II. Violation of the Administrative Procedure Act

The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.

Thus § 3 (a) of the Act requires every agency to which it applies, which includes the Federal Trade Commission, to publish in the Federal Register certain statements of its rules, organization and procedure, "including the nature and requirements of all formal or informal procedures available," and adds that, "No person shall in [365] any manner be required to resort to organization or procedure not so published." In addition § 6 (b) proscribes any requirement of a report or other investigative demand "in any manner or for any purpose except as authorized by law."

Principally on the basis of these two sections respondents contend that the current order cannot be enforced except in violation of the Administrative Procedure Act. Have the respondents been ordered to comply with procedure of which they were not put on notice by publication in the Federal Register? And to the extent that the procedure had been defined and published, was it authorized by law?

The pertinent provisions of the Administrative Procedure Act became effective September 11, 1946. On December 11, 1946, the Federal Trade Commission published in the Federal Register its Rules of Practice, 11 Fed. Reg. 14233–14239. The Commission's Rule XXVI, *id.*, 14237, republished without change in 12 Fed. Reg. 5444, 5448, sets the time limit for filing initial reports of compliance with Commission orders and asserts the Commission's right to require, within its sound discretion, the filing of further compliance reports thereafter.[4] In § 7.12 of its Statement of Organization, Procedures, and Functions, 12 Fed. Reg. 5450, 5452, the Commission restated its right

[4] "§ 2.26. *Reports showing compliance with orders and with stipulations.* (a) In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation: *Provided, however,* That if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination . . . .

"(b) Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation. . . ."

to require by order "such supplemental reports of compliance as it considers warranted," and defined the contents of such a report.[5]

We conclude that the Commission's published Rule XXVI announced the [366] right it claims in this case to demand of a party against whom an enforcement decree has been entered that it "file with the Commission from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order. . . ." Taken together with the Commission's Statement of Organization, Procedures, and Functions, *supra*, if indeed not by itself, Rule XXVI amply met the requirements of § 3 (a) of the Administrative Procedure Act.

Respondents hardly challenge this conclusion. Theirs is the more subtle argument that requirement of supplemental reports following court enforcement of a Commission order is unauthorized by statute and *ultra vires*, so that no valid notice of Rule XXVI had been or could be given, as required by § 3 (a) of the Administrative Procedure Act. Also, it is said to be in direct violation of § 6 (b) of that Act. This leads to the question of statutory authority for the order to report, a question we must determine even apart from consideration of the Administrative Procedure Act. Accordingly we turn to the Federal Trade Commission Act itself to see whether it contains statutory authority for the Commission's Rule XXVI, as well as for its order here sought to be enforced, issued, as it was, pursuant to the procedures proclaimed in that Rule. If we find such statutory authority, we must conclude that the objections under the Administrative Procedure Act are taken in vain.

III. Statutory Authority To Require Reports

The Court of Appeals found the Commission to be without statutory authority to require additional reports as to compliance. Sec-

[5] "§ 7.12. *Compliance and enforcement.* (a) Reports of compliance with orders to cease and desist are required in accordance with the provisions of § 2.26 of the rules of practice. The Commission may by order require such supplemental reports of compliance as it considers warranted. Reports of compliance must consist of a full statement showing the manner and form in which the order has been complied with. Mere statements that the respondent is not violating the order are not acceptable. A factual showing is required sufficient to enable the Commission to appraise the manner and form of compliance.

"(b) After an order to cease and desist issued by the Commission pursuant to the Federal Trade Commission Act has become final as provided for under section 5 of that act, and the Commission has reason to believe that a respondent has violated such order, it shall certify the facts concerning the violation to the Attorney General, who may institute a suit in one of the District Courts of the United States for the recovery of civil penalties as provided in the act. In proceedings under the Federal Trade Commission Act, where a Circuit Court of Appeals of the United States has by decree commanded obedience to the Commission's order, enforcement may be accomplished by way of contempt proceedings in the Circuit Court. With respect to orders under the various provisions of the Clayton Act, enforcement must be accomplished by way of contempt proceedings. . . ."

tion 6 of the Federal Trade Commission Act, it thought, could not be invoked in connection with a decree sought and entered pursuant to § 5, which sections the court regarded as insulated from each other and directed to wholly different situations. Section 6, so it was held, authorized requirement only of "special reports" supplemental to "annual reports" and could not be authority for requiring special reports supplemental to a report of compliance required by court decree in a § 5 case.

At the root of this position lies the elaborate and plausible argument of respondents that §§ 5 and 6 of the Act set up self-sufficient, independent and exclusive procedures for dealing with different matters and that therefore neither section can be supported or aided by the other. Respondents also say that the present use of the asserted power is novel and unprecedented in Commission practice and introduces a new method of investigating compliance. Respondents are not without statements by the Commission or its officials, *dicta* from judicial opinions, views of text writers and facts of legislative history which give some support to this theory. But this Court never before has been called upon to deal consciously and squarely with the subject.

The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser.

The Commission's organic Act, § 5, comprehensively provides substantive and procedural rules for checking unfair methods of competition. The procedure is complete from complaint and service of process through final order, court review, and enforcement proceedings to recover penalties which are not those here sued for. This entire subject of unfair competition, it is true, came into the bill late in its legislative history and dealt with a commercial evil quite different from the target of prior antitrust laws. It is to be noted, however, that although complete otherwise, this section confers no power to investigate this or any other matter. That power, without which all others would be vain, must be **[367]** found in other sections of the Act. The Commission, for power to investigate compliance with a § 5 order, has turned to § 6, which authorizes it to require certain reports but is not expressly applicable to a § 5 case. Respondents say it might better have turned to § 9, which authorizes it to send in-

vestigators to examine their books, copy documents and issue subpoenas, and which is expressly applicable to § 5 proceedings.

Section 6, on which the Commission relies, is entitled, "Additional Powers of the Commission." Among other things and with exceptions not material, it adds the power "to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce, . . . and its relation to other corporations and to individuals, associations and partnerships." It also authorizes the Commission "to require by general or special orders, corporations engaged in commerce . . . to file with the Commission in such form as the Commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relationship to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing."

To one informed of no fact apart from this text, it would appear to grant ample power to order the reports here in question. Respondents are in the class subject to inquiry, the call is for what appears to be a special report and the matter to be reported would seem to be as to business conduct and practices about which the Commission is authorized to inquire. But respondents advance several arguments to persuade us that this seemingly comprehensive power is subject to limitations not evident in the text.

Respondents derive from legislative history their contention that Congress divided the duties and powers of the Commission into two separate categories, one in § 6 merely re-enacting the old powers of investigation and publicity in antitrust matters—"essentially a mere continuance of the former powers of the old Bureau of Corporations." The other was a new unfair-competition power, self-contained and sealed off in § 5. It is argued that the reports set forth in § 6 can be required only "in support of general economic surveys and not in aid of enforcement proceedings under Section 5."

While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that the information procured would be chiefly useful in reports to the President, the Congress, or the Attorney General, we find nothing that would deny its use for any purpose within the duties of the Commission, including a § 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least. The information was such as the Com-

mission was authorized to obtain and we think it could be required for use in determining whether there had been proper compliance with the court's decree in a § 5 case.

It is argued, however, and the court below has agreed, that the "special report" authorized by statute does not embrace the one here asked as to the method of compliance with the decree. We find nothing in the legislative history that would justify so limiting the meaning of special reports, or holding that the report here asked is not such a one. The very House Committee Report (H. R. Rep. No. 533, 63d Cong., 2d Sess.) which the court below thought sustained respondents' contention, we read in its context to support the Commission. Speaking of this section, the Report said, "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in [368] its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." An annual report of a corporation is a recurrent and relatively standardized affair. The special report was used to enable the Commission to elicit any information beyond the ordinary data of a routine annual report. If the report asked here is not a special report, we would be hard put to define one.

Nor does the fact that § 5 applies to individuals, partnerships, and corporations, while §§ 6 (b) and 10 apply only to corporations, lead us to conclude that the Act must not be read as an integrated whole. The argument that, because the reporting and penalty provisions of the latter extend only to corporations they must not be invoked to implement, as against corporations, a § 5 proceeding which contemplates action against persons and partnerships as well, would have force were there not sound reason for more drastic powers to compel disclosure from corporations than from natural persons. What the former may be compelled to disclose without objection the latter may withhold, or reveal only after exacting the price of immunity from prosecution. Corporations not only have no constitutional immunity from self-incrimination; but the disparity between artificial and natural persons is so significant that differing treatment can rarely be urged as an objection to a particular construction of a statute. Moreover, Congress may have considered that the volume or proportion of unincorporated business or the relatively small size of individually owned enterprises, or even a lesser capacity and disposition to resist made it possible to omit persons from duties and penalties imposed on artificial combinations of capital.

We conclude that the authority of the Commission under § 6 to require special reports of corporations includes special reports of the manner in which they are complying with decrees enforcing § 5 cease and desist orders.

IV. Rights Under Fourth and Fifth Amendments

The Commission's order is criticized upon grounds that the order transgresses the Fourth Amendment's proscription of unreasonable searches and seizures and the Fifth Amendment's due process of law clause.

It is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment. *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186. Although the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men," Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, *Boyd* v. *United States*, 116 U. S. 616, *Hale* v. *Henkel*, 201 U. S. 43, 70, neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret. *Hale* v. *Henkel*, *supra; United States* v. *White*, 322 U. S. 694.

While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. *Cf. United States* v. *White*, *supra.* They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced meas[369]ure of regulation. *Cf. Graham* v. *Brotherhood of Locomotive Firemen*, 338 U. S. 232; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Engineers*, 323 U. S. 210; *Wickard* v. *Filburn*, 317 U. S. 111, at 129. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n* v. *American Tobacco Co.*, *supra.* But it is sufficient if the

inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 208. Nothing on the face of the Commission's order transgressed these bounds.

Nor do we consider whether, for reasons peculiar to these cases not apparent on the face of the orders, these limits are transgressed. Such questions are not presented by the procedure followed by respondents. Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions. Neither respondent raised objection to the order's sweep, nor asked any modification, clarification or interpretation of it. Both challenged, instead, power to issue it. Their position was that the Commission had no more authority to issue a reasonable order than an unreasonable one. That, too, was the defense to this action in the court below.

Of course, there are limits to what, in the name of reports, the Commission may demand. Just what these limits are we do not attempt to define in the abstract. But is is safe to say that they would stop the Commission considerably short of the extravagant example used by one of the respondents of what it fears if we sustain this order—that the Commission may require reports from automobile companies which include filing automobiles. In this case we doubt that we should read the order as respondents ask to require shipment of extensive files or gifts of expensive books. This is not a necessary reading certainly, and other parties to the decree seem to have been able to satisfy its requirements.

If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, matters which now rest on mere assertions in their briefs. The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.

It is argued that if we sustain this use of § 6, the power will be unconfined and its arbitrary exercise subject to no judicial review or control, unless and until the Government brings suit, as here, for penalties. The Government, it is said, may delay such action while ruinous penalties accumulate and defendant runs the risk that his defenses will not be sustained. However, we are not prepared to say that courts would be powerless if after an effort to clarify or modify

such an order it still is considered to be so arbitrary as to be unlawful and the Government pursues a policy of accumulating penalties while [370] avoiding a judicial test by refusing to bring action to recover them. Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. *Cf. Oklahoma Operating Co.* v. *Love*, 252 U. S. 331. It is enough to say that, in upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act.

The judgment accordingly is reversed.

Reversed.

Mr. JUSTICE DOUGLAS and Mr. JUSTICE MINTON took no part in the consideration or decision of these cases.

ALBERTY ET AL. v. FEDERAL TRADE COMMISSION [1]

No. 9843—F. T. C. Docket 5101

(United States Court of Appeals for the District of Columbia Circuit. March 20, 1950)

CEASE AND DESIST ORDERS—SCOPE—IF REMEDY SELECTED WITHOUT REASONABLE RELATION TO UNLAWFUL PRACTICES FOUND

The Federal Trade Commission Act confers upon Federal Trade Commission not only the power specifically prescribed but all powers falling within the penumbra of meaning in the statutory provisions, and courts will not interfere with Commission's choice of remedy where unfair deceptive trade practices have been disclosed, except where remedy selected has no reasonable relation to the unlawful practices found to exist.

