IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL., GIANT FOOD SHOPPING CENTER, INC.

Dockets 6458, 6459. Order and opinion, Apr. 25, 1956

Order denying respondents' appeal from hearing examiner's denial of their motion for consolidation of hearings in cases involving charges of knowing acceptance of illegal payments from suppliers by food retailers in violation of Sec. 5 of the FTC Act with hearings in cases charging suppliers with granting promotional allowances to said food retailers in violation of Sec. 2 (d) of the Clayton Act.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Andrew C. Goodhope and *Mr. Frederic T. Suss* for the Commission.

Stein, Stein & Engel, of Jersey City, N. J., and *Gravelle, Whitlock & Markey* and *Howrey & Simon*, of Washington, D. C., for Food Fair Stores, Inc.

Danzansky & Dickey, of Washington, D. C., for Giant Food Shopping Center, Inc.

ORDER RULING ON RESPONDENTS' INTERLOCUTORY APPEALS

The respondents having filed appeals from the hearing examiner's order denying their motions for consolidation of certain hearings in this and other pending proceedings designated in the motions; and

The matter having been heard on the appeals and the answer in opposition thereto, and the Commission having determined, for reasons stated in its accompanying opinion, that the appeals should be denied:

It is ordered, That the respondents' appeals be, and they hereby are, denied.

OPINION OF THE COMMISSION

Per Curiam:

The respondents in the above-captioned proceedings have separately filed interlocutory appeals from orders by the hearing examiner denying their respective motions to consolidate the hearings therein with those in other pending proceedings designated in their motions.

According to the pleadings, the respondents, Food Fair Stores, Inc., and Giant Food Shopping Center, Inc., each engage in operating a chain of retail stores reselling all types of grocery products. The complaints in which each is named as the party respondent

charge them with knowing inducement and receipt of allegedly illegal payments from suppliers or manufacturers of grocery products there named, and from other unnamed suppliers as well, in violation of Section 5 of the Federal Trade Commission Act; and the complaints in eleven other proceedings instituted by the Commission charge that the respective manufacturers and suppliers named have granted promotional allowances on their purchases to one or both of the aforesaid food retailers in violation of Section 2 (d) of the Clayton Act. These eleven complaints additionally charge that such allowances were not offered or made available on proportionally equal terms to other customers of the respective suppliers and manufacturers competitively engaged with Food Fair Stores, Inc., or with Giant Food Shopping Center, Inc., in the resale of those products.

In the motion before the hearing examiner, the respondent, Food Fair Stores, Inc., requested that hearings in all thirteen proceedings be consolidated. Under the appeal, however, it alternatively requests that hearings in its case be combined with those in the nine wherein the suppliers are charged with having granted discriminatory payments to it. The appeal of Giant Food Shopping Center, Inc., similarly requests that the hearings in its case be consolidated with those in seven proceedings involving suppliers specifically charged with having granted discriminatory payments to it.

Appellants state that common questions of law and fact are presented in these proceedings and contend that consolidation of hearings will save expense, promote the convenience of the parties, and expedite the hearings and thereby better serve the interests of justice. The proceedings naming the sellers were instituted under the Clayton Act and those involving the buyer-retailers under the Federal Trade Commission Act. Thus, actual identity of legal and evidentiary principles controlling to all the cases does not prevail, even though some common questions of law and fact may be presented therein. In any event, consolidation would be warranted only upon due showing that the interests of justice would be better served thereby.

In support of the arguments on lessening parties' litigation burdens, it is urged that if each case proceeds separately to hearings, full participation by each of the respondent suppliers will be required not only in his own case, but also in those of the respondent retailers to whom his allegedly unlawful payments were furnished. This asserted result of multiple participation does not follow, however. Although representatives of the respondent sup-

pliers may be called upon to testify or furnish documentary evidence in one or both of the two buyer proceedings, each would remain a party litigant in but one proceeding. On the other hand, consolidation would in effect make every supplier a party in interest in all combined hearings applicable to his case under the order of consolidation. If this course were adopted, each might feel impelled to be represented in interest at all combined hearings, applicable under such order to his case, even though only a part of the evidence submitted might be relevant and material to the issues in his case. In these circumstances, we must conclude that no showing has been made in support of the appeals that parties' convenience would be promoted by the requested consolidation or that a lessening of trial burden or expense would result.

Nor can it be concluded that the course of hearings would be expedited. The scheduling of hearings under procedures for combined hearings would entail reconciling of or other due regard for the convenience of a large number of parties and their counsel when designating times and places therefor, which circumstance would tend to retard rather than expedite the general course of hearings. It also appears from the answers filed by counsel supporting the complaint in opposition to the appeals that hearings for the reception of evidence already have been held in two of the thirteen proceedings and hearings are scheduled for the near future in certain others. The probabilities of delay which would attend the rescheduling of matters heretofore set for hearing are obvious.

In the circumstances here, it is apparent that more expeditious and orderly disposition of the proceedings will be afforded if these cases separately proceed to hearings and the Commission is of the further view that granting of the respondents' requests for consolidation would less serve the interests of justice.

We, accordingly, have determined that the motions to consolidate the hearings were not well taken and the appeals are being denied. Inasmuch as adoption of the requested program for consolidated hearings in these cases would be unwarranted, we note no error in the hearing officer's failure to grant the additional request of respondent, Food Fair Stores, Inc., that he direct a pre-hearing conference of the parties for identifying common issues and simplifying the issues in the interests of conducting such consolidated hearings. Because the questions presented under the appeals are procedural in nature and informed determinations in respect thereto can be made from the moving papers, answers and orders below, the respondents' requests for the privilege of oral argument on their appeals likewise are denied.

Decision

IN THE MATTER OF

P. & D. MANUFACTURING CO., INC.

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

Docket 5913. Complaint, Aug. 9, 1951—Decision, Apr. 26, 1956

Order requiring a manufacturer of automotive products in Long Island City, N. Y., to cease discriminating in price through allowing certain purchasers rebates or discounts off its jobber price lists (1) of 5% to 15% based on total monthly purchases, in lieu of the usual 2% cash discount granted all its customers; (2) of 20% and 2% on all purchases without regard to size of monthly purchases; or (3) of 20% and 2% on the aggregate group purchases to jobber manufacturers of two group buying organizations regardless of the value of purchases made by each individual; which practice resulted in eight different buying prices on sales of its ignition line and four different buying prices on sales of its fuel pump line.

Mr. Eldon P. Schrup and *Mr. Francis C. Mayer* for the Commission.

Halfpenny & Hahn, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel.

The complaint in this proceeding was issued August 9, 1951, charging the respondent, P. & D. Manufacturing Co., Inc., a corporation, with having violated the provisions of subsection (a) of the Clayton Act as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Webster Ballinger, a duly designated hearing examiner of the Commission. At the close of the testimony in support of the complaint the respondent made a motion to dismiss the complaint for failure to establish a prima facie case, which motion was denied by the Hearing Examiner, Webster Ballinger, on the record on April 5, 1954. It then appearing that said Hearing Examiner Webster Ballinger would become unavailable to the Commission by reason of his retirement from Government service on May 31, 1954, counsel for the respondent advised that he would not be in a position to complete the respondent's defense within that time and agreed to the appointment of a substitute hearing examiner to go forward with the case and

hear the full defense offered by the respondent and make a decision on the whole record just as though he had heard the whole case. Subsequent thereto, on April 12, 1954, the Commission issued its order designating Earl J. Kolb as Hearing Examiner in this proceeding to take testimony and receive evidence in the place and stead of Hearing Examiner Webster Ballinger. Thereafter, counsel for respondent made certain motions before the undersigned Hearing Examiner renewing his motions to dismiss and to strike certain testimony. These motions having been denied, the case for the respondent was closed without the introduction of any testimony in opposition to the charges of the complaint.

The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers is not disputed by the respondent, but instead the respondent relied upon the contention that counsel in support of the complaint had failed to establish the violation of law alleged in the complaint by reliable, probative and substantial evidence. Evidence in this proceeding, with reference to the charges of the complaint as to primary line injury to competition between respondent and its competitors and tertiary line injury to competition between customers of respondent's purchasers, is not sufficient to warrant any finding, and consideration of this matter must be limited to secondary line injury between competing customers of the respondent. Consequently, the issues to be determined in this proceeding are reduced to the following:

(*a*) Does the record contain reliable, probative and substantial evidence that respondent's pricing plan constitutes discriminations in price between competing purchasers of its automotive products of like grade and quality?

(*b*) Does the record contain reliable, probative and substantial evidence that the effect of respondent's pricing plan may be substantially to lessen, injure, destroy, or prevent competition between competing purchasers from the respondent?

FINDINGS AS TO THE FACTS

1. Respondent P. & D. Manufacturing Co., Inc., is a corporation organized under the laws of the State of New York with its principal office and place of business located at 19-02 Steinway Street, Long Island 5, New York.

2. Respondent is now and for several years last past has been engaged in the business of the manufacture, sale and distribution of automotive products and supplies, principally ignition parts, fuel pump parts, carburetor parts and other related items, in interstate

commerce in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

3. In the course and conduct of its business the respondent has been and is now marketing its automotive products of like grade and quality under its own brand name throughout the United States, maintaining warehouse space in the cities of Los Angeles, California; Kansas City, Missouri; Chicago, Illinois; Atlanta, Georgia; and Dallas, Texas. In offering its products for sale respondent classifies its products generally into two lines—ignition line, including carburetor kits and parts, and fuel pump line and related items. At all times since 1936 respondent has offered and sold an ignition line to its purchasers, adding the fuel pump line in 1950.

4. The respondent, during the time mentioned herein, has sold its products to jobbers who were designated by the respondent as distributors who resold such products to garages, service stations, fleet owners and other jobbers. From time to time respondent issued its jobbers price list on each of these lines which listed the basic prices used by respondent in the sale and distribution of its various automotive parts. Any discounts, allowances or rebates were off said jobbers price list. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products.

5. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive products sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of respondent's automotive products in the various territories and places where such distributors carried on their businesses.

6. Respondent's pricing plan involved the granting of monthly volume rebates which were incorporated in and made a part of its various distributors franchise and rebate agreements. During the year 1950, respondent distributed its automotive products on the basis of applicable jobbers price lists subject to rebates or discounts provided for in franchise and rebate agreements with its distributors and other customers. The Distributor's Rebate Agreements used by respondent in connection with the sale of its ignition line provided for the following monthly rebates in lieu of the usual 2 percent cash discount granted all its customers:

Net purchases during each month:	*Monthly rebate*
$100 to $149	5%
150 to 199	7%
200 to 299	10%
300 to 399	13%
400 and over	15%

The Distributor's Fuel Pump Rebate Agreement used by respondent in connection with the sale of fuel pumps provided for the following monthly rebates in addition to the usual 2 percent cash discount:

Net purchases during each month:	*Monthly rebate*
$0 to $199	10%
$200 and over	15%

Under the above rebate plans, purchasers were granted and received rebates applicable to their total monthly purchases, differing in amounts according to the total of their monthly purchases.

7. In the sale of both of the above-described lines, respondent further entered into Distributors Franchise Agreements on its ignition line and Distributor's Fuel Pumps Franchise Agreements on its fuel pump line with some of its customers providing for cash discounts of 20 percent and 2 percent on all purchases without regard to, or any limitation upon, the size of the monthly purchases of the franchise distributors. This agreement further provided that the distributor must sell more than 80 percent at wholesale and maintain a complete stock of respondent's parts.

8. As a result of its sales of ignition line, respondent offered its customers eight different buying prices ranging from sales upon which no monthly rebate was granted but only the 2 percent cash discount allowed, to the 20 percent and 2 percent cash discount granted to the franchise distributors, irrespective of the distributor's monthly volume of purchases. In the sale of its fuel pump line respondent granted its purchasers four different buying prices ranging from its jobber's list price without any rebate but subject to the 2 percent cash discount for prompt payment, to the 20 percent monthly rebate, plus 2 percent cash discount, allowed to its franchise distributors, regardless of the total monthly purchases of those customers.

9. During the year 1950 respondent sold its automotive products to approximately 700 accounts with total domestic sales of approximately $1,685,059.00. In the ignition line the sales were distributed on the basis of rebates and discounts as follows: 60 jobbers purchasing $8,364.00 received the 2 percent cash discount; 258 jobbers,

purchasing $299,417.00 received rebate of 5 percent to 7 percent; 92 jobbers, purchasing $134,619.00, received a rebate of 10 percent; 86 jobbers, purchasing $168,570.00, received a rebate of 15 percent; and 186 jobbers, purchasing $1,054,638.00, received 20 percent, plus 2 percent cash discount. As to the fuel pump customers, there were 56 jobbers who purchased $19,451.00 who received 10 percent to 15 percent, plus 2 percent cash discount.

10. During the year 1950, respondent sold its products to jobber manufacturers of two group buying organizations—Six-State Associates, Boston, Massachusetts, and Warehouse Distributors, Inc., Chattanooga, Tennessee—who entered into franchise agreements with respondent as distributors.

11. The purchase procedure in a group buying operation provided for the forwarding of purchase orders by the individual jobber member to the seller directly or through the group office. Merchandise so ordered was shipped by the respondent direct to the individual jobber member with billing for same being directed to the group office. Monthly settlements were made between the respondent and the group office for the aggregate purchase orders of all the jobber members so received, and each jobber member also settles monthly with the group office for his own individual purchases so made. Such rebates, discounts and allowances as are collected from the seller by the group office on the aggregate of the purchases thus made are distributed by the group office to each individual jobber purchaser in proportion to the amount of such individual jobber's purchases so made. The rebates and discounts as shown by the tabulations in evidence were granted and allowed by respondent on the purchases of each individual member of said buying group irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of respondent's rebate schedules set forth in respondent's rebate agreements. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. Such jobber members, in fact, purchase their requirements of respondent's products direct from the respondent and at the same time receive a more favorable price or higher rebate based upon the combined purchases of all of the members.

12. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's competing distributors and also between respondent's distributors and competing group buying jobbers, and

the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and the customers who do not receive the benefit of such discriminations. The respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas who were, in fact, in competition with each other and also in competition with group buying jobbers, who sold respondent's automotive parts to dealers and other purchasers in their respective trade areas. The price discriminations received by some distributors as compared with others competing with them in the same trade area as the result of respondent's pricing plan is shown by a number of tabulations taken from respondent's books and records which were received in evidence as Commission's Exhibits 46 through 48. These tabulations show the prices paid and the rebates received by purchasers located in various trade areas throughout the United States during the year 1950. For example, testimony was taken of distributors who were in competition with each other in the sale of respondent's products in the trade area which includes the cities of Scranton, Wilkes-Barre and Kingston, Pennsylvania. The amounts purchased by the distributors in this area and the rebates and discounts received by them on both the ignition line and the fuel pump line are as follows:

Ignition line

Name of purchaser	Net purchases	Amount of rebate	Percentage of rebate
Ackerson-Weinberg Co	$107.14	$2.19	2.04
Daves Auto Parts	208.66	0	0
Charles B. Scott Co	2.77	.06	2.17
Hy-Grade Tire Supply	511.92	51.21	10.00
N. & W. Auto Parts and Associates	559.59	81.66	14.59
Penn Auto Parts Co	804.91	119.05	14.79
Sterling Auto Supply	1,508.00	146.55	9.72
Shapiro Auto Supply Co	149.47	21.74	14.55
Kitsee Auto Store	2,021.08	241.76	11.96
Stull Brothers	3,219.56	476.77	14.81

Fuel pump line

Name of purchaser	Net purchases	Amount of rebate	Percentage of rebate
Daves Auto Parts	$48.59	0	0
N. & W. Auto Parts and Associates	198.96	$32.14	16.15
Shapiro Auto Supply Co	49.27	11.96	24.27
Blackman Auto Parts Co	294.89	45.03	15.27

There is nothing in the record to indicate that the above trading area is unique or different from other trading areas where respond-

ent sells its automotive parts at differing prices. It is therefore, concluded that competitive conditions shown to exist in this area with respect to the purchase and resale of respondent's automotive parts is typical and representative of the other areas of the United States and that respondent's distributors reselling respondent's products in the same trading area are in competition with each other in the resale of such products.

13. The record, based upon the tabulations in evidence in this proceeding, disclosed substantial differences in the net purchase prices paid by competing purchasers of respondent's products for resale. The substantiality of the amount represented by such price differences with relation to the purchasers' net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent, who testified in this proceeding, stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses, and that such discount reduced the cost of acquisition of respondent's products. This 2 percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. By the very nature of the business operated by the various jobber customers of respondent their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled from 40 to 300 lines, involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they receive to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

14. In the testimony of at least one witness it was indicated that the jobber is not too concerned about differing prices among competitors for the reason that all sell at the suggested resale price in his territory. The fact that price competition may have been eliminated in some areas because of uniformity of resale prices does not eliminate the question of injury to competition. Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less non-existent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exists.

15. It was also contended by the respondent that the automotive parts sold by it to competing customers have not been shown to be of like grade and quality, and as a basis for this contention respondent has taken the position that such parts to be of like grade and quality, under Section 2 (a) of the Clayton Act, must pass the test of interchangeability. This would, in effect, be saying that merchandise to be of like grade and quality must be identical. If Congress had intended to so require, it would have said so. We do not have here different grades of merchandise designed to sell at different price levels, such as first quality line and second or inferior quality line. All of respondent's products are of the same grade and quality.

16. Respondent's distributors purchased respondent's automotive parts not as individual items, but as part of a line designed to supply the needs of garages and others engaged in the repair of motor vehicles. The respondent has grouped its automotive parts for discount purposes into two separate categories which are referred to as respondent's ignition line and fuel pump line. As each of these lines carries a separate and different monthly volume rebate, respondent has made the selection of the parts to go into the various lines and the rebates granted to purchasers of such lines apply to each and every item in the line. Having grouped its parts for discount purposes, the respondent cannot logically contend that items within the group are not of like grade and quality or that distributors in the same trade area, who purchase items within the group for resale, are not in competition.

17. The Robinson-Patman Act is an antitrust statute designed to preserve equal competitive opportunity. Respondent's contention of interchangeability places the existence of like grade and quality solely on functional similarity and thereby ignores the effect of competitive opportunity. When the respondent sells automotive parts classified into the two lines described above to its distributors who resell in competition with each other in their respective trade areas, the functional similarity of the individual items in each class is no longer of consequence because from a competitive standpoint they are all of like grade and quality. Distributors in order to supply the needs of their garage and other customers would purchase substantially all of the items in respondent's various lines over a period of time, their purchases of the items being dependent upon the demands of their customers. It must accordingly be concluded that the discriminations in price herein found were, in fact, made in connection with the sale and distribution of merchandise of like grade and quality and that the defense that such products must pass the test of interchangeability is without merit.

CONCLUSIONS

The aforesaid discriminations in price by respondent, as herein found, constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That the respondent P. & D. Manufacturing Co., Inc., and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale for replacement of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating directly or indirectly in the price of said automotive products and supplies of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price, in the resale and distribution of respondent's products.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner.

Complaint was issued in this matter on August 9, 1951, charging respondent, P. & D. Manufacturing Co., Inc., of Long Island City, New York, with having discriminated in price in connection with its sale of ignition and fuel pump lines of automotive replacement parts to competing purchasers in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act [15 U.S.C.A., Sec. 13].

After introduction of testimony and other evidence in support of the complaint, respondent moved to dismiss on the ground that a *prima facie* case had not been established. This was denied by the Hearing Examiner. Subsequent thereto, the Hearing Examiner became unavailable for further participation in the proceedings. Thereafter another Hearing Examiner was substituted by agreement of counsel. The motion to dismiss the complaint was renewed and other motions were made by respondent to strike certain testimony. These were denied. Thereafter, except for two exhibits, (1) a debit memorandum, and (2) a copy of its motion to dismiss, respondent failed to introduce testimony or other evidence in opposition to the allegations in the complaint or in justification of the differing prices charged their competing customers which had been placed in the record by counsel supporting the complaint. On

December 20, 1954, the Hearing Examiner issued his initial decision upholding the position of counsel supporting the complaint.

