

5. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

6. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

7. Failing to set forth separately information required under Section 5(b)(1) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.

It is further ordered, That respondents Murray Hoffman and Edward Jacobs, individually and as copartners trading as Hoffman & Jacobs or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

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

IN THE MATTER OF

J. WEINGARTEN, INC.

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

Docket 7714. Complaint, Jan. 5, 1960—Decision, Aug. 13, 1963

Order dismissing "solely for the purpose of complying with the * * * order of the District Court" requiring the Commission to issue a final order disposing of the case by August 13—"without prejudice to the right of the

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Commission to reopen the matter * * * if the * * * order of the District Court becomes ineffective as a matter of law"—complaint charging a grocery supermarket chain with 45 outlets in Texas, Louisiana and Tennessee, with knowingly inducing or receiving discriminatory advertising allowances from suppliers.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that J. Weingarten, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of Section 5 of said Act (15 U.S.C.A. Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent J. Weingarten, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its principal office and place of business located at 600 Lockwood Drive, in the city of Houston, State of Texas.

PAR. 2. Respondent is now, and for many years has been, engaged in the operation of a large chain of retail grocery stores reselling all types of grocery, cosmetic, and other products to the consuming public. Respondent purchases all of said products, including all types of canned foods, fresh vegetables, all types of meats, canned and fresh, dairy products of all kinds and numerous other food items, household articles and clothing, which it resells, from a large number of manufacturers, processors and handlers of such products. The forty-five retail grocery stores presently composing respondent's chain are all located in the States of Texas, Louisiana and Tennessee. The total sales made by respondent from these stores are substantial and exceeded \$120,000,000 for the fiscal year ending June 28, 1959. Respondent advertises the products which it sells to create consumer demand and acceptance therefor throughout the states where its stores are located.

PAR. 3. Respondent, in the course and conduct of its business, has engaged and is now engaging in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent for many years has been purchasing the products which it sells in its various chain stores from a large number of suppliers located throughout the United States and respondent causes these products when purchased by it to be transported from the place of manufacture and purchase

*The District Court's order was reversed by the Court of Appeals for the Fifth Circuit on Sept. 14, 1964 [7 S.&D. 1000].

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without the States of Texas, Louisiana and Tennessee to stores or warehouses located within the States of Texas, Louisiana and Tennessee for resale to the consuming public. There is now, and has been for many years, a constant current of trade in commerce in said products between and among the various states of the United States.

PAR. 4. In the course and conduct of its business, as herein described, respondent has been for many years in competition in the sale and distribution of food and grocery products in commerce between and among the States of Texas, Louisiana and Tennessee with other corporations, persons, firms and partnerships.

PAR. 5. In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

PAR. 6. For example, the respondent addressed letters to a large number of its suppliers early in 1958 as follows:

Weingarten's is on the move! Your products are now getting greater distribution through more units, serving more people than at any time in our history.

We are highlighting this progress with our great annual event this year * * * the *57TH ANNIVERSARY SALE*. Thirty-nine great big units are taking part, and we are sure that you will want to avail yourself of the opportunity to participate.

We will use proven advertising, merchandising and promotional facilities to create maximum traffic during this mammoth sales concentration. There will be newspaper coverage, radio and television employed, plus personnel enthusiasm and carefully laid plans for presentation of all merchandise to insure success on an overall basis.

Many of our suppliers have asked us concerning this event, and we are, therefore, extending to you an opportunity to participate.

The attached sheet shows the prices of participation in the entire promotional program with the difference in prices being due to the different size ads in the various cities which will be included in a newspaper section.

Please mail the attached card indicating your intentions, and we would appreciate it if it would reach us no later than February 3rd, so we may formulate our plans accordingly.

Respondent enclosed a chart containing the following information and indicating that the amount of newspaper advertising which each supplier was purportedly to receive varied depending upon the amount paid by the supplier and the area chosen:

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	Section in Houston area with distribution in Houston, Freeport, Baytown, Texas City	Section in three Sabine area newspapers, including Beaumont, Orange, Port Arthur	Section in Bryan and Galveston	Section in Lake Charles American Press	Section in Shreveport Times-Journal	Total amount in all areas
1/8 page, including entire service.....	215.00	111.05	87.50	56.05	106.01	546.83
1/8 page, including entire service.....	352.35	170.00	141.00	91.15	173.02	881.14
1/4 page, including entire service.....	559.50	318.00	223.00	145.30	279.04	1,448.40
1/2 page, including entire service.....	870.95	608.50	344.00	226.60	438.08	2,343.72
Full page, including entire service.....	1,409.15	1,115.80	555.00	367.20	759.06	3,995.90

A 5% discount is included and already deducted for participation on all sections where our stores are located.

The payment in each case to be made by the supplier was set by the respondent and varied from \$56 to \$3,995. Ninety of respondent's suppliers entered into the arrangements above described with respondent, and as a result agreed to and did pay the respondent a total of \$23,538.