CEASE AND DESIST ORDERS—SCOPE—FALSE AND MISLEADING ADVERTISING—IF PRODUCT ADVERTISED FOR CERTAIN CONDITION DUE TO CERTAIN CAUSE—WHETHER DISCLOSURE OF PRODUCT'S INEFFECTIVENESS FOR OTHER MORE OR LESS FREQUENT CAUSES, VALID REQUIREMENT

Where advertisers stated plainly that their product would aid a certain condition when that condition arose from one certain described condition, Federal Trade Commission could not require advertisers to include the statement that frequently, or less frequently, or more frequently, the

[1] Reported in 182 F. (2d) 36. For case before Commission see 44 F. T. C. 475. Petition for certiorari was denied October 9, 1950.

described condition springs from causes which would not be reached by product unless it was found that failure to make such statement was misleading because of consequences from use of the product, or that failure to make such statement was misleading because of things claimed in the advertisement.

FEDERAL TRADE COMMISSION ACT—SCOPE AND PURPOSE—METHODS, ACTS AND PRACTICES—FALSE AND MISLEADING ADVERTISING—WHETHER AFFIRMATIVE ENCOURAGEMENT OF PROPERLY INFORMATIVE ADVERTISING, AS DEEMED, INCLUDED.

Both purpose and terms of Federal Trade Commission Act are to prevent falsity and fraud in advertisements, and when Federal Trade Commission goes beyond that purpose and enters upon affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority.

METHODS, ACTS AND PRACTICES—NONDISCLOSURE—FALSE AND MISLEADING ADVERTISING—IF PRODUCT ADVERTISED FOR CERTAIN CONDITION DUE TO CERTAIN NAMED CAUSE—WHETHER NONDISCLOSURE THAT CERTAIN AILMENTS NOT REACHED BY DRUG, "FALSE ADVERTISING"

Where advertisers of drug claimed only that their product would aid a certain condition when that condition arose from one certain described cause, failure of advertisers to state affirmatively that there were other ailments not reached by the drug was not "false advertising" under Federal Trade Commission Act, and Federal Trade Commission had no power to require advertisers to include such affirmative statement in their advertisement.

METHODS, ACTS AND PRACTICES—NONDISCLOSURE—FALSE AND MISLEADING ADVERTISING—IF PRODUCT, ADVERTISED FOR CERTAIN CONDITIONS, RECOGNIZED AS BENEFICIAL BY ONE OF TWO ESTABLISHED SCHOOLS—WHETHER NONDISCLOSURE OF WHICH, "FALSE ADVERTISING"

Failure of advertisement claiming drug to possess therapeutic value in treatment of sleeplessness, nervousness, etc., to designate which of two established schools of medicine rec[37]ognized the product as beneficial did not make the advertisement false within Federal Trade Commission Act, and did not authorize Federal Trade Commission to require advertisers to designate which of the established schools of medicine recognized their product as beneficial.

(The syllabus, with substituted captions, is taken from 182 F.(2d) 36.)

On petition to review order of Commission, order modified and affirmed.

Mr. Carl McFarland, Washington, D. C., with whom *Messrs. Ashley*, *Sellers* and *Kenneth L. Kimble*, Washington, D. C., were on the brief, for petitioners.

Mr. Donovan R. Divet, Special Attorney, Federal Trade Commission, Washington, D. C., with whom *Mr. W. T. Kelley*, General Counsel, Federal Trade Commission, and *Messrs. Walter B. Wooden* and *James W. Cassedy*, Associate General Counsel, Federal Trade Commission, Washington, D. C., were on the brief, for respondent.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, *Circuit Judges.*

PRETTYMAN, *Circuit Judge:*

This is a petition to review an order of the Federal Trade Commission. Petitioners are engaged in selling food and food products. They were charged by the Commission with disseminating false advertisements amounting to unfair and deceptive acts or practices in commerce. Four products are involved in this petition. They are Oxorin Tablets, Zen, Vitamin A Shark Liver Oil, and Alberty's Phospho B. After hearing, the Commission made detailed findings and issued a cease and desist order. Petitioners contest the validity of two clauses contained in parts of the order.

The Commission found that typical of the advertisements in respect to Oxorin are:

"Pep up your blood! Iron . . . A principal factor in Red Blood Cells . . . The disease Fighting Units of the Blood."

"When you are weary, tired, run-down, just dragging yourself around with no ambition left, when every effort you make seems to leave you weak and spent then try Oxorin Tablets, a tonic for the blood."

The Commission found as a fact that these tablets have no beneficial effect upon the blood except in cases of simple iron-deficiency anemia and that there are many causes of run-down conditions and lack of energy which will not be beneficially affected by the tablets. Petitioners do not object to that portion of the cease and desist order which forbids them to represent "That the preparation 'Oxorin Tablets' will have any therapeutic effect upon the blood or the red corpuscles thereof, except in cases of simple iron-deficiency anemia; or that said preparation will relieve, correct, or have any beneficial effect upon the condition of lassitude characterized by such expressions as 'weariness,' 'tiredness,' 'weakness,' 'lack of energy,' or 'general run down condition,' unless such representation be expressly limited to symptoms or conditions due to simple iron-deficiency anemia."

However, the Commission added to the foregoing the requirement that the advertisement also state

"that the condition of lassitude is caused less frequently by simple iron-deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it."

This additional clause is one of the two which are the subject matter of the petition for review. It is applied to other products as well as to Oxorin Tablets.

The Federal Trade Commission Act gives the Commission authority to prevent persons from using unfair or deceptive practices in com-

merce,[1] provides that the dissemination of false advertisement is an unfair or deceptive practice in commerce,[2] and defines a false advertisement as one which is misleading in a material respect.[3] [38] In determining whether the advertisement is misleading, failure to reveal facts made material by existing representations and failure to reveal facts made material by reason of the consequences of using the product are to be considered.[4] Thus, false advertising, by the terms of the statute, includes failure to reveal certain characteristics of the product which become important either because of certain things which are represented in the advertisement or because of consequences which arise from the use of the product. The Supreme Court has held that the act confers upon the Commission not only the powers specifically prescribed but all power falling within the penumbra of meaning in the statutory provisions. In *Siegel Co.* v. *Federal Trade Comm'n*,[5] the Supreme Court held that in these cases "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."

The question posed in the case at bar is not restricted to the peculiarities of these products. None involved is injurious or harmful in any sense. On the contrary, it is agreed that they have beneficial effects. The proposition that an advertisement should limit claims of beneficial effect to the causes for which the product is helpful—in the case of Oxorin Tablets simple iron-deficiency anemia—is not disputed. But the Commission says that these advertisers must go further and say that the condition of lassitude is caused less frequently by simple iron-deficiency anemia than by other causes and that in such cases the product will not be effective. In short, the Commission requires that the advertiser tell the public that his product is more frequently valueless than it is valuable.

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[1] 38 Stat. 719 (1914), 52 Stat. 111 (1938), 15 U. S. C. A. § 45 (a).

[2] 52 Stat. 114 (1938), 15 U. S. C. A. § 52 (b).

[3] 52 Stat. 116 (1938), 15 U. S. C. A. § 55 (a), reads:

"The term 'false advertisement' means an advertisement other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact and includes, or is accompanied by each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug."

[4] *Ibid.* False advertising is defined in this section of the act for the purposes of Sections 12, 13, and 14. Section 12 (b) (52 Stat. 114 (1938), 15 U. S. C. A. § 52 (b)), says that false advertising is an unfair or deceptive practice within the meaning of Section 5 of the act (*supra*, note 1). *Cf. Fresh Grown Preserve Corp.* v. *Federal Trade Comm'n*, 125 F. (2d) 917 (C. C. A. 2d 1942) [34 F. T. C. 1827, 3 S. & D. 460].

[5] 327 U. S. 608, 613, 90 L. Ed. 888, 66 S. Ct. 758 (1946), [42 F. T. C. 902, 4 S. & D. 476].

If this rule applies to petitioners, it must also apply to all other products similarly advertised. The scope of the power thus claimed by the Commission will be seen if the advertisements which are currently customary in newspapers and magazines and on the radio are called to mind. Headaches, lack of energy, indigestion, and numerous other ailments may be due to any one or more of many causes, and remedies for these ills are usually beneficial only when the condition results from certain of those causes. It is admitted in this case that the Commission can require an advertiser of a product beneficial to a certain condition to specify which cause of that condition will yield to the product. But under the power claimed, the Commission could require every such advertiser to announce that in most cases the remedy will be useless. The question before us deals with an advertiser who states plainly that his product will aid a certain condition when that condition arises from one certain described cause. The question is whether that advertisement is, nevertheless, false and fraudulent unless it also states that frequently, or less frequently, or more frequently, the described condition springs from other causes which will not be reached by the product.

Even if we give effect to the broadest possible concept of the power conferred by the Congress upon the Commission, we do not think that the Commission has the power here claimed. There is a limit to the Commission's power. It is not given a general charter to police the expenditure [39] of the public's money or generally to do whatever is considered by it to be good and beneficial. The task assigned it by Congress is specific, and it has no other authority in respect to this subject. False advertising is defined by the act as including failure to reveal facts made important, or of some consequence, because of other things claimed, and failure to reveal facts made important, or of some consequence, because of the results of the use of the product. The Commission must find either of two things before it can require the affirmative clause complained of: (1) that failure to make such statement is misleading because of the consequences from the use of the product, or (2) that failure to make such statement is misleading because of the things claimed in the advertisement. There is no such finding here.

Nor do we see how a derogatory addendum to the advertisement, such as that required here by the Commission, has any reasonable relation to the purpose of preventing the advertisements from being misleading. As we have pointed out, there are no harmful consequences from use of these products. The limitations imposed by the first part of the Commission's order reveal the stark, complete truth. In the case of Oxorin Tablets, petitioners can say that they help lassitude only if they specify lassitude due to simple iron-deficiency

anemia. The Commission has found that such a statement is true. Moreover, it is the full truth. It is clear enough that an additional derogatory negative emphasizes the truth. No matter how clear and complete an affirmative statement is, it can be sharpened by a negative delimitation. Almost every advertisement of a food, drug or drink, no matter how accurately described and carefully limited in claims, would fall within the scope of the rule here sought to be established.

We are concerned with the scope of the power thus sought by the Commission. If it has this power, it could, if it chose, require an advertiser of a breakfast food rich in iron to state not only that the food is good for those deficient in iron but also that iron deficiency is less frequent than other ills and that for these others the advertised food is valueless; and similarly through the long list of foods, drugs and drinks good for one or a few of the ills of men but not for all. Such power seems to us to be no less than the power to control the marketing of all such products, because, if particular advertisers, selected by the Commission, can be required not only to state accurately the limited benefits of their products but also to call attention to what the products will not do the effect on marketing is clear enough. Such a requirement seems to us to have no relation to the prevention of falsity in advertising. It is a wholly different power.

Our dissenting judge says that "The Act's purpose is to encourage the informative function of advertising." That view reflects clearly the difference between us. We think that neither the purpose nor the terms of the act are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority. Of course, the truth of an advertisement affects its informative function. But the scope and nature of the information contained in an advertisement involve many more considerations than its mere truth. It would be ideal from the buyer's point of view if all advertisements were required to describe the product with cold precision, to enumerate with fidelity its shortcomings, and to call attention to the circumstances in which it is valueless. And a plausible argument can be made that an advertisement is not really truthful unless it does all those things. But we think that the negative function of preventing falsity and the affirmative function of requiring, or encouraging, additional interesting, and perhaps useful, information which is not essential to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter. In our judgment, the Commission goes far across the line when it attempts to require the

ad[40]vertiser of a drug admittedly beneficial in one ailment to state affirmatively that there are other ailments not reached by the drug. This latter requirement is merely the encouragement of the informative function of advertising.

Congress has given us a definition of false advertisement and in it has specified the respects in which failure to reveal amounts to falsity. It has thus indicated, even though it has not prescribed precisely, the limits to which it meant the Commission could go. It seems to us that the limit of the Commission's power is to require that a product be truthfully represented, and that it has no power to require additional negative statements except as the act itself indicates, *i. e.*, where the affirmative representations require further explanation or where the consequences of using the product require further warning. Neither of these specifications is present in the case at bar.

The other part of the Commission's order complained of relates solely to Phospho B. The Commission required that if the petitioners make any claim that this product possesses any therapeutic value in the treatment of sleeplessness, nervousness, etc., they must expressly limit such claims to "claims of value made for the preparation under the principles of the homeopathic school of medicine". The homeopathic school is one of the two generally recognized schools of medicine, and, although it has considerably less supporters in number than has the allopathic school, it is nonetheless respectably established and practiced. According to the principles of the homeopathic school, this particular product is a medicine. We do not think that failure to designate which of two established schools of medicine recognizes a product as beneficial is misleading and makes the advertisement false.

We hold that failure to include the two disputed clauses in the advertisements under consideration is not false advertising under the Federal Trade Commission Act, and that the Commission has no power to enforce such requirements.

The statute gives this court power not only to affirm or to reverse but also to modify orders of the Commission.[6] The order under review is modified by striking from paragraph 1 (d) the clause "and unless the advertisement reveals that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it", and eliminating from other paragraphs similar clauses; and by striking from paragraph 1 (k) the phrase "under the principles of the homeopathic school of medicine". As thus modified, the order is affirmed.