The matter is now before the Commission on respondent's appeal from the Hearing Examiner's initial decision. The initial decision includes seventeen numbered paragraphs of findings as to the facts; a conclusion that the discriminations found constitute violations of Sec. 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act; and an order that respondent cease and desist from discriminating in price:

> By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price, in the resale and distribution of respondent's products.

In the respondent's appeal, exceptions have been taken as follows: (1) to the Hearing Examiner's findings in paragraphs 5, 8, 9, 12, 13, 14, 15, 16 and 17 of the initial decision; (2) to the Hearing Examiner's conclusions of law; (3) to the failure of the Hearing Examiner to make certain findings and conclusions; (4) to procedural rulings of the Hearing Examiner (a) on the admission of evidence, (b) on the motions to dismiss, and (c) denying a motion to require counsel in support of the complaint to make certain elections and specifications from the evidence; and (5) to the substance, form and constitutionality of the proposed order to cease and desist.

Although the complaint alleged injury to competition in other lines of commerce, we are of the opinion that the Hearing Examiner was correct in his initial decision in finding that the evidence of record limits consideration to that of injury in the secondary line of commerce between distributors and jobbers who are customers of respondent.

The following questions are raised by the respondent's exceptions to the rulings of the Hearing Examiner and the appeal taken from the initial decision:

1. Did the Hearing Examiner err in his procedural rulings?

2. Is there reliable, substantial and probative evidence that (*a*) there were price differentials to (*b*) competing customers in their purchase of (*c*) commodities of like grade and quality?

3. If there were price differentials to competing customers on their purchases of commodities of like grade and quality, is there reliable, probative and substantial evidence that the effect of these may be substantially to lessen competition between such competing purchasers?

4. Is the proposed order in the initial decision, in form and substance, in compliance with the standards of definiteness and reasonableness required by due process of law under the Fifth Amendment to the Constitution?

These questions were all raised and decided in the matter of *Moog Industries, Inc.* (Docket No. 5723), a companion case, in which the Commission issued its order to cease and desist on April 29, 1955, and which is now pending on appeal in the Court of Appeals for the Eighth Circuit. The pattern of pricing and the character of the evidence presented by the record in the *Moog* case were substantially the same as in this matter.

The rulings of the Hearing Examiner in admitting Commission's Exhibits 46–A through 48 were not prejudicial error. These are tabulations which were prepared by the accounting staff of the Commission. The preparation of these tabulations was in connection with a two months' study and examination at respondent's offices of the customers' debit and credit memoranda, invoices, cash books, sales journals and freight bills for the year 1950. From these books and records of respondent, tabulations were made of (1) the names and locations of customers in numerous trading areas, (2) each of such customer's total billing, parcel post and insurance, freight allowances, net items, total sales subject to rebate and discount, (3) the separate total purchases by each of said customers of the ignition and fuel pump lines with separately itemized amounts and percentages of rebates and discounts allowed, and (4) the combined total rebates and discounts allowed each of them.

Respondent does not challenge the accuracy of these tabulations. Respondent's objections are that (1) the tabulations do not reflect differing prices on purchases of commodities of like grade and quality, rejecting the arguments of counsel supporting the complaint that separate designation and tabulation of the two lines, ignition and fuel pump, satisfy this requirement, (2) that since individual items within a line are not comparatively designated, respondent is not able to present defense testimony and evidence, and is, therefore, denied due process of law, and (3) that the tabulations do not prove the existence of competition between the customers listed.

The tabulations were not offered to show competition. They were offered to illustrate the pricing pattern of respondent in the sale of the two lines to different customers in a number of trading areas throughout the United States.

Respondent grouped its individual automotive replacement parts into two categories, the ignition line and the fuel pump line. Arrangements for distributorships were provided in the "Distributors Fuel Pumps Franchise Agreement" and the "Distributor's Fuel Pump Rebate Agreement"; and, as to the ignition line, "Distributor's Rebate Agreement" and "Jobbers Contract." Terms of sale includ-

ing discounts and rebates are set out in the agreements and apply to the line involved in the contract.

Respondent's salesmen check the inventory of the distributors and jobbers in making their rounds and present the list of deficiencies to the customer from which a single order is made for a number of varied items within the line purchased. William O. Nickel, Manager of The Kitsee Auto Store, Wilkes Barre, Pennsylvania, testified as follows:

> A. We make up this order, these sizes, for a couple of reasons. The first reason, there might be times we might order something we might need in a hurry, something that we can't wait for. In the lines that we carry with P & D, I made a recount here recently. We found that there are 507 items in the P & D line that we attempt to carry.
>
> The P & D people have representatives out. Those men are out not to get orders as much as to be of service to us. We don't have the time to check over our complete inventory personally, so we depend on the road man to check the inventory for us as an accommodation. When he gets through, he has a recap, so naturally, when you go through 507 items, you are bound to come up with an order that exceeds better than $100. The only time when we will order anything less than that—and that's a very rare case—is when we don't have the time to go through this whole inventory. * * *

Invoices are submitted on single purchase orders of a number of individual items within the line involved. At the end of the month, total purchases in each line are separately figured to determine the total monthly discounts or rebates due to individual purchasers.

Thus it is clear that respondent sells and prices its automotive parts in two lines. There is a single grade and quality of each item in each line. Respondent's customers do not necessarily purchase all of the items at one time, but in order to meet the demands of the trade they carry the line or lines involved.

Respondent has sought to have the Commission adopt the theory of interchangeability, i.e., that the only way "commodities of like grade and quality" may be shown for the purposes of the act is that the identical individual items in each of these lines be segregated and separately considered in connection with their sale to different customers. We find that respondent has prevented any practical application of this test through its method of selling, invoicing, pricing and receiving payment through the grouping of the two categories, ignition and fuel pump parts. We do not find here different grades of merchandise designed to sell at different price levels, such as first quality line and second or inferior quality line. All of respondent's products are of the same grade and quality.

The conclusion is, therefore, inescapable that respondent's sales of the ignition line to two distributors who resell the lines in the

same trading area are sales of "commodities of like grade and quality" within the meaning of Sec. 2 (a) of the Clayton Act, as amended. The Commission so found as to the similar practice of grouping automotive parts by lines in the *Moog* case.

We are of the opinion that Commission's Exhibits 46–A through 48 are tabulations showing differing net prices to customers in a number of respective trading areas on their purchases of commodities of like grade and quality.

Any difficulties of presenting respondent's defense to the facts presented in Commission's Exhibits 46–A through 48 are the result of respondent's method of offering for sale, selling and pricing its products by lines. These difficulties are not increased by the method of presenting the facts in tabular form in lieu of the heavy volume of source materials from respondent's files. Respondent has not, as contended, been denied due process of law by admission of these documents to the record.

The Hearing Examiner did not err in overruling respondent's motions to dismiss the complaint on the ground that counsel supporting the complaint had not established a *prima facie* case. The points raised in those motions are substantially the same as those we consider here on appeal.

The Hearing Examiner was correct in his denial of the motion of respondent that counsel supporting the complaint elect and specify certain evidence from the record relied upon to show respondent's violations of the statute. Respondent contended that counsel supporting the complaint had, by placing voluminous documentary evidence in the record, including the 1950 tabulations of price differences to customers in a number of trade areas, placed an insurmountable burden of analysis and proof upon them by requiring a breakdown of thousands of invoices and cost allocations.

We were faced with exceptions by respondent in the *Moog* matter to similar rulings by the Hearing Examiner in denial of a similar motion. There, as here, tabulations of price differences to different customers in a number of trading areas on lines of automotive replacement parts, based on respondent's records, were placed in the record. We find no different facts which would support a different ruling here. Respondent was fully apprised of the issues herein and counsel supporting the complaint has included tabulations, the nature of which, in our opinion, is responsive to the respondent's method of doing business.

The respondent had a fair and impartial hearing.

In disposing of respondent's exceptions to procedural rulings by the Hearing Examiner, we have found that respondent sold its commodities of like grade and quality to different customers in a

number of trading areas throughout the country. Respondent contends that there is no evidence in the record that the different prices were to competing customers.

Respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas. We find these distributors were, in fact, in competition with each other and in competition with group-buying jobbers in their respective trade areas.

Seven automotive parts jobbers who sell respondent's automotive parts in the general trading area of Scranton and Wilkes Barre, Pennsylvania, testified at the call of counsel supporting the complaint. One of the seven, Selig Shapiro, a partner in Shapiro Auto Supply, Wilkes Barre, Pennsylvania, testified in part as follows:

Q. In what general area do you offer your products for sale?

A. Our men cover a radius of approximately fifty miles, but we confine most of our efforts to the Wilkes Barre general trading area.

Q. With what other type of automotive businesses do you compete in the resale of your products?

* * * * * * *

A. Any business that would be in the wholesaling of parts, accessories or equipments.

Q. Would you name for me by name several of the companies in your area?

A. Yes. We compete with Stull Brothers of Kingston; Kitsee Auto Stores of Wilkes Barre; Franconi Auto Supply of Kingston; K & K of Wilkes Barre and Scranton; Klein Auto of Wilkes Barre. I think I just about covered the field.

Q. To what class of customers do you offer your products for sale?

A. Well, we wholesale to garages, car dealers, gas stations, and we also cover some sub-jobbers.

Q. Did you purchase any products for resale during the year 1950 from the P & D Manufacturing Company of New York?

A. Yes, sir, I did.

Mr. Shapiro purchased both lines of automotive parts from respondent.

Two of those named by Mr. Shapiro as competitors testified. Howard A. Stull, partner in Stull Brothers, testified that his company competes in the same areas for customers' business, having a radius of about 50 miles from Kingston, Pennsylvania, which includes Wilkes Barre, Pennsylvania;[1] and that he purchased the P. & D. ignition line in 1950.

The second competitor named who testified was William O. Nickel, manager of The Kitsee Auto Stores, Wilkes Barre, Pennsylvania. He testified in part as follows:

[1] This would also include Scranton, Pennsylvania, which is shown by the Rand McNally road map to be about 20 miles to the northeast of Kingston.

Q. In what general area do you offer your goods for sale?

A. We cover Luzerne County, Wyoming County, part of Wyoming, part of Columbia.

* * * * * * *

Hearing Examiner BALLINGER. Will you state what companies are selling in the same area that you are selling in—that is, comparable products.

The WITNESS. Any jobber, you can go through the list. You can pick up any jobber. They all handle ignition parts. Everybody handles ignition parts. * * * You can name all—Klein, K & K, Franconi Auto Parts; you can name Stull Brothers; you can name Rudolph Auto Electric; Ritter Electric; you can name Penn Parts; you can name Shapiro. They are competitors, but we don't recognize them as too big of a competitor. Kingston Auto Parts. That covers the majority of them.

Q. Mr. Nickel, to what class of trade do you offer your automotive products for sale?

A. We offer our merchandise to gas stations, garages, car dealers * * *.

Q. What products of the respondent P & D did you purchase for resale during 1950?

A. We purchased * * * ignition parts * * *.

The other witnesses from the Scranton area testified likewise.[2]

The words "competitor" and "competition" have been judicially defined within the meaning of the Robinson-Patman Price Discrimination Act. In *Russelville Canning Company* v. *American Can Company*, 87 F. Supp. 484, the court held that where plaintiff and another buyer of defendant's cans did not pack the identical products, but they both canned packed vegetables, sold them in the same markets, and products of both of them often appeared on the same shelf in the same grocery store, they were "competitors" within the meaning of the statute. The court further held that competition is the effort of two or more parties, acting independently to secure the business of a third person by the offer of the most favorable terms. See also *Simmons* v. *Johnson*, 11 So. 2d 710; *Silbert* v. *Kerstein*, 62 N.E. 2d, 109; *Shill* v. *Remington Putman Book Co.*, 17 A. 2d 175; *Stockton Dry Goods Co.* v. *Girsh*, 221 P. 2d 186; *Ferd Heim Brewing Co.* v. *Belinder*, 71 S.W. 691; *United States* v. *American Linseed Oil Co.*, 262 U.S. 371 ("* * * the play of contending forces ordinarily engendered by an honest desire for gain."); and *Lipson* v. *Socony Vacuum Corporation*, 87 F. 2d 265.

The tabulations prepared for 1950 list the details of the purchases of the aforementioned witnesses and others from the Scranton area showing varying net prices on their purchases from P. & D. of "commodities of like grade and quality."[3]

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[2] Allen G. Smith, Sterling Auto Supply, Scranton, Pa. (Tr. 339, 340); Jesse Levy, Hi-Grade Auto and Supply Company, Scranton, Pa. (Tr. 347, 348); Sol Goosay, Penn Auto Parts, Scranton, Pa. (Tr. 355, 356); and David Rubin, Dave's Auto Parts (Tr. 362, 363).

[3] CX 46-C (Stull Brothers, Kingston, Pa.); CX 46-D (Dave's Auto Parts, Ackerson-Weinberg Company, Chas. B. Scott Co., Hi-Grade Auto Parts & Accessories, Penn Auto Parts Co., and Sterling Auto Supply, all from Scranton, Pa.; and Shapiro Auto Supply Company, Kitsee Auto Store, and Blackman Auto Parts Co., all of Wilkes Barre, Pa.).

We therefore find that there is reliable, probative and substantial evidence that respondent sold commodities of like grade and quality at different net prices to competing customers.

Is there reliable, probative and substantial evidence that the effect of these may be substantially to lessen competition between such competing customers?

The differing net purchase prices in the two lines of automotive parts resulted from the application by respondent of its monthly rebate volume discount schedules to the net purchase prices of such products. On the ignition line, the following monthly rebates were granted in lieu of the usual 2 percent discount for payment within ten days granted all customers:

Net purchases during each month:	*Monthly rebate*
$100 to $149	5%
150 to 199	7%
200 to 299	10%
300 to 399	13%
400 and over	15%

On the fuel pump line the following monthly rebates in addition to the usual 2 percent cash discount resulted in different net purchase prices to competing customers of respondent:

Net purchases during each month:	*Monthly rebate*
$0 to $199	10%
$200 and over	15%

Respondent has agreed to and does grant some of its customers discounts of 20 percent and 2 percent cash on all purchases without limitation or regard for the size of their monthly purchases. Those customers who receive this rate of discount agree to handle a complete stock of P. & D. automotive parts and must sell at least 80 percent of their products as wholesalers.

This method of pricing reflected respondent's offer of eight different net purchase prices of its ignition line, ranging from no monthly rebate but only the 2 percent cash discount, to the 15 percent monthly rebate based on the various sizes of total monthly purchases, and from there to the 20 percent and 2 percent cash discount to its franchised distributors without regard to the size of their purchases. In the fuel pump line, four different buying prices were offered, ranging from the jobber's price list without rebate but subject to the 2 percent cash discount for payment within 10 days, to the 15 percent monthly rebate depending on the size of the total monthly purchases, and from there to the 20 per-

cent monthly rebate, plus 2 percent cash discount, to its franchised distributors on all purchases irrespective of the total amounts involved in same.

Regardless of the dollar amount, size, or the number of individual purchase transactions of a customer, the discounts or rebates granted by respondent are based upon the total aggregate dollar amount of that customer's monthly purchases.

Respondent also entered into agreements with group-buying organizations through which jobber members of the organizations individually purchased the two lines of automotive parts and through which each received higher discount rates than would normally apply to their separate monthly purchase volumes. This was accomplished by applying the volume discount rate to the aggregate volume of all the individual purchases of the members of the group. During the sample year chosen, 1950, there were two such group-buying organizations—Six State Associates, Boston, Massachusetts, and Warehouse Distributors, Inc., Chattanooga, Tennessee, who participated on behalf of their members in purchases of respondent's lines of automotive parts under this plan.

The group-buyer arrangements were no more than bookkeeping devices for the collection of rebates and discounts received by the jobber members of the group on their individual purchases. The result was that some of such purchasers received a more favorable price or higher rebate than other competing purchasers outside of the group.

With a total business in 1950 of approximately $1,685,059 and approximately 700 accounts, respondent granted its rebates and discounts under this method of pricing as follows: 60 jobbers purchasing $8,364.00 received the 2 percent cash discount; 258 jobbers, purchasing $299,417.00 received rebate of 5 percent to 7 percent; 92 jobbers, purchasing $134,619.00, received a rebate of 10 percent; 86 jobbers, purchasing $168,570.00, received a rebate of 15 percent; and 186 jobbers, purchasing $1,054,638.00, received 20 percent, plus 2 percent cash discounts. As to the fuel pump customers, there were 56 jobbers who purchased $19,451.00 who received 10 percent to 15 percent, plus 2 percent cash discount.

The following details illustrate the results of respondent's pricing method in 1950 in the trade area which includes the cities of Scranton, Wilkes Barre, and Kingston, Pennsylvania, in which testimony was taken of distributors who were in competition with each other:

Ignition line

Name of purchaser	Net purchases	Amount of rebate	Percentage of rebate
Ackerson-Weinberg Co	$107.14	$2.19	2.04
Daves Auto Parts	208.66	0	0
Charles B. Scott Co	2.77	.06	2.17
Hy-Grade Tire Supply	511.92	51.21	10.00
N. & W. Auto Parts and Associates	559.59	81.66	14.59
Penn Auto Parts Co	804.91	119.05	14.79
Sterling Auto Supply	1,508.00	146.55	9.72
Shapiro Auto Supply Co	149.47	21.74	14.55
Kitsee Auto Store	2,021.08	241.76	11.96
Stull Brothers	3,219.56	476.77	14.81

Fuel pump line

Name of purchaser	Net purchases	Amount of rebate	Percentage of rebate
Daves Auto Parts	$48.59	0	0
N. & W. Auto Parts and Associates	198.96	$32.14	16.15
Shapiro Auto Supply Co	49.27	11.96	24.27
Blackman Auto Parts Co	294.89	45.03	15.27

There is no reason of record from which it may be inferred that the Scranton-Wilkes Barre-Kingston, Pennsylvania, trading area is unique or different from other trading areas which are listed in the tabulations which set out the details of varying net prices granted by respondent in its sale of the two automotive parts lines in 1950. We therefore conclude that the competitive conditions which are shown in the above table to exist in that area are typical of those throughout the country with respect to the purchase and resale of respondent's automotive parts.

The significance of the substantial differences in net purchase prices offered and granted by respondent to competing customers on their purchases of its lines of automotive parts of like grade and quality is shown by direct customer testimony. These customers testified that the 2 percent cash discount is essentially important to them in the conduct of their business.[4] For example, Mr. Louis A. Roazen, Treasurer of Standard Auto Gear Co., Inc., Brookline, Massachusetts, testified in part as follows:

Q. Mr. Roazen, in the purchase of merchandise for resale, is the cash discount of 2 percent important to you?

* * * * * * *

The WITNESS. The answer is yes. * * * The amount that you are able to show as a profit which the company realizes is by availing yourself of the cash discounts. It is quite often the difference between a profit and a loss in any particular year.

Mr. Sol Goosay, copartner of Penn Auto Parts, Scranton, Pennsylvania, testified as follows:

[4] Similar testimony was considered on the same points by the Commission in Docket No. 3200, *H. C. Brill Company, Inc.*, 26 FTC 666, *FTC* v. *Morton Salt Company*, 334 U.S. 37.

Q. Do you take advantage of the cash discounts offered to you by your various suppliers?

A. We do.

Q. Why is that?

A. For a number of reasons, one it's necessary to reduce your costs, increase your profits, to meet your competition.

Respondent contends that, since these customers also testified that because resale prices are maintained they were not injured by the varying net purchase prices, there can be no finding of the Commission that there is reliable, probative and substantial evidence that the effect of respondent's varying net purchase prices may be substantially to lessen competition in the secondary line of commerce.

We cannot agree. Certainly if, as respondent's customers testified, the 2 percent cash discount is essentially important to them, it cannot be gainsaid that the substantially higher discounts or rebates reflected in the varying net purchase prices are even more important to them.

In order for a wholesaler or distributor of automotive parts to successfully compete, he must not only be in a position to meet or beat his competitors' prices, which respondent would have the Commission use as the sole test here, but he must maintain a superior sales force, warehousing and delivery facilities, and advertising and promotional activities, and in other ways be able to present his product.[5] This is especially true here, since, as in the Scranton-Wilkes Barre area, the purchasers of respondent's lines of automotive parts cover a rather wide geographic trading area.