PAR. 7. Typical of the suppliers, the products which they supply and the amounts which they paid the respondent are the following:

Name of Supplier	Location	Product	Amount paid
Max Factor & Co.....	Hollywood, Calif.....	Cosmetics.....	\$881.14
Nestle-LeMur Co.....	New York, N.Y.....	do.....	881.14
Lanolin Plus, Inc.....	Newark, N.J.....	do.....	881.14
Yakima Fruit & Cold Storage Co.....	Yakima, Wash.....	Fruit.....	150.00
Shreveport Macaroni Manufacturing Co.....	Shreveport, La.....	Macaroni.....	108.00
Ipswich Hosiery Co.....	Manchester, N.H.....	Hosiery.....	285.00
Vanity Fair Paper Mills, Inc.....	New Orleans, La.....	Paper products.....	215.00

PAR. 8. Many of respondent's suppliers, including those listed above, did not offer or otherwise make available similar compensation or things of value or allowance for advertising or other service or facility on proportionally equal terms to those granted the respondent to all other of their customers which were competing with respondent in the sale and distribution of the same supplier's products. Respondent knew or should have known that it was inducing or receiving a payment or allowance for advertising or other service or facility from its suppliers which its suppliers were not offering or otherwise making available on proportionally equal terms to other of such supplier's customers who were competing with respondent in the sale and distribution of such supplier's products.

PAR. 9. The acts and practices of respondent, as hereinbefore alleged, of inducing and receiving special payments or allowances

from its suppliers which were not made available by such suppliers on proportionally equal terms to respondent's competitors are all to the prejudice and injury of competitors of respondent and of the public; have the tendency and effect of obstructing, hindering and preventing competition in the sale and distribution of food, grocery, cosmetic and clothing products and have the tendency to obstruct and restrain, and have obstructed and restrained, commerce in such merchandise and constitute unfair methods of competition in commerce and unfair practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. The amounts of money solicited and received by the respondent from each of its suppliers were paid by such suppliers for advertising to be done by respondent in promoting each such supplier's products during respondent's anniversary sales and Texas Products and Louisiana Products sales in the year 1958 and the years prior thereto. However, it has been the regular and continuous practice of respondent not to use the entire amounts of money received from its suppliers to advertise such suppliers' products during such sales but to divert substantial amounts of such payments to its own use.

For example, during the year 1958, respondent solicited its suppliers and ninety of them paid respondent substantial amounts of money totalling \$23,538 for advertising which respondent was to do on such suppliers' products during its anniversary sale beginning February 24, 1958, and lasting one week. However, respondent did not expend the entire amount of money received from each of its suppliers as an advertising allowance in advertising each such supplier's products during such sale, but diverted substantial amounts of such payments from its suppliers to its own use.

PAR. 11. The aforesaid acts and practices of respondent as herein alleged of inducing and receiving advertising allowances from its suppliers and not expending the entire amount of money received from each such supplier as an advertising allowance in actual advertising of such suppliers' products and of diverting substantial amounts of such money to its own use are all to the prejudice and injury of such suppliers and of competitors of respondent and the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of and in violation of Section 5 of the Federal Trade Commission Act.

Mr. Ernest Oakland for the Commission.

Fulbright, Crooker, Freeman, Bates & Jaworski, by *Mr. Austin C. Wilson*, *Houston, Texas*;

Howrey, Simon, Baker & Murchison, *Washington, D.C.*, by *Mr. Edward F. Howrey*, *Mr. Harold F. Baker*, and *Mr. A. Duncan Whitaker* for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

The Commission's complaint in this matter, issued on January 5, 1960, charges the respondent with violations of Section 5 of the Federal Trade Commission Act in two particulars, the gist of which are:

- (1) Knowingly induced or received promotional allowances from suppliers, and that it knew or should have known that such allowances were violative of Section 2(d) of the Clayton Act, as amended; and
- (2) Not expending the money received from its suppliers for advertising, but diverting substantial amounts thereof to its own use.

The respondent filed its answer, hearings were held at which evidence was received in support of and in opposition to the complaint, proposed findings were submitted and arguments heard. The proposed findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions:

The respondent challenges the jurisdiction of the Commission.

First, it asserts that it is a live poultry dealer within the meaning of Section 218b of Title 7, U.S.C., and, therefore, subject to the exclusive jurisdiction of the Secretary of Agriculture under the provisions of Section 227 of Title 7, U.S.C., as amended.

Second, it is the position of the respondent that the Commission does not have jurisdiction under Section 5 of the Federal Trade Commission Act to bring this action.

The jurisdictional questions were first raised by the respondent by its motions to dismiss the complaint, which motions were denied by the Hearing Examiner. The respondent filed an interlocutory appeal from such ruling which was denied by the Commission. It is found that the Federal Trade Commission has jurisdiction over the acts and practices of respondent as alleged in the complaint, and the complaint alleges a cause of action under Section 5 of the Federal Trade Commission Act.

Respondent, J. Weingarten, Inc., is a corporation organized under the laws of the State of Texas, and its principal office and place of business is located at 600 Lockwood Drive, Houston, Texas. Respondent is now and for many years has been engaged in the operation of a large chain of retail supermarkets purchasing and reselling all types of food products, drugs, cosmetics, household articles, and clothing.

The respondent's business can be traced back to the year 1901 when Harris Weingarten, a native of Poland, together with his 17-year-old son, opened a small grocery store in Houston, Texas, on \$300 capital. The senior's dry goods business had failed and the money came from