Order modified and affirmed.

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[6] 38 Stat. 719 (1914), 52 Stat. 111 (1938), 15 U. S. C. A. §§ 45 (c) and 45 (d).

854002—52——95

BAZELON, *Circuit Judge*, dissenting: Ever since Congress decided that many of the problems of our complex economy should be entrusted to specialized agencies, courts have relied on notions of "self-restraint" and "special competence" to limit their review of agency action. This was tacit recognition that no court could match the skill, time and selectivity which are brought to bear upon any given problem by an agency especially established and equipped for that purpose. A direct outgrowth of this development was a reorientation in judicial thinking, fundamental to which was the distinction between that which one finds personally acceptable or "reasonable" and that which falls within the bounds of acceptability or "reasonableness." The former tends to approximate the relatively subjective decision of the administrator himself; the latter represents merely a determination of whether the action under scrutiny bears some rational connection with the facts. This distinction—between that which is personally acceptable and that which is within the bounds of acceptability—is often difficult to grasp, but it is hardly new to the law. For example, members of a jury are required, in negligence cases, to apply the standard of conduct observed by a "reasonable man," who represents a community ideal, rather than to measure the tortfeasor's conduct by what they themselves **[41]** would do under the same circumstances. See Holmes, *The Common Law* 111 (1881).

Although judicial deference to administrative expertness was first applied in the area of fact-finding, it has been extended to the matter of remedy as well. In a series of cases involving orders of the National Labor Relations Board, the Supreme Court held that the Board's choice of remedy would not be disturbed, absent a clear showing of abuse of discretion.[1] And the same was true of Securities and Exchange Commission dissolution orders under the Public Utilities Holding Company Act;[2] and of the orders of other administrative agencies.[3]

Since this development post-dated the enactment of the Federal Trade Commission Act and its grant of authority to Courts of Appeals to "modify" orders of the Commission, 15 U. S. C. A. § 45 (b), there arose a need for reexamination of the case law in this area. In *Herz-*

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[1] See, e. g., *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82 (1940); *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194 (1941); *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U. S. 533, 543 (1943); *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702, 704–5 (1944).

[2] *American Power & Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90, 115–6 (1946).

[3] See, e. g., *Board of Trade* v. *United States,* 314 U. S. 534, 548 (1942); *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227–9 (1943); *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U. S. 119, 124 (1944); *Ayrshire Collieries Corp.* v. *United States,* 335 U. S. 573, 593 (1949); cf. *Gray* v. *Powell,* 314 U. S. 402, 412–3 (1941).

feld v. *United States*, 140 F. (2d) 207 (C. A. 2d, 1944), which involved a prayer for review of a Federal Trade Commission order prohibiting false advertising, the court refused to follow the precedent of modification established in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218 (1933) [17 F. T. C. 664, 2 S. & D. 217]. Judge Learned Hand, speaking for the Second Circuit, said that since the *Royal Milling Co.* case was decided, "the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme. [Citing cases] It is true that all these decisions concerned the Labor Board, but that tribunal does not enjoy a position of peculiar authority, as the court has indicated in other connections. [Citing cases] * * * Congress having now created an organ endued with the skill which comes of land experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed." 140 F. (2d) at 209.[4]

It seems to me that, by its disposition of *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946) [42 F. T. C. 902, 4 S. & D. 476] the Supreme Court has tactily narrowed its own decision in the *Royal Milling Co.* case to such an extent that it **[42]** is drawn within the rationale expressed by Judge Hand in the *Herzfeld* case. In the *Siegel* case, the Federal Trade Commission had ordered Siegel to cease and desist from using its trade name because of certain misprepresentations contained therein. Petitioner, citing the *Royal Milling Co.* decision, asserted that so valuable a right as a trade name should not be destroyed if qualifying words might cure the misrepresentation. The Third Circuit held, however, that it was powerless to disturb the remedy, following the *Herzfeld* case. *Siegel Co.* v. *Federal Trade Commission*, 150 F. (2d) 751, 755–6 (C. A. 3d, 1944) [4 S. & D. 294]. The Supreme Court reversed, relying in large part on the fact that, by being prohibited from further use of a valuable trade name, petitioner was being deprived of a valuable business asset. Mr. Justice Douglas, speaking for a unanimous Court, stated: "The Commission

[4] Followed by the Second Circuit in *Parke, Austin & Lipscomb* v. *Federal Trade Commission*, 142 F. (2d) 437, 442 (C. A. 2d, 1944), cert. den. 323 U. S. 753 (1944); *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. (2d) 676, 680 (C. A. 2d, 1944) [39 F. T. C. 657, 4 S. & D. 226]; *Deer* v. *Federal Trade Commission*, 152 F. (2d) 65, 67 (C. A. 2d, 1945) [41 F. T. C. 463 4 S. & D. 437]; cf. *Irving Weis & Co.* v. *Brannan*, 171 F. (2d) 232, 235 (C. A. 2d, 1948); by the Third Circuit in *Siegel Co.* v. *Federal Trade Commission*, 150 F. (2d) 751, 755–6 (C. A. 3d, 1944) (discussed *infra*); [42 F. T. C. 902, 4 S. & D. 476] *Perloff* v. *Federal Trade Commission*, 150 F. (2d) 757, 760 (C. A. 3d, 1944) [40 F. T. C. 878, 4 S. & D. 316]. See also *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726–7 (1948) [44 F. T. C. 1460, 4 S. & D. 676].

has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes,[5] judicial review is limited. It extends no further than to ascertain whether the Commission made an *allowable judgment in its choice of the remedy.* As applied to this particular type of case, it is whether the Commission abused its discretion in concluding that no change 'short of the excision' of the trade name would give adequate protection. * * * The issue is stated that way for the reason that we are dealing here with trade names which, as *Federal Trade Commission* v. *Royal Milling Co.*, * * * emphasizes are valuable business assets. * * * The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." [Emphasis supplied.] 327 U. S. at 612–3. The Court did not, however, proceed to order the Commission to permit "proper qualifying words" as was done in the *Royal Milling Co.* case, 288 U. S. at 217 [17 F. T. C. 664, 2 S. & D. 217], but instead, remanded to the Federal Trade Commission, saying: "we are left in the dark wether some change of name short of excision would *in the judgment of the Commission* be adequate." [Emphasis supplied.] 327 U. S. at 613. The inference to be drawn from the Supreme Court decision in the *Siegel* case seems to me to be that if the Commission had considered the possibility of qualifying words and found them insufficient to cure the misrepresentation, especially if no property in a trade name were involved, the Court would not interfere with the Commission's expert judgment, unless there was a clearly demonstrable abuse of discretion.

"The question before the court is not whether my view is right but whether it is reasonable." [6] our function is limited to finding whether the remedy has a rational basis in the facts. Since I find such a rational basis, I am unable to agree with the majority that the Commission abused its discretion.

The Commission found that Alberty had falsely advertised that Oxorin Tablets had beneficial effects on lassitude, tiredness, etc.[7] Typical of these misrepresentations is the following advertisement:

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[5] Citing cases which are included in Notes 1 and 3, *supra*.

[6] Judge Edgerton dissenting in *Hannegan* v. *Read Magazine*, 81 U. S. App. D. C. 339, 343, 158 F. (2d) 542, 546 (1946), reversed, *Donaldson* v. *Read Magazine*, 333 U. S. 178, 188 (1948).

[7] The stipulation of facts reads: "* * * respondents have represented, directly and by implication, that by the use of 'Oxorin Tablets' the blood and the red corpuscles of the user will be rendered stronger, more vital and active and will perform their functions better, and that it will correct run-down conditions and bring back energy."

"Pep up your blood! Iron . . . A principal factor in Red Blood Cells . . . The disease Fighting Units of the Blood.

[43] "When you are weary, tired, run-down, just dragging yourself around with no ambition left, when every effort you make seems to leave you weak and spent then try Oxorin Tablets, a tonic for the blood."

In truth, as the stipulated facts show, the tablets had no such beneficial effects except when the designated symptoms were caused by iron deficiency anemia—and that was infrequently the case.[8] Thus, in deciding how best to remedy the falsehood without unnecessarily restricting petitioner from stating the "complete truth," the Commission carved out of the misrepresentation all that was false, expressly or impliedly. The resulting order enjoined petitioner to cease and desist from representing

"That the preparation 'Oxorin Tablets' will have any therapeutic effect upon the blood or the red corpuscles thereof, except in cases of simple iron deficiency anemia; or that said preparation will relieve, correct, or have any beneficial effect upon the condition of lassitude characterized by such expressions as 'weariness', 'tiredness', 'weakness', 'lack of energy', or 'general run down condition', unless such representation be expressly limited to symptoms or conditions due to simple iron deficiency anemia and unless the advertisement reveals that the condition of lassitude is caused less frequently by simple iron deficiency anemia than by other causes and that in such cases this preparation will not be effective in relieving or correcting it."

If the Commission had considered only what affirmative statements could minimally be made to cure the misrepresentation, it would have ignored its statutory mandate. The Federal Trade Commission Act, as amended in 1938, specified that

"* * * in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also *the extent to which the advertisement fails to reveal facts material in the light of such representations* or material with respect to consequences which may result from the use of the commodity

[8] Following is the stipulation of facts in this connection: "That 'Oxorin' will have no beneficial effect upon the blood or the red corpuscles thereof except in cases of simple iron deficiency anemia. There are many causes of rundown conditions and lack of energy which will not be beneficially affected in any way by 'Oxorin'."

* * * * * * *

"That the causes of lassitude described by such expressions as 'weary,' 'tired,' 'run-down,' 'just dragging around,' 'no ambition left,' 'slipping,' 'all gone,' and the like, are so numerous that in the aggregate they are due much less frequently to simple iron deficiency anemia than to other causes."

to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." [Emphasis supplied.] 52 Stat. 116 (1938), 15 U. S. C. A. § 55 (a).

It is clear from the italicized language that Congress realized that omissions could be as misleading as affirmative misrepresentations. With this in mind, I am unable to reject the Commission's finding that we have here a situation where, "In recommending a particular preparation [i. e., Oxorin] as a cure or remedy for certain designated ailments, symptoms or conditions [i. e., lassitude], respondents suggest not only that such ailments, or conditions may be due to causes for which the preparation is beneficial, but also that there is at least a reasonable chance that they are in fact due to such causes." To prevent such a suggestion from being accepted and relied on in a case where it would be false or misleading, as here, the Commission ordered "appropriate disclosure of the possibility of other causes of the ailments, symptoms or conditions."

It seems to me that, where the sin is one of omission, the Commission may find that it can be remedied only by eliminating any possibility that consumers may draw incorrect inferences in the future. Just as the flat statement "Oxorin is good for lassitude" requires the qualifying phrase, "when that symptom is due to iron deficiency anemia," so also might the Commission have concluded that this single qualification, without more, would raise the inference that, more probably than not, [44] such a symptom *is* the result of iron deficiency anemia. To remove the possibility of this incorrect secondary inference on the part of consumers, the Commission may properly insert a second qualifying phrase.

Nor is such a decision on the part of the Commission completely without precedent. In a case under the Food and Drug Act which, according to the Court, forbids "every statement, design and device [on a label] which may mislead or deceive," the Supreme Court said that "Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false." *United States* v. *95 Barrels of Vinegar*, 265 U. S. 438, 443 (1924). It then upheld the view of the lower court that a label describing vinegar as "apple cider vinegar made from *selected apples*" gave rise to the inference that selected *fresh* apples were used. In reality, the vinegar was the product of *dried* apples. The omission was found to be misleading even though the two products were equally wholesome.[9]

[9] Cf. *United States* v. *Six Dozen Bottles, etc.*, 158 F. (2d) 667, 669 (C. A. 7th 1947).