Testimony by respondent's customers as to adherence in their trading territory to the suggested resale prices does not support respondent's exception to the examiner's finding that the effect of respondent's different prices of commodities of like grade and quality to competing customers may be substantially to lessen competition. In *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 742, the Supreme Court stated:

> But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition.

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[5] See also Docket No. 5771, *In the Matter of Namsco, Inc.*, March 17, 1953, in which it was found that "price competition is but one form of competition. Additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, proximity to customers—all aid respondent's customers to stay in business and to prosper. The institution or expansion of these competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise."

We think that it was the intent of Congress that the Commission should take such elements into consideration in determining the question of whether or not the effects of such a pattern of pricing may be substantially to lessen competition. In House Report No. 2287, 74th Congress, 2nd Session, which was the report of the House Committee on the Judiciary on the bill which, among other things, resulted in the present language of Section 2 (a) of the Clayton Act, as amended, the Committee stated in part:

> Section 2 (a) attacks directly the problem of price discrimination. Like present section 2 of the Clayton Act, it contains a general prohibition against such price discriminations, from which certain exceptions are then carved.
>
> Section 2 (a) attaches to competitive relations between a given seller and his several customers. It concerns discrimination between customers of the same seller. It has nothing to do with fixing prices nor does it require the maintenance of any relationship in prices charged by a competing seller.
>
> Discriminations in excess of sound economic differences between the customers concerned, in the treatment accorded them, involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them.

As in the *Moog* case, where, as to this same issue of injury, there was similar evidence, we find that there is reliable, probative and substantial evidence that the effect of respondent's varying net purchase prices which it granted in the sale of its lines of automotive parts of like grade and quality to competing distributors and jobbers may be substantially to lessen competition in the secondary line of commerce.

The order which we entered in the *Moog* case (Docket No. 5723) is identical with the order proposed in the initial decision herein. As in the *Moog* case, respondent here takes exception to the form and substance of the order, contending that it is too general, that the price discrimination statute as construed and applied by the examiner is unconstitutional and fails to comply with the standards of definiteness and reasonableness required by due process of law under the Fifth Amendment to the Constitution; and that the Commission's enforcement of the proposed order will constitute a denial of due process. For the same reasons which we gave in the *Moog* case, these exceptions of the respondent are denied. See *F.T.C.* v. *Ruberoid Company*, 343 U.S. 470; *Engineers Public Service Company* v. *Securities and Exchange Commission*, 138 F. 2d 936.

It is our opinion that the hearing examiner decided this matter correctly. The appeal of the respondent and the exceptions of the respondent, including those to the procedural rulings of the examiner, the findings of the examiner, the failure of the examiner to make certain findings, and to the form, substance and constitutionality of the proposed order are denied. The examiner's

findings, conclusions and order are adopted as the findings, conclusion and order of the Commission.

Commissioner Kern did not participate in the decision in this matter.

Commissioner Mason dissented.

DISSENTING OPINION

By MASON, Commissioner.

The question of competitive injury here is the same as in the *Moog* case.[1]

The evidence here is of like ilk. There is, in my opinion, no competitive injury, nor any reliable, probative and substantial evidence to support the finding of injury enunciated by the majority.

I am against it.

FINAL ORDER

Respondent P. & D. Manufacturing Co., Inc., having filed on March 7, 1955, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the appeal and adopting as its own the findings, conclusion and order contained in the initial decision:

It is ordered, That respondent P. & D. Manufacturing Co., Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

Commissioner Kern not participating, and Commissioner Mason dissenting.

[1] In the Matter of Moog Industries, Inc., Docket No. 5723.

IN THE MATTER OF

DETRA WATCH COMPANY, INC., ET AL.

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

Docket 6421. Complaint, Sept. 23, 1955—Decision, Apr. 26, 1956

Consent order requiring sellers in New York City to cease misrepresenting the gold carat fineness of their "Detra" watches by marking the cases with the phrase "14 K" or "10 K" on the back and inside, when the cases were manufactured from gold of 13⅛ and 9⅛ carat fineness, respectively.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Frederick McManus for the Commission.

Halperin, Natanson, Shivitz, Scholer & Steingut, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Detra Watch Company, Inc., a corporation, and Joseph H. Levine, Arthur D. Natanson and William Levites, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Detra Watch Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 106 West 46th Street, New York 36, New York.

Individual respondents Joseph H. Levine, Arthur D. Natanson and William Levites are the president, treasurer and secretary, respectively, of said corporation and formulate, direct and control the policies, acts and practices of said corporate respondent. Said individual respondents have their office at the same place as the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of selling and distributing gold watch cases under the brand name "Detra" to retailers and jobbers for sale to the purchasing public.

PAR. 3. In the course and conduct of their business, respondents now cause and for some time last past have caused their watch cases, when sold, to be transported from their place of business in the State of New York to distributors and jobbers for resale to the general public located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said watches in commerce between and among the various States of the United States.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase of their said watches, respondents have sold and distributed, and do now sell and distribute in commerce as aforesaid, said watch cases with the phrase "14 K" and "10 K" appearing on the back and on the inside of said gold watch cases.

By means of said marking, respondents represent directly and by implication that said gold watch cases marked 14 K are manufactured from gold of 14 carat fineness and that said gold watch cases marked 10 K are manufactured from gold of 10 carat fineness. In truth and in fact the said gold watch cases sold by respondents and marked 14 K are not manufactured from gold of 14-carat fineness but are manufactured from gold of 13⅛-carat fineness; the said gold watch cases sold by respondents and marked 10 K are not manufactured from gold of 10-carat fineness but are manufactured from gold of 9⅛-carat fineness.

PAR. 5. In the course and conduct of their business respondents are in direct and substantial competition with other corporations, firms and individuals engaged in the sale, in commerce, of gold watch cases.

PAR. 6. The practice of respondents, as aforesaid, in selling and distributing their above described gold watch cases in commerce with the phrases "14 K" and "10 K" appearing on their said gold watch cases has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the false and erroneous belief that said watches are manufactured from gold of 14 carat fineness or 10 carat fineness and into the purchase of substantial quantities of said gold watch cases because of such mistaken and erroneous belief.

PAR. 7. The acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On September 23, 1955, the Federal Trade Commission issued its complaint in this proceeding, charging the Respondents with unfair and deceptive acts and practices and unfair methods of competition in commerce by the use of false, misleading and deceptive representations as to the carat fineness of the gold from which their watch cases are manufactured, in violation of the Federal Trade Commission Act.

On November 2, 1955, all Respondents except Joseph H. Levine submitted their answer to the complaint herein. On January 11, 1956, at the opening of the initial hearing in New York, N. Y., counsel informed the Hearing Examiner that they and Respondents had reached tentative accord upon an Agreement Containing Consent Order To Cease And Desist which would, when executed, dispose of this proceeding without the necessity of presenting evidence; whereupon the hearing was concluded. Thereafter, on February 28, 1956, all Respondents except Joseph H. Levine entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the Hearing Examiner, on March 13, 1956, an Agreement Containing Consent Order To Cease And Desist, disposing of the proceeding as to all Respondents signatory thereto; stating that Joseph H. Levine, named in the complaint as president of the corporate Respondent, is no longer an officer thereof nor connected therewith in any capacity whatsoever, and that he does not in any manner formulate, control, or direct the acts and practices of the corporate Respondent; and recommending that all charges with respect to him be dismissed. Counsel supporting the complaint, concurring in this recommendation, states that the public interest does not require further proceedings against Respondent Levine. In view of the foregoing facts, the complaint will be dismissed as to Respondent Joseph H. Levine.

Respondent Detra Watch Company, Inc. is identified in the agreement as a New York corporation, with its office and principal place of business located at 106 West 46th Street, New York 36, New York, and Respondents Arthur D, Natanson and William Levites as individuals and officers thereof, having their office at the same place as the corporate Respondent, the policies, acts and practices of which they formulate, control and direct.

Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents, in the agreement, waive any further procedure before the Hearing Examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance therewith. All parties agree that the answer heretofore filed by all Respondents except Respondent Joseph H. Levine shall be considered as having been withdrawn, and for all legal purposes it will hereafter be so regarded; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; and that the agreement is for settlement purposes only and does not constitute an admission by Respondents that they have violated the law as alleged in the complaint.

The agreement sets forth that the order to cease and desist contained therein shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint herein may be used in construing the terms of said order.

After consideration of the charges set forth in the complaint, the agreement, and the provisions of the proposed order, the Hearing Examiner is of the opinion that such order will safeguard the public interest to the same extent as could be accomplished by an order issued after full hearing and all other adjudicative procedure waived in said agreement. Accordingly, in consonance with the terms of the aforesaid agreement, the Hearing Examiner accepts the Agreement Containing Consent Order To Cease And Desist; finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That respondents Detra Watch Company, Inc., a corporation, and Arthur D. Natanson and William Levites, individually and as officers of Respondent Detra Watch Company, Inc., and their agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale, or distribution of any articles composed in whole or in part of gold or an alloy of gold in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Stamping, branding, engraving, or marking any article with any phrase or mark such as 14 K or 10 K, or otherwise representing directly or by implication that the whole or a part of any article is composed of gold or an alloy of gold of a designated fineness, unless the article or part thereof so marked or represented is com-

posed of gold of the designated fineness within the permissible tolerances established by the National Stamping Act (15 U. S. Code, Sections 294, et seq.).

It is further ordered, That the complaint herein, insofar as it relates to Respondent Joseph H. Levine, be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 26th day of April 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Detra Watch Company, Inc., a corporation and Arthur D. Natanson and William Levites, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

TETLEY TEA COMPANY, INC.

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

Docket 6462. Complaint, Nov. 21, 1955—Decision, Apr. 26, 1956

Consent order requiring a food supplier in New York City—charged with giving special allowances to Food Fair Stores, Inc., of Philadelphia, and Giant Food Shopping Center, Inc., of Washington, D. C. for promotion of anniversary sales—to cease granting such allowances unless it made them on a proportionally equal basis to all competing customers.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Andrew C. Goodhope for the Commission.

Cleary, Gottlieb, Friendly & Ball, of Washington, D. C., for respondent.

COMPLAINT

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

PARAGRAPH 1. Respondent, Tetley Tea Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 483 Greenwich Street, New York, New York.

PAR. 2. Respondent is now and has been engaged in the sale and distribution of tea and tea bags as its principal products and which are sold under the trade name "Tetley". Respondent sells its products through grocery jobbers and directly to retail customers, including retail chain store organizations. Sales made by respondent of its products are substantial, amounting to in excess of $11,000,000 annually.

PAR. 3. In the course and conduct of its business respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act as amended. Respondent sells and causes its products to be shipped from its principal place of business in the State of New York across state lines to customers located in States other than the State of New York and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for service or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, during the year 1955 respondent contracted to pay and did pay $1,875 to the Food Fair Stores, Inc., of Philadelphia, Pennsylvania, and $250 to the Giant Food Shopping Center, Inc., of Washington, D. C., and has also contracted to pay an additional $1,875 to the Food Fair Stores, Inc., as compensation or as allowance for advertising or other service or facility furnished by or through such customers in connection with their offering for sale or sale of products sold to them by the respondent. Such compensation or allowances were not offered or made available by respondent on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products with Food Fair Stores, Inc., or Giant Food Shopping Center, Inc.

PAR. 6. The acts and practices of respondent, as alleged above, violate subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of subsection (d) of Section 2 of the Clayton Act (15 U.S.C. 13) as amended by the Robinson-Patman Act, the Federal Trade Commission on November 21, 1955, issued and subsequently served its complaint in this proceeding against Tetley Tea Company, Inc., a New York corporation with its office and principal place of business located at 483 Greenwich Street, New York, New York.

On March 12, 1956, there was submitted to the undersigned hearing examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondent admits all the jurisdictional facts alleged in the complaint, agrees that the record may be taken as if jurisdictional facts had been made in accordance with such allegations and agrees that the agreement disposes of all of this proceeding as to all parties. By such agreement, respondent waives any further procedural steps before the hearing examiner and the Commission, the making of findings of fact and conclusions of law, and all the rights it may have to challenge or

contest the validity of the order to cease and desist agreed upon therein and hereinafter entered herein. Such agreement further provides that respondent's answer heretofore filed in this proceeding shall be considered as having been withdrawn and that the record on which this initial decision is based and on which the decision of the Commission shall be based shall consist solely of the complaint and such agreement. Such agreement further provides that it shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the cease and desist order provided for therein, may be entered by the Commission without further notice to the respondent, and, when so entered, such order shall have the same force and effect as if entered after full hearing and may be altered, modified, or set aside in the manner provided for other orders. Lastly, such agreement provides that the complaint may be used in construing the terms of the order.

The hearing examiner, having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, that the Commission has jurisdiction of the subject matter and of respondent, herewith, in accordance with said agreement enters the following order:

ORDER

It is ordered, That respondent Tetley Tea Company, Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of tea and tea bags in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other service or facilities furnished by or through such customer, in connection with the handling, offering for resale or resale of products sold to him by respondent, unless such payment is affirmatively offered or otherwise made available to all competing customers on proportionally equal terms.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 26th day

of April, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

INTERNATIONAL MOTELS, INC., ET AL.

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

Docket 6457. Complaint, Nov. 21, 1955—Decision, Apr. 27, 1956

Consent order requiring sellers in Millbrae, Calif., to cease making a variety of false claims in advertising and through statements of sales persons concerning their correspondence course designed to prepare students for work as motel managers.

Before *Mr. William L. Pack*, hearing examiner.
Mr. George E. Steinmetz for the Commission.
Mr. E. C. Mahoney, of Burlingame, Calif., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that International Motels, Inc., a corporation, Lewis I. Heater, Reedy O. Bouldin, Frank E. Weeks and Albert I. Mayberry, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent International Motels, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with offices and principal place of business maintained at 273 Broadway, Millbrae, California. Respondent Lewis I. Heater is President, Reedy O. Bouldin First Vice-President, Frank E. Weeks Second Vice-President, and Albert I. Mayberry Secretary-Treasurer of said corporation. These individuals, acting in cooperation with each other, formulate, direct and control the acts, policies and practices of said corporate respondent. Their addresses are the same as that of the corporate respondent.

PAR. 2. Respondent International Motels, Inc. is now, and for more than two years last past has been, engaged in the solicitation, sale and distribution in commerce of a course of study and instruction designed to prepare students for work in the capacity of Motel Managers. Said course is pursued through the medium of the

United States Mails. Respondents in the course and conduct of said business cause their said course of study and instruction to be transported from their said place of business in the State of California to purchasers thereof located in other states of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said correspondence course in commerce, among and between the various states of the United States.

PAR. 3. Respondents, in soliciting the sale and selling of their said course of study and instruction in commerce, have made certain statements, representations and claims respecting said course and the results which may thereafter be obtained thereby in newspapers, folders, brochures, and other printed matter circulated by said respondents, as well as by means of oral representations made by salesmen and saleswomen in their employ, acting within the scope of their employment. Among and typical of such statements, representations and claims made by or through one or more of said methods, but not limited thereto are the following:

1. That it is easy for anyone to take and complete the course of instruction.

2. That tuition will be refunded if the purchaser becomes dissatisfied and decides to discontinue the course.

3. That married couples finishing the course will receive a minimum salary as Motel Managers of from $500 to $600 per month or more, jointly.

4. That the practical training included in their course of instruction will be provided at specific locations and that rooms will be furnished free of charge or at reduced rates for the duration of said training.

5. That purchasers are guaranteed or assured of employment as motel managers following completion of said course.

6. That the corporation owns, controls or operates, or is affiliated with from 300 to 350 member Motels, located from Mexico through the United States and into the Dominion of Canada.

7. That the respondents maintain a placement service through which students who complete the course may obtain employment.

8. That the respondents maintain branch offices in the cities of Seattle, Washington; San Francisco, California and Portland, Oregon.

9. That respondents provide home consultation for students and purchasers of said course of study while taking said course.

10. That only those purchaser-students who are especially and adequately qualified, through background, age, experience and personality are accepted for enrollment and study.

11. That graduate student-purchasers and persons who have employed such graduates endorse, and have endorsed the course of study offered by the respondents.

12. That leading and well known motels throughout the United States have acclaimed said school or course of study, including the quality and capability of its graduates.

13. That prominent and well known motels, hotels and resort centers are owned, operated, controlled, or affiliated with said corporation.

PAR. 4. All of said statements, representations and claims are false, misleading, and grossly exaggerated. In truth and in fact, it is not easy to take or complete respondents' course of instruction. A large percentage of purchasers never complete the course. Tuition is not refunded for any reason, save in isolated cases where third parties have intervened on behalf of the purchaser, and then only when legal action has been taken or about to be taken to enforce such action. Married couples completing the said course of instruction, including the concluding practical training period, do not and have not together or separately received salaries of as much as from $500.00 to $600.00 monthly when they have in fact been able to secure employment as Motel Managers. The practical training course was, in many instances, not given at the locations specified and, in many instances, rooms were not provided, free or at reduced rates. The respondents do not maintain a placement service, and do not secure employment for persons who have completed their course of instruction, except in isolated instances. The corporation has never owned, controlled or operated any motels. While it is affiliated with a number of motels such affiliation extends only to referral service. Respondents do not maintain branches in Seattle, Washington; San Francisco, California; Portland, Oregon, or elsewhere within the United States. Respondents do not provide home consultation to students. Respondents do not especially select applicants for said course of training and instruction or discriminate between those qualified by background, education and personality to ultimately become Motel Managers, as distinguished from those not obviously qualified, but sell their course to all applicants possessing the ability to make the required initial payment whether otherwise qualified or not. Endorsements of the course by persons completing the same and by third persons thereafter employing such graduates have been exaggerated by the respondents in tone and manner. Leading and well known motels throughout the United States neither endorse nor acclaim the course of instruction owned and operated by the respondents, nor the quality of those completing the course.

PAR. 5. Respondents, including their authorized sales representatives, in soliciting the sale and the selling of their said course of study and instruction in Motel management have made further statements, representations and claims in newspapers disseminated and distributed in commerce, in classified sections thereof under headings described as "Help Wanted—Men"; "Instructions Leading to Jobs—Schools"; "Schools & Instruction"; "Instruction—Schools"; "Schools—Instruction" and "Schools." Typical of such statements, representations and claims are the following:

Are you looking for a profession with security? This is your answer. Motels need trained managers. International Motels, Incorporated, wants men, women and couples to start immediate training for motel management. * * * Terms can be arranged for tuition. Length of time required to complete course from 2 to 5 months. Good starting salary plus living quarters after graduation. * * *

Mature men and women wanted to train for motel and resort management. Placement service available upon completion of training. * * *

Men and women wanted to start immediate training for positions in the motel industry. Placement service for those who qualify for training. * * *

Mature men and women wanted to train for motel and resort management. Placement service. * * *

Couples and women wanted to start immediate home training for managerial positions. Excellent opportunity if qualified. * * *

PAR. 6. The aforesaid statements, representations and claims are false, misleading and deceptive, since in truth and in fact said respondents do not discriminate between qualified and unqualified persons who apply for said course of instruction; do not maintain any placement service for persons completing the said course of instruction, or provide any starting salaries; nor is there a demand in the motel operating industry for managers trained by the respondents.

PAR. 7. Through the use of the corporate name, "International Motels, Inc.," respondents represent and imply that corporate respondent owns or operates motels upon an international basis.

In truth and in fact, said respondent corporation does not now and never has, owned or operated motels upon an international basis.

PAR. 8. In the course and conduct of their business respondents are in direct competition, in commerce, with other corporations, firms and individuals engaged in the sale of correspondence courses in motel management.

PAR. 9. The use by the respondents of the above and foregoing false, misleading and deceptive statements, claims and representations has, and has had, the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and

mistaken belief that such statements, claims and representations were and are true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' course of instruction. As a consequence thereof, trade in commerce has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

PAR. 10. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through misrepresentation of a course of study sold by them, the course being designed to prepare students for work as motel managers. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that respondents' answer to the complaint shall be considered as having been withdrawn, and that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent International Motels, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 273 Broadway, Millbrae, California. Respondents Lewis I. Heater, Reedy O. Bouldin, Frank E. Weeks, and Albert I. Mayberry are the officers of respondent corporation and their addresses are the same as that of the corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents International Motels, Inc., a corporation, and its officers, and Lewis I. Heater, Reedy O. Bouldin, Frank E. Weeks, and Albert I. Mayberry, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of a course of study and instruction intended for preparing purchasers thereof for employment as motel managers or any similar course or courses of instruction and study, do forthwith cease and desist from:

1. Representing, directly or by implication:

(*a*) That it is easy for anyone to take or complete respondents' course of instruction.

