mere existence of the restrictive contracts executed between the corporate respondent and respondents' distributors, or even the enforcement thereof, cannot of themselves constitute a violation of the Clayton Act unless the effect thereof falls within the prohibitions of the Act. Our problem, therefore, is to determine the effect of such restrictive contracts upon competition within any line of commerce. Accordingly, we must first inquire into the intent and meaning of the phrase "a line of commerce" as used in the Act, and second, delimit the line or lines of commerce in which respondents are here engaged and the competition therein.

The Supreme Court of the United States, in the case of *U.S.* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), gives us an authoritative explanation of the meaning of the term "line of commerce." The Court was there concerned with determining whether certain paints and fabrics designed especially for use in finishing and decorating automobiles constituted a separate line of commerce distinct and different from other paints and fabrics which might also be used in the painting and finishing of automobiles, but which were not specifically designed or used for that purpose and would not have the peculiar characteristics of the paints and fabrics in question. The Court stated that

> The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute such products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. Cf. *Van Camp & Sons Company* v. *American Can Company*, 278 U.S. 245. Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automobile finishes and fabrics.

We conclude that a "line of commerce", as defined in the Clayton Act, consists of a commodity or class of commodities possessing "sufficient peculiar characteristics and uses" to render such commodities substantially more suitable for a specific purpose or purposes than commodities lacking such characteristics. All commodities, then, which possess the same "sufficient peculiar characteristics and uses" are, by force of competitive reality, in the same line of commerce and compete with each other. A line of commerce, therefore, is not determined by the method of distribution or sale of a product, but by the inherent "sufficient peculiar characteristics and uses" of the product itself.

National Sales Compared:

The record shows that respondents make no sales at retail, nor do they sell to retail establishments such as drugstores or similar over-the-counter retail outlets. Respondents even forbid their own distributors to maintain " * * * an office for retail sales of Nutrilite * * * ." The only channel through which Nutrilite flows to the consuming public is by the so-called "direct-selling" method; that is, house-to-house canvassing. During the past eight years respondents have not only maintained leadership in such sales, but have far surpassed their direct-selling (house-to-house canvassing) competitors, as shown by the tabulation which follows:

Year	Total sales by direct-selling competitors	Total sales of Nutrilite	Respondents' share of direct sales
			Percent
1951	$10,250,000	$9,881,000	96.40
1952	13,440,000	11,501,000	85.57
1953	18,540,000	15,480,000	83.40
1954	23,000,000	20,507,000	89.16
1955	30,800,000	25,401,000	82.47
1956	35,350,000	26,514,000	75.00
1957	32,590,000	21,522,000	66.04
1958	31,120,000	19,145,000	61.52

Respondents regard themselves, and are regarded by their competitors, as "one of the largest direct-sales organizations in America", and as the leader in the direct-selling of vitamin-and-mineral food supplements. From 1951 to 1957 the annual value of sales of Nutrilite ranged from $10,900,000 to $26,900,000, and the net value of sales from $4,000,000 to $10,000,000.

A survey conducted by Drug Topics, the national newspaper for retail druggists, which was placed in evidence by respondents as their Exhibit 19, shows that even when the total national market for multiple-vitamin concentrates sold in combination with minerals is considered, the respondents, although their share of the national

market has been declining, have nevertheless retained a very large share thereof, as demonstrated by the tabulation which follows:

Year	Total national sales of vitamin-mineral combinations	Total Nutrilite sales	Respondents' market share
			Percent
1955	$44,320,000	$25,401,000	57.3
1956	48,310,000	26,514,000	54.9
1957	52,990,000	21,522,000	40.6
1958	55,290,000	19,145,000	34.6

Contentions of Counsel as to the Line of Commerce:

Upon the basis of the above facts, counsel supporting the complaint would have us conclude that " * * * house-to-house selling or field selling * * * " of vitamin-and-mineral food supplements constitutes a separate line of commerce, distinct from other vitamin-and-mineral preparations sold at drugstores and other over-the-counter retail outlets. On the other hand, counsel for respondents, on the basis of the national sales of all vitamin food supplements as shown in their Exhibit No. 19, would have us conclude that all multiple-vitamin food preparations designed as food supplements, regardless of whether they are packaged in combination with minerals or separate therefrom, and regardless of whether they are sold over the counter or from house to house, fall within the same line of commerce, and are sold in competition with each other.

Obviously, if a combination of vitamins and minerals sold by the so-called direct-selling method (house-to-house canvassing) is a separate line of commerce from the same food supplement sold over the counter, respondents' share of sales in that separate line of commerce would far exceed their nearest competitor, and the tendency toward monopoly inherent in respondents' restrictive contracts would likewise be increased. On the other hand, if the line of commerce includes, as counsel for the respondents would have us find, all multiple-vitamin products regardless of how sold or whether combined with minerals, then respondents' share of the market, in proportion to the total sales in that line of commerce, would be substantially less, and the tendency toward monopoly of respondents' contractural restrictions would be greatly minimized. Neither contention falls wholly within the "line of commerce" as herein defined, and both must therefore be rejected.

Line of Commerce Here Involved:

The authentic definition, as here interpreted, does not permit the determination of a line of commerce by the method of sale, nor by including therein products possessing some but not all of the re-

quired "peculiar characteristics." To constitute a line of commerce, products must possess, in common, sufficient peculiar characteristics and uses. The commodity here involved consists of a combination of multiple vitamins with minerals. Therefore no multiple-vitamin preparation without minerals, and no mineral preparation without vitamins, can properly be considered to be in the same line of commerce as such a combined product as Nutrilite. Accordingly, we must conclude that vitamin-and-mineral-combination food supplements, such as Nutrilite, are sufficiently different from vitamin food supplements and mineral food supplements, separately, to constitute, of necessity, an independent line of commerce.