Similarly, under the Federal Trade Commission Act, it was held that advertisement of defendant's "6% finance plan" tended to mislead the public into thinking that a simple interest charge of six percent on unpaid balances was contemplated and, therefore, that a curative order was required. *General Motors Corp.* v. *Federal Trade Commission*, 114 F. (2d) 33 (C. A. 2d, 1940) [3 S. & D. 282].[10]

As I view the development of the law in this field, the Commission is entitled to exercise the utmost caution rather than put the consumer to the risk of inquiry. The cases are almost legion which state that this statute was "made to protect the trusting as well as the suspicious. * * * the rule of *caveat emptor* should not be relied upon to reward fraud and deception." *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116 (1937) [25 F. T. C. 1715, 2 S. & D. 429]. The Commission's function is "to protect the casual, one might even say the negligent, reader, as well as the vigilant and more intelligent and discerning public." *Parker Pen Co.* v. *Federal Trade Commission*, 159 F. (2d) 509, 511 (C. A. 7th, 1946) [43 F. T. C. 1190, 4 S. & D. 597]. Even if it is "only the careless or the incompetent [who] could be misled * * * if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment." *General Motors Corp.* v. *Federal Trade Commission*, 114 F. (2d) 33, 36 (C. A. 2d, 1940) [35 F. T. C. 955, 3 S. & D. 282]. The Federal Trade Commission Act was not " 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous,' * * * and the 'fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced' * * *. The important criterion is the net impression which the advertisement is likely to make upon the general populace. * * * It is for this reason that the Commission may 'insist upon the most literal truthfulness' in advertisements," *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. (2d) 676, 679–80 (C. A. 2d, 1944) [39 F. T. C. 657, 4 S. & D. 226].[11] It is, of course, almost axiomatic that " 'words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.' " *Sebrone Co.* v. *Federal Trade Commission*, 135 F. (2d) 676, 679 (C. A. 7th, 1943)[12] [36 F. T. C. 1142, 3 S. & D. 570].

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[10] See Judge Minton's dissent in *D. D. D. Corp.* v. *Federal Trade Commission*, 125 F. (2d) 679, 682–3 (C. A. 7th, 1942) [34 F. T. C. 1821, 3 S. & D. 455].

[11] *Aronberg* v. *Federal Trade Commission*, 132 F. (2d) 165, 167 (C. A. 7th, 1942) [35 F. T. C. 979, 3 S. & D. 528].

[12] Cf. *Donaldson* v. *Read Magazine*, 333 U. S. 178, 188–9 (1948).

There are intimations in the majority opinion that if use of these products were to have harmful consequences, it might be permissible to add further qualifications than those considered adequate by the majority. Although such a distinction, between misleading advertisements which may [45] have harmful effects (beyond the useless expenditure of money) and those which do not, may be a desirable one, I do not believe it is established by the Act. The statutory language draws within its condemnation all "false advertisements." Failure to reveal facts becomes determinative of falsehood when they are "material in the light of such representations ['made or suggested by statement, word, design, device, sound, or any combination thereof'] *or* material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." 15 U. S. C. A. § 55 (a). Only the clause after the conjunction "or" adverts to considerations of harmfulness. The clause before it seems to me to authorize the Commission to require qualifying or explanatory statements whenever these may be necessary to remedy omissions found by the Commission to be misleading. Since the statute makes no provision for requiring a greater amount of truth when a product is harmful than when it is not, I think the majority are injecting an irrelevant criterion into the case.

Nor is this a case, like *Royal Milling* and *Siegel*, where the property right in a trade name would have been entirely lost if the Commission order had been permitted to stand. Perhaps, in such cases, there is need for greater scrutiny and for consideration of every available alternative before permitting so drastic a course.[13] But no such "right" is involved here. The Commission made no attempt to prevent petitioner from advertising that Oxorin Tablets had a beneficial effect on iron deficiency anemia. The circumscription was only with regard to a symptom, "lassitude," which is only infrequently caused by such deficiency.

It seems to me that the main thrust of the majority opinion is towards caution in interfering with the "right" to advertise. It decides that the Commission goes too far when its order "requires that the advertiser tell the public that his product is more frequently valueless than it is valuable." I do not find that a startling requirement when its function is to rebut a false or misleading inference that the product is more frequently valuable than it is valueless. In my view, the action taken by the majority overlooks the fact that Congress, by enacting legislation proscribing false and deceptive advertising, sought to remedy the consumer's patent inability to ascertain the merit of claims

[13] See *Churchill Tabernacle* v. *Federal Communications Commission,* 81 U. S. App. D. C. 411, 415, 160 F. (2d) 244, 248 (1947).

made by advertisers. The Act's purpose is to encourage the informative function of advertising; and the Commission's duty is to eliminate falsehoods. If that which is left after the elimination of all that is expressly or inferentially false is hardly worth saying, then, of course, it need not be said.[14]

These same considerations apply to the other part of the Commission's order complained of by petitioner. Phospho B, another of petitioner's products, has therapeutic value in the treatment of sleeplessness, nervousness, etc., *only under the tenets of the homeopathic school of medicine.* That school, as the majority points out, has considerably less supporters than has the allopathic school. For the reasons already discussed, I feel that it was within the discretion of the Commission to order that the public be informed of the limited medical support for the claims made by petitioner. To permit petitioner to continue its representations without restricting them to adherents of the homeopathic school is to "fail to reveal facts material in the light of such representations." 15 U. S. C. A. § 55 (a).

I think the order of the Commission should be affirmed without modification. But even if I were to accept the view of the majority, I think the proper procedure now would be to remand to the Commission for its reconsideration of the entire order in light of this court's rejection of the second qualifying clause. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55 (1948) [44 F. T. C. 1499, 4 S. & D. 716]

DR. F. A. NEWCOMB v. FEDERAL TRADE COMMISSION[1]

No. 3920—F. T. C. Docket 4962

(Circuit Court of Appeals, Tenth Circuit. April 12, 1950)

Order dismissing, for failure to prosecute, petition to review order of Commission of March 23, 1949, 45 F. T. C. 568, at 578, requiring respondent individual, his representatives, etc., in connection with the offer, etc., of a home treatment for avrious diseases, disorders, and ailments of the human body, which treatment consisted of an electric device, a preparation designated "Ray Solution" used therewith, a preparation designated "Cataract Tonic," and a recommended diet, or of any similar treatment, to cease and desist from disseminating advertising representing, directly or through inference, and among other things, that said device or preparations or diet, alone or in any combination, constitute a remedy or competent treatment for diseases and conditions of the eyes including cataracts, opacities of the vitreous and aqueous humor, corneal ulcers, optic nerve atrophy, etc., as well as a long list of other ailments and diseases.

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[14] Cf. *American Medicinal Products* v. *Federal Trade Commission,* 136 F. (2d) 426, 427 (C. A. 9th, 1943).

[1] Not reported in Federal Reporter. For case before Commission, see 45 F. T. C. 568.

Mr. Jerome Walsh, Kansas City, Mo., for petitioner.

Mr. James W. Cassedy, Assistant General Counsel, of Washington, D. C., for Federal Trade Commission.

ORDER OF DISMISSAL

It appearing to the court that on March 13, 1950, a certified typewritten transcript of the record in this cause was received from the secretary of the Federal Trade Commission and that on such date the clerk of this court advised counsel for petitioner of the receipt of such record and that under the provisions of rule 34, paragraph 5 (a) the designation for printing should be filed within 10 days, that no designation was filed within such 10 days, and that on March 24, 1950, the clerk of this court advised counsel for petitioner that the time for filing such designation had expired and that no designation had been received as of that date, and it further appearing that on April 3, 1950, the clerk of this court advised counsel for the petitioner that the time for filing the designation for printing had long expired and unless a reply was received by the end of the week of April 3, 1950, the matter would be presented to the court, and it further appearing to the court that no designation had been filed to date and no reply has been made to any of the three letters of the clerk above set out,

It is now here ordered on the court's own motion that the petition to review the order of the Federal Trade Commission in this cause be and the same is hereby dismissed out of this court for failure to diligently prosecute the same.

PENALTY PROCEEDINGS

United States v. *Atlantic Coast Oil Company of New York, Inc.*, United States District Court, Eastern District of New York; $2,500 penalty assessed on April 6, 1950.

Atlantic Coast Oil Company of New York, Inc., its officers, etc., in connection with the offer, sale, and distribution of its motor oils and greases in interstate commerce, was ordered to cease and desist from:

(1) Representing through the use of the emblem of the Pennsylvania Grade Crude Oil Association that it is a member of said association, unless and until such is the case.

(2) Representing through the use of the emblem of the Pennsylvania Grade Crude Oil Association, the phrase, "Guaranteed 100 Per Cent Pure Pennsylvania Oil, Specially Processed," the word "Pennsylvania" or any derivation thereof, the phrase "Permit No. ——," or the word "License" together with said emblem, that the oil or greases being offered for sale or sold by it are pure, unadulterated Pennsylvania oils or greases produced in the Pennsylvania strata of oil fields, unless and until such is the case.

(3) Representing, through the use of the letters and numbers developed by the Society of Automotive Engineers to indicate relative viscosities in motor oils, that the products being offered for sale and sold have the viscosities indicated by said numbers and letters, when such is not the case (D. 2865, 23 F. T. C. 533 at 540).

United States v. *Oland D. Redd (Woelfel Studio, et al.)*; United States District Court for the Western District of New York; settled by compromise about May 4, 1950, for $4,500, to be paid in installments of $500, of which the last installment was submitted on September 4, 1951.

Respondent individuals, their agents, etc., had been ordered, as of February 7, 1945, in connection with the offer and sale, etc., in commerce of tinted or colored photographs, or enlargements or miniatures of photographs or snapshots, and of frames therefor, to cease and desist from:

1. Representing in any manner, directly or by implication, that colored or tinted photographs, photographic enlargements, or reductions are paintings.

2. Using the terms "oil painting," "portrait painting," "hand painted," or "hand painted portrait," or the word "painting," either alone or in conjunction with any other words or terms, to designate,

describe, or refer to colored or tinted photographs, photographic enlargements or reductions, or other pictures produced from a photographic base or impression.

3. Using a "draw" or "draw contest" or so-called "lucky coupons" or "lucky certificates," or any similar device, plan, or scheme, so as to represent, indicate, or imply that any customer will obtain any substantial discount or reduction in the price of any picture or pictures.

4. Representing, in connection with pictures being offered or sold in the regular course of business at the usual and customary prices therefor, that such pictures are being offered or sold at a reduced price as an advertising offer or introductory offer, or representing in any manner that a purchaser is receiving an advantage in price not available to all purchasers.

5. Representing that a picture to be made and delivered will be equal in quality and appearance to any sample displayed to the customer unless in fact the picture thereafter delivered is of the same quality, design, and workmanship as said sample.

6. Using trade names consisting of or including terms such as "Art Studios," "Art Institute," "Art Association," or any other fictitious name of similar import, unless the respondent using such name or names actually owns, operates, conducts, or controls an organization or establishment of the character indicated and comprehended by the trade name so used.

7. Misrepresenting or authorizing, permitting, or cooperating in the misrepresentation of the financial responsibility, prestige, or standing of respondents, or any of them, or of the character or extent of such business, by falsely claiming to be connected with an operating established house or by deceptively using the business address of such established house as and for a business allegedly operated by respondents, or any of them, and from misrepresenting through the use of fictitious trade names and misleading State and post office addresses the place, character, and extent of the business actually conducted.

8. Concealing from or failing to disclose to customers at the time pictures are ordered that the finished picture when delivered will be so shaped and designed that it can be used only in a specially designed, odd-style frame that cannot ordinarily be obtained in stores accessible to the consuming public, and that it will be difficult or impossible to obtain a frame to fit the picture from any source other than respondents.

9. Representing that States Finance Company, or any similar collection agency operated by or for respondents, is an innocent purchaser for value without notice of notes for unpaid balances due on pictures or frames sold to the consuming public by respondents, or has in good faith discounted such notes or paid out any money or

given anything of value in connection with the alleged purchase of such notes.

10. Failing or refusing, in cases where pictures have been ordered, completed, and paid for, to deliver to the customer the completed picture or return the photograph or snapshot previously loaned by the customer for use in producing the picture (Docket 4649, 40 F. T. C. 84, 106).

MISCELLANEOUS MATTERS

IN THE MATTER OF

NEW STANDARD PUBLISHING CO., INC., ET AL.

ORDER DENYING RESPONDENTS' MOTIONS TO SUPPRESS AND STRIKE ALL EVIDENCE, RETURN DOCUMENTARY EVIDENCE, AND TO DISMISS THE COMPLAINT, AND SUPPORTING AND DISSENTING OPINIONS, ETC.

Docket 4697. Order, June 16, 1950

This matter came on to be heard in regular course upon motions filed May 2, 1946, by the individual respondent Julius B. Lewis and the corporate respondent New Standard Publishing Co., Inc., to suppress and strike from the record all evidence and other information introduced in this proceeding against said respondents, to return to the individual and corporate respondents all the documentary evidence introduced, and to dismiss the complaint as to them.

The motions to suppress and strike from the record all evidence and information introduced against said respondents and to return the documentary evidence to them allege that said documents and other evidence were the private papers and property of the individual respondent Julius B. Lewis and were the papers and property of the corporate respondent and were obtained by illegal search and seizure directly or indirectly by the Commission, acting through its duly constituted officers.