(*b*) That respondents will refund tuition paid on contracts, unless such refunds are in fact made upon demand of the purchaser.

(*c*) That typical earnings of persons finishing respondents' course of instruction are greater than is the fact.

(*d*) That the practical training included in respondents' course of instruction will be provided at specific places or without extra cost or at reduced rates, unless the place, cost and facilities to be provided are clearly and definitely set forth in advance by the respondents.

(*e*) That persons completing respondents' course of instruction are assured or guaranteed specific salaries, or that opportunities for employment are greater than is the fact.

(*f*) That respondents own, control, operate or are affiliated with other motels.

(*g*) That respondents maintain a placement or employment service, unless respondents in fact provide such service to assist persons completing their course of instruction.

(*h*) That there is a demand in the motel business for managers trained through respondents' course of instruction.

(*i*) That respondents maintain branch offices in other cities.

(*j*) That home consultation service is available to purchasers of respondents' course of instruction.

(*k*) That only selected persons are qualified and accepted for enrollment in respondents' course of instruction.

(*l*) That persons completing respondents' course of instruction or those who have employed them endorse respondents' course of instruction.

(*m*) That leading motels acclaim respondents' course of instruction, or the quality and capability of their graduates.

2. Using the word "International," or any other word of similar import or meaning as a part of the corporate respondent's name; or otherwise representing, directly or by implication, that said respondent corporation constitutes an international organization or business.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 27th day of April 1956, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

IN THE MATTER OF

FORREST A. JONES DOING BUSINESS AS OREGON HEARING CENTER, ETC., ET AL.

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

Docket 6414. Complaint, Sept. 19, 1955—Decision, Apr. 28, 1956

Consent order requiring two individuals, one doing business in Portland, Oreg., and San Francisco, Calif., and both operating as partners in Seattle, Wash., to cease using "bait" advertising to sell their several types of hearing aids and making various false claims in advertising in newspapers and circulars and by radio broadcasts concerning them.

Before *Mr. William L. Pack*, hearing examiner.
Mr. John J. McNally for the Commission.
Mr. Theodore D. Lachman, of Portland, Oreg., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Forrest A. Jones, an individual doing business as Oregon Hearing Center, California Hearing Center and Western Hearing Center, and Forrest A. Jones and John A. Holm, individuals and copartners doing business as Washington Hearing Center, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Forrest A. Jones is an individual doing business as Oregon Hearing Center, with his principal place of business located at 421 S. W. Sixth Avenue, Portland, Oregon; said respondent is also doing business as California Hearing Center and as Western Hearing Center at 17 Grant Avenue, San Francisco, California. Respondents Forrest A. Jones and John A. Holm are individuals trading as copartners and doing business as Washington Hearing Center, with their principal place of business at 1520 Westlake Avenue, Seattle, Washington.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the advertising and sale of hearing aids and accessories, and in the advertising and sale of other products represented to be hearing aids, to members of the general public.

All of these products are devices, as "device" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, respondents cause and have caused their said devices, when sold, to be shipped from the State of Oregon to the purchasers thereof located in various other States of the United States; respondents also cause and have caused their said devices to be shipped from the State of Oregon to respondents' stores located in the States of California and Washington. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in their said devices in commerce between and among the various States of the United States.

PAR. 4. Respondents, at all times mentioned herein, have been in substantial competition, in commerce, with other persons and with corporations, firms and partnerships engaged in the sale of hearing aid devices.

PAR. 5. In the course and conduct of the aforesaid business, respondents, subsequent to March 21, 1938, have disseminated and caused the dissemination of advertisements concerning the aforesaid devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers, by circulars and by radio continuities broadcast by stations with sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices; and respondents have disseminated and caused the dissemination of advertisements by various means, including but not limited to the means aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of statements made in advertisements disseminated as aforesaid, respondents have represented, directly and by implication, that:

1. The earphone receivers offered for sale are complete hearing aids, are transistor-powered aids, are invisible and will provide hearing to the deaf, will fit any ear, and have the approval of the American Medical Association and medical councils affiliated therewith.

2. The bone conduction type of hearing aids offered for sale by respondents is a recent invention, is invisible, and enables deaf persons to hear every sound as well as do normal-hearing persons.

3. The "Hear-Mold," "Tru-Ear" and "Ear-Aid" plastic ear canal openers offered for sale will enable all or most deaf people to hear

again, are the natural way to better hearing, and were developed at a laboratory owned by respondents.

4. The air conduction hearing aids offered for sale enable deaf persons to "hear everything"; to "hear better, farther, more naturally" than with competitive brands of hearing aids; and give "super power."

PAR. 7. The advertisements containing the aforesaid representations were and are misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. The earphone receivers offered for sale by respondents are not complete hearing aids, are not transistor-powered aids, are not invisible, will not provide hearing to the deaf, will not fit any ear, and are not now, and have not been, approved by the American Medical Association or any councils affiliated therewith.

2. The bone conduction type of hearing aids offered for sale by respondents is not a recent invention, is not invisible and does not enable deaf persons to hear every sound as well as do normal-hearing persons.

3. The "Hear-Mold," "Tru-Ear" and "Ear-Aid" plastic ear canal openers offered for sale by respondents will not enable all or most deaf people to hear again, are not the natural way for most deaf people to obtain better hearing, and were not developed at a laboratory owned by respondents. These devices are useful only in cases wherein the deafness is due to a collapse or a partial collapse of the external ear canal. Such conditions are practically nonexistent. In the most recent of advertisements of this device, respondents have added qualifying words to indicate the device is to be used in the case of a collapse or a partial collapse of the ear canal. However, respondents do not, even in these advertisements, inform the reader that such a defect occurs so seldom as to be an insignificant factor in the cause of deafness. On the contrary, these advertisements convey the opposite impression.

4. The air conduction hearing aids offered for sale do not enable deaf persons to hear everything; or to hear better, farther or more naturally than with competitive brands of hearing aids and their performance is subject to the same limitations and restrictions which competitive brands of hearing aids encounter.

PAR. 8. The use by respondents of the said false advertisements with respect to their devices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations contained in the advertisements are

true; and into the purchase of substantial quantities of said devices by reason of said erroneous and mistaken belief.

PAR. 9. In the course and conduct of their business, respondents, through the use of newspapers, radio broadcasts, and circulars disseminated through the United States mails, and other forms of advertising, have made certain other statements respecting the devices offered by them and the prices thereof. Among and typical, but not all inclusive, of the statements made by respondents, were the following:

Wearing nothing in your ear except this tiny device. $39.50 full price.
- Not a Gadget
- Not a Come-on!
- But a truly fine complete Hearing Aid.

Imagine a complete hearing aid that weighs less than 3 ounces * * * the total cost just $39.50.

The Natural Way to Better Hearing
Not $200 not $150 not $75 only $39.50 complete!
Ready for use! No other expense.

Ear-Aid
The Natural Way to Hear Better
Weighs less than ¼ ounce.
Not $200
Not $150
Not $75
But Only $19.50 complete ready to wear

No Batteries
No Cords
No Ear Buttons
No Tubes
Not Electrical
Will Not Wear Out
First Cost Only Cost

PAR. 10. Through the use of the statements set forth in Paragraph Nine herein, and others of similar import not specifically set forth herein, respondents represented, directly or by implication, that they were making a bona fide offer to sell the devices referred to or described in said advertisements.

PAR. 11. The aforesaid representations were false, misleading and deceptive. In truth and in fact, respondents' said offers were not bona fide offers to sell the devices referred to or described in said advertisements. On the contrary, respondents' said offers were made for the purpose of developing leads to prospective purchasers of different and more expensive devices than those referred to or described in said advertisements.

In numerous instances, persons attracted by respondents' advertisements, upon visiting respondents' places of business or upon being visited by respondents' sales people in their homes or offices, were

informed by the sales people in effect that the advertised devices would not aid their hearing, were not correctly described in the advertisements, or were not desirable as hearing aids. The sales people often failed to even demonstrate said devices to prospective purchasers, but attempted to and did describe, demonstrate, and in many instances sold, different or more expensive devices than those described or referred to in said advertisements, to such persons.

PAR. 12. The aforesaid representations set forth in Paragraphs Nine through Eleven had the tendency and capacity to induce and did induce members of the purchasing public to contact respondents and to purchase devices which they would not have otherwise purchased from respondents except for such practices.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public, and of respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with misrepresenting hearing aids and accessories sold by them, in violation of the Federal Trade Commission Act. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding, the

agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Forrest A. Jones is an individual doing business as Oregon Hearing Center, with his principal place of business located at 421 S. W. Sixth Avenue, Portland, Oregon. He also does business as California Hearing Center and as Western Hearing Center at 17 Grant Avenue, San Francisco, California. This respondent and respondent John A. Holm, an individual, are copartners doing business as Washington Hearing Center, with their principal place of business at 1520 Westlake Avenue, Seattle, Washington.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Forrest A. Jones, an individual doing business as Oregon Hearing Center, California Hearing Center, Western Hearing Center, or under any other trade name or names, and respondents Forrest A. Jones and John A. Holm, as individuals or as copartners trading as Washington Hearing Center or under any other trade name or names, and respondents' representatives, agents or employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of hearing aids and of other devices represented to be hearing aids, do cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States Mails or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication that:

(*a*) The canal ear phone receivers offered for sale are:

(1) Complete hearing aids or will, in themselves, provide hearing to persons suffering from hearing loss;

(2) Are transistor-powered aids;

(3) Are invisible;

(4) Will fit any ear;

(5) Have the approval of the American Medical Association, or of any medical councils affiliated therewith, when such is contrary to the fact.

(*b*) The bone conduction type of hearing aids offered for sale by respondents are a recent invention, are invisible, or that they will enable persons suffering from hearing loss to hear as well as normal-hearing persons.

(*c*) The non-powered ear canal inserts advertised or offered for sale by respondents, whether designated "Hear-Mold", "True-Ear", "Ear-Aid", or by any other name or names, or any device of similar design, construction, or properties:

(1) Provide a natural way to better hearing;

(2) Were developed at respondents' laboratory;

(3) Will be of any benefit to persons suffering from deafness or hearing loss except in instances when deafness or hearing loss is caused by collapse or partial collapse of the ear canal and unless such advertisements disclose that such causes are infrequent.

(*d*) The air conduction hearing aids offered for sale will enable persons suffering from hearing loss:

(1) To hear everything;

(2) To hear farther, or more naturally than they would by using competitive brands of hearing aids.

2. Disseminating or causing to be disseminated by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such devices in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1 above.

It is further ordered, That respondent Forrest A. Jones, an individual doing business as Oregon Hearing Center, California Hearing Center, Western Hearing Center, or under any other trade name or names, and respondents Forrest A. Jones and John A. Holm, as individuals or as copartners trading as Washington Hearing Center, or under any other trade name or names, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of hearing aids and accessories in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that hearing aids and accessories are offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 28th day of April 1956, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

IN THE MATTER OF

THE YALE & TOWNE MANUFACTURING COMPANY

Docket 6232. Order and opinion, May 1, 1956

Interlocutory order denying joint petition by respondents in separate proceedings for leave to intervene for filing brief amicus curiae and to participate in oral argument.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William H. Smith and *Mr. Brockman Horne* for the Commission.

Milbank, Tweed, Hope & Hadley, of New York City, for The Yale & Towne Manufacturing Co.

Kirkland, Fleming, Green, Martin & Ellis, of Washington, D. C., for Clark Equipment Co.

Brown, Lund & Fitzgerald, of Washington, D. C., for Lewis-Shepard Co.

McBride & Baker, of Chicago, Ill., for Hyster Co.

Stage & Butler, of Cleveland, Ohio, for The Elwell Parker Electric Co.

Mr. Fayette S. Dunn, of New York City, for Otis Elevator Co.

ORDER DENYING PETITION FOR LEAVE TO INTERVENE

A joint petition having been filed by Clark Equipment Company, Lewis-Shepard Company, Hyster Company, The Elwell Parker Electric Company, and Otis Elevator Company, for leave to intervene in this proceeding for the purpose of filing a brief amicus curiae and participating in oral argument before the Commission on appeal of counsel in support of the complaint from the initial decision of the hearing examiner; and

The Commission having determined, for the reasons set forth in the accompanying opinion, that the request should not be allowed:

It is ordered, That the aforesaid joint petition for leave to intervene be, and it hereby is, denied.

Commissioner Mason dissenting and Commissioner Gwynne not participating.

ON APPLICATION FOR LEAVE TO INTERVENE

Per Curiam:

This matter is before the Commission upon a joint petition, filed by counsel for Clark Equipment Company, Lewis-Shepard Company, Hyster Company, The Elwell Parker Electric Company and Otis

Elevator Company, requesting leave to intervene in this proceeding to the extent of filing a joint brief amicus curiae and of jointly presenting oral argument. The petition is unopposed by counsel for the respondent, but is vigorously opposed by counsel supporting the complaint.

The complaint charged respondent with violation of Subsection (a) of Section 2 of the Clayton Act, as amended. Hearings were held, and on November 18, 1955, the hearing examiner filed an initial decision granting respondent's motion to dismiss. Counsel supporting complaint has appealed from the initial decision and the matter has been scheduled for oral argument on May 3, 1956.

To support their request for leave to intervene, petitioners assert (1) that they are directly affected by the appeal, and (2) that they plan to present arguments beyond the issues raised in the appeal brief. Counsel supporting the complaint opposes intervention on the grounds that the petition was not timely filed which thereby renders it impossible for him, for lack of time, to make an adequate answer to the questions presented, and that the petition and brief are not proper because petitioners do not appear as "friends of the court", but to litigate, if they can, in the instant matter, the legality of their own cumulative discount systems, concerning which complaints have issued against all five of the petitioners.

In a proceeding by the Commission under Section 2 and other sections of the Clayton Act, as amended, Section 11 of that Act provides that any person may make application, and "upon good cause shown" may be allowed by the Commission to intervene and appear in said proceeding. Likewise, under § 3.11 of the Commission's Rules of Practice intervention may be allowed and the opportunity may be afforded of filing an appropriate brief as amicus curiae. Intervention, however, under both the statute and the rule, is at the discretion of the Commission.

In supporting their petition to intervene on the ground that they are directly affected by the appeal in this proceeding, petitioners state that they have voluntarily abandoned their own cumulative quantity discounts and that, therefore, they should not become the subjects of further adversary proceedings if the instant appeal is decided adversely to the position of counsel supporting the complaint. They further state that they desire to intervene before the Commission in order to vindicate their cumulative discounts which have been the subject of complaints in separate proceedings. Petitioners argue, in effect, that the matters in which they are respondents can be settled by the decision on this appeal. That is not the case. The complaints which have issued against the petitioners have not been made a part

of the record in this proceeding. These are separate matters which have not yet proceeded to hearing, and when they do, each will be heard and decided on its individual facts and merits. Moreover, the issue of abandonment sought to be raised by the petitioners is not even involved in this appeal. It necessarily follows that petitioners are not directly affected by this appeal, and a decision of the instant matter will not affect their rights.

As a further ground for intervention, petitioners have asserted that inasmuch as respondent is limited in its answering brief to questions raised in the appeal brief, and may not cover some arguments which they deem essential to the full and speedy disposition of, what they term, these controversies, they plan to present arguments beyond those of the respondent. It is apparent to the Commission that, in this assertion, petitioners make reference to the disposition of their own proceedings, as well as the instant matter, but this appeal has no direct reference to the other proceedings. Furthermore, to permit presentation of argument on questions not raised in the appeal brief would place an unjustified and unreasonable burden on counsel supporting the complaint. Under § 3.22 (c) of the Commission's Rules of Practice, the respondent's answering brief is limited to questions raised in the appeal brief, and to now require counsel to prepare for questions not so raised would not only put him at a disadvantage but would leave him without time to make adequate preparation, with further delay in the proceeding not justified.

The joint petition for leave to intervene for filing a brief amicus curiae and to participate in oral argument will be denied and an appropriate order will be entered.

Commissioner Mason dissented to the decision herein and Commissioner Gwynne did not participate in the decision herein.

IN THE MATTER OF

JOSEPH GRAIS ET AL. TRADING AS RUBIN GRAIS & SONS

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 6488. Complaint, Jan. 11, 1956—Decision, May 1, 1956

Consent order requiring five copartners to cease violating the Wool Products Labeling Act through tagging boys' jackets falsely with respect to the character and amount of constituent fibers contained in the fabrics composing them, and through failing to label wool products as required.

Before *Mr. Earl J. Kolb*, hearing examiner.
Mr. Floyd O. Collins for the Commission.
Brown, Fox & Blumberg, of Chicago, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 and by virtue of the Authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Joseph Grais, Edward Grais, Benjamin Grais, Rubin Grais and Lyllian Braun, individually and as co-partners, trading and doing business as Rubin Grais & Sons, hereinafter referred to as respondents, have violated provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Joseph Grais, Edward Grais, Benjamin Grais, Rubin Grais and Lyllian Braun are individuals and co-partners trading and doing business under the firm name of Rubin Grais & Sons with their office and principal place of business located at 325 South Wacker Drive, Chicago, Illinois. These individual respondents formulate, direct and control the acts, practices and policies of the said business.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act and more especially since January, 1952, respondents have manufactured for introduction into commerce, introduced, sold, transported and distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in the Wool Products Labeling Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein. Among such misbranded wool products were boys' jackets labeled or tagged by respondents as "Shell 100% wool" whereas in truth and in fact a substantial quantity of said jackets were made out of fabrics composed of 100% reprocessed wool, and a substantial number of said jackets were manufactured out of fabrics containing 35% wool and 65% reused wool.

PAR. 4. Certain of said wool products were misbranded in that they were not stamped, tagged or labeled as required under the provisions of Section 4 (a) (2) of said Wool Products Labeling Act of 1939, and in the manner and form prescribed by the rules and regulations promulgated thereunder.

PAR. 5. The acts and practices of respondents as herein alleged were and are in violation of the Wool Products Labeling Act of 1939, and of the rules and regulations promulgated thereunder, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued January 11, 1956, charged the respondents Joseph Grais, Edward Grais, Benjamin Grais, Rubin Grais, and Lyllian Braun, individually and as co-partners trading as Rubin Grais & Sons located at 325 South Wacker Drive, Chicago, Illinois, with the use of unfair and deceptive acts and practices and unfair methods of competition in interstate commerce in violation of the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the Rules and Regulations made pursuant thereto, by misbranding certain wool products manufactured by them for introduction into commerce.

After the issuance of said complaint and the filing of their answer thereto, the respondents Joseph Grais, Edward Grais, Benjamin Grais, Rubin Grais and Lyllian Braun, individually and as co-partners trading as Rubin Grais & Sons, entered into an agreement for consent order with counsel in support of the complaint disposing of all the issues in this proceeding, which agreement was duly approved by the Director and Assistant Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not con-

stitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the said respondents admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations.

By said agreement, the answer heretofore filed by respondents was withdrawn and the parties expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

By said agreement, respondents further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon.

It is further provided that said agreement, together with the complaint, shall constitute the entire record herein, that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement, and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and, in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That the respondents, Joseph Grais, Edward Grais, Benjamin Grais, Rubin Grais and Lyllian Braun, individually and as copartners trading as Rubin Grais & Sons, or under any other name, and their representatives, agents, and employees, directly or through any corporate or other device in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of boys' jackets or other "wool

products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain or in any way are represented to contain "wool," "reprocessed wool," or "reused wool" as those terms are defined in said Act, do forthwith cease and desist from misbranding or mislabeling such products by:

1. Falsely or deceptively stamping, tagging, labeling, or otherwise identify such products as to the character or amount of the constituent fibers included therein;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(*a*) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, (5) the aggregate of all other fibers;

(*b*) The maximum percentage of the total weight of the wool product, of any non-fibrous loading, filling, or adulterating matter;

(*c*) The name or registered identification number of the manufacturer of such wool product, or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution, or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

Provided that nothing contained in this order shall be construed as limiting any applicable provisions of the Wool Products Labeling Act of 1939 or the rules and regulations promulgated thereunder.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 1st day of May 1956, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

IN THE MATTER OF

SIMPLICITY PATTERN COMPANY, INC.