Respondents' Relative Importance in Line of Commerce:

As one of the tabulations heretofore presented shows, respondents have maintained, within the line of commerce here involved, total yearly sales ranging from $25,401,000 in 1955 to $19,145,000 in 1958. Those yearly sales have given the respondents a share of the national market ranging from 57.3% in 1955 to 34.6% in 1958. During the same period, it will be remembered, respondents have maintained through their exclusive-dealing contracts a 100% control over the purchase and resale of Nutrilite. By December 31, 1958, such control extended to 1,420 direct purchasers and 80,700 indirect purchasers and distributors. These figures clearly show that the respondents, if not in a dominant position in the line of commerce here involved, are at least leaders therein, with a substantial share of the market.

Proof Under § 3 of the Clayton Act:

The question follows: Do the above facts constitute sufficient proof of a violation of § 3 of the Clayton Act? The United States Court of Appeals for the Second Circuit has answered this question with clarity in the case of *Dictograph Products, Inc., Petitioner*, v. *Federal Trade Commission*, Respondent, 217 F. 2d 821, Cert. denied 349 U.S. 940. The court stated:

> * * * Where the alleged violator dominated or was a leader in the industry, proof of such fact, was, at an early stage, determined to be a sufficient predicate from which to conclude that the use of exclusive-dealing contracts was violative of Section 3 and other factors appear to have been largely ignored. * * * More recently the Supreme Court extended the rule to business organizations enjoying a powerful, though clearly not dominant, position in the trade and doing a substantial share of the industry's business by means of these contractual provisions and tacitly approved the trial court's refusal to consider other economic effects or merits of the system employed. * * *

Accordingly, we conclude that the effect of the exclusive-dealing agreements, as alleged in Count I of the complaint and as herein

found, may be substantially to lessen competition in the line of commerce in which respondents are engaged and in the line of commerce in which their distributors are engaged, and may tend to create a monopoly in respondents, in violation of the provisions of § 3 of the Clayton Act.

Proof Under § 5 of the Federal Trade Commission Act:

Furthermore, we must inquire if the above facts, which show that the threats and enforcement of the restrictive contracts were and are to the prejudice of competitors and purchasers of respondents' product and to the public interest, constitute sufficient proof of a violation of § 5 of the Federal Trade Commission Act. *In the Matter of Dictograph Products, Inc.*, Docket 5655, the Commission held:

> * * * that respondent's practices of entering into contracts containing exclusive-dealing provisions with its distributors and of intimidating and coercing them into complying with those provisions were unfair methods of competition and unfair acts and practices in commerce in violation of § 5 of the Federal Trade Commission Act.

We conclude, therefore, that the effect of the threats and actual enforcement of respondents' restrictive agreements and exclusive-dealing contracts, as alleged in Count II of the complaint herein, have a tendency to render respondents' distributors subservient to respondents, to the prejudice of the competitors of respondents' dealers and of the public; have a tendency toward and effect of obstructing, hindering and preventing competition in the sale and distribution of vitamin-and-mineral-combination food supplements in commerce; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of § 5 of the Federal Trade Commission Act.

Count III of the Complaint

Introduction:

As previously stated, the respondents are charged in Count III of the complaint herein with a violation of § 5 of the Federal Trade Commission Act, by making and causing to be made three specific misrepresentations about the consent decree of injunction issued against the corporate respondent by the United States District Court for the Southern District of California in 1951. Each of those specific misrepresentations will be considered in detail.

The Consent Decree of Injunction:

A brief statement of the background of that consent decree is essential to an understanding of the issues concerning it. Prior to its issuance the Food and Drug Administration had instituted multiple seizures of Nutrilite in various widely-scattered areas of the

United States. Those actions were based upon allegations that Nutrilite was misbranded by the use of certain allegedly misleading literature in connection with its sale. In addition, a criminal action against the respondent corporation had also been instituted. While these various actions were pending, the corporate respondent instituted an injunction proceeding in the United States District Court for the District of Columbia, against the Federal Security Administrator and certain officials of the Food and Drug Administration. That injunction proceeding was based upon the theory that the various seizure actions against the corporate respondent were arbitrary and illegal. The District Court of the District of Columbia held that Nutrilite had not been misbranded and that the government officials named in that proceeding had acted arbitrarily and illegally. On an appeal from that trial court's decision to the Supreme Court, the decision of the trial court was reversed on the ground that the court was without jurisdiction. Therefore the decision of the District Court of the District of Columbia in that case is a legal nullity, and, accordingly, it is not in any sense an authority by which to resolve any of the factual controversies involved in this proceeding.

Following the Supreme Court's decision, and while the criminal and seizure proceedings were still pending, a complaint for injunction was filed in the District Court for the Southern District of California, charging that Nutrilite was misbranded within the meaning of § 502(a) and § 502(f)(1) of the Food, Drug and Cosmetic Act. That complaint for injunction repeated the charges of the earlier seizure cases and the criminal action to the effect that the then current edition of the book, "How To Get Well And Stay Well", used by the respondents in connection with the sale of Nutrilite, represented that Nutrilite would be an effective and adequate treatment for many diseases and ailments of mankind. The complaint also alleged that various other promotional material misrepresented the curative effects of Nutrilite.

The complaint just referred to sought to restrain the defendants from distributing Nutrilite Food Supplement which was allegedly misbranded by the use of false and misleading written, printed or graphic material, or misbranded by failure to bear adequate directions for use for the conditions for which the preparation was intended. In addition, the complaint prayed that the defendants be required to make restitution to purchasers of Nutrilite Food Supplement who had purchased that product because of the false and misleading representations alleged to have been made by respondents.