The motion to dismiss the complaint alleges that the documentary and other records, unlawfully seized, were used against the individual respondent in violation of the fourth and fifth amendments to the United States Constitution and against the corporate respondent in violation of the fourth amendment to the United States Constitution. As to the individual respondent Julius B. Lewis, these motions further allege (1) that when he was subpenaed as a witness by the Commission and compelled to testify in its behalf in compliance with said subpena he was granted immunity from prosecution under the fifth amendment to the United States Constitution and under section 9 of the Federal Trade Commission Act; (2) that having been subpenaed and having given testimony in behalf of the Commission in compliance with said subpena he was granted immunity by the provisions of subsection (1) of section 5 of the Federal Trade Commission Act; and (3) that he was not warned by officials of the Federal Trade Com-

mission at any time that his testimony and his books and papers could be used as a basis for prosecuting him to recover fines and penalties set forth in section 5 of the Federal Trade Commission Act.

The Commission has duly considered said motions, the brief in support therof, oral argument and reargument in support of and in opposition thereto, and the record herein, and is now fully advised in the premises.

It appears from the evidence of record that the documents, records, and other evidence received from respondents Julius B. Lewis and New Standard Publishing Co., Inc., during the course of the investigation of this matter and introduced as evidence in this proceeding were obtained in a lawful manner under and by virtue of the authority granted the Commission by the provisions of the Federal Trade Commission Act. Authorized agents of the Commission called at respondents' established place of business during regular business hours and requested permission to examine certain records and correspondence then in their possession. Said agents, after properly identifying themselves, fully advised respondent Julius B. Lewis, an officer of the corporate respondent, of the objects and purposes of their visit; and then and there advised him of his rights and privileges and explained to him the authority under which they sought permission to examine the records of the corporate respondent. He was advised of the purposes for which the documents, papers, and other evidence might be used and further advised that the Commission had authority to require their production in response to a subpena. Thereafter, respondent Julius B. Lewis, acting in his individual capacity and as an officer of the corporate respondent, permitted the agents of the Commission to fully examine all files in his possession and temporarily to remove a portion of said files, letters, documents, and other papers for the purpose of making copies.

During the process of hearings on the issues raised by the complaint and answer herein, certain of the documents, papers, and records obtained during the course of the investigation were offered and properly received in evidence, either as originals or photostat copies. The Commission is of the opinion that their use in this manner does not contravene or violate any right or privilege granted the individual or corporate respondent by the provisions of the fourth or fifth amendments to the United States Constitution.

Pursuant to the provisions of section 9 of the Federal Trade Commission Act, respondent Julius B. Lewis was duly subpenaed by the Commission and was properly required to attend and testify in support of the allegations of the complaint. He did no more than is required by the provisions of the statute and was not thereby granted immunity from proceedings properly initiated by the Commission

under the laws administered by it, either by the fifth amendment to the United States Constitution or by sections 9 or 5 (1) of the Federal Trade Commission Act.

Section 5 (1) of the Federal Trade Commission Act provides for a civil penalty for a violation of a cease-and-desist order of the Commission only after it has become final and is in effect. To date, no cease-and-desist order has been issued against the respondents. The documents, papers, and records obtained from respondents during the course of the investigation and received in evidence in the trial of the issues herein have in no manner been used or offered for use as evidence in the collection of civil penalties. The Commission is of the opinion that the question of whether respondent Lewis was advised of the penalty provisions of section 5 (1) of the Federal Trade Commission Act need not be decided.

It is therefore ordered, That the motions to suppress and strike from the record all evidence introduced against the respondents in this proceeding and to return to them all documentary evidence be, and the same are, hereby denied.

It is further ordered, That the motions to dismiss the complaint against the respondent Julius B. Lewis and the corporate respondent New Standard Publishing Co., Inc., be, and the same are, hereby denied.

Commissioner Mason dissenting.

OPINION OF THE COMMISSION

AYRES, *Commissioner.*

This matter is before the Commission on motions by respondents to suppress and strike all evidence and return documentary evidence and to dismiss the complaint; and on motions by counsel supporting the complaint to strike affidavits accompanying respondent's motions and to reopen the proceeding. These motions have been denied and the several orders on them show the reasons for the Commission's action. In view of the scope and gravity of respondents' motions, however, it may be helpful to discuss the situation to which they relate in more detail.

The gravamen of respondents' motions is their contention that documentary and other records were obtained by unlawful search and seizure and were used against them in violation of the fourth and fifth amendments to the Constitution of the United States. It is also contended that when he was subpenaed and required to testify, the individual respondent was granted certain immunities under the fifth amendment to the Constitution of the United States and under sections 9 and 5 (1) of the Federal Trade Commission Act. The latter contention may be disposed of first.

Subsection (1) of section 5 of the Federal Trade Commission Act provides for civil penalties against persons or corporations who violate an order of the Commission to cease and desist after it has become final. No order to cease and desist has been issued in this matter and accordingly we need not decide here what, if any, immunity respondent may have acquired under section 5 (1) of the Federal Trade Commission Act by reason of having testified under subpena in this matter. It is also irrelevant for the purposes of this proceeding, to determine what, if any, immunities from prosecution, penalties or forfeitures respondent may have acquired under section 9 of the Federal Trade Commission Act or under the fifth amendment to the Constitution. This is a proceeding against alleged violations of the Federal Trade Commission Act and it has been conducted strictly in conformity therewith. The Commission is empowered by the provisions of that act to require the attendance and testimony of witnesses and the production of documentary evidence and to impose an appropriate remedy based upon such testimony and evidence. Immunity from such remedy could not be acquired as a result of the production of the necessary evidence without substantially nullifying the manifest purposes of the law.

The question of primary importance raised by respondents is whether or not the documentary evidence which was obtained and introduced into the record was secured by illegal search and seizure. This question must be resolved upon the basis of the facts, as they appear in the record, leading up to and surrounding the alleged illegal search and seizure.

Before issuance of the complaint in this matter, duly authorized representatives of the Commission made an extensive preliminary and informal investigation. The information developed in the course of that investigation provided the Commission with reason to believe that the respondents were engaged in certain violations of the Federal Trade Commission Act and, based on that information, the Commission on February 4, 1942, issued its complaint charging such violations. The alleged illegal search and seizure occurred during the preliminary investigation, well before the formal complaint was issued.

The first contact with the moving respondents in the course of the investigation was in May 1939. Thereafter investigation was conducted through other sources, and on February 19, 1941, these respondents were again contacted, and it was during this contact that the alleged illegal search and seizure occurred. The events at that time have been fully explored in the record and extensive testimony has been adduced with respect to them. Such testimony shows surprisingly little conflict.

It appears that two investigating attorneys of the Commission appeared at the office of the respondents, New Standard Publishing Co., Inc., and its president, Julius B. Lewis, at about 9 or 9:30 o'clock on the morning of February 19, 1941, at which time they identified themselves, displayed their credentials and advised Mr. Lewis concerning the purposes of the investigation and of their visit. During the course of their interview with Mr. Lewis they requested his permission to examine certain files of the individual and corporate respondents, and after discussion, expanded their request to include permission to make a general file examination. Pursuant to his inquiries concerning their authority to examine the files, the investigating attorneys discussed their authority generally and advised Mr. Lewis that under the provisions of the Federal Trade Commission Act he could be required, by subpena, to produce his records for examination and for copying. In so advising him they relied primarily upon that part of the act which provides that the Commission or its duly authorized agents "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation" (sec. 9). Mr. Lewis was advised that if he refused to make the requested files available for examination, he could be taken to court and required to produce them, and that it would be to his advantage to permit the file examination without requiring resort to the courts. After conference with his wife, who is Secretary and Treasurer of respondent, New Standard Publishing Co., Inc., Mr. Lewis agreed to permit the investigating attorneys to examine the files. The file examination covered about 4 days, during which time the investigating attorneys selected a considerable number of documents, including letters and memoranda. Respondent Lewis then granted the request of the investigating attorneys to remove the selected material from his office for copying. Some 2 or 3 months later the original material was returned to respondent Lewis by registered mail.

Mr. Lewis testified that he did not seek legal advice before granting the investigating attorneys access to his files, but that he called a friend in Chicago concerning their authority to make the examination. He further testified that neither of the investigating attorneys used any force or threats of force or any abusive language and that they conducted themselves like "perfect gentlemen." Their only threat, according to his testimony, was that they would take him to court if he did not let them have access to the files they requested.

The investigating attorneys were not operating under authority of any subpena or other formal process, and made no pretense of doing so. They were simply making a preliminary informal investigation in the course of which, after considerable discussion, they persuaded respondent to grant them access to the requested files in order to avoid the probability of being required to produce them in response to a subpena. We believe that it is clear from the record that respondent Lewis was fully and properly advised of the informal nature of the investigation and that he voluntarily permitted the investigating attorneys to examine all files in his office and to remove those which were selected, upon condition that they would be returned after certain of them had been copied. In doing so, he acted for and in behalf of himself and the corporate respondent. No threat of physical violence was made or implied and no abusive language was used and the investigating attorneys conducted themselves with propriety throughout.

The investigating attorneys did not advise respondent Lewis in detail concerning all the processes of the Federal Trade Commission, the legal effect of an order to cease and desist, under what circumstances such an order would become final, or concerning the penalties which may be imposed for its violation. And they were under no obligation to do so. They did, however, correctly advise him that the Federal Trade Commission had authority to require by subpena his testimony and the production of all documentary evidence in his possession relating to the matter under investigation, and that it would be to his advantage voluntarily to grant access to the files for the purpose of examining and copying rather than to be required to produce the files before the Commission or the courts in response to subpena.

The only representations made by the investigating attorneys to respondent Lewis which could possibly be construed as constituting a threat, were to the effect that he could be required by subpena to produce the documents in court and that if he refused to make them available voluntarily, he could be taken to court. By such representations the respondent was fairly informed concerning the legal authority of the Commission and the probable results which could be expected from his refusal voluntarily to grant access to the files for the purposes requested. Representatives of this Commission would be remiss in their duties and lacking in a sense of fairness if they failed under such circumstances to disclose their authority and the authority of the Commission. Laymen not well versed in the provisions of the statutes under which this Commission functions would have reason to feel aggrieved if, upon refusal to grant access to their files, they were, without warning, required by subpena to pro-

duce important and bulky files at an inconvenient time and distant place, resulting probably in endless expense and serious disruption of the normal business operations. It is usually much more to the advantage of persons and corporations under investigation to make their files available for examination at their own places of business during customary office hours at a minimum of interference with their business, than to produce them in response to subpena.

It is abundantly clear, we believe, that the investigating attorneys entered respondent's place of business during regular business hours, and that their entry was not a trespass in any sense; that they identified themselves and fairly advised respondent concerning their authority to make the investigation and the file examination; that they were granted permission to make a general file examination, and to remove the selected material for the purpose of copying; and that they complied fully with the conditions under which the permission was granted. To characterize such conduct as illegal search and seizure in contravention of the provisions of the Constitution of the United States is to strain their meaning and fundamental purposes to the point of absurdity. The Commission is of the opinion, therefore, that the file examination which resulted in certain documents being removed from respondent's files and copied and subsequently used in evidence, was properly conducted in all respects, and that respondent's contentions that it constituted unlawful search and seizure are wholly without merit.

Minority Findings and Dissenting Opinion of Commissioner Lowell B. Mason

This is a controversy over the taking by Government agents of a large mass of documents and papers belonging to the respondents without warrant, and without the Government giving a receipt for the same.

All of this was done to further the Government's presentation of a complaint against a man who sells books for a living.

There is a corporation involved, but it is one of those family affairs owned by a man and his wife, so that for the time being we may put aside consideration of that phase of the matter.

In the original complaint the man was charged with fooling the public in the way he peddled his books.

However, the issue before us at this time is not concerned with his guilt or innocence on that charge.

We are here faced with a protest by the defendant that the agents of the Commission violated constitutional guarantees against the illegal search of his premises and the wrongful seizure of his papers.

Defendant's motion concerning his constitutional rights was countered by the Commission attorney with opposing motions.

These motions are all interrelated, and for the purpose of deciding the issues presented, it may be said their respective merits all depend on one factual finding; namely, were Lewis' rights under the fourth and fifth amendments to the Constitution of the United States violated by the alleged unlawful actions of certain agents of the Commission searching his private office and effects, and was the seizure of his papers without due process of law.

This the defendant charges, and this the agents of the Government deny.

In considering the merits of this controversy, one must bear in mind that administrative fact-finders such as we, engage in a dual capacity. First, as Commissioners, we control and direct investigational operations. To all intents and purposes we are, in the world of commerce, traffic police upon the public highways of commerce. Secondly, as Commissioners, we sit as judges when we act in our quasi-judicial capacity trying the charges against those whom we (in our administrative capacity) bring before us.