Docket 6221. Order and opinion, May 2, 1956

Interlocutory order denying (1) respondent's motion that hearing examiner's partial oral dismissal be construed as an initial decision, and (2) complaint counsel's appeal from such dismissal as untimely.

Before *Mr. William L. Pack*, hearing examiner.

Mr. William H. Smith, *Mr. Brockman Horne* and *Mr. R. D. Young, Jr.* for the Commission.

House, Grossman, Vorhaus & Hemley, of New York City, and *Mr. William Simon*, of Washington, D. C., for respondent.

ORDER DENYING INTERLOCUTORY APPEAL OF COUNSEL SUPPORTING THE COMPLAINT AND MOTION OF THE RESPONDENT

Counsel in support of the complaint having filed an appeal from the hearing examiner's ruling of February 13, 1956, granting the respondent's motion to dismiss Count I of the complaint in this proceeding; and

The respondent having subsequently filed a motion for an order construing said rulings as an initial decision under Section 3.21 of the Commission's Rules of Practice, rather than interlocutory rulings; and

The Commission, for the reasons stated in its accompanying opinion, having concluded that said appeal and motion should not be granted:

It is ordered, That the appeal of counsel supporting the complaint, and the respondent's motion for an order construing the rulings below as an initial decision, be, and the same hereby are, denied.

Commissioner Gwynne not participating.

OPINION OF THE COMMISSION

Per Curiam:

After the reception of evidence in support of the case-in-chief was closed, oral arguments were heard by the hearing examiner in support of and in opposition to the respondent's motion to dismiss the complaint on grounds that a prima facie case was not established. The hearing examiner thereupon stated his reasons why he deemed the motion to be well taken as to the first of the two counts contained in the complaint and without merit as to the second, and orally ruled that Count I was dismissed, accordingly. In his interlocutory appeal

filed under Section 3.20 of the Commission's Rules of Practice, counsel supporting the complaint requests that we reverse the hearing examiner's rulings with respect to Count I.

The answer filed by the respondent interposes no objection to review by the Commission of the action below, but opposes reversal of those rulings; and the respondent contends that any appeal instituted by counsel supporting the complaint should be filed not under Section 3.20 which authorizes interlocutory appeals to the Commission in situations there specified, but, instead, under Section 3.22 which is the rule applicable to review of initial decisions filed by hearing examiners. This position also is adopted by the respondent in its subsequently filed motion requesting that the Commission construe the determinations below as an initial decision, so we address ourselves first to the question of the status of those rulings.

Section 3.15 confers on hearing examiners the duty of conducting impartial hearings and empowers them, among other things, to make and file initial decisions. Under the procedure provided for in Section 3.21, an initial decision becomes the Commission's decision thirty days after service thereof upon the parties in the absence of appeal or review or entry of an order staying the proceedings. Because the provision whereby such decisions may become decisions of the Commission by operation of the rule is contingent on date of "Service" upon parties and the rule additionally requires that a "copy" be served upon counsel or other representatives, it is clear that the rule contemplates that initial decisions of hearing examiners be made and filed in documentary form. Hence, one of the indispensable prerequisites to hearing officers' rulings being regarded as initial decisions under the Commission's Rules of Practice is that such adjudications be submitted in documentary form.

The Commission's Rules of Practice contemplate that initial decisions be submitted under conditions according due notice not only to parties for seasonable appeals therefrom, but also that they be filed under circumstances affording timely opportunity for the Commission's exercise of its right and duty to review such decisions in situations where appropriate. Rulings by a hearing officer at the close of the case-in-chief are made in the exercise of his delegated duties to conduct impartial hearings and with formal notice only to parties. Transcripts of hearings reflecting such rulings frequently are not made available to the Commission by the official reporter until considerable time has elapsed following dates of hearings. Only under fortuitous circumstances, therefore, would rulings of partial dismissal come to the Commission's official attention within time for it to take seasonable steps for review within the contemplation of Section 3.21.

Under the Commission's Rules of Practice as now effective, a general policy on our part of conferring initial decision status on rulings in the foregoing category would thus deprive the commission of timely opportunity for their review, and, accordingly, would violate considerations of public policy.

Some of the principles of public policy which underlie our duty to review initial decisions and the comparable duty of federal courts of appeals to review "final decisions" of district courts, pursuant to Section 1291 of Title 28 of the United States Code, are common to both. By judicial definition, a final decision under that section is one terminating the litigation on its merits and disposing of the whole matter in controversy. This interpretation reflects the historic rule of federal law against piecemeal disposal and review of litigation. Under Rule 54 (b) of the Federal Rules of Civil Procedure, an exception is created for avoiding the injustice of delay in judgment of distinctly separate claims pending adjudication of the entire case, but the effect of this provision serves in no manner to overturn the settled rule noted above. The exercise by the trial judge of this discretionary provision also is contingent on an express determination in his decision of no just reason for delay in entering final judgment and his express direction for entry of that judgment.

In the instant case, the motion to dismiss was denied by the hearing officer as to one of the two counts in the complaint and the rulings below leave issues of law and fact still to be determined. Because all rights of the parties have not been adjudicated and the oral rulings below lack other appropriate stamp of finality, we think that they do not constitute an initial decision within the meaning of the Commission's Rules of Practice. The respondent's motion that such rulings be construed to the contrary is not well taken and we hold that no initial decision has been presented here for our review.

The remaining question presented is whether the appeal of counsel supporting the complaint meets the requirements of Section 3.20 and should be entertained as an interlocutory appeal. Under that rule, counsel, to succeed in this appeal, must demonstrate to the Commission's satisfaction that the ruling appealed from involves substantial rights and will materially affect the final decision of the case and, further, that a determination of its correctness before conclusion of the trial would better serve the interests of justice.

The appeal urges that the hearing examiner incorrectly concluded that no evidence was submitted supporting inferences that the practices engaged in by the respondent and challenged in the complaint have resulted or may result in injury to customers competing in the resale of the respondent's dress patterns. The jurisdictional ground

relied upon in support of contentions that this interlocutory appeal should be decided now is that its decision would eliminate delay in the ultimate disposition of this proceeding in case of its subsequent remand by the Commission for the reception of testimony in defense of the charges contained in Count I. This manifestly would result only if the Commission subsequently held in the course of an appeal or review on the merits that the hearing officer had erred. Save in cases where palpable errors in applying the law to the facts may be apparent, the considered judgment of the hearing officer who heard the evidence and ruled on the merits of a motion to dismiss is entitled to great weight in the interlocutory stages of the proceeding. This is particularly true where, as here, the appeal is devoid of showing of prejudice to any rights asserted by appellant with respect to the presentation of his case.

A policy of entertaining appeals from rulings of partial dismissal at the close of the case on direct would be but to encourage fragmentary submission of cases for decision and piecemeal determinations and inevitably would result in unjustifiable delay. This, in the opinion of the Commission, would not "better serve the interests of justice." It follows that the appeal of counsel supporting the complaint is not one to be granted under Section 3.20 of the Commission's Rules of Practice and we are entering appropriate order in that respect.

Commissioner Gwynne did not participate in the decision of this matter.

IN THE MATTER OF

VAISEY-BRISTOL SHOE COMPANY, INC., ET AL.

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

Docket 6493. Complaint, Jan. 12, 1956—Decision, May 2, 1956

Consent order requiring a corporate manufacturer of juvenile shoes and its advertising agency to cease advertising falsely in newspapers, magazines, etc., and by radio broadcasts, that said shoes were beneficial to the health of children, and to cease using the word "health" in referring to the shoes.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Daniel J. Murphy for the Commission.
Mr. Elmus L. Monroe, of Monett, Mo., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Vaisey-Bristol Shoe Company, Inc., a corporation, and Sam Vaisey and Joe McCaffery, individually and as officers of Vaisey-Bristol Shoe Company, Inc., Storm Advertising Company, Inc., a corporation, and Morry Storm, individually and as an officer of Storm Advertising Company, Inc., all hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Vaisey-Bristol Shoe Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business at 100 Fifth Street, Monett, Missouri. Respondents Sam Vaisey and Joe McCaffery are president-treasurer and vice president-sales manager, respectively, of said corporate respondent Vaisey-Bristol Shoe Company, Inc., and these individuals formulate, direct and control the acts, policies and practices of said corporate respondent. Their addresses are the same as that of said corporate respondent.

PAR. 2. Respondent Vaisey-Bristol Shoe Company, Inc., is now, and has been for more than one year last past, engaged in the manufacture, sale and distribution of juvenile shoes designated "Jumping-Jacks" in commerce between and among the various States of the United States and in the District of Columbia.

This respondent causes and has caused its said shoes, when sold, to be transported from its said place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia. This respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in its said shoes in commerce between and among the various States of the United States and in the District of Columbia, and is now, and at all times mentioned herein, has been in substantial competition in commerce with other corporations, firms or businesses similarly engaged in the manufacture, sale and distribution of shoes.

PAR. 3. Respondent Storm Advertising Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 72 East Avenue, Rochester 4, New York. This respondent is an advertising agency and as such is engaged in formulating, selling and advising its clients on advertising. Respondent Morry Storm is the president of said corporate respondent and formulates, directs and controls the acts, policies and practices of said corporate respondent; his address is the same as that of said corporate respondent.

These respondents are the advertising representatives of respondent Vaisey-Bristol Shoe Company, Inc., and prepare, edit and place advertising material used by respondent Vaisey-Bristol Shoe Company, Inc., in promoting the sale of shoes, including the advertising matter hereinafter referred to.

PAR. 4. Respondents act in conjunction and cooperation with one another in the performance of the acts and practices hereafter alleged.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase of said shoes, respondents have made, and are now making, many statements and representations concerning the nature and usefulness of said shoes by means of radio broadcasts, advertisements in newspapers and magazines, folders, circulars, catalogs, labels on cartons in which the shoes are contained, and other advertising media. Among and typical of such statements and representations in said advertisements are the following:

Jumping-Jacks * * * to guide little feet through the formative years!

* * * to help steady young steps, guide little feet into proper walking habits!

Freedom to grow and develop—assured by Jumping-Jacks' finer, softer, flexible leathers!

* * * help tiny feet grow normally!

* * * Jumping-Jacks * * * that's the pair the doctors say they ought to wear, Tiny arch and tiny toes stay strong and healthy while they grow!

* * * what better assurance that your young prewalker's feet will grow straight and strong in flexible Jumping-Jacks Shoes!

* * * helps bones and muscles grow straight and strong. * * *, preventing foot defects!

* * * the healthful protection of Jumping-Jacks * * *

Yes, that's where good health starts, right on the ground with healthy feet!

* * * to help prevent foot defects, promote better health habits.

Yes, your child's feet will grow healthier, if they grow unhampered in Junior Jumping-Jacks.

* * * normal, healthy arch! Only Jumping-Jacks let your youngster's feet develop this way.

* * * helps your youngsters walk straighter!

PAR. 6. Through the use of the statements and representations herein above set forth and others of similar import not specifically set out herein, respondents have represented, directly or by implication, that the wearing of Jumping-Jacks Shoes will guide little feet through the formative years and into proper walking habits, assures that the feet will grow straight and strong and will develop normally, causes the arch and toes to stay strong and healthy, helps bones and muscles to grow straight and strong, promotes better health habits, prevents foot defects, helps youngsters walk straighter, improves and promotes the health of the feet and the general health; that respondents' shoes incorporate therapeutic and corrective devices and contain health features.

PAR. 7. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, respondents' shoes will not guide little feet through the formative years or into proper walking habits, will not have any significant beneficial effect on walking habits, cannot assure that the feet will grow straight or strong or will develop normally, will not have any significant beneficial effect on the growth or development of the feet, do not cause the arch or toes to stay strong or healthy, do not help bones or muscles to grow straight or strong, do not promote better health habits, do not prevent foot defects, do not help youngsters walk straighter, do not improve or promote the health of the feet or the general health; respondents' said shoes do not incorporate any therapeutic or corrective devices nor do they contain any features to justify representing them as a health product.

PAR. 8. The use by respondents of the foregoing false, deceptive and misleading statements and representations with respect to their shoes has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and to induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' shoes and has placed

in the hands of dealers in said shoes means and instrumentalities whereby they may deceive and mislead the purchasing public in the respects stated herein.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are to the prejudice and injury of the public and respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued January 12, 1956, charges the respondents Vaisey-Bristol Shoe Company, Inc., a corporation existing by virtue of the laws of the State of Missouri, with its office and principal place of business located at No. 100 Fifth Street, Monett, Missouri; and Sam Vaisey and Joe McCaffery, individuals and as officers of Vaisey-Bristol Shoe Company, Inc., the address of the latter to coincide with that of the foregoing corporate respondent; and Storm Advertising Company, Inc., a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 72 East Avenue, Rochester 4, New York, and Morry Storm, individually and as president of the corporate respondent Storm Advertising Company, Inc., with the same address as that of the Storm Advertising Company, Inc., with unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Respondent Vaisey-Bristol Shoe Company, Inc., is engaged in the manufacture, sale and distribution of juvenile shoes designated "Jumping-Jacks" in commerce between and among the various states of the United States and in the District of Columbia; and respondent Storm Advertising Company, Inc., is an advertising agency and as such is engaged in formulating, selling and advising its clients on advertising and in this capacity acted as advertising representative of Vaisey-Bristol Shoe Company, Inc. in the preparation, editing and placing of advertising material more particularly set forth in the complaint herein, which said advertising constitutes the basis for the initiation of this action.

After the issuance of said complaint the respondents entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director and Assistant Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute

an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission; the making of findings of fact or conclusions of law by the hearing examiner of the Commission; the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondents further agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed only upon becoming part of the Commission's decision in accordance with Section 3.25 of the Rules of Practice.

Consonant with the terms of said agreement the hearing examiner makes the following findings as to jurisdictional facts:

1. That the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named therein.

2. That the named respondent in the complaint, Sam Vaisey is properly named Samuel B. Vaisey, and that the named respondent in the complaint, Joe McCaffery, is properly named Joseph A. McCaffrey. Both of the foregoing misnomers, as described, are to be remedied by issuance of the hereinafter contained order bearing the names of the respondents as corrected.

3. That this proceeding is in the public interest, wherefore the following order is issued:

ORDER

It is ordered, That the respondent Vaisey-Bristol Shoe Company, Inc., a corporation, its officers and respondents Samuel B. Vaisey (otherwise known as Sam Vaisey), and Joseph A. McCaffrey (otherwise known as Joe McCaffery), individually and as officers of respondent Vaisey-Bristol Shoe Company, Inc., and Storm Advertising Company, Inc., a corporation, its officers and Morry Storm, individually and as an officer of respondent Storm Advertising Company, Inc., their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' shoes designated "Jumping-Jacks," or any other shoes of similar construction, irrespective of the designation applied thereto, do forthwith cease and desist from:

1. Representing, directly or by implication, that the wearing of respondents' said shoes:

(*a*) Will guide the feet through the formative years or into proper walking habits, or will have any significant beneficial effect on walking habits;

(*b*) Will assure that the feet grow straight or strong or develop normally, or will have any significant beneficial effect on the growth or development of the feet;

(*c*) Will cause the arch or toes to stay strong or healthy;

(*d*) Will help bones or muscles to grow straight or strong;

(*e*) Will promote better health habits;

(*f*) Will prevent foot defects;

(*g*) Will help youngsters walk straighter;

(*h*) Will improve or promote the health of the feet or the general health.

2. Using the word "health" or any other word or term of similar meaning, alone or in combination with any other word or words, to designate, describe or refer to respondents' shoes in such manner as to import or imply that respondents' shoes incorporate therapeutic or corrective devices or contain health features.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 2nd day of May, 1956, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

IN THE MATTER OF

MAHLER'S, INC., ET AL.

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

Docket 6195. Complaint, Mar. 18, 1954—Decision, May 3, 1956

Order dismissing, for failure to substantiate the allegations, complaint charging sellers in East Providence, R. I., with misrepresenting in advertising the effectiveness and safety of the device "Mahler Electrolysis Epilator," designed for the removal of superfluous hair by individual self-application.

Mr. Jesse D. Kash and *Mr. William M. King* for the Commission.
Letts & Quinn, of Providence, R. I., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that respondents have violated the Federal Trade Commission Act by the dissemination of false and deceptive representations in advertising material used to promote the sale and distribution in commerce of the Mahler Electrolysis Epilator, a device for the removal of superfluous hair from the human body.

After the filing of an answer, hearings were held in which testimony and other evidence were presented, duly recorded and filed in the office of the Commission, and proposed findings of fact, conclusions and orders were submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent Mahler's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, having its office and principal place of business located at 3124 Pawtucket Avenue, Providence, Rhode Island.

Respondents Arthur Y. Mahler, Daniel J. Mahler and Harold C. Mahler are President, Vice-President, and Secretary-Treasurer, respectively, of the corporate respondent. Their office and principal place of business is the same as that of the corporate respondent. They formulate, direct and control the advertising, sales activities and policies of the corporate respondent. Respondent Arthur Y. Mahler is licensed under the laws of the State of Rhode Island to engage in the practice of electrolysis, and also teaches that subject.

2. The respondents are now, and for more than one year last past have been, engaged in the promotion, sale and distribution of a "device," as that term is defined in the Federal Trade Commission

Act, designated as the Mahler Electrolysis Epilator, hereinafter referred to as the Epilator, which is advertised and recommended by them for use in the electrolytic removal of superfluous hair from the human body by individual self-application.

Respondents cause and have caused the Epilator, when sold, to be transported from their place of business in the State of Rhode Island to purchasers thereof located in various other States of the United States, and, at all times mentioned herein, have maintained a substantial course of trade in said device in commerce among and between various States of the United States. Respondents, or their predecessors in the business, have sold approximately 50,000 Epilators—10,000 since 1946.

3. In the course and conduct of their aforesaid business, for the purpose of inducing the purchase of their device in commerce, respondents have disseminated various advertisements concerning it, by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements published in various newspapers, magazines, booklets, circulars and circular letters.

One advertisement of respondents' device published in various magazines of national circulation during 1952, 1953 and 1954 is as follows:

DESTROY Unwanted Hair FOREVER
Temporary relief is NOT enough

Only by KILLING THE HAIR ROOT can you be sure UNWANTED HAIR is GONE FOREVER. Brings relief and social happiness. Do not use our method until you have read our instruction book carefully and learned to use the MAHLER METHOD safely and efficiently. Used successfully over fifty years.

Send 5¢ TODAY for booklet NEW BEAUTY FOR YOU
MAHLER'S, INC., Dept. 51–K
Providence 15, R. I.

Persons responding to the foregoing advertisement were sent the booklet "New Beauty For You," which contains, among other things, warnings against misuse, a money-back guarantee, and a description of how the Epilator is used, as follows:

The use of the Mahler Electrolysis Epilator by persons not trained in the technique of removing superfluous hair from the human body by electrolysis may result in permanent disfigurement, cause infections or other irreparable injury to health, and that said device should not be used to remove hair from cancerous or syphilitic lesions, pigmented moles or other areas showing local pathological conditions.

Therefore, for these reasons do not use the Mahler Hair Remover until you have read our instruction book carefully and learned to use the Mahler safely and efficiently.

* * * IF, AFTER PURCHASING THE MAHLER AND USING IT FOR 15 DAYS YOU ARE NOT ENTIRELY SATISFIED, YOU MAY RETURN IT AND WE WILL REFUND YOUR MONEY.

* * * By carefully following the exact instructions furnished with each outfit, you too can remove your superfluous hair forever.