By negotiation by and between the parties, the pending complaint for an injunction against the respondents was disposed of by the

consent decree issued by the District Court for the Southern District of California on April 6, 1951. The decree was based upon the agreement and consent of the respondents on the one hand, and Food and Drug Administration officials on the other hand. Accordingly, the decree was one of consent, and was entered without any findings by the Court on issues of fact or of law. Although the decree was based upon consent, the corporate respondent was placed under an injunction by the Court, the consent of the parties, under Court practice, rendering the making of factual findings unnecessary, the consent taking the place of and standing in lieu of findings as to the facts, and the corporate respondent was "Ordered, adjudged and decreed" to refrain from certain acts and practices, as follows:

1. Distributing Nutrilite Food Supplement accompanied by certain designated, written Nutrilite articles, books, pamphlets, and a motion picture;

2. Distributing Nutrilite Food Supplement accompanied by articles, pamphlets or graphic matter which implied that Nutrilite would be an effective cure for approximately 54 specific diseases or conditions;

3. Making certain other specific misrepresentations in writing, printing, or graphic matter, to promote the sale of Nutrilite.

The decree set forth certain specified allowable claims which might be made as to the need for or usefulness of Nutrilite Food Supplement XX, Nutrilite Food Supplement X, and Nutrilite Food Supplement Junior.

It also specified that the respondents would have the option of submitting to the Food and Drug Administration for inspection and comment all written, printed and graphic matter to be used in the future merchandising of their product, Nutrilite.

The indictment against the partnership and against Lee S. Mytinger, William S. Casselberry and Carl F. Rehnborg was dismissed, and the consolidated libel proceedings terminated by a stipulation between the parties. The injunction action was dismissed as to the individual defendants Mytinger, Casselberry and Rehnborg.

It should here be observed that we are not sitting in judgment on any of the factual issues involved in either the injunction proceeding in the United States District Court for the District of Columbia or the litigation which resulted in the issuance of the consent decree by the United States District Court for the Southern District of California. Regardless of whether the respondents had made the false representations with which they were charged in the injunction proceeding, they consented to the court's order to refrain from making specified representations in the future. Our problem here is, therefore, to determine whether the three specific allegations made

in the Commission's complaint relative to misrepresenting the significance of the injunction are sustained by substantial evidence. In other words, we are not here concerned with the truth or falsity of any acts and practices of the respondents other than the three specific misrepresentations alleged. Accordingly, a number of findings as to the facts concerning other misrepresentations, proposed by counsel supporting the complaint, have been rejected.

Specific Charges Relative to the Consent Decree:

The three specific charges of Count III of the complaint herein allege that the respondents have misrepresented the consent decree, as follows:

1. That the consent decree amounted to an endorsement and approval of Nutrilite Food Supplement by the United States government, the United States District Court, and the Food and Drug Administration;

2. That the allowable claims contained in the consent decree applied only to Nutrilite Food Supplement and to no other vitamin-mineral supplement product;

3. That no other seller of vitamin or mineral food supplement products has a right to submit its promotional literature to the Food and Drug Administration for inspection and comment.

The attitude of respondents and of their counsel concerning the significance of the decree in question is revealed at pages 509 and 510 of the transcript herein. Counsel for respondents made an objection as follows:

> We object to that as an improper characterization of the consent decree. We object specifically to the words "ordered," and "enjoined," as an improper characterization of this document.

To this objection counsel supporting the complaint replied:

> Your Honor, the document is in evidence in this case and in a great many paragraphs it states very clearly that the defendants are ordered and enjoined.

Although the document in question bears the title "Final Consent Decree", it is clearly an injunction, for in six separate places therein the Court uses mandatory language, as follows:

> * * * ORDERED, ADJUDGED, and DECREED that the defendants, and each of them, and their officers, agents, distributors, representatives, servants, employees, attorneys * * * be and hereby are perpetually enjoined from * * *.

In a statement released by the corporate respondent, dated January 1, 1952, entitled "The Nutrilite Consent Decree: How It Came About", respondents make the statement:

> * * * Mytinger & Casselberry agreed not to use certain literature—including reprints of magazine articles which they had long before discontinued using—and not to make certain statements, most of which they had not made anyway,

and not to claim that Nutrilite would cure diseases—a claim which they had never made. The decision of the three judges in Washington proved *that.* In exchange, Mytinger & Casselberry secured a list of more than 60 definite claims they could make for Nutrilite, the right to use testimonials and the right, at M & C's option, to submit literature to FDA for its advance comment, or to the Court for its approval. These are rights which FDA had never granted to anyone before in all its forty-year history. For obvious reasons, Mytinger & Casselberry considered the trade a good one.

In a general memorandum to its Nutrilite distributors, the respondents stated:

You can be proud and confident as you present the "facts" about vitamins and minerals as set forth in the Consent Decree. "Proud" because none of your competitors has such a document, and "confident" because it bears the approval of a Judge of the United States District Court. * * * The Decree is a valuable selling tool.

In a pamphlet entitled "Know Where You Are Going"; which contained a preface to a reproduction of the consent decree, respondents state in semiscript type, such as is usual in diplomas and certificates of merit, the following:

* * * On that day an important document called the "Final Consent Decree" was signed by representatives of both corporations and the United States Government * * * (No dispute was ever involved over the merits of the product, which the government conceded is wholesome and beneficial.)

* * * * * * *

This Decree is a tribute, indeed, and we are sincerely grateful for the right to say that for the first time we really "know where we are going"!

