IN THE MATTER OF

# GEORGE GOLDBERG TRADING AS ARTGOLD LEATHER GOODS MANUFACTURING COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6139. Complaint, Nov. 3, 1953—Decision, May 8, 1954*

Where an individual engaged in the manufacture and competitive interstate sale and distribution of luggage, including certain handbags, the leather part of which appeared to be thicker than was the fact, due to the presence, not discernible from ordinary or usual inspection, of a cardboard or other backing of nonleather material—

Failed to disclose that the leather in said bags was so backed with cardboard or other nonleather material:

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of his competitors and constituted an unfair and deceptive act and practice in commerce and an unfair method of competition therein.

Before *Mr. James A. Purcell*, hearing examiner.

*Mr. Charles S. Cox* for the Commission.

*Mr. Maurice B. Holsberg*, of Boston, Mass., for respondent.

## DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated May 8, 1954, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

## INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 3, 1953, issued and subsequently served its complaint in this proceeding upon the respondent George Goldberg, an individual trading as Artgold Leather Goods Manufacturing Company, charging him with the use of unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the provisions of said Act. On March 25, 1954, respondent filed his answer, in which answer he admitted all of the material allegations as to the facts as set forth in said complaint and waived all intervening procedure and hearing as to the said facts.

Thereafter, the proceeding regularly came on for final consideration by the above-named Hearing Examiner, theretofore duly designated by the Commission, upon said complaint and answer thereto, proposed findings and conclusions not having been submitted on behalf of either of the parties; and said Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

## FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent George Goldberg is an individual trading as Artgold Leather Goods Manufacturing Company with his office and principal place of business located at 10 Thatcher Street, Boston, Massachusetts.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the manufacture, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of luggage, including traveling bags, which are sold by him to retailers and others for resale to ultimate purchasers.

PAR. 3. Some of the bags sold by respondent, as aforesaid, have the appearance of being made entirely of leather except for metal parts and linings. Such appearance is deceptive and misleading to the public for the reason that the leather part of said bags is backed with cardboard or other nonleather material thus making them appear to be made of a thicker leather than is actually the fact. The presence of such backing is not discernible from ordinary or usual inspection and is not disclosed by respondent on his said bags or otherwise.

PAR. 4. Respondent, at all times mentioned herein, has been, and is now, in substantial competition with other individuals, partnerships, firms and corporations engaged in the manufacture, sale and shipment of luggage in commerce between and among the various States of the United States and the District of Columbia.

PAR. 5. The failure of respondent to disclose that the leather in his said bags is backed with other materials has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that his said bags are made entirely of leather, except necessary metal parts and linings, and into the purchase of substantial quantities of said bags because of such erroneous and mistaken belief. As a result thereof, trade in commerce has been unfairly diverted to respondent from his competitors. In consequence thereof, substantial injury has been and is being done to respondent's competitors in commerce.

Furthermore, respondent's said practice places in the hands of retailers and others a means and instrumentality by and through which the public may be misled as to the composition of his said product.[1]

## CONCLUSION

The aforesaid acts and practices, as herein found is all to the prejudice and injury of the public and of respondent's competitors and constitutes an unfair and deceptive act and practice and an unfair method of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That the respondent, George Goldberg, an individual, trading under the name of Artgold Leather Goods Manufacturing Company, or under any other name, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of luggage in