A needle almost as fine as a hair is inserted into the pore from which the hair grows, right alongside the hair. With this fine needle in place at the hair root, the hand is then placed on the wet felt pad, and in half a minute you have destroyed the hair root. Some hairs may require a few seconds less, and others more, depending on the coarseness of the hair. If you have operated properly, you have destroyed forever the life of that hair, and you now find that the hair lifts out easily with the tweezers, and you continue on to the next hair.

In the case a sale did not develop within a reasonable period of time following mailing of the aforesaid booklet, respondents sent follow-up letters and circulars to prospective purchasers.

4. Through the use of the foregoing and other similar statements appearing in their advertisements, respondents have represented directly or by implication (1) that said device is an effective and efficient method for the permanent removal of superfluous hair from the human body, and (2) that after respondents' instructions have been read, the Epilator may be safely, successfully and effectively used by purchasers for the permanent removal of superfluous hair by individual self-application.

5. Respondents manufacture two models of the Epilator for self-use—the Marvel and the Deluxe. One has 6 cells and 6 electrical outlets, the other 8; both are battery-operated; each has a needle which may be attached to a negative pole, and a felt pad which may be dampened, preferably with salt water, and attached to a positive pole, so that when the hand or bare foot of the person using the device is in contact with the pad and the needle is inserted into the skin, an electric circuit is completed. The strength of the current may be regulated to some degree by the selective use of the various electrical outlets. The principle of the device is that by the insertion of the electrically charged needle into the hair follicle, the hair root will be brought within the field of the electric current and will be destroyed, after which the hair can be removed with a pair of tweezers.

6. The Epilator is effective and efficient for the permanent removal of superfluous hair from the human body. The reliable, probative evidence of record permits no other conclusion. Witnesses appearing in support of the complaint as well as those for the respondents so testified, and counsel supporting the complaint, in his proposed findings, states that no testimony was introduced to support a contrary conclusion. He suggests that the complaint should be dismissed insofar as it relates to the charge that such a representation is false, and

with that suggestion the hearing examiner is in complete agreement. As to the other charges of the complaint, a thorough analysis of the evidence is required.

7. With the Epilator, respondents provide each purchaser with a book of instructions. In fact, two separate, almost identical booklets are used—one with the Marvel model and one with the Deluxe. Some of the instructions included in both booklets follow:

Keep the little protective covering over the needle in the holder when not in use. This will prevent its getting dirty or bent. Wipe the needle clean with alcohol before and after using. Do not use needles that are rusty, bent or broken off so they have no pointed end.

Do not use the Mahler Epilator for removing warts, moles, or hair in moles. And do not use on skin where it is broken out, irritated, pimply or not in a healthful condition.

PATCH TEST

Before removing unwanted hair from the face, it is a good plan to first remove unwanted hair from the arms or legs. In that way you gain both practice and experience in placing the needle so as to reach the hair root, learning the current strength you find comfortable, and the timing necessary to "loosen" the hair.

A very convenient area is on the legs, above or below knee. Use this as your patch test area for two or three sittings, or until you have acquired a certain amount of skill and experience in permanent hair removal. Then, when you have a good working knowledge of how the Mahler should be used, you can proceed to remove hairs from the face.

AMOUNT OF CURRENT APPLIED TO HAIR ROOT

Please bear in mind that the amount of current you apply to a hair root is the *total* of (a) the strength of the current, *plus* (b) the length of time the current is on. In other words, if you use a stronger current, then you need less timing, and if you use a weaker current. then you need use more timing. With needle in place at a hair root, you use the same *total* current in each of the following ways:—

Plug No. 2—30 seconds timing
Plug No. 3—20 seconds timing

MIRROR

For removing unwanted hair from the face, you need a good magnifying mirror. * * * arrange your magnifying mirror on the table, or around the neck as illustrated, so the light from the lamp behind you reflects on the mirror and on your face where you wish to remove unwanted hair.

DEPTH OF THE HAIR "ROOT"

The papilla, or "root" of the hair is $\frac{1}{16}$ of an inch (—) to $\frac{3}{16}$ of an inch (——) deep in the skin, depending on the coarseness of the hair. Most medium to coarse hairs are between these two extremes, namely ⅛ of an inch (—). So for the average hair, you can plan to insert the needle ⅛ of an inch (—) deep to reach the hair papilla, unless they are very coarse, or very fine.

THE TIMING

The timing begins as soon as you place the palm of the free hand (or foot) on the wet felt pad when the needle is in place at the hair root—as soon as you feel the "tingle" or "sting" of the current. * * *

CARE OF THE SKIN—CLEANLINESS

Give your skin the best care so as to prevent the possibility of infection. The hands and the skin area should be clean and dry. This is also true of the needle, needle holder and tweezers. Wash and dry the hands and the skin area. Moisten some clean absorbent cotton with alcohol, and apply to the skin before using the Mahler Epilator. Wipe the needle, needle holder and the tweezers, and then throw away this piece of cotton. Wait until the skin is dry before using the needle.

CARE OF THE SKIN AFTER USING

When finished using your Mahler, moisten a clean cloth in good warm water and apply to the skin for a few minutes. Then apply alcohol again with another piece of clean cotton, wipe your needle clean and put your utensils away. * * * * * * It is best not to use cosmetics on the skin for at least 24 hours afterwards. Do not finger the skin. Allow it to heal naturally. * * *.

These and other instructions are supplemented with illustrations. If read at a time when the Epilator is at hand to be observed and experimented with, they appear to be clear enough to enable a person of ordinary intelligence and skill to use the device. The Epilator is not complicated. There are no moving parts. The operator need know little more about it than how to attach the needle and the pad. Knowing that, the remaining problem is to acquire the ability to insert the needle into the hair follicle and keep it there, with the current on, long enough to destroy the root of the hair. The skill required to use the needle properly and effectively may be acquired by practice.

8. In the State of New York, and in many other States, any person who can afford to buy a machine and rent an office may engage in the practice of epilation by electrolysis. In Rhode Island, there is a statutory requirement, adopted in 1943, that every person who shall hereafter engage in the practice in that State must have attained the age of 21 years, have graduated from high school, have served, under a licensed operator, an apprenticeship consisting of 400 hours of study and practice in the theory and practical application of electrolysis within a six-months' period, be of good moral character and free of infectious disease.

Those who engage in the business of removing superfluous hair by electrolysis refer to themselves as electrologists; yet the word "electrologist" does not appear in any of the dictionaries in the Federal Trade Commission Library. These include Webster's Unabridged Dictionary, 1950 edition; the Encyclopaedia Americana; Collier's Encyclopaedia; the American Illustrated Medical Dictionary, 1951

edition; and Stedman's Medical Dictionary. The nearest approach to a definition is found on page 481 of the 22nd edition (1951) of the American Illustrated Medical Dictionary, where the word "electrology" is defined as "that branch of science which deals with the phenomena and properties of electricity."

The word "electrologist," because of its derivation, carries the connotation of being descriptive of one who belongs to a learned scientific profession. Its use by those who, having no scientific training, engage in removal of hair by the use of electrolysis, is an etymological misnomer, the suffix "-ology" being a combining form denoting a doctrine, theory or science, and the suffix "-ologist" denoting one trained or versed therein.

In a cataloguing of occupational titles, put out in the form of a "Dictionary of Occupational Titles" by the United States Employment Service, a division of the Department of Labor, which is prefaced with the statement that the publication is "for the use of public employment offices and related vocational services, and for that use alone," the title "Electrologist" is defined rather loosely to describe the operations incident to the removal of hair by electrolysis. In the classification of occupations in this manual, electrologists are listed under the title "Personal Service Occupations," which includes domestic servants, protective service occupations, building service workers and porters.

It is apparent that there is a widespread belief that the removal of superfluous hair by electrolysis requires no particular ability other than that possessed by the ordinary or average individual with no specialized educational qualifications. This belief is supported by an examination of the qualifications of the "electrologists" who appeared as witnesses in this proceeding.

9. Five persons engaged in the practice of removing superfluous hair by electrolysis were offered as expert witnesses in this proceeding, in support of the allegations of the complaint. The first had entered the business of manufacturing electrolytic devices when he was 18 or 19 years old, and operated the Hoffman Electrolysis School. No statement of his educational background was given. Two of the others were graduates of the school operated by the first, which required a minimum training period of 90 hours[1] for completion of the electrolysis course, 80 hours of which were devoted to practical training on live subjects and 10 hours, approximately, to theoretical training. The remaining two witnesses were graduates of another electrol-

[1] Upon cross-examination it was disclosed that the hours of required study were at one time reduced to 72, which could be completed during "a glorious two-week vacation that will pay dividends for years to come. * * * You'll learn a guaranteed, permanent, *safe, efficient,* and *painless* method of removing hair from the face." [Emphasis supplied.]

ysis training "institute" similar to the school just mentioned. No reference was made to any educational requirements for entering either school, and evidently there were none. Such "expertise" as these men possess has been acquired through experience and practice in the use of electrolytic devices which are similar in principle to those manufactured and sold by respondents.

The first of these witnesses, operator of the Hoffman school, when he testified on September 9, 1954, said that no one "not trained in electrolysis" could use respondents' device for self-application, and that "irreparable damage to anyone's skin" might follow its use by an unskilled operator. He was particularly apprehensive of ill effects that might result from infection following use of the needle in the nostril area and under the arms, and stated:

> * * * An infection in the area of the nostril can have fatal effects. People can die from infections in the area of the nostril * * * and as far as treatments underneath the arms are concerned, that is an area which, too, is subject to infection more readily than other areas * * *.

Under cross-examination on March 24, 1955, this witness admitted that during an address made by him on January 26, 1955, at a meeting in New York of the Electrolysis Society of America, which consists of persons like himself who are engaged in removing superfluous hair by electrolysis, he had said that in his experience over the years the matter of infection was not of great concern; that the question of infections following electrolysis or short-wave treatment is one which is rarely faced by the average electrologist; that "while it is true that occasionally a patient does develop a pimple here or there in the area following treatment, it may not necessarily be concluded that the pimple is a result of the treatment, for it may be a question of coincidence, in that the patient might have developed the pimple whether she received treatment or not"; and that to his knowledge a serious infection had never occurred; and he acknowleged that he had asked the 100 or so persons present whether or not they had heard of or experienced any serious infection among electrolysis patients, and that none could answer in the affirmative.

Another of these witnesses had completed a course at the Hoffman school lasting, to the best of his recollection, about three or four months. At the time of his appearance, on September 9, 1954, he was serving his sixth term as president of the Electrolysis Society of America, and had done some writing on electrolysis. He had listened to the direct testimony of the first witness, followed him on the witness-stand, and supplemented his statements, saying that: "no amount of literature is adequate so that one may make a proper insertion to remove a hair permanently. My opinion is that it is the

personal instruction and the personal scrutiny of the instructor that actually teaches the operator to make the proper insertion, because insertions vary." He considered it "unsafe to do electrolysis under the arms, in the nostrils, and the eyelids."

Another graduate from the Hoffman school testified that "a layman cannot operate the machine. * * * the use of this needle entails some training (through) which a certain amount of skill must be attained before it can be used." Asked if respondents' device could be used to remove hair from the legs by self-application, he said, "You could use the machine to remove the hair, but you wouldn't be capable of doing it intelligently, the way a trained person would do it." He had removed hair from his own arms and legs, but found, when he tried to remove ingrown hairs from his face, that it was not possible for him "to guide the needle correctly working with a mirror."

Of the other two of these witnesses, one had removed hair from his own arms and legs but had never tried it on his face; the other said that with a short-wave set he could remove hair from his arm, but he did not think he could do it with respondents' machine. Of course, the operation is exactly the same, the only difference being that in the short-wave set the electricity used is drawn from a standard house current socket, while respondents' set is battery-powered. Both these witnesses were sure that "it takes years of experience to be good" in the use of an electrolytic device, and neither thought that the Epilator could be used successfully for the permanent removal of hair by self-operation. One of these two had been a barber, then a beauty-shop operator (for which he had a license), then started practice of electrolysis within a month after completing his course at the "institute"; the other had started the practice of electrolysis on a part-time basis while he was still attending the "institute" clinic.

A consideration of the many factors involved in evaluating the testimony of these witnesses—their demeanor on the witness-stand, their comprehension, candor and forthrightness or lack thereof, their self-interest in the outcome of the proceeding, their educational background and experience—leads to the conclusion that their testimony can be given little weight. If the evidence presented by this group establishes anything, it is that after some initial practice an electrolytic device, such as that sold by respondents, can be used to remove superfluous hair successfully, even professionally, by persons of ordinary intelligence, education and physical ability.

10. *Users:* Of those who had purchased one or more of the 10,000 Epilators sold by respondents since 1946, only one was called to support the allegations of the complaint. This one testified that early in 1954 she had purchased a Mahler Epilator, which she used for a

total of eight or ten hours over a period of about a month, to remove hair from her legs. She found it difficult to determine the correct length of time the needle should remain in the hair follicle to accomplish complete destruction of the hair; that in the area of epilation there was some discoloration of the skin, which did not disappear until she went to the beach a few months later; and that the removal of excess hair by electrolysis was a time-consuming operation. She had discontinued use of the Epilator for these reasons.

Six other users, all women, testified for respondents, as follows:

1. A machine operator in a dress factory, with 8 years' schooling, had spent $500 for epilation treatments over a 3-year period about 11 years ago, then bought a Marvel model Epilator which she used with a mirror to remove hair from her upper lip, chin, and side of face. She preferred her own treatment to that of the practitioner; got more done, cheaper; is "very much satisfied."

2. A stenographer, who had taken treatments 20 years or more ago, bought respondents' machine 1½ years ago, which she then used on her upper lip and chin; was "very satisfied."

3. A housewife, 53 years old, with little education, had previously received electrolysis treatments about twice a week for a year, with which she was less satisfied than she is now with the Epilator, which she has used for about a year to remove hair from her lip and chin; "it is very easy."

4. A housewife, 63 years old, bought her first Epilator in 1917 or 1918 after having had some treatments from an electrolysis practitioner; later bought a Deluxe model; had a serious problem with hair on lip, chin and neck; has used the machine for hundreds of hours successfully.

5. Another housewife, age not given, with grade-school education, procured an Epilator in 1938 and, with no previous experience, used it first on her arms, then on her chin and upper lip; she offered to demonstrate its use in the hearing room; has no difficulty using it successfully.

6. An employee in a venetian shade shop, with 2 years' high school education, had gone to an electrolysis practitioner for about a year before buying respondents' Deluxe model in 1953, which she has since used to remove hair from her face, and is more satisfied with her own treatments than with those procured from the practitioner.

During the course of the proceeding, respondent Arthur Y. Mahler demonstrated the use of the Epilator by removing hair from his hand, and from his face using a mirror. His mother, now 73 years old, testified that she had first used a Mahler home epilator to remove hairs from her face, chin and upper lip when she was 16 years old,

and without previous experience. She became so proficient through her own use of the machine that 7 years later she was employed by O. J. Mahler, father of the individual respondents herein, to demonstrate it. When she was 29 years old, she married O. J. Mahler, now deceased, and has been connected with the business ever since.

11. *Medical and other technical experts:* There was testimony in support of the complaint by two medical experts and a bacteriologist. Three medical experts and a physical chemist appeared for the respondents.[2] All were highly trained in their respective professions.

In support of the complaint, *Dr. Howard T. Behrman*, a dermatologist, stated that if an electrolysis needle be introduced into a hair follicle near a small malignant mole or growth, "it might stimulate the development of a cancerous growth," and it might cause serious results if used "without sterilizing" in the vicinity of a pimple or small boil or something of that type where pus might exist. In his practice he had observed, in patients who had been treated with electrolysis, pustural infections difficult to clear up, damage to tissues, and scarring of the facial region which had resulted in a permanent and comparatively serious cosmetic defect.

Upon cross-examination the doctor said that the instances of damage and scarring which he referred to were cases in which the removal of hair had been done by a "professional electrologist" in the course of his business, and that he had seen only a couple of cases where cancer had followed electrolysis. He acknowledged that infection could be caused by and that the same damage could result from the use of a sewing needle, a razor, or a hammer. The doctor stated that he did not think a layman could successfully operate the Epilator, that it requires a certain amount of knowledge of the skin, a certain amount of education and training in use of the device, and a knowledge of the possible ill effects or dangers that might be associated with its use.

Also in support of the complaint, *Dr. Vincent Joseph Ryan*, another dermatologist, testified that he had never seen a patient who had undertaken the use of electrolysis by self-application, but believes that "an operator could, on himself, remove hairs from his arms and legs in certain locations and not have too much difficulty in doing it." He added, "I don't believe, in my opinion, that it is possible for a person to properly and effectively remove superfluous hairs from the face * * * by means of mirrors." Scarring, he said, is more frequent if a great deal of current is used, as is possible with a short-wave outfit, and is one of the "most common sequelae * * * frequently a

[2] There was also a laboratory technician, who appeared only to identify excisions, slides and other physical exhibits referred to by one of the medical experts.

professional operator will produce scarring. * * * A person who is the nervous, jittery type would never be a good operator." He added that he has seen "considerable damage done to the skin, some serious conditions that perhaps were stimulated by electrolysis."

Upon cross-examination, Dr. Ryan said respondents' warnings in their booklet are correct and that the cases of infection and damage he was speaking of in his direct testimony were cases in which proper precautions with respect to cleanliness had not been taken. This witness personally had not used electrolysis for the past ten years, but had taught his office assistants, who had been previously trained for secretarial work, not nursing, how to remove superfluous hair, their only training in electrolysis being that given them by Dr. Ryan.

For respondents, *Dr. William Montagna*, a biological anatomist and cytochemist,[3] testified that he had examined the Epilator, and, without previous experience, had used it "out of curiosity" on his own hand, arm, chin and upper lip, and on respondent Mahler. It is his opinion that a person "might easily use the needle" on the chin and upper lip as well as on the hand or any other part of the body. He added:

> My judgment would be that the danger incurred from an individual using such an instrument would be no greater than plucking hairs with tweezers or receiving scratches from pins, or nicking himself with a razor, or probably not as great as with these other hazards that I have just mentioned, because the needle is sterile, or renders itself sterile when the electricity is discharged. * * * It has to, after all, kill cells in order to be effective, and micro-organisms are cells. They, too, would be then destroyed together with the cells, * * *.

Under Dr. Montagna's directions three biopsy specimens of human skin which had been epilated through use of respondents' device were examined microscopically to ascertain the effects of epilation after intervals of 24 hours, 4 days and 2 weeks following epilation. At 24 hours the lower half of the hair follicle had become necrotic, it was then either dead or dying. At four days the whole structure of the hair follicle was precipitating or being destroyed, the tissue was going to pieces and wandering cells from the surrounding tissue were coming in to clean out the dead or dying tissue; sweat glands about a millimeter and a half from the follicle had remained "perfectly normal"; the damage was "an extremely local one." At two weeks the entire lower half of the hair follicle was completely gone, leaving only the upper portion of the hair follicle; the hair had been completely destroyed.

From these examinations the witness concluded that the effective area in electrolysis is a core of tissue, approximately one millimeter

[3] He describes himself as "a polyglot about skin."

in diameter, surrounding the needle, and that insertion of the needle need not follow with precision the direction of the hair growth. He added that the repair process "is very unexciting"—like any repair "which follows extremely minor damage such as a pinprick or razor nick * * * just perfectly normal repair of an extremely minute amount of damage." In his opinion the trauma caused by plucking a hair is "considerably more severe" than that inflicted with an electric needle.

Dr. Eugene F. Traub, dermatologist and syphilologist, appearing for respondents, had, in his practice, removed hair by electrolysis and had examined respondents' machine and book of instructions. He stated that in his opinion, a person could use the Epilator "perfectly safely" by self-application without injury to himself or herself, on the face as well as on the hands and other parts of the body, if that person followed the book of instructions—

> * * * it is merely a matter of acquiring a little skill, and that can be easily taught * * * by self-application.
>
> * * * I believe the machine is basically a harmless machine to start with, and following instructions in the printed pad, no damage could result from its use if the instructions are carefully followed.

To confirm his opinion the doctor had organized a panel of five women, to each of whom he gave an Epilator and a copy of the book of instructions. In his presence, and without previous experience, they used the set and needle successfully on an arm or leg, and then on the face.