In similar promotional literature disseminated to their distributors, respondents stated:

The Truth—The Consent Decree is one of the strongest sales tools a Nutrilite Distributor can use. It is an official document, bearing the signatures of officials of the Federal Government. The prospective customer is immediately convinced that the Nutrilite Distributor is speaking the truth—making only honest claims for his product. WHAT OTHER FOOD SUPPLEMENT DISTRIBUTOR CAN SAY:

"HERE IS A LEGAL DOCUMENT SIGNED BY A UNITED STATES DISTRICT JUDGE AND UNITED STATES ATTORNEYS THAT BACKS UP THE CLAIMS I MAKE FOR MY PRODUCT?"

In a letter to respondents from the Deputy Commissioner of the Food and Drug Administration, respondents were advised as follows:

I have examined some carbon copies of recent letters that have been signed by various members of the Food and Drug Administration in answer to letters of inquiry about Nutrilite and, in particular, about answers to inquiries about the meanings and significance of the pamphlet "The Nutrilite Consent Decree". It appears that the efforts of the distributors of Nutrilite to create the impression that the Court Decree is some form of meritorious award have been confusing to some of the prospects contacted by Nutrilite salesmen.

Actually, I am sure you will recognize that the pamphlet "The Nutrilite Consent Decree" is a very cleverly worded piece of advertising and capable of creating an entirely unwarranted impression about the Consent Decree. My observation is that letters signed by officers of the Food and Drug Administration have represented a forthright attempt to responsively state facts in answer to questions raised by the public.

In Commission's Exhibit 14B, the respondents reported in a letter under their letterhead the following comments of one of their agents:

* * * The Consent Decree itself is a good selling tool because it is a *document.* His group uses it effectively by telling the prospect that they are presenting the facts about vitamins and minerals and, "Here is a document written over the signature of Judge Harrison and the FDA officials giving the facts which I know you'd like to have." Bill stated that a good increase in volume has resulted in his group from the extensive use of the Consent Decree in canvassing.

In Commission's Exhibit 27A, respondents instruct their Distributors in a method of using the consent decree to sell Nutrilite. The distributor is told:

In Nutrilite, we have the most powerful sales tool of any corporation in America—the Know Where You're Going booklet. Here is the M&C-approved way to use this sales tool to present the possible need to your prospects.

* * * * * * *

I would like to show you a legal document. This document ,as you will see on page one, was filed in the United States District Court for Southern California in April of 1951. Back here on page sixteen are the names of the United States District Judge and the United States Attorneys who signed this document. You'll agree with me, Mrs. Prospect, that such a legal document would contain only factual information.

The distributor is then instructed to go on and point out to the prospect various allowable claims contained in the consent decree and to refer to it continually as "this legal document", but nowhere in the presentation does he advise the prospect that the document was issued to restrain the distributor and the company, including the respondents, from misrepresenting the product as a treatment or cure for many conditions and diseases. In fact, by conveying to the public only half of the story contained in the allowable-claims section and by pointing out that the document was filed in court and signed by a Judge and United States attorneys, the respondents are actively concealing from the public the true nature of the consent decree.

In a speech given by R. L. Mytinger at a distributor meeting in 1952, he stated:

And so we find that our Consent Decree gives us: Federal Court-approved facts about vitamins and minerals; approved list of claims; right to submit literature to FDA *before* release. No other vitamin-mineral food supplement has these court-approved rights.

A typical example of respondents' use of a true statement to produce a misimpression in the representation that the allowable claims listed in the consent decree apply only to Nutrilite appears in Commission's Exhibit 20:

No other vitamin-mineral food supplement has such an approved list of claims.

In Commission's Exhibit 17A, respondents made the representation that:

We are also happy because now we can get our literature passed on *before* we publish it and as far as we know, we are the only company with this privilege.

and in Commission's Exhibit 20,

No other vitamin-mineral food supplement company has the court-approved right to submit its literature.

The effect of such representations is shown in part by the statement of Deputy Commissioner Harvey of the Food and Drug Administration, who testified that the Food and Drug Administration had received possibly over a thousand letters of inquiry as to the Government's approval of Nutrilite, and practically none as to such approval of any other similar product.

It is readily apparent from the above statements, and others in the record herein, that the respondents have disseminated to their distributors and to the public representations which are capable of creating the inference that the consent decree constitutes a vindication of respondents' past acts and practices; a tribute to the merits of respondents' product Nutrilite; approval of that product by the Federal District Court and by the officials of the Food and Drug Administration; a document to be proud of; approval of a number of definite claims for the product Nutrilite; a prize sales tool; one of respondents' biggest achievements; something in the nature of an award for merit which none of respondents' competitors has the right to claim; and that said consent decree confers upon respondents the exclusive privilege of submitting their advertising material to the Food and Drug Administration for its comment in advance of publication.

In truth and in fact, the consent decree is an injunction, albeit one based upon consent of the parties rather than upon evidence. The order contained therein is just as authoritative and restrictive upon respondents as if the injunction had resulted from a lengthy trial and factual findings by the court. The orders contained therein restrain the corporate respondent from making various representations in connection with the sale of Nutrilite, which representations were alleged in the complaint in that proceeding to be false and

deceptive. Obviously, therefore, the consent decree is not in the nature of an award or something to be proud of, nor is it a vindication of or tribute to respondents' past performances. It is instead a corrective measure taken by the court to abate alleged wrongdoing by the respondents, and to prevent the repetition thereof in the future. Clearly the consent decree is not an endorsement and approval of Nutrilite Food Supplement by the United States Government, the United States District Court, or the Food and Drug Administration.