If we countenance, while sitting as judges, the unbridled and unrestrained violation of a citizen's right of privacy by accepting the fruits of an illegal search and seizure, we in effect serve notice on our investigators that we as administrative officers approve a continuance of such act in future cases.

Thus it would seem to me we are under a double command to protect the established guarantees of American citizenship.

It is not enough for us to consider the technical admissibility of evidence allegedly obtained in violation of constitutional guarantees. That is all well and good insofar as our judicial capacities are concerned, but the actions of our employees are also the administrative responsibility of Commissioners, and this responsibility cannot be taken lightly, nor should any departure from accepted standards be condoned by a quasi-judicial toleration of the same.

Attorney-examiners of the Federal Trade Commission are not catch polls. They are highly trained business specialists—lawyers with legal degrees. In most cases they have had considerable general practice before entering into this highly specialized work. Experts in their fields, and noted for thoroughness and enthusiasm in carrying out what they believe to be their appointed tasks, they must not let enthusiasms carry them beyond the bounds of constitutional procedure. If it does, we Commissioners, whose oath of office requires us to support the Constitution, must not condone acts that violate it.

Conditioned as we are by reports of despotic controls over the every-day affairs of mankind in Eastern Europe, it is necessary that

citizens of this country be constantly reassured that their liberty and freedom from unwarranted violation of personal privacy are just as sacred to our administrative agencies as they are to our courts.

Thus it can be seen our particular task at this stage of the proceeding is not to determine whether respondents are guilty of unfair acts in commerce, but to determine if certain evidence was obtained by our agents through means violative of constitutional guarantees.

I make the following findings of fact:

The respondent Lewis is president of the respondent New Standard, a Virginia corporation. The stock of this corporation is owned by Lewis and his wife.

The office is housed in a small room only sufficiently large to accommodate the desks of the employees. Lewis occupies a small office partitioned off from the room occupied by the employees, and in addition, there is a small storeroom in the rear.

The office contains file cabinets. These cabinets hold the books, records, documents, customer correspondence pertaining to the business, and also private papers, writings, and memoranda of respondent Lewis, as well as other personal papers and memoranda belonging to the employees. There are approximately eight file cabinets in the room. Amongst them were the active files used to operate the business.

It appears that on February 19, 1941, at about 9 o'clock in the morning, before the respondent Lewis had arrived at work, two attorney-examiners of the Commission came to the office and demanded of one Lawrence Hanson, an employee, that they be given the right to examine Lewis' books and records. Hanson was the office manager and in charge of the clerical work. Hanson says the agents threatened to obtain a warrant from the Federal marshal and take him to court if he did not allow them to go through the records.

Shortly afterwards respondent Lewis appeared on the scene. Thereupon the Government agents renewed their demand to go through and examine his books and papers. They stated they would take Lewis to court if he refused access to the same. The agents showed him their credentials as examining officials of the Federal Trade Commission, an agency of the Federal Government, and informed him the Government had a case against him and repeated their demand that they be given access to all his files and papers. According to the agents, the defendant willingly turned over his whole office to them for 4 days and assisted them in bundling up the vast quantity of material that they took away with them.

On the other hand, defendant Lewis declares that he protested vigorously against the search, saying that if they were going to use the files against him, he didn't want to give them up. The agent replied that he would be better off if he did. Lewis claims that he was

frightened, coerced and "put at bay"; that turning over his office and personal files was the act of an automaton, motivated by the spring of fear. Lewis says that his business was at a standstill for the 4 days the agents had possession of the rooms and files, and that during the period, he and his employees were under strict surveillance. He and his staff were required to obey the agents' orders that nothing was to be touched which the agents were engaged in examining. On this latter point there is no conflict, for during cross-examination, one of the agents readily admitted giving such instruction.

From the mass of conflicting statements it is difficult to determine just how long the controversy over the agents' right to examine and seize the defendant's papers went on. I think it reasonable to infer that once the two Government agents had taken over the office, there was scant show of further protest by the defendant. The average citizen does not resist the actions of Federal agents, for it is well ingrained in the American mores that resistance to an officer may of itself constitute a serious Federal offense.

Because of this aura of unassailable authority that the average public associates with a Federal agent, it is difficult to estimate just how many incidents similar to the one at hand may occur in the future if this line of conduct is not scrutinized in strict accordance with constitutional requirements.

The question for the Commission to decide is whether or not this acquiescence and submission to the commands of the Federal agents were a waiver of the defendant's constitutional guarantee as set out in the fourth and fifth amendments. It is urged that the facts surrounding the acquiescence and submission to the commands of the Government agents were such a waiver. I do not so believe.

In support of the Commission counsel's view, it is pointed out that no violence or abusive language was used by the Government agents. To this I can only reply in the words of Mr. Justice Bradley in the *Boyd* case:

> It is not the breaking of his doors and the rummaging of his drawers that constitute the essence of the offense; but it is in the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.[1]

It was further urged by Commission counsel that once the agents were in possession, the defendant cooperated by obeying the agents' command not to touch anything at night nor to touch anything that the agents were in the process of examining.

I don't believe lack of resistance denotes waiver—surrender, yes, but waiver, no. In fact, I believe the orders the agents gave were strange

[1] Development of the Fourth Amendment, by Lasson, p. 109.

instructions to a free citizen regarding his own property. They smack of the cell house. A drumhead injunction that a man must not touch his own property has no place in Federal Trade Commission investigations.

The fact that the agents gave no receipt for the large mass of documents they removed to Washington is used by the prosecution to support its contention that the defendant voluntarily relinquished his constitutional rights. The prosecution contends the failure of the defendant to demand a receipt is also evidence of his good will and cooperative attitude.

To use a farm phrase, this does not scour with me.

After 4 days of harassment, the defendant was undoubtedly so relieved to see the agents leave that they probably could have also moved out the furniture. Certainly they could have done it with as much legality as the removal of his private papers.

The procedure for the compulsory production of documentary evidence "before the Commission" through subpena duces tecum is well established and has constitutional sanction. The purpose of a subpena is to take the decision as to what may or may not be done out of the hands of the officer who executes the subpena, and to place it in the more responsible, trustworthy, and sober judgment of a judicial official. There was no subpena duces tecum issued in this matter.

But with or without a warrant, specified or unspecified, there is certain property which *may not be searched for and seized at all.* It was early laid down in the *Boyd* case that only that class of property to which the Government is otherwise entitled or to which its possessor is not entitled, as stolen goods, counterfeit money, implements used to commit a crime, etc., is seizable under a search warrant, whereas a person's private books and papers cannot be so taken, in order merely to get information from them to be used in evidence against him. [Italics supplied.] [2]

Nowhere in the entire Federal Trade Commission Act is there one word giving the Commission the right to search a man's premises. On this point the contention of respondent is well-founded.

Going now to another point urged by respondent, in my opinion the respondent's contention that the complaint itself was wrongfully issued and should be dismissed, is without merit. When the Commission issues a complaint, it is acting in a capacity similar to a prosecuting officer who files a charge on information and belief. The responsibility for this administrative act rests solely on the Commissioners and no one may successfully challenge their judgment, for to do so would stifle before birth processes aimed at the correction of law violations.

But when the actual trial of the issues is commenced, then the respondents are no longer subject to ex parte procedures. Like any

[2] Development of the Fourth Amendment, by Lasson, p. 133.

other defendant brought before a commission or court, they stand on equal footing with the prosecuting officer, protected by the same rules of evidence and subject to the same course of orderly procedure.

Then it is that the trial agency must preserve all the rules and functions of a fair and impartial arbiter of justice. One duty is to accept all competent and reject all incompetent evidence.

For an agency that operates in a dual capacity, ordering the filing of a complaint and then sitting as a magistrate on the trial of such a complaint, it is imperative that the issues be determined in full accord with all the respondents' constitutional privileges.

Here the respondents charge that the evidence adduced against them was obtained in violation of their constitutional rights.

Such a charge would be serious enough if presented before a court which had no control over those who assembled the evidence. Here the preliminary assembly of such evidence devolves upon the same agency which later must sit in public judgment on the case. It seems to me we are therefore doubly constrained to apply most strictly the rules of judicial conduct. In considering the validity of such evidence, the attorney for the Commission who presents the challenged evidence stands in no more favored position than does the respondents' attorney who seeks to strike such evidence. The criteria applies equally.

An officer gaining access and possession of private files must have authority in law for the intrusion. Any other rules would violate the fourth amendment to the Constitution which guarantees the right of citizens to be secure in their persons and papers against unreasonable search.

Respondents New Standard and Julius B. Lewis filed motions before the trial examiner and these being denied by the trial examiner, they now renew the same before the Commission.

1. Respondent Lewis moves that all the alleged evidence and information introduced in this proceeding against respondent be suppressed and that all documentary evidence introduced in this proceeding be returned to him.

This is a large order. Granting the validity of respondent Lewis' claim that officers of the Federal Trade Commission violated his constitutional guarantees of freedom from unlawful search, it would only apply to those documents illegally obtained from him and such evidence as was founded on such illegal search and seizure.

I find that all papers and documents searched and seized by the officers and agents of the Government from the premises of respondent Lewis on February 19 to 24 were taken in violation of the fourth

amendment of the Constitution, and said documentary evidence should be returned to respondents, and such evidence as was based on said seized documents be stricken from the record.

2. The second motion covers the same ground as the first but applies to the corporate respondent New Standard and, in my opinion, an order consistent with the above should issue.

3. As to respondent Lewis' motion to dismiss, it cannot be determined at this time whether there is sufficient proper lawful evidence to warrant the issuance of a cease-and-desist order. If my view were to prevail upon reopening of the case, it would be the province of the Trial Examiner to weigh all relevant and material evidence properly adduced and make his recommended decision. Prior to his finding, any motion such as proposed by respondent here is untimely and should be denied, with leave to renew the same in accordance with the Commission's rules.

4. It seems to me the order of the Commission should be to reopen the trial before the trial examiner for the purpose of ruling on the admissibility of evidence in accord with this opinion, and for the taking of such testimony as the attorneys in support of the complaint may wish to offer, as well as to afford respondents the opportunity of meeting the charges set forth in the complaint.

Counsel in support of the complaint has considered the striking of such evidence as inimical to the full and proper presentation of his case, and he has applied to the Commission for leave to reopen the proceedings for the taking of further testimony.

I would be in favor of granting this motion. But if such were done, counsel in support of the complaint would then have to rely for the presentation of his case on evidence untainted by unlawful seizure.

As for those portions of the several orders approved by the majority of the Commission, and which the Commission has entered herein in conflict with these views, I must dissent.

IN THE MATTER OF

STANDARD BRANDS INCORPORATED

REPORT OF THE FEDERAL TRADE COMMISSION UPON ITS INVESTIGATION OF ALLEGED VIOLATIONS OF ITS ORDER TO CEASE AND DESIST

Docket No. 2986. January 10, 1950

THE PROCEEDINGS

On December 30, 1946, the Commission directed that an investigation be conducted for the purpose of determining (1) whether respondents, Standard Brands Incorporated and Standard Brands of California, had violated an order to cease and desist issued against them on June 15, 1939, and (2) whether said respondents were selling or contracting to sell bakers' yeast at prices which were unreasonably low for the purpose of destroying or eliminating a competitor. A trial examiner of the Commission was duly designated to preside at hearings to be conducted for such purposes. Said trial examiner was empowered with all the functions and duties of a trial examiner as provided by the Commission's Rules of Practice in the same manner as though the hearings were to be conducted pursuant to formal complaint. Acting upon respondents' motion of January 6, 1947, the Commission, on January 17, 1947, ordered that further action be deferred as to item (2) above, and thereafter, by order duly entered herein, rescinded its order of December 30, 1946, as to said item so that it is not herein considered.

Pursuant to, and in accordance with, the foregoing, hearings were held at which evidence was adduced and received before said trial examiner in various cities during eight months of 1947, and the reception of evidence was terminated on January 6, 1948. On January 9, 1948, the Commission directed the trial examiner to report to it his findings as to whether or not the evidence adduced was sufficient to justify a petition to the United States Circuit Court of Appeals to affirm and enforce the order to cease and desist herein. Subsequently, counsel supporting the contentions that the order to cease and desist had been violated and counsel for the respondents each filed proposed findings and conclusions, and the trial examiner thereafter submitted his report as directed, to which exceptions were filed by opposing

counsel, each of whom also filed briefs and presented oral argument before the Commission in support of their contentions.

The Commission has duly considered the evidence adduced during the investigation herein, the report of the trial examiner and each of the exceptions thereto, briefs and oral argument of opposing counsel, and the record herein, and being now fully advised in the premises, makes this its report upon the investigation of the alleged violations of the order to cease and desist.