Regarding infection, he said:

> * * * the possibility of infection is not present any more in this outfit than there is in the one that we use, a professional outfit. And that danger is practically minimo because we believe that the needle is more or less self-sterilizing, and infection with a properly prepared skin is practically an unknown thing.
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> * * * the instructions for (sic) the book for sterilization of the skin and cleanliness are the ones that we adopt and use as professional men for the same purpose, so that we think they are adequate.

Regarding syphilitic lesions, warts, and moles, this witness said the chance of getting into a syphilitic lesion is negligible. "* * * The syphilitic lesion is practically an extinct thing, and it is hard to find syphilis to demonstrate to the medical students. We very rarely see one any more."

> As far as getting into a cancerous lesion or something of that sort, I cannot possibly conceive that a patient, in searching for a hair follicle, would pick a tumor or something of that sort to try to find a hair.
>
> As regards moles, it is a teaching premise, basic teaching premise, that the hairs, particularly on the face, that contain—the moles that contain hairs are the non-dangerous ones, and they are the ones we have all our lives destroyed

by electrolysis. That is the treatment of choice for that particular mole that I have written up and called the "Common Mole of the Face."

The dangerous mole, the dangerous pigmented mole, is the flat, smooth pigmented non-hairy mole, so that the individual using an apparatus of this type would not be in that field because there is no hair.

Upon cross-examination by counsel supporting complaint, Dr. Traub added:

* * * I do not believe the average layman would attempt to tackle a hair in a mole because they inherently are very careful of themselves. I am amazed that my patients are so much more careful of themselves than the doctor would be for them.

* * * * * * *

I think that counselor has the opinion that the layman is a pretty careless individual about himself. That is not so. I find they are much more meticulous than the average doctor. * * * They are much more apt to be fussy about washing their face with soap and water and using alcohol fairly generously; much more so than I think we would be in the office.

Also upon cross-examination he said that in 36 years of practice, in which he had observed thousands of patients in his office and in clinics with which he was connected, he had "never seen an immediate infection following the use of an electrolysis needle" and had never known of infection from a pimple going into the bloodstream.

Dr. Herbert John Spoor, also a dermatologist and syphilologist, and an associate in practice with Dr. Traub, confirmed Dr. Traub's testimony, stating that in his practice he had removed hair by electrolysis, that he had examined the Epilator, read respondents' instruction book, and used the Epilator on his own arm and chin, and is of the opinion that a person can, by self-application, using the Epilator, successfully and safely remove superfluous hair from the face as well as from the hands. He added to Dr. Traub's testimony as to the panel of five women, that under his personal observation they were able to remove hair from the face, using a mirror, after practicing for approximately twenty minutes.

Dr. Daniel P. Norman, a physical chemist with thirty years' experience as President of one and director of another scientific laboratory engaged in research and testing activities pertaining to commercial products, had been asked by respondents (*a*) to determine the suitability, practicability and safety for use in self-application of the Epilator, and (*b*) to determine the effect on bacteria of a needle activated by the device.

To arrive at a conclusion as to the first point of inquiry, Dr. Norman examined, made physical tests and measured the effectiveness of respondents' device. He read the instruction booklet, used the Epilator on himself, and observed its use by members of a volunteer panel who were each given a machine and asked to use it with no other

instruction than that which they obtained by reading respondents' booklet. Based upon the resulting data, he concluded that the Epilator may be used in self-application safely and effectively, in conformance with the printed instructions, by persons of ordinary or average skill and ability, and that respondents' booklets give adequate and satisfactory instructions.

To determine the effect of the electrically charged needle upon bacteria, a standard bacteriological test was performed in triplicate, using the Epilator. The needle, carrying no electrical charge, was touched to a sterile growth medium after having been dipped into a standard staphylococcus aureus culture and a standard E coli culture; an abundant growth of both organisms developed during a succeeding 24-hour incubation period. Following the same procedure in two other tests, but using a needle that carried an electrical charge, derived from terminals 2 and 4, respectively, of the Epilator, no growth of bacteria was observed either after twenty-four hours or after seven days of incubation. The laboratory notes of this test are in the record.

Dr. Norman concluded:

> It is my opinion that any bacteria within the electrical field of the current from these needles would be destroyed.

To rebut the testimony of Dr. Norman, the testimony of *Louis F. Ortenzio*, bacteriolgist in the United States Department of Agriculture, was presented. He had been given Dr. Norman's test report and handwritten laboratory notes, and said that he knew there was some controversy about the matter, but not that he would be expected to appear at a hearing as a witness to answer questions about his report. Therefore, upon completion of his series of tests, he "cleaned up" his laboratory, threw out some wire he had used to complete an electrical circuit in part of his tests, and destroyed his notes.

In Dr. Ortenzio's test the Epilator needle carrying an electrical charge was dipped into a standard micrococcus pyogenes var, aureus culture, then "submerged" in a tube of sterile nutrient broth, which after 48 hours' incubation, showed "a good growth of test organism." The same results were obtained using terminals 2, 4, 6, and 8, and by "stabbing" the contaminated needle into a sterile agar nutrient instead of broth. Other variations of this experiment showed similar results.[4]

As a result of these experiments, Dr. Ortenzio concluded, "In my opinion the device is not self-sterilizing * * * the bacteria on or around the needle would not be destroyed by electrolysis."

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[4] An *in vivo* test was made on two successive days, using a rabbit, but some of the results of this test were erratic and it is generally understood that the results of an experiment performed on a single animal cannot be accepted as significant or valid.

There is no question but that the experiments as they were performed by Dr. Ortenzio support his conclusion. However, when Dr. Norman duplicated the Ortenzio tests, exactly opposite results were obtained, confirming his own earlier report and conclusion. The laboratory notes of this second series of tests by Dr. Norman are in the record. It was explained by Dr. Norman that the difference in the results obtained by him was due to the greater degree of care exercised in his laboratory—the contaminated needle was not "submerged" or "stabbed" into the culture of test organisms or into the sterile broth, but placed carefully in each, so that only the current-carrying part of the needle came in contact with either substance, it being recognized that the plastic holder of the needle is a non-conductor, would carry no electrical charge, and, therefore, that the bacteria coming in contact with this part of the apparatus would not be affected by the electrical charge of the needle and would be transferred as active bacteria from one medium to the other. This is a fact which perhaps was not known to Dr. Ortenzio, since, as he said, he is not an electrical engineer, and not familiar with electrical circuits and currents. Dr. Norman stated that the test requires a knowledge of electricity *and* bacteriology.

Further doubt as to the validity of Dr. Ortenzio's conclusions arises out of the fact that although he stated that he had duplicated the tests originally made by Dr. Norman, he did not bring in a report of the results he obtained; hence the presumption is strong that they supported Dr. Norman's findings.

Under all of these circumstances, the results of Dr. Norman's experiment must be taken as correct, and his conclusion must be accepted as authentic and valid—that the charged Epilator needle does destroy bacteria.

CONCLUSIONS

(1) It is undisputed that the removal of superfluous hair by use of respondents' Epilator is an effective and efficient method for the permanent removal of unwanted hair from the human body.

(2) The Epilator can be successfully employed by individual self-application to remove superfluous hair from all accessible parts of the body by persons with ordinary care and skill after reading the instruction book published by respondents and distributed with the device.

From observing the user witnesses who appeared in this proceeding and listening to their testimony, it is evident that they are such individuals as one might meet on the street, in church, at a railroad station or any other public place—persons of ordinary means, ordinary education and intelligence, ordinary physical characteristics—persons

having some pride of appearance, who were embarrassed to some extent because of having superfluous hair on the face, arms or other commonly exposed parts of the body. For all the purposes of this proceeding, they may be looked upon as being representative of the type of persons who are purchasers or prospective purchasers of electrolytic devices such as respondent's Epilator, and of similar devices produced by other manufacturers. They are of those whom one expert referred to as creating a social problem through the development of inferiority complexes because of their concern about unwanted hair, especially if it is prominent upon the face. They are, as stated, persons of ordinary means who cannot readily afford the tedious, expensive treatments which would be necessary if they went to an "electrologist." None of the user-witnesses had any difficulty using the Epilator, except one, and her difficulty was such that it could have been readily overcome with patience and practice. All except this one were thoroughly satisfied with its use.

Under expert observation, two separate panels of untrained individuals used the Epilator successfully with no instructions except those gained from reading respondents' booklet. The weight of the expert testimony is to the effect that respondents' device can be used by self-application by persons of ordinary qualifications, effectively and successfully, after a little practice—and safely, if the instructions in respondents' booklet are observed.

It is a matter of common knowledge that there are some individuals who cannot successfully employ self-application of any product—cannot use an electric or safety razor, cannot give themselves a wave-set or a facial treatment. Respondents recognize this fact and afford protection for such persons through their guarantee to refund the entire cost to any purchaser who is not "entirely satisfied" after fifteen days' use of the device. It is common knowledge, too, that certain parts of the human anatomy are inaccessible to any device that has to be used with the hands, but certainly no potential purchaser is so foolish as to believe that any device would make such inaccessible parts accessible.

(3) Use of the Mahler Epilator is a safe method of removing superfluous hair from the human body by self-application.

The weight of the testimony of the qualified experts supports this conclusion. Not a single specific instance of infection, permanent scarring, or other damage to the skin or injury to the health of any person who had used the Epilator or any similar device upon his own person is disclosed in the record. The needle of the Epilator will kill bacteria within the field of its charge; the precautions set forth in respondents' booklet are explicit and adequate, and are the same

precautions as those ordinarily taken by dermatologists in their practice, and, if followed, reduce the chances of infection to a minimum;[5] experience indicates that individuals observe more care when they are treating themselves than is exercised by the professionals—physicians or "electrologists"; the trauma resulting from use of the Epilator is less than that resulting from plucking a hair or from a pinprick or slight cut; and certainly there is less danger of infection in the self-use of an electrolytic device than would be present where the removal of superfluous hair by electrolysis is performed by one who has no specialized training in the physiology of the skin, in antisepsis, or in any of the various phases of dermatology in an office or place of business where a succession of miscellaneous patients receive similar treatments with the same instrument. The specific cases of injury or skin damage shown in the record came from the offices of professional practitioners.

The foregoing conclusions are as positive as though the burden of proof were upon respondents, which is not the case. The burden has been and is upon counsel in support of the complaint to substantiate the allegations of the complaint. That burden has not been sustained; the charges contained in the complaint are not supported by substantial, reliable, probative evidence; and it cannot be found that the respondents have violated the Federal Trade Commission Act. Therefore, the complaint should be dismissed. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

The initial decision filed by the hearing examiner after the hearings were concluded provided for dismissal of the complaint. The case is presented here on the appeal filed by counsel supporting the complaint from such initial decision, the briefs in support of and in opposition to the appeal, and the oral arguments of counsel.

The respondents engage in the sale to the general public of electrolysis machines which are to be used in removing superfluous hair from the body and face by self-application. Before proceeding to a discussion of the issues, some facts about the machines should be noted. A typical device includes a cabinet holding electric cells, a series of posts affording varied amounts of electricity, and a small needle. By puncturing the skin and inserting the needle along the hair shaft toward the hair root and then applying the proper amount

[5] The testimony of the witnesses in support of the complaint goes no further than to say that injury may result if persons using the Epilator operate it contrary to or in disregard of the printed instructions and warnings.

of current, the user will destroy the hair root if it is within the range of the current. In such case, that particular hair will not grow again.

Nor is there any dispute as to the general routine followed by the respondents in soliciting sales of their machines in commerce. It includes the insertion of advertisements in magazines of national circulation reading as follows:

DESTROY Unwanted Hair FOREVER
Temporary relief is NOT enough

Only by KILLING THE HAIR ROOT can you be sure UNWANTED HAIR is GONE FOREVER. Brings relief and social happiness. Do not use our method until you have read our instruction book carefully and learned to use the MAHLER METHOD safely and efficiently. Used successfully over fifty years.
Send 5¢ TODAY for booklet
NEW BEAUTY For You
MAHLER'S, INC., Dept. 51–K
Providence 15, R. I.

To prospects responding to their initial contact advertisements, the respondents transmit certain literature including a so-called beauty booklet which contains the following admonition or disclosure:

The use of the Mahler Electrolysis Epilator by persons not trained in the technique of removing superfluous hair from the human body by electrolysis may result in permanent disfigurement, cause infections or other irreparable injury to health, and * * * said device should not be used to remove hair from cancerous or syphilitic lesions, pigmented moles or other areas showing local pathological conditions.

Those subsequently electing to purchase receive with their machines an instruction booklet. It reiterates the foregoing revealing statement and counsels buyers to acquire dexterity in using the device by experimental removal of hair near the knee prior to undertaking to remove hair from the face. In addition to outlining procedures for removing hair effectively and other practices to be avoided, the instruction booklet also contains directions relating to care and cleanliness of the skin and needle before and after operation of the machine.

Turning now to the issues presented, the complaint under which this proceeding was instituted alleges that the respondents have falsely represented through their previously noted advertising that use of their devices through self-application constitutes a safe method for the removal of superfluous hair and that such advertisements are violative of the Federal Trade Commission Act. It additionally charges, among other matters, that various of the respondents' advertisements are misleading because they fail to reveal material facts with respect to the consequences which allegedly may result from use of the electrolysis devices under conditions prescribed in the ad-

vertisements or conditions which are customary and usual among purchasers.

The initial decision held that the statement in the initial contact advertising against using the method until purchasers read the instruction book carefully and have learned to use the machine safely and efficiently was not misleading and has not served to misrepresent the device's safety when so used. The hearing examiner's rulings in this regard are based on his conclusions that respondents' machine constitutes a safe method for removing superfluous hair from the face and body by self-application provided that the directions or precautions set forth in the instruction book furnished all purchasers are followed.

The appeal contends that he erred and that risks of injury definitely attend use of respondents' machines even as directed for the reasons (1) that use of the needle on areas in the vicinity of potentially malignant moles or growths may stimulate them into cancerous growths and that removal of hair adjacent to the nose or under the arms may cause infection, none of which procedures is advised against in the instructions; and (2) that the instructions relating to cleanliness and care of the skin and needle merely minimize but do not eliminate the incidence of infection and consequent injury.

A view that infection may stem from removing hair immediately adjacent to the nostrils or under the arms was expressed by a professional electrologist who has engaged in his profession for more than twenty years. No probative medical evidence was received indicating that the hazards of removing hair from that area are greater than those encountered in removing it from elsewhere on the face, nor is the record persuasive that users are tempted to the needle method of epilation on tender underarm areas.

Scientific evidence, including the testimony of physicians specializing in the field of dermatology, also was received bearing on the other issues. One of the physicians called by counsel supporting the complaint expressed the view that applying the needle within one-fourth of an inch of a potentially malignant mole or growth might stimulate it to a cancerous course of development. He further stated that he had observed two instances in which cancers had followed electrolysis; and another physician testified that he had seen serious conditions of this type which perhaps were stimulated into activity by electrolysis. The scientific testimony introduced by respondents included evidence to the effect that the directions and revealing statements, including the instructions, adequately inform on matters to be avoided by users. Evidence also was received tending to show that

the effective area in electrolysis is limited to a core of tissue only 1/25 of an inch in diameter.

Testimony was received in support of the complaint relating to the inability of laymen in identifying pathological conditions or areas where hair removal is contra-indicated. In addition to the testimony relating to the adequacy of the directions, respondents offered testimony which tends to show that passable efficiency in operating their machines can be acquired within a reasonably short time by people generally through the trials recommended in the instructions. While we do not adopt the view that no risks can accompany the public's self-use of needle electrolysis techniques pursuant to the respondents' instructions, we recognize that the burden of proof is on the proponent of the complaint. It is our view, therefore, that the greater weight of the evidence does not support affirmative conclusions that the devices are unsafe when the instructions are observed or to the effect that the advertising is rendered false by matters omitted from the revealing statement. This aspect of counsel's appeal is denied, accordingly.

We also have considered the appeal's contentions of non-safety because of risks from skin infection in addition to those previously referred to. It urges that the instructions relating to care of the skin and cleaning of the needle serve only to reduce materially and do not eliminate possibilities of infection. The precautions counseled by the respondents appear generally similar to those used among professional electrologists and in many physicians' offices. There can be no doubt but that infections have followed professional removal of hair by electrolysis methods. However, there is no probative evidence indicating that they have resulted from inadequacies in the recognized procedures instead of deviations from them. Hence, the record does not suffice for informed determinations of whether appreciable risks of infection attend use of electrolysis when the respondents' directions on skin care and other matters are observed.

The initial decision also dismissed the companion charge earlier mentioned that certain of the respondents' advertisements were misleading because they failed to reveal material facts with respect to the consequences, i.e. injuries, which may result from use of the machines under conditions prescribed in the advertisements or those customary and usual among purchasers. The advertisements which initially solicit inquiries from prospective purchasers have contained no revealing statement with respect to specific risks which may attend respondents' hair removal method. On the other hand, information on price and other matters also is omitted and we would not be warranted in concluding that the initial contact advertisement has served

to induce sales of the machine. The so-called beauty booklet containing the revealing statement and a letter, a brochure and order blank, none of which reiterate it, make up the respondents' first mailing. If the prospect does not order, follow-up literature is sent at intervals of three weeks, three months and six months after initial inquiry. At one time, mailings also were made nine months after inquiry. These mailings have included order blanks and descriptive and testimonial pamphlets. Only in the first mailing does the prospect receive the beauty booklet. Except for a pamphlet included in the now discontinued nine-month mailing and the instruction booklet, none of the promotional matter later transmitted contains any disclosure of potential dangers inhering in use of the machine.

Certain of the advertisements offer the machine for removing unwanted hair and clearing the face, and a testimonial pamphlet has emphasized that the skin remains clear and soft. The respondents introduced scientific testimony to the effect that hair does not grow in moles which are potentially malignant and that no risks would accompany removal of hair from the benign type of mole. This was qualified by an admission that benign and potentially malignant areas sometimes are intermixed; but the witness was of the view that the presence of hair is rare in such areas and those conditions are "not really much of a problem." More credible in the Commission's view, however, are the opinions expressed by witnesses testifying in support of the complaint that appreciable risks are presented when users remove hair from moles or from areas very close to them or pigmented spots. It is clear from the record, furthermore, that ignorance of or departures from proper procedures and precautions in clearing the face of hair may result in infection or disfigurement. Implicit in the initial decision are conclusions to the contrary and, to the extent that exceptions are interposed thereto under the appeal, the appeal obviously has merit. It would be unrealistic to conclude that these machines do not come within the category of potentially injurious devices.

Section 15 (a) (1) of the Federal Trade Commission Act, as amended, provides that an advertisement shall be deemed misleading if it fails to reveal material facts respecting consequences from use under the conditions there prescribed or those customarily or usual. The Commission, therefore, would be justified in concluding that any advertisement disseminated in commerce for the purpose of inducing or likely to induce sales of the respondents' apparatus is false as a matter of law if it is offered for the removal of superfluous hair or clearing the face and contains no revealing statement in the vein similar to that in the beauty and instruction booklets.

There is, however, no direct record support for conclusions that any substantial portion of the machines distributed by the respondents have been sold as a result of the mailings following the first one. Because all purchasers receive the two booklets, the record additionally suggests that prospects are guided by the beauty booklet in making their decisions to purchase and users guided by the respondents' instruction booklet. In this factual situation, there is no clear showing that the public interest requires issuance of an order forbidding respondents from disseminating advertisements which do not contain the booklets' revealing statements. On the basis of the present record, therefore, dismissal also is warranted as to the complaint's additional charges of falsity of the advertising for alleged failure to reveal material facts. The appeal's exceptions to the initial decision's provision for dismissal are accordingly denied and the order below affirmed.

In reaching certain conclusions as to the effect of the needle's charge on bacteria, the hearing officer discussed various scientific experiments conducted by witnesses who testified in this case. Vigorous objection is taken under the appeal to the hearing examiner's statement of a strong presumption that a report on tests not brought to the hearings by a bacteriologist called by Commission counsel on rebuttal really supported the experimental results of another scientist who previously testified as a defense witness. As elsewhere mentioned in the initial decision, the bacteriologist did submit a report on his experiments which was received in evidence. His reported results were contrary to those of the defense witness. The initial decision also stated that those experiments supported his conclusions. The witness, a scientist in the employ of the Government, testified that he had destroyed his laboratory notes after completing the experiments and writing his report from them; that his report included all experimental work he had done in the matter; and that certain of them repeated the tests made by the scientist who had conducted experiments at the request of the respondents. There accordingly was no record basis for the hearing examiner's assumption that the witness conducted experiments on which he made no report or that the data which he destroyed after completing his report related to unreported tests. The hearing examiner clearly erred in such respect and the appeal's exception thereto is well taken.