A number of the statements quoted above have a tendency to give the impression that the claims allowed in the consent decree to be made for Nutrilite apply only to that product. The evidence shows, however, that the claims listed as allowable in the consent decree consist of statements of facts relating to vitamins and minerals which have been scientifically recognized and are so generally known that they may be applied with equal relevance to any products which contain the vitamins and minerals contained in Nutrilite. Clearly the officials of the Food and Drug Administration and the Federal Court never intended to grant, nor did they grant to respondents any exclusive right to make the claims allowed. Accordingly, we must conclude that respondents' representations that the allowable claims contained in the consent decree may be applied only to Nutrilite Food Supplement and to no other vitamin or mineral supplement product were false and misleading, in that no such exclusive right was ever granted.

Respondents have also created the false impression that they alone, and no other seller of vitamin and mineral products, have the right, as the result of the consent decree, to submit their advertising and promotional literature to the Food and Drug Administration for comment in advance of publication. Actually, any advertiser of any food, drug or cosmetic has the right so to submit advertising to the officials of that agency, and the mere fact that this right is mentioned in the consent decree does not render it exclusive to the respondents. Nor was the consent decree necessary to grant such right to respondents; they had that privilege before the issuance of the decree, in common with all other advertisers who wished to avail themselves thereof. Emphasis upon that privilege in the manner used by respondents, therefore is unwarranted by fact and misleading in effect.

In 1956, when respondents submitted to the Food and Drug Administration their pamphlet prepared for the use of their distributors, entitled "How To Use The Consent Decree", for comment and opinion, the respondents' attorney was warned that

"Deception may result from the use of statements not technically false or which may be literally true." *U.S.* v. *90 Barrels etc.*, 265 U.S. 438.

The Food and Drug Administration might have added a further quotation from the Supreme Court's opinion in the same case, to the effect that "It is not difficult to choose statements, designs and devices which will not deceive."

These erroneous impressions and fallacious inferences have been created by telling half-truths, by making true statements but placing them in unwarranted juxtaposition, and by failure to reveal certain facts which are essential to a true understanding of the consent decree. We must, therefore, conclude that the three allegations of Count III of the complaint herein have been sustained by substantial, reliable and probative evidence.

CONCLUSIONS

1. The Commission has jurisdiction over the respondents herein, and over their acts and practices as herein found.

2. This proceeding is in the public interest.

3. The effect of respondents' restrictive contracts, as herein found, may be substantially to lessen competition in the lines of commerce in which respondents and their customers and purchasers are engaged, and may be to tend to create a monopoly in respondents in the line of commerce in which they have been and now are engaged, in violation of § 3 of the Clayton Act.

4. The acts and practices of respondents, as herein found, are all to the injury and prejudice of respondents' competitors, customers, and purchasers, and of the public; have a tendency and effect of obstructing, hindering, and preventing competition in the sale and distribution of vitamin and mineral products in commerce; have a tendency to and have obstructed and restrained such commerce in such merchandise; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning and in violation of § 5 of the Federal Trade Commission Act.

5. The use by respondents of the aforementioned misleading and deceptive representations has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were and are true, and into the purchase of a substantial amount of respondents' product because of such erroneous and mistaken belief; as a result of which, trade has been unfairly diverted to the respondents from their said competitors, and injury has thereby been done to competition in commerce.

6. The acts and practices of respondents, as herein found, are all to the injury and prejudice of respondents' competitors, customers, and purchasers, and of the public; have a tendency and effect of obstrucing, hindering, and preventing competition in the sale and distribution of vitamin and mineral products in commerce, within the intent and meaning of the Federal Trade Commission Act; have a tendency to and have obstructed and restrained such commerce in such merchandise, and constitute unfair methods of competition and unfair acts and practices in commerce, within the intent and meaning and in violation of § 5 of the Federal Trade Commission Act. Therefore,

It is ordered, That Respondents Mytinger & Casselberry, Inc., a corporation; William S. Casselberry and Lee S. Mytinger, individually and as officers of said corporation; and their officers, agents, representatives, employees and attorneys, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Nutrilite Food Supplement, or any product possessing similar characteristics, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondents;

2. Enforcing, or continuing in operation or effect, any condition, agreement or understanding in, or in connection with, any existing contract of sale, which is to the effect that the purchaser of such products shall not use, deal in, sell or distribute similar products supplied by any competitor or competitors of respondents.

It is further ordered, That said respondents, their officers, agents, representatives, employees and attorneys, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Nutrilite Food Supplement, or any other product possessing similar characteristics, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Canceling, or directly or by implication threatening to cancel, any contract or franchise or selling agreement with respondents' distributors, or with any other seller, for the sale of respondents' product, because of the failure of such purchasers to purchase exclusively or deal exclusively in the product sold and distributed by respondents;

2. Instituting litigation, or directly or by implication threatening to institute litigation, against any of respondents' dealers, distribu-

tors, or other customers or sellers of respondents' product, because of their failure or refusal to purchase exclusively or deal exclusively in products sold and distributed by respondents;

3. Entering into, continuing, maintaining, threatening to enforce, or enforcing, in any manner, any agreement or understanding with any customer or seller, or former customer or seller, of respondents' products, to refrain from dealing in products of a competitor or competitors of respondents, when such actions are taken by respondents for the purpose or with the effect of coercing or intimidating such customers or sellers into dealing exclusively in respondents' products, or of retaliating against such customers or sellers for their failure or refusal to purchase or deal in, exclusively, products sold and distributed by respondents;

4. Enjoining, attempting to enjoin, or threatening to enjoin, any of respondents' distributors, dealers or customers from selling or distributing any product of a competitor or competitors, like, similar or related to respondents' product, to persons to whom they formerly sold respondents' product, or revealing the names of such persons to any competitor of respondents' for a period of two years or any other specific period of time;

5. Coercing or intimidating any customer or seller of respondents' product in any manner, for the purpose or with the effect of causing said customer to deal exclusively in respondents' said product;