THE ORDER

The order to cease and desist, issued June 15, 1939, prohibits respondents from discriminating in price between different purchasers of bakers' yeast of like grade and quality sold in interstate commerce or in the District of Columbia,

(1) By selling said bakers' yeast at different prices based upon the total quantity or volume purchased or required monthly by the respective purchasers, as set forth in Schedule A of Paragraph Ten of said findings of fact;

(2) By selling said bakers' yeast at different prices based upon the total quantity or volume purchased (whether from the respondents or from any other source) over a period of time by the respective purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in which respondents or any of their customers are engaged, or to injure, destroy or prevent competition with respondents or any of their customers, except where said differentials in price, based upon the quantities or volume purchased from the respondents during such period of time by said respective purchasers, make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such bakers' yeast is to such purchasers sold or delivered during the period of time for which such differentials are allowed;

(3) By means of price differences resulting from selling said bakers' yeast to a single purchaser at prices based upon the total quantity or volume purchased (whether from the respondents or from any other source) during a period of time by such purchaser, irrespective of the quantities or volume delivered by the respondents to the separate plants, factories, bakeries, or warehouses of such purchaser, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in which respondents or any of their customers are engaged, or to injure, destroy or prevent competition with respondents or any of their customers, except where said differentials in price make only due allowance for differences in the cost of manufacture, sale or delivery result-

ing from the differing methods or quantities in which said bakers' yeast is to such purchasers sold or delivered;

(4) By selling said bakers' yeast to certain of such purchasers at so-called "off-scale" prices as described in paragraph 12 of said findings of fact, even though the differentials in price of any given price scale make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which said bakers' yeast is to such purchasers sold or delivered during the period of time for which such differentials in price are allowed.

REPORT ON THE FACTS

PARAGRAPH 1. Respondent Standard Brands of California was dissolved on December 31, 1942, and its business has subsequently been carried on by Standard Brands, Inc., so that for the purposes of this proceeding only the pricing practices of the latter are considered. Paragraph 1 of the order is not involved in this proceeding, since respondent discontinued the use of the price schedule identified therein on May 1, 1940.

PAR. 2. On May 1, 1940, respondent filed a report of the manner and form in which it stated it was complying with the order of June 15, 1939, which, among other things, contained four price scales which respondent adopted and made effective for pound yeast on the same date in the several areas in which it was selling said product. The scale for the eastern and central portions of the United States (scale A) was as follows:

Bracket No.	Monthly purchases in pounds	Price per pound (cents)
1	1–99	21
2	100–249	18
3	250–449	16
4	450–699	15
5	700–999	14
6	1,000–1,399	13½
7	1,400–1,899	13
8	1,900–2,499	12½
9	2,500 and up	12

The three additional scales (B, C, and D) adopted for sales in other areas, were identical with scale A except that they established per pound prices which were higher by 1, 2, and 3 cents, respectively. On August 1, 1944, respondent made certain adjustments in the areas in which the aforesaid price scales were effective. A portion of the area formerly covered by scale B was included in the territory covered by scale A. All the area formerly covered by scale C was included in the territory covered by scale B, while the area covered by scale D remained unchanged. The use of scale C was discontinued. Thus, a price reduction of 1 cent per pound was effected in all that

area included in the territory covered by another scale in which the prices had been lower by this amount.

PAR. 3. (a) On January 2, 1945, respondent adopted and put into effect revised price scales whereby it lowered its prices for pound yeast in all areas. The new scale A, effective throughout the United States except for certain Rocky Mountain, southeastern, and southwestern territories, was as follows:

Bracket No.	Monthly purchases in pounds	Price per pound (cents)
1	1-49	20
2	50-99	18
3	100-449	15
4	450-999	13
5	1,000-1,899	12
6	1,900-2,499	11½
7	2,500 and up	11

Two additional scales (B and D) adopted for sales in other areas of the United States and Alaska, respectively, were identical with scale A except that they established per pound prices which were higher by 1 and 3 cents, respectively. These three price scales remained in effect until March 24, 1947.

(*b*) For comparative purposes, respondent's scale of prices in each bracket in effect in zone A before and after January 2, 1945, is set out in the following table:

Pounds per month	Old price	New price	Difference in price
1-49	$0.21	$0.20	$0.01
50-99	.21	.18	.03
100-249	.18	.15	.03
250-449	.16	.15	.01
450-699	.15	.13	.02
700-999	.14	.13	.01
1,000-1,399	.13½	.12	.01½
1,400-1,899	.13	.12	.01
1,900-2,499	.12½	.11½	.01
2,500 and up	.12	.11	.01

(*c*) The secretary and general counsel of respondent addressed a letter to the Commission on December 22, 1944, in which he explained that the price scales of January 2, 1945, were being adopted—

Because of the expanded total volume in our business, this corporation has been able to effect certain operating economies, and is now in a position to pass certain resulting savings on to its customers by a reduction of at least 1 cent per pound for baker's yeast in every case, and by a greater reduction in certain instances. We have been able to consolidate some of the price brackets, and have added a new bracket of from 1 to 49 pounds, reducing the total number of brackets from nine to seven.

In addition to being able to effect general price decreases, as mentioned above, we have been able to include the areas in Michigan which were formerly sold at prices specified in exhibit II in the prices charged in areas embraced in exhibit I.

We have also been able to change the prices charged in Key West, Fla., from those specified in exhibit IV, by reducing them to prices specified in exhibit II. * * *

PAR. 4. (*a*) From 1941 to 1945, inclusive, respondent was engaged in competition with ten firms also engaged in the manufacture and sale of bakers' yeast. A list of these, together with a description of the area in which each sold, is as follows:

Company	*Sales area*
Anheuser-Busch, St. Louis, Mo_____	East of the Rocky Mountains.
National Grain Yeast Corp. (now National Yeast Corp.), Belleville, N. J.	From Richmond, Va., north to Maine and west to Omaha, Nebr.
Red Star Yeast Co., Milwaukee, Wis___	Central United States, west to Salt Lake City, Utah, south to Texas and New Orleans and east to Philadelphia not including Southeastern and New England States.
Federal Yeast Corp., Baltimore, Md___	Eastern seaboard from Massachusetts south to Washington, D. C., including Pennsylvania and Ohio.
Peerless Yeast Co., San Francisco, Calif. (Yeast Division of Acme Brewing Co.).	West coast and Arizona, Nevada, Utah, and Idaho.
Consumers Yeast Co., San Francisco, Calif.	Washington, Oregon, and California.
Capital Yeast Co., West Brookfield, Mass.	New Hampshire, Massachusetts, and Connecticut.
Atlantic Yeast Co., New York City_____	New York metropolitan area.
Calumet Yeast & Grain Products Co., Chicago, Ill.	Chicago, Ill., and Gary and South Bend, Ind.
A. M. Richter Sons Co., Manitowoc, Wis.	Green Bay, Wis., to Chicago, Ill., and west to Minneapolis and St. Paul, Minn.

These companies are hereinafter sometimes referred to respectively as follows:

Anheuser-Busch or AB;	Consumers or Cons;
National Grain or NG;	Capital or Cap;
Red Star or RS;	Atlantic or Atl;
Federal or Fed;	Calumet or Cal;
Peerless or Prls;	Richter or Ric;

and respondent as Standard Brands or SB.

(*b*) The annual sales of pound or bakers' yeast by respondent and these competitors for the years 1941 through 1945 and the percentage of the total sales made by each were as follows:

Company	1941 [1]		1942 [1]		1943 [2]		1944 [2]		1945 [2]	
	Pounds	*Percent*	*Pounds*	*Percent*	*Pounds*	*Percent*	*Pounds*	*Percent*	*Pounds*	*Percent*
SB	110,563,388	57.4	113,495,884	56.0	116,415,716	57.5	119,059,336	57.9	124,491,478	57.6
AB	32,890,127	17.1	35,876,894	17.7	38,278,860	19.0	36,964,237	18.0	38,736,364	17.9
NG	19,933,717	10.3	21,217,554	10.5	19,263,171	9.5	19,743,341	9.6	[3] 20,734,559	9.6
RS	8,237,603	4.3	8,952,512	4.4	8,477,839	4.2	9,424,659	4.6	10,321,979	4.8
Fed	9,455,394	4.9	8,884,187	4.4	7,077,453	3.5	7,019,844	3.4	7,683,334	3.6
Prls	3,484,888	1.8	4,662,882	2.3	4,523,749	2.2	4,768,689	2.3	5,396,301	2.5
Cons	2,152,869	1.1	2,452,569	1.2	2,509,886	1.2	3,035,748	1.5	3,342,867	1.5
Cap	2,008,002	1.1	2,160,370	1.1	1,706,072	.8	2,196,498	1.1	2,417,278	1.1
Atl	2,870,000	1.5	3,900,000	1.9	[4] 3,350,000	1.7	[4] 2,630,000	1.3	[4] 2,630,000	1.2
Cal	435,346	.2	437,724	.2	[4] 429,661	.2	[4] 378,332	.2	[4] 276,481	.1
Ric	516,572	.3	670,190	.3	501,925	.2	278,244	.1	201,282	.1
Total	192,637,906		202,710,766		202,534,332		205,498,958		216,231,923	

[1] Figures for 1941 and 1942 include sales to the U. S. Government.
[2] Except as indicated in footnotes 3 and 4, figures exclude sales to the U. S. Government.
[3] Estimated figure on assumption sales to Government were the same as in 1944.
[4] All sales. Figures exclusive of Government sales not in record. 1945 figure for Atlantic assumed to be same as 1944.

(*c*) Except for sales made by Calumet, Atlantic, and Capital, the following table provides a comparison of prices existing between respondent and its competitors on pound or bakers' yeast in zone A for the period from May 1, 1940, to the end of 1944:

Monthly purchases in pounds	SB	AB	NG	RS	Fed	Ric
1–50	$0.21	$0.20	$0.18	$0.20	$0.20	$0.18
50–100	.21	.18	.16	.18	.18	.17
100–150	.18	.18	.16	.18	.16	.16
150–250	.18	.16	.15	.16	.15	.15
250–450	.16	.15	.14	.15	.14	.14
450–500	.15	.15	.14	.15	.14	.14
500–700	.15	.14	.13	.14	.13	.13
700–750	.14	.14	.13	.14	.13	.13
750–1,000	.14	.14	.13	.135	.13	.13
1,000–1,400	.135	.135	.125	.13	.125	.125
1,400–1,500	.13	.13	.125	.13	.125	.125
1,500–1,900	.13	.13	.12	.125	.12	.12
1,900–2,000	.125	.125	.12	.125	.12	.12
2,000–2,500	.125	.125	.12	.12	.12	.12
2,500–3,000	.12	.12	.115	.12	.115	.115
3,000–3,500	.12	.12	.115	[1] .115	.115	.115
3,500–4,000	.12	.12	.115	[1] .115	.115	.11
4,000 and over	.12	.12	.11	[1] .11	.11	.11

[1] Effective Apr. 6, 1944.

(*d*) The following table supplies a similar comparison with Pacific coast competitors from May 1, 1940, to August 1, 1944:

Monthly purchases	Standard Brands	Consumers	Peerless
1–99 pounds	$0.22	$0.22	$0.22
100–249 pounds	.19	.19	.19
250–449 pounds	.17	.17	.17
450–699 pounds	.16	.16	.16
700–999 pounds	.15	.15	.15
1,000–1,399 pounds	.145	.145	.145
1,400–1,899 pounds	.14	.14	.14
1,900–2,499 pounds	.135	.135	.135
2,500 pounds and over	.13	.13	.13

On August 1, 1944, the foregoing prices were changed as follows:

Monthly purchases	Standard Brands	Consumers	Peerless
1–99 pounds	$0.21	$0.21	$0.21
100–249 pounds	.18	.18	.18
250–449 pounds	.16	.16	.16
450–699 pounds	.15	.15	.15
700–999 pounds	.14	.14	.14
1,000–1,399 pounds	.135	.135	.135
1,400–1,899 pounds	.13	.13	.13
1,900–2,499 pounds	.125	.125	.125
2,500–2,999 pounds	.12	.12	.12
3,000 pounds and over	.12	.12	.115

During the period from May 1, 1940, to the end of 1944, Consumers, in two or three instances, made sales at 11 cents per pound for quantities in excess of 2,500 pounds per month. On April 6, 1944, Red Star Yeast Company reduced its prices by one-half cent per pound on quantities of 3,000 pounds to 4,000 pounds and one cent per pound

on quantities of 4,000 pounds and up. There were no other changes in price schedules during the year by respondent or any of its competitors in the territory covered by scale A. It was not until the respondent, on January 2, 1945, issued its new price list, hereinbefore mentioned, in which it reduced the price in all of its brackets, that competitors, such as Anheuser-Busch, National Grain, and Federal, reduced their prices, and then Red Star again reduced its price to meet the further reduction by respondent and the other competitors.