The appeal, accordingly, is granted to the extent hereinbefore noted and otherwise denied. To the extent that the appeal is granted, the findings of the initial decision are to be deemed modified in conformity therewith and, as thus modified, the initial decision is affirmed.

Chairman Gwynne concurs in the result insofar as dismissal of the complaint is concerned.

Commissioner Secrest did not participate in the decision herein.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral arguments of counsel, and the Commission having rendered its decision granting the appeal to the extent noted therein and otherwise denying the appeal, and affirming the initial decision as modified under the Commission's decision:

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed.

Commissioner Secrest not participating.

IN THE MATTER OF

UNITED FISHERMEN OF ALASKA ET AL.

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

Docket 6368. Complaint, June 27, 1955—Decision, May 3, 1956

Consent order requiring two respondents, canners of king crab caught in waters adjacent to their packing plants in Kodiak, Alaska—charged with effectuating a conspiracy with two fishermen's associations to restrain competition in the sale and distribution of king crab and king crab meat in commerce, in the course of which they jointly fixed and maintained minimum prices for all king crab caught in said area by means of annual contracts with the fishermen's associations, enforced by intimidation and threats of violence against canners and fishermen not parties to the agreement and threats of black-listing fishermen who sought employment with other canners not paying the fixed minimum prices—to cease and desist from such joint price fixing and from empowering any association or group to negotiate prices for king crab or crab meat;

Provided, however, That this order cease to be of any effect if the pending proceeding against respondent fishermen's associations be finally determined in any manner other than in an order to cease and desist from the same acts and practices.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Fletcher G. Cohn, *Mr. Lewis F. Depro* and *Mr. John J. McNally* for the Commission.

Mr. Herald A. O'Neill, of Seattle, Wash., for Island Seafoods, Inc. and King Crab, Inc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties hereinafter referred to as respondents have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in this respect as follows:

PARAGRAPH 1. Respondent United Fishermen of Alaska, hereinafter referred to as "respondent Union," is an unincorporated association which is an affiliate or constituent unit of the Seafarers International Union of North America (American Federation of Labor). Among its members are fishermen who fish for King crab in the waters bordering Western and Northwestern Alaska, including the

waters adjacent to Kodiak, Alaska. Its principal office and place of business is in Kodiak, Alaska, where its mailing address is P. O. Box 501–A, Kodiak, Alaska.

PAR. 2. Respondents Eldon Lester, John Anderson, and P. J. Kerrigan, are individuals and are, respectively, President, Vice-President, and Secretary-Treasurer of respondent Union, with the office and place of business of each being the same as that of respondent Union.

Respondents Charles Warren, Russell Attwood, and Alfred Levine are individuals who compose the Executive Board of said Union.

All of the respondents named in this Paragraph, which are hereinafter referred to as a group as "respondent Union officials," individually and in their respective capacities as officials of respondent Union have formulated, directed, or controlled the policies and activities of said Union, and in so doing, have, expressly or impliedly, authorized, performed, adopted, or affirmed one or more of the policies, acts and practices herein alleged to have been performed by or through respondent Union. Said policies, acts, and practices were performed through the medium of said Union, with the approval, and on behalf, of all of its fishermen members and particularly those engaged in the catching of King crab in the waters bordering Western and Northwestern Alaska and especially in the waters adjacent to Kodiak, Alaska, and were intended to, and did, bind said members in the same manner and with the same effect as though they had individually engaged in same.

The members of respondent Union are too numerous and the changes in the membership of said Union too frequent to render it practicable to name as respondents herein each and all members of respondent Union, without manifest delay and inconvenience. Therefore, there are named and included as respondents in this proceeding the above-named respondent officials of respondent Union individually, as officials of respondent Union, and as representing all members of said Union.

PAR. 3. Respondent Kodiak Fish Producers Association, hereinafter referred to as "respondent Cooperative," is a nonprofit organization, organized in the first quarter of 1954 under the laws of the Territory of Alaska and under the provisions of the Act of Congress of June 25, 1934, entitled "An Act authorizing associations of producers of aquatic products." It has its principal office and place of business in Kodiak, Alaska.

It is composed of approximately fifty independent fishermen who own their boats and who formerly were members of respondent Union. Its function is to act as a fish marketing cooperative for said members.

Several of the directors of respondent Cooperative were formerly

officers of respondent Union and acted for and on behalf of respondent Union in carrying on the negotiations and entering into the contracts, hereinafter described, for the sale by the respondent fishermen members of respondent Union of the King crab caught by said members.

PAR. 4. Respondents W. A. Cannon, Dal Valley, Barney Corgatelli, Jack Warren, A. J. Cichoski, Ray Heinrichs, and Thomas Clampffer, who are hereinafter referred to as a group as "respondent Cooperative officials," are individuals who are directors of respondent Cooperative. Said respondents, individually and in their respective capacities as officials of respondent Cooperative, have formulated, directed, or controlled the policies and activities of said Cooperative, and in so doing, have, expressly or impliedly, authorized, performed, adopted, or affirmed one or more of the policies, acts, and practices herein alleged to have been performed by or through respondent Cooperative. Such policies, acts, and practices were performed through the medium of said Cooperative, with the approval and on behalf of all its independent boat owner members who are fishermen engaged in the catching of King crab in the waters bordering Western and Northwestern Alaska and more particularly in the waters adjacent to Kodiak, Alaska, and were intended to, and did, bind said members in the same manner and with the same effect as though they had individually engaged in same.

The members of respondent Cooperative are too numerous to render it practicable to name as respondents herein each and all members of respondent Cooperative without manifest delay and inconvenience. Therefore, there are named and included as respondents in this proceeding the above-named officials of respondent Cooperative individually, as officials of respondent Cooperative, and as representing all members of said Cooperative.

PAR. 5. Respondent Island Seafoods, Inc., is a corporation organized under the laws of the Territory of Alaska, with its principal office and place of business being located at 66 Marion Street, Seattle, Washington, and having a packing plant located at Kodiak, Alaska.

Respondent King Crab, Inc., is a corporation organized under the laws of the Territory of Alaska, with its principal office and place of business being located at Kodiak, Alaska, where its mailing address is P. O. Box A–1047, Kodiak, Alaska.

Respondents Walter Muller and Mildred D. Muller are individuals composing a partnership trading as Kodiak Sea Foods Packing Company, with their principal office and place of business being located at Kodiak, Alaska.

Each of the respondents named in this paragraph, and hereinafter referred to as a group as "respondent Canners," is engaged in the

business of canning and packing crabmeat secured from King crabs caught in the waters of Western and Northwestern Alaska, especially the waters adjacent to Kodiak, Alaska.

PAR. 6. The King Crab Industry is relatively new and has grown very rapidly. For the 1954 season the pack of such crab had a wholesale value in excess of $2,000,000. Approximately one-half of said pack is purchased by the respondent Canners from the respondent fishermen members of respondent Union and/or respondent Cooperative. A large proportion of the other half is either caught on the boats owned or controlled by a concern other than the respondent Canners or is purchased by such concern from fishermen who, like the fishermen employed on the boats owned or controlled by this concern, are not members of either the respondent Union or respondent Cooperative. This other concern freezes the crab or the crabmeat secured from the King crabs which it obtains by either of the aforementioned methods, and transports the same directly to the United States. Part of the crab secured by this concern is frozen on the boats used to catch same in the waters boarding on the Western and Northwestern Coast of Alaska, including the waters adjacent to the Kodiak Bay area, and the rest is frozen in plants located at or near Kodiak, Alaska, which are owned or operated by the concern. This concern likewise has never entered into any contracts or agreements with either the respondent Union or the respondent Cooperative for the purchase of King crab or crabmeat.

PAR. 7. All of the respondent fishermen members of both the respondent Union and the respondent Cooperative who are engaged in the catching of King crab in the waters of Western and Northwestern Alaska, including the waters adjacent to Kodiak, Alaska, are independent fishermen who own their own boats and either own or rent the traps or other gear used in the catching of said crabs. None of such respondent fishermen members of either respondent Union or respondent Cooperative are employees of respondent Canners. Respondent Union and/or respondent Cooperative are the media whereby the officials of both respondents and the respective respondent fishermen members of each, who are engaged in the catching of such crab, have performed the illegal acts and practices hereinafter alleged.

PAR. 8. In the course and conduct of their respective businesses, respondent Canners each makes substantial sales of the King crabmeat and crab which they purchase from the respondent fishermen members of respondent Union and/or respondent Cooperative and pack and can in their respective plants, to customers located in the various States of the United States and cause same to be transported from the Territory of Alaska to such customers. Said respondents,

as well as the respondent fishermen members of both the respondent Union and respondent Cooperative, maintain, and at all times herein mentioned have maintained, a regular course or current of trade in commerce in King crab in the Territory of Alaska, between said Territory and the various States of the United States, and among and between the several States of the United States. The respondents Union and Cooperative have been, and are, the media whereby the respective respondent officials of each and the respective members of each have committed and performed, in commerce, the alleged illegal policies, acts, and practices hereinafter set forth.

All respondents named herein have been, and are, engaged in commerce in King crab and crabmeat as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their respective businesses, respondent Canners are in competition in such commerce with each other, and with others who not only purchase and sell King crab which are caught in the waters adjacent to Kodiak, Alaska, but also King crab caught in various waters bordering on the Western and Northwestern Coast of Alaska, and also with others who freeze the crab so caught, in the purchase and sale of raw or fresh King crab and King crabmeat, except insofar as such competition has been restrained or destroyed by the policies, acts, and practices hereinafter set forth.

Also, except as it has been restrained or destroyed by the policies, acts, and practices hereinafter set forth, the respondent fishermen members of respondent Union and/or respondent Cooperative who are engaged in catching King crab in the waters hereinbefore described, including those adjacent to Kodiak, Alaska, are in competition in such commerce with each other and with other fishermen who likewise are engaged in catching King crab in the aforedescribed waters, including those adjacent to Kodiak, Alaska, but who are not members of either respondent Union or respondent Cooperative, in offering for sale and selling such crab to the respondent Canners and to others who are engaged in businesses similar to respondent Canners, including those freezing such King crab or crabmeat.

PAR. 10. Each of the respondents named herein, directly or indirectly, participated in, approved, or adopted one or more of the alleged illegal policies, acts, and practices hereinafter set forth.

PAR. 11. For many years last past and especially during 1952 and 1953, respondent Union and respondent Union officials, acting individually and/or through or by means of respondent Union, and since 1954 respondent Cooperative and respondent Cooperative officials, acting individually and/or through or by means of respondent Co-

operative, and respondent Canners have entered into, maintained, and effectuated an agreement, understanding, or conspiracy between and among themselves to pursue, and they have pursued, a planned common and concerted course of action to adopt, fix, and adhere to the practice and policy of restricting and restraining competition in the offering for sale, sale, and distribution of King crab and King crabmeat in commerce in the Territory of Alaska, between said Territory and the several States of the United States, and among and between such States.

PAR. 12. As part of, pursuant to, and in furtherance of the aforesaid agreement, understanding, conspiracy, and planned common and concerted course of action, respondents have performed and pursued the following policies, acts and practices:

(1) To fix and maintain, and they have fixed and maintained, the minimum prices at which all raw or fresh King crab and King crabmeat caught in the waters bordering Western and Northwestern Alaska, including the waters adjacent to Kodiak, Alaska, are bought and sold;

(2) Respondent Union, at least for the years 1952 and 1953, entered into annual contracts with each of respondent Canners wherein and whereby were fixed, established, and maintained the minimum prices which each of said Canners should pay, and each paid, to respondent fishermen members of respondent Union for the raw or fresh King crabs which said fishermen members caught in the aforementioned area;

(3) Since 1954, respondent Cooperative, acting in conjunction with, and with the approval of, respondent Union, has entered into annual contracts with respondent Canners wherein and whereby have been fixed, established, and maintained the minimum prices which said respondent Canners should pay, and each has paid, to the respondent fishermen members of respondent Cooperative and/or respondent Union for the raw or fresh King crab caught by said fishermen members in the aforedescribed waters, and which prices respondents have established as the minimum prices to be paid for all King crab caught in said area, even though same be purchased by parties other than respondent Canners and be caught by fishermen who are not members of either respondent Union or respondent Cooperative;

(4) Respondent Cooperative and respondent Cooperative officials, in conjunction with respondent Union and respondent Union officials, have employed and are employing various means and methods, including intimidations and threats of violence, to require purchasers of raw King crab, for the purpose of packing, canning, or freezing same, who have not entered into agreements or understandings with re-

spondent Cooperative or respondent Union, to pay for the King crab which they purchase the minimum prices fixed in agreements between respondent Cooperative and respondent Canners;

(5) Respondent Cooperative and respondent Cooperative officials, in conjunction with respondent Union and respondent Union officials, have employed various means and methods, including intimidation and threats of violence, to compel fishermen who are not members of either respondent Union or respondent Cooperative to refrain from catching King crab for any purchasers or prospective purchasers of said crabs who will not pay the minimum prices for such crabs which are fixed by the current annual agreements between respondent Cooperative and respondent Canners;

(6) Respondent Cooperative and respondent Cooperative officials, acting in conjunction with respondent Union and respondent Union officials, have, by various means and methods, including threats of blacklisting, sought to prevent fishermen from securing or accepting employment as cannery workers for canners other than respondent Canners when said other canners do not pay to the fishermen who catch King crab in the aforedescribed area, the minimum prices which are fixed by the current agreements or contracts between respondent Cooperative and respondent Canners;

(7) Respondent Canners have jointly negotiated with respondent Union and/or respondent Cooperative as to the minimum prices each and all would pay to the respondent fishermen members of respondent Union and/or respondent Cooperative for the raw King crab caught by such fishermen members in the aforedescribed waters;

(8) Respondent Canners have agreed to pay, and have paid, through and by means of the aforesaid agreements or contracts between each of them and respondent Union and/or respondent Cooperative the identical minimum prices to the respondent fishermen members of respondent Union and/or respondent Cooperative for such King crab.

PAR. 13. The capacity, tendency, and effect of the aforesaid understanding, agreement, combination, conspiracy, and planned common and concerted course of action and the policies, acts, and practices, as hereinbefore set forth, have been, and are now, to unlawfully restrict, restrain, and hinder the catching of King crab in the waters bordering Western and Northwestern Alaska, including those adjacent to Kodiak, Alaska; to prevent price competition in the aforedescribed commerce between and among respondent Canners in the purchase of such King crab; to prevent competition in such commerce between said respondent Canners and others engaged in the purchase and sale of such crab and crabmeat; to prevent such competition, (*a*) between

and among respondent fishermen members of respondent Union, (*b*) between and among respondent fishermen members of respondent Cooperative, (*c*) between and among respondent fishermen members of respondent Union and respondent fishermen members of respondent Cooperative, and (d) between such respondent fishermen members of respondent Union and respondent Cooperative and other fishermen who are not members of respondent Union and/or respondent Cooperative but are engaged in the catching of such crab in the aforedescribed waters, in the sale of same to respondent Canners and to others engaged in the purchase and/or sale of King crab and crabmeat in interstate commerce: all within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 14. In addition to the effects, hereinbefore set forth, of said understanding, agreement, combination, conspiracy, and planned common and concerted course of action of the respondents and the policies, acts, and practices done pursuant thereto, they likewise have the capacity and tendency to unduly enhance the price which the public is required to pay for King crab and crabmeat when same is offered for sale to the consuming public.

PAR. 15. The policies, acts, and practices of the respondents, all and singularly, as hereinbefore set forth, are to the prejudice of the public, have a dangerous tendency to unduly hinder competition and to create a monopoly in respondents in the King Crab Industry, and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION AS TO CERTAIN RESPONDENTS BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with entering into a combination in restraint of trade in violation of the Federal Trade Commission Act. An agreement has now been entered into by two of the respondents, Island Seafoods, Inc., and King Crab, Inc., and counsel supporting the complaint which provides, among other things, that said respondents admit all of the jurisdictional allegations in the complaint; that as to that part of the proceeding which is disposed of by the agreement, the answer of each of said respondents to the complaint shall be considered as having been withdrawn and that the record, insofar as it pertains to said respondents, on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that as to that part of the proceeding which is disposed of by the agreement, each of said respondents waives any further procedural steps before

the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights each of said respondents may have to challenge or contest the validity of the order entered in accordance with the agreement; that the order hereinafter set forth may be entered in disposition of the proceeding as to said respondents, such order to have the same force and effect as if entered after a full hearing; that the order may be altered, modified or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by either of said respondents that it has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding as to said respondents, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Island Seafoods, Inc., is a corporation organized and existing under the laws of the Territory of Alaska with its principal office and place of business located at 66 Marion Street, Seattle, Washington, and having a packing plant located at Kodiak, Alaska. Respondent King Crab, Inc., is a corporation organized under the laws of the Territory of Alaska with its principal office and place of business located at Kodiak, Alaska, its mailing address being P. O. Box A–1074, Kodiak, Alaska.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of said respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Island Seafoods, Inc., a corporation, and King Crab, Inc., a corporation, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase, or offering to purchase, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of raw king crab caught in waters bordering western and northwestern Alaska, including the waters adjacent to Kodiak, Alaska, do forthwith cease and desist from entering into, cooperating in or carrying out any planned common and concerted course of action, understanding or agreement between said respondents or between or among said respondents and one or more of the other respondents named in the complaint herein or between either of said respondents and others not parties hereto, to do or perform any of the following acts:

1. Fixing, establishing, maintaining or adhering to, or attempting to fix, establish or maintain, or cause adherence to, by any means or method, any prices for the purchase or sale of such raw king crab and king crab meat;

2. Jointly or collectively negotiating, bargaining or agreeing, by any means or method, as to the price or prices at which said raw king crab or king crab meat are proposed to be, or are, purchased or sold;

3. Authorizing or empowering any association, group, corporation or union to negotiate, bargain or agree as to the prices to be paid or received in the purchase of such king crab or king crab meat;

Provided, however, That nothing herein contained shall be construed or interpreted as preventing or prohibiting any respondent named herein, individually, from purchasing or selling, or bargaining for the purchase or sale of such raw king crab and king crab meat with any boat owner, boat captain, or other single seller or buyer.

Provided further, That nothing herein contained shall be deemed to prohibit the respondents herein from entering into a bona fide partnership, joint operation, or venture, or consolidation, for the purpose of operating one or more canneries and in which the prices of such raw king crab and king crab meat are determined by said partnership, joint operation, or venture, or consolidation, and where such determination is under the contract establishing such partnership, joint operation, or venture, or consolidation binding upon all members thereof. This proviso shall not be construed as either an approval or disapproval of any specific partnership, joint operation, or venture or consolidation, nor as permitting any such partnership, joint operation or venture or consolidation, to be continued or formed for the purpose, or with the effect, directly or indirectly, of rendering ineffective or unenforceable the inhibitions of this order and the purposes thereof.

Provided further, That nothing herein contained shall prevent any association of bona fide crab fishermen, acting pursuant to or in accordance with the provisions of the Fisheries Cooperative Marketing Act (15 U.S.C.A. Sections 521 and 522) from performing any of the acts and practices permitted by said Act; and

Provided further, That if the pending proceeding against respondents United Fishermen of Alaska and Kodiak Fish Producers Association is finally determined in any manner except by the issuance of an order to cease and desist, either (*a*) by consent, or (*b*) by final order of the Commission not subject to further review, or (*c*) by order of the Commission, which, although subject to further review, continues effective, requiring said respondents United Fishermen of

Alaska and Kodiak Fish Producers Association to cease and desist from the same or similar acts or practices provided by the order contained herein, then this order shall terminate and cease to be of any effect.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 3rd day of May, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Island Seafoods, Inc., and King Crab, Inc., corporations, 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 the order to cease and desist.