6. Disseminating, causing to be disseminated, or otherwise making available to distributors or their customers, any pamphlet, booklet, leaflet, printed or recorded talk, or in any other manner or through the use of any other printed, written or graphic material, representing, or causing to be represented, directly, indirectly, or by implication,

(a) That the Final Consent Decree issued on April 6, 1951, by the United States District Court for the Southern District of California in Civil Action No. 10344-BH, *United States of America, Plaintiff, v. Mytinger & Casselberry, Inc., et al., Defendants*, was or is anything other than an injunction prohibiting, restraining and limiting respondents' advertising practices;

(b) That the allowable claims for respondents' product Nutrilite, listed in said Final Consent Decree, may be applied only to respondents' product Nutrilite;

(c) That the right to submit advertising and promotional material to the Food and Drug Administration for its inspection and comment, prior to publication, has been granted exclusively to the corporate respondent, or that such right is other than a privilege available without special permission to any advertiser of foods, drugs or cosmetics desirous thereof:

(d) That Nutrilite Food Supplement, or any other of respondents' products, or the claims made therefor, are approved by any Court, or by any agency or officials of the United States Government.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The corporate respondent engages in the nationwide sale of Nutrilite Food Supplement composed of various vitamins and minerals. It is sold house to house by independent distributors or dealers buying direct from respondents at wholesale or purchasing indirectly through other distributors. In the initial decision, the hearing examiner found that an exclusive dealing provision contained in respondents' agreements with the distributors was violative of Section 3 of the Clayton Act. He further found that respondents' practices in enforcing and threatening to enforce that requirement and another contract provision restricting sales of competing products by terminated distributors were in violation of Section 5 of the Federal Trade Commission Act, and that the complaint's charges of product misrepresentation by respondents also were sustained. Respondents have appealed from those findings and conclusions in the initial decision and its order to cease and desist.

It is undisputed that all of the respondents' distributors are required to covenant and agree not to sell any other vitamin or mineral products while so engaged. They further agree that for a period of two years after their distributor relations terminate they will not solicit Nutrilite customers on behalf of like products. It is clear, too, that respondents have enforced the exclusive dealing provision of the agreements against distributors electing to handle other supplements by cancelling or threatening to cancel their distributorships and by refusing to supply distributors so cancelled with merchandise.

Under Section 3 of the Clayton Act, sales or contracts for sale upon agreements or understandings that buyers not deal in the products of competitors are unlawful if their effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce. The evidence received herein discloses that the value of retail sales of Nutrilite for the year 1958 was $19,145,000. This amount represented 61.52% of the total value of house-to-house sales of vitamin concentrates for that year; 34.6% of the total value of retail sales of vitamin and mineral combination preparations (such as respondents') through all types of outlets; and 8.6% of the total value of retail sales of vitamin concentrates through all types of outlets. In 1958, respondents had 80,700 distributors, 1,470

of whom purchased directly from respondents and all of whom had agreed not to sell any other vitamin and/or mineral products. The hearing examiner found that vitamin and mineral combination preparations sold through all types of outlets constituted the line of commerce to be examined in this case to the exclusion of vitamin and mineral combination preparations sold only by the house-to-house method, as contended for by counsel supporting the complaint, and vitamin concentrates, whether or not packaged with minerals, sold through all types of outlets, as contended for by respondents.

We think the hearing examiner was in error in so limiting the line of commerce to be considered. In our opinion, each of the foregoing commercial areas can be properly deemed a separate market or line of commerce within the meaning of Section 3. However, the outcome of this case is not dependent upon the selection of any one of these areas as the relevant line of commerce. It is established by the record herein that respondents are engaged in the sale of Nutrilite in commerce and that their contracts with all of their distributors contain the restrictive exclusive dealing provisions. From the figures given above, it is obvious that respondents' volume of business is substantial and that their exclusive dealing requirement affects a substantial share of the market in each of the three lines of commerce. We have no doubt that respondents' exclusive contracts have the probable effect of substantially lessening competition. *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1949). All of the requirements of Section 3 having been met, it follows that a violation of that section has been established.

Respondents introduced certain economic data as justification for the use of their exclusive dealing arrangements. It is true, as pointed out by respondents, that in the *Maico* case, the Commission issued an order remanding the matter to the hearing examiner for the purpose of obtaining evidence as to the economic effect of the exclusive dealing agreements used by that company. In the Matter of *The Maico Company, Inc.*, 50 F.T.C. 485 (1953). It is also true that the proof necessary to establish a violation of certain other provisions of the statutes administered by the Commission, such as Section 7 of the Clayton Act, may require an appraisal of economic data. However, since the date of the Commission's action in the *Maico* case, the courts have made it clear that in a situation such as that shown to exist in this record, the plain language of Section 3 makes irrelevant those economic considerations urged by respondents. *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821 (2d Cir. 1954), *cert. denied* 349 U.S. 940 (1955); *Anchor Serum Company* v. *Federal Trade Commission*, 217 F. 2d 867 (7th Cir. 1954); *Tampa Electric Co.* v. *Nashville Coal Co.*, 276 F. 2d 766

(6th Cir. 1960), *cert. granted* June 27, 1960. Respondents' appeal from the initial decision's findings that they have violated Section 3 of the Clayton Act is denied