PAR. 5. (*a*) At the time respondent adopted its price scales of January 2, 1945, its officials had knowledge of its relative position in the industry, as well as the relative position of each of its major competitors. They had knowledge of the prices at which most competitors were selling bakers' yeast. A number of said officials testified that price was the dominant factor in the sale of yeast, that the aforesaid price scales were adopted and made effective because respondent had suffered major losses in its business and was threatened with additional losses because of the lower price of competitors, and that the adoption of said price scales was necessary in order for it to maintain its position in the industry.

(*b*) The evidence of record clearly discloses that during the years 1941 through 1944, inclusive, respondent consistently sold bakers' yeast at prices higher than those in effect with most of its competitors and that during said period its volume of sales in bakers' yeast was slightly in excess of 57 percent of the total sales of said product throughout the United States. In fact, its volume of sales in 1944 exceeded its sales made in any of the three previous years by more than 2½ million pounds, and in the same year it slightly increased its percentage of sales in relation to the total sales of all competitors. It is equally clear that the general reduction in prices and those price reductions and differentials effected through the revision of total monthly purchase requirements adopted by the price scale of January 2, 1945, were not made for the purpose of meeting equally low prices of competitors. A comparison of respondent's prices thereby made effective in zone A with those of competitors in the same area discloses that in at least 48 instances respondent reduced its prices one-half to 3 cents per pound below those of competitors, while in many other instances its prices, which had previously been higher, were brought to the same level. Respondent conducted no cost study, either before the adoption of said price scales or during the period in which they were effective, to determine if the differentials in price based on different volume purchase requirements therein set out made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which its bakers' yeast was sold or delivered to purchasers during the period in which said differentials were allowed.

(*c*) As a result of respondent's change in prices on January 2, 1945, three of its competitors, namely, Anheuser-Busch, Consumers, and Peerless, were obliged to lower their bakers' yeast prices in every bracket, while all remaining competitors found it necessary to reduce their prices in some brackets. Some competitors showed an operating loss, while others sustained material reductions in profit. Practically all competitors were compelled to curtail their operations by reducing the number of their delivery routes, by reducing the number of customers served or otherwise, and one competitor discontinued its bakers' yeast business as an indirect result of respondent's adoption of said price scales.

(*d*) From the foregoing, the Commission finds that from January 2, 1945, to March 24, 1947, respondent, in the offering for sale, sale and distribution of bakers' yeast of like grade and quality in interstate commerce, discriminated in price between different purchasers by selling said yeast at different prices based upon the total quantity or volume purchased monthly by the respective purchasers; that the effect of said discriminations in price was, and has been, to substantially lessen competition in the line of commerce in which respondent has been, and is engaged, and to injure, destroy, or prevent competition with respondent; that said price discriminations were not made in good faith to meet equally low prices of competitors; and that respondent made no cost study to determine if said differentials in price made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said bakers' yeast was sold or delivered.

PAR. 6. During approximately 7 months of 1945 respondent sold bakers' yeast to Pucillio Brothers, Inc., Boston, Mass., and delivered a portion thereof to this firm and the balance to the nearby Lagrassa Bakery. The total amount delivered to both each month was billed to Pucillio at the scale price which prevailed on the combined amount, thus resulting in a lower price to Pucillio than if it had taken delivery only in amounts sufficient to meet its requirements. The record shows that this arrangement was made by a local representative of respondent and was terminated by a higher official when brought to his attention. Having found that sales at the regular scale of prices prevailing during this period resulted in unjustified price discriminations, the Commission finds that the sale of bakers' yeast as described in this paragraph resulted in greater discriminations than those previously set forth and that the effects of such discriminations are substantially as stated in paragraph 5 above.

PAR. 7. (*a*) The record contains details of the accounts of 242 customers of respondent which were introduced as evidence tending to show violations of paragraph 4 of the order to cease and desist. It appears that in 15 of these sales were made in accordance with the

scale prices, while in 226 sales were made at prices which were below those established by respondent's scale of prices in existence between January 2, 1945, and March 1946 for the volume of monthly purchases by respective customers involved. Sales made below scale prices fall in two categories: (1) Those where the customer purchased a portion of his monthly requirements from respondent and a portion from competitors and the price granted him by respondent was based upon the customer's total purchases in accordance with the respondent's established scale of prices just as though the customer's entire monthly purchases had been made from respondent, and (2) those in which the customer purchased his total monthly requirements from respondent but was granted a price below that required by respondent's established price for his particular monthly volume of purchases. The majority of sales made by respondent at prices below its established scale of prices falls in the first category.

(*b*) Most of the 226 accounts to which sales were made at prices below those established by respondent's scale of prices involved transactions with small and medium-sized bakers in which sales were made by respondent's sales representatives in accordance with its instructions. It was this class of customer which was given the greatest advantage by respondent's price scales of January 2, 1945, and which had previously been purchasing bakers' yeast from respondent at prices in excess of those paid competitors. Respondent's sales representatives were in effect instructed to exercise their best efforts to sell at scale prices when possible and to deviate therefrom only where, and to the extent, they found it necessary to do so in order to protect respondent's business or get new business and to permit such price deviation only to the extent of meeting the low price of a competitor. The evidence of record discloses that these instructions were substantially carried out.

However, said instructions were initially deficient in two respects and therefore ineffective in preventing sales at prices which deviate from respondent's scale prices only to the extent of meeting equally low prices of competitors. Respondent failed to advise said representatives as to what low price of a competitor was to be met or to define said low price and permitted them to consider the entire monthly requirements of a customer to be used as a basis for determining the price to be quoted and used in meeting the undefined low price of a competitor regardless of the monthly quantity actually purchased from respondent. The record discloses numerous instances in which respondent quoted and sold bakers' yeast not only at prices below its established scale prices but below the prices of competitors, particularly when the monthly volume purchased by the customer is taken into consideration and used as a basis for determining price. In such instances the low price of a competitor was for a monthly quantity of

yeast far in excess of that sold said customer by the respondent. In other instances, where respondent was already supplying the total monthly requirements of a customer it reduced prices below its scale for such requirements. In these instances its representatives were advised by the buyer of unconfirmed price quotations of competitors, and in others neither respondent nor its representatives had any knowledge of the competitive price quotations or even the name of the alleged potential competitor.

(*c*) For more than 9 years prior to January 2, 1945, respondent consistently sold bakers' yeast at prices higher than those of most of its competitors and yet retained more than 57 percent of the total volume of said yeast sold throughout the United States. A competitive situation or condition was thus established under which most competitors of respondent could normally expect to sell and did sell bakers' yeast at prices slightly below those of respondent. Also, buyers normally expected to purchase, and did purchase, said product from respondent at prices slightly in excess of those paid most of its competitors. Under these conditions it was unnecessary for respondent to meet or match exactly a lower price of a competitor in order to retain business or to get new business. By adoption of its price scales of January 2, 1945, respondent overturned the conditions of 9 years' standing and initiated discriminatory prices in many instances lower than the prices of its competitors and thereby forced them to lower their prices to an extent which threatened their ability to survive. By thereafter selling below the prices thus established, in some instances, respondent in fact put into effect still larger price differentials resulting in still broader discriminations than those found to exist under said price scale. In view of the foregoing the Commission is of the opinion that the respondent did not in good faith meet the equally low prices of competitors after January 1945 but abandoned its former policy of making higher prices than its competitors for one of underselling them on a discriminatory basis.

CONCLUSION

From the foregoing, the Commission concludes that in the sale of bakers' yeast in interstate commerce between January 2, 1945, and March 24, 1947, respondent has violated paragraphs (2), (3), and (4) of the order to cease and desist issued June 15, 1939.

Commissioner Mason not concurring.

TRADE PRACTICE CONFERENCE SUMMARY

During the period covered by this volume, namely, from July 1, 1949, to June 30, 1950, trade practice rules were promulgated for nine industries, and revised for a tenth, under the Commission's trade practice conference procedure, which was established by the Commission to protect the public from the harmful effects of such unfair practices as false, misleading advertising and other forms of distribution, and is designed to bring about law observance on an industry-wide basis through the cooperative establishment and maintenance of rules designed to prevent unfair trade practices.

As pointed out by the Commission in its 1950 Annual Report, the procedure is utilized by the Commission, along with its voluntary individual stipulation-agreements or procedures to encourage widespread observance of the law by enlisting the cooperation of members of industries and informing them more fully of the requirements of the law, so that wherever consistently possible the Commission may avoid the need for adversary proceedings against persons who through misunderstanding or carelessness, may violate the law unintentionally, and the objective is to utilize the best thought and voluntary cooperation of all concerned in establishing rules reflecting the requirements of law and a high standard of ethics.

Such industries, and rules applicable thereto, as thus promulgated, include:

The Venetian blind industry, the members of which are engaged in the manufacture, assembly, sale, or distribution of venetian blinds or parts or accessories for them, with aggregate annual retail sales of blinds approximating $200,000,000, and in which the rules include a definition of what may properly be termed a venetian blind, prohibit misuse of the term, and of such significant terms as "custom built," "made to order," and "removable slats" in describing such blinds, and proscribe various deceptive pricing schemes and unfair methods.

The Peat industry, in which business of the industry is the marketing of peat products represented as suitable for any agricultural or horticultural soil conditioning or soil improvement purpose, for use as poultry or stable litter, or for similar uses, and in which the rules ban various unfair methods and deceptive practices and afford in-

[1] Copies of the full trade practice conference rules, as promulgated for the different industries, and other specific information with respect to the Commission's Trade Practice Conference work, which is described in the Commission's Annual Report, may be had on application to the Commission.

dustry members guidance as to the proper use of terms such as "peat moss" and "moss peat."

The Fountain pen and mechanical pencil industry, the members of which are engaged in manufacturing and marketing fountain pens, ball point pens, dip pens, mechanical pencils, and parts of such products, with annual sales, at retail, aggregating $250,000,000 and in which rules are directed to the elimination and prevention of various types of unfair trade practices offer a yardstick to industry members in curbing misleading advertising and cover specifically the false use of the terms "Iridium tipped" and "Osmiridium tipped," and also deal with deceptive practices with respect to gold content.

The Wholesale optical industry, the members of which sell corrective eye glasses or lenses, with or without processing, and eye glasses, frames, mountings, parts or accessories, the total volume of business of which is about $147,000,000 and in which the rules promulgated, upon application from the industry, are concerned with clarifying the interpretations of section 2 of the Clayton Act, as amended, and cover also certain unfair methods and practices such as misrepresentation, misuse of the terms "close-outs" and "discontinued lines," transactions below cost, commercial bribery and inducing breach of contracts;

The Mail-order insurance industry, in which the rules are designed primarily to eliminate and prevent deceptive sales-promotional practices and advertising, in interstate commerce, and include such subjects as misuse of such terms as "full coverage" and "hospitalization"; deceptive concealment of exceptions contained in the policy; misuse of the word "all" as applied to benefits; confusing use of duplicate names for the same disease; time limitations not fully disclosed; deceptive testimonials; and misrepresentations that policies are especially advantageous to a special group;

The Shoe finders industry, including wholesalers of leather and rubber shoe repair materials and other products used in the repair, servicing, and preservation of shoes and similar footwear, with sales amounting, in 1948, to about $100,000,000, and in which the rules are designed to correct such unfair practices as illegal price discrimination, misrepresentation of quality grading, defamation of competitors, commercial bribery, and coercing purchase of one product as a prerequisite to the purchase of other products;

The Candy manufacturing industry, involving all products of the industry, excluding solid or molded chocolate products (for which a separate set of rules is under consideration) with total sales, at wholesale, in 1948, in excess of $900,000,000 and in which the rules are directed at the correction of such specific abuses as misuse of the word

"free," tie-in sales, false advertising, price discrimination, and the use of lottery schemes;

The Fine and wrapping paper distributing industry, held upon industry application, in which the members are engaged in selling at wholesale or distributing fine and wrapping paper products, including writing paper, envelopes and paper boards, and in which the group I rules are directed against the prohibition of various forms of deception and unfair methods, and eight group II rules are directed to fostering sound business methods and the promotion of fair competition;

The Tie fabrics industry, held upon application of industry members, including converters who produce fabrics used in the manufacture of men's neckwear, and in which the rules proscribe various forms of misrepresentation as to fiber content, color fastness, foreign origin of fabric or design, and other unfair practices;

The Umbrella industry, having to do with the manufacture, assembly, sale and distribution of various kinds and types of such products and parasols, in which the rules as promulgated on March 9, 1940, were revised to include additional rules relating to misuse of the word "free," selling below cost, combination or coercion to fix prices, suppress competition, or restrain trade, fictitious or deceptive pricing, and guaranties and warranties, together with numerous other changes clarifying applicable requirements of laws administered by the Commission.

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