In addition to enforcing the exclusive dealing provision of their distributor agreements, respondents also have enforced and threatened to enforce a companion covenant which provides that terminated distributors shall not solicit Nutrilite customers on behalf of competing supplements or disclose customer names within two years after such severance. The hearing examiner found that their activities in that respect unlawfully obstructed and prevented competition with respondents. Respondents ask us to find that the two-year clause is reasonably designed to protect trade secrets and imposes no undue hardships because the dealer is free to sell others' wares to anyone except former Nutrilite customers. However, respondents' enforcement measures have included bulletins to the distributor organization warning that violation of the two-year clause will subject offenders to legal proceedings by way of damages, injunction, or both, and that distributors discontinuing the sale of Nutrilite must start their businesses anew. Their status as independent business men and women notwithstanding, discontinued distributors are required to cut themselves off completely from their present and former customers for Nutrilite. They likewise are precluded from subjobbing a new supplement line to present or former Nutrilite distributors who bought from others; and they call on any new customer at their peril inasmuch as they have no way of knowing whether the prospect has been a Nutrilite user or customer. The seriousness of the handicaps imposed on terminated distributors who attempt to continue their businesses by marketing competitive supplements while abiding by the two-year covenant is, therefore, obvious.

Respondents further contend that the *Numanna* decisions[1] represent judicial approval for their two-year clause and that the initial decision's order forbidding them to enforce that clause arbitrarily takes away respondents' rights to resort to the courts for redress of wrongs. In the first of those cases, the trial court granted a temporary injunction against a competing marketer of food supplements and others, including various defendant distributors, who the court found had by concerted action and other unfair trade practices induced over 1700 Nutrilite distributors to discontinue buying respondents' product and to handle the supplement of the defendant marketer. On appeal, the preliminary injunction was up-

[1] *Mytinger & Casselberry, Inc.* v. *Numanna Laboratories Corporation*, Civil Action No. 6142, U.S. District Court, Eastern District of Wisconsin; and *Numanna Laboratories Corporation* v. *Mytinger & Casselberry*, 215 F. 2d 382 (C.A. 7, 1954).

held and the proceedings in the court below subsequently were dismissed by consent. In the opinion rendered by the Court of Appeals, it is particularly evident that decision there turned on considerations apart from the legal status of the two-year clause. In fact, that court specifically expressed its reservations to the lower court's reference to that provision as a contract instead of as a "purported" contract. Hence, the *Numanna* cases cannot be regarded as clear-cut legal tests of the validity of the two-year covenant.

It goes without saying that orders of the Commission should not impinge on the rights of those being proceeded against to petition the courts for redress of wrongs. However, in instances of proved violations of laws administered by it, the Commission has the power and duty to issue an appropriate order to terminate such violations. The paragraph of the order specifically excepted to forbids respondents to enjoin or to threaten to enjoin distributors from selling competitive products to persons to whom they formerly sold Nutrilite, or to enjoin or threaten to enjoin them from revealing the names of such customers to any of respondents' competitors. The latter part of that prohibition can be construed as forbidding respondents from proceeding against disclosure of customer names by distributors under any circumstances whatsoever, including those in which such disclosures are against public policy for other reasons. Its clarification is accordingly warranted. Furthermore, the first part of the prohibition should be broadened to expressly forbid continued use in respondents' distributor agreements of restrictive provisions against soliciting former Nutrilite purchasers, as well as prohibiting threatened or actual enforcement thereof for purpose of rendering the distributors subservient to respondents in the conduct of their businesses. The order is being appropriately modified. The appeal of respondents from the hearing examiner's findings sustaining the complaint's charges under the second count is otherwise denied, however.

The remaining exceptions to be considered pertain to charges of misrepresentation of Nutrilite in promotional statements explanatory of a consent decree of injunction issued by the U.S. District Court for the Southern District of California. The decree was entered April 6, 1951, and it "Ordered, Adjudged and Decreed" that the corporate respondent and its agents be enjoined from specified acts and practices, including representations that the preparation was an effective treatment for 54 named diseases and conditions. The decree also set forth certain allowable claims which might be made respecting the need for or usefulness of Nutrilite and specified that respondents at their option could submit advertising material

to the Food and Drug Administration for its inspection and comment. The hearing examiner found that the respondents have falsely represented in promotional literature and otherwise that such decree constituted an endorsement or approval of Nutrilite by the United States Government, such Court, and the Food and Drug Administration, and that their advertising falsely implied that the allowable claims contained in the injunction applied only to Nutrilite and no other supplement and that no other sellers of such products has the right to submit his promotional material for inspection and comment.

The decree was based upon the agreement and consent of the respondents on the one hand, and Food and Drug officials on the other. Their agreement contemplated that a criminal indictment against respondents and other also pending multiple seizure proceeding would be dismissed; and they were subsequently thus disposed of. The case disposed of under the decree was a complaint for injunction charging misbranding. The decree was one of consent and was entered without any findings by the court on issues of fact or law. Under court practice, the consent feature rendered the making of factual findings unnecessary, the consent taking the place of and standing in lieu of findings as to the facts.

The Nutrilite dealers had been deeply concerned over the outcome of those cases and their effects on future sales activities. When the decree issued, respondents immediately set about to reinstate distributors' morale. In a pamphlet denying that they had been doing virtually any of the things enjoined in the decree, respondents explained their motives for entering into the agreement for settlement, as follows:

> * * * In exchange, Mytinger & Casselberry secured a list of more than 60 definite claims they could make for Nutrilite, the right to use testimonials and the right, at M & C's option, to submit literature to FDA for its advance comment, or to the Court for its approval. These are rights which FDA had never granted to anyone before in all its forty-year history. For obvious reasons, Mytinger & Casselberry considered the trade a good one. * * *

Two other pieces of literature recommending and explaining the consent decree's use as a sales tool stated:

> THE TRUTH—The Consent Decree is one of the strongest sales tools a Nutrilite Distributor can use. It is an official document, bearing the signatures of officials of the Federal Government. The prospective customer is immediately convinced that the Nutrilite Distributor is speaking the truth—making only honest claims for his product. WHAT OTHER FOOD SUPPLEMENT DISTRIBUTOR CAN SAY: "HERE IS A LEGAL DOCUMENT SIGNED BY A UNITED STATES DISTRICT JUDGE AND UNITED STATES ATTORNEYS THAT BACKS UP THE CLAIMS I MAKE FOR MY PRODUCT"?

* * * * * * *

Nutrilite Food Supplement has a Federal Court-approved list of claims that can be made in selling the desirability of food supplementation with Nutrilite. No other vitamin-mineral food supplement has such an approved list of claims.

Before Nutrilite Food Supplement literature is released to the public it may, by court-approved right, be submitted to the Federal Food and Drug Administration for inspection and comment. No other vitamin-mineral food supplement company has the court-approved right to so submit its literature.

Before starting to sell Nutrilite Food Supplement, Nutrilite Distributors must take training and pass a quiz on the Federal Court-approved facts about vitamins and minerals.

As noted by the hearing examiner, the promotional material has carried an underlying theme that the decree constituted a vindication of past acts and practices by respondents and was in the nature of a meritorious award.[2]

The consent decree, however, is an injunction and its order is as authoritative and binding upon respondents as if resulting from lengthy trial and factual findings. It was issued by the court to abate alleged wrongdoing and to prevent its future repetition and not to vindicate respondents' past practices. The decree accordingly did not constitute an endorsement or approval of Nutrilite by our Government. Respondents' advertising techniques have included repetitious emphasis on the words "approved" and "court-approved" in juxtaposition to the terms "Federal Court", "U.S. District Court" and "Food and Drug Administration." That this has had the capacity and tendency to engender erroneous beliefs by distributors and users that Nutrilite was officially endorsed or approved is clearly evident from the record.

In the promotional literature furthermore, the allowable claims also are held out as an approved list of claims and the decree is described as a legal document backing up the distributors' claims for the product. The claims listed as allowable in the decree, however, constitute facts on vitamins and minerals which have been scientifically recognized as equally applicable to any product containing the vitamins and minerals present in Nutrilite. Respondents' representations that the allowable claims dealt with in the decree are applicable only to Nutrilite are, therefore, false and misleading.

The record also supports the hearing examiner's conclusions that the advertising statements imply that respondents alone and no other seller of vitamin products have a right to submit their promotional literature to the Food and Drug Administration for inspection and comment. All marketers of food, drug or cosmetic

[2] To illustrate, in a speech before a conference of key agents respondent William S. Casselberry pointed to the consent decree and its allowable claims as "one of our biggest accomplishments". And a distributor addressing a meeting of its fellow agents stated: "Thank God for the Consent Decree." "Now we know the true worth or value of this document, the hundreds of thousands of dollars the company spent in getting it for us."

preparations are privileged to submit promotional material to that agency for comment; and the Administration's policy of inviting such submissions goes back 35 years or more. Respondents' unqualified statements that they alone have rights or court-approved rights in that respect is a deceptive half-truth. Furthermore, it is evident from the record that such representations have had capacity and tendency to mislead distributors and users and to handicap respondents' direct selling competitors.

The appeal also excepts to the provision of the order to cease and desist which prohibits representations that the consent decree is anything other than an injunction prohibiting, restraining and limiting respondents' advertising practices. Respondents state that its language can be construed to bar any references whatsoever to the decree's allowable claims and even as prohibiting statements that the decree is a consent decree at all. That provision of the order is not worded as an unqualified prohibition against using the term "consent decree" to designate, describe or refer to the decree. It does proscribe past deceptive explanations and interpretations of that document by respondents which by their silence as to the injunctive purpose and effect of the decree imply official and documentary endorsement of the product and claims. Furthermore, the order does not forbid references in respondents' advertising to the allowable claims in the event such statements are not made in word settings implying that the decree operates to confer rights on respondents to make them to the exclusion of others. Under the order, respondents' rights to truthful and nondeceptive explanation and discussion of the provisions of the decree in their advertising are fully protected. Those exceptions to the order are accordingly denied.

The appeal is denied and the initial decision, as modified in accordance with this opinion, is being adopted as the decision of the Commission.

Commissioner Tait concurs in the result.

FINAL ORDER

This matter having been heard by the Commission upon the appeal filed by the respondents from the initial decision of the hearing examiner; and

The Commission having denied the appeal for reasons stated in the accompanying opinion and having further determined that the order to cease and desist contained in the initial decision should be modified:

It is ordered, That the fourth numbered paragraph contained in the second section of the initial decision's order to cease and desist be, and it hereby is, modified to read as follows:

"Entering into, continuing or enforcing, or threatening to enforce, any agreement or understanding which in any manner restricts or limits respondents' terminated distributors or customers from selling products like or similar to respondents' products to any other prospective purchaser or which in any manner restricts said distributors or customers from using or disclosing the names of their own customers for promoting the distribution of products other than respondents' products."

It is further ordered, That the initial decision, as so modified, be, and it hereby is, adopted as the decision of the Commission.

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

Commissioner Tait concurring in the result.

IN THE MATTER OF

HIT-RECORD DISTRIBUTING COMPANY OF CINCINNATI ET AL.

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

Docket 7897. Complaint, May 20, 1960—Decision, Sept. 28, 1960

Consent order requiring a distributor of phonograph records in Cincinnati, Ohio, to cease giving concealed payola to disc jockeys or other personnel of radio and television programs to induce frequent playing of their records in order to increase sales.

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 Hit-Record Distributing Company of Cincinnati, a corporation, and Isadore Nathan, 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 Hit-Record Distributing Company of Cincinnati is a corporation organized, existing and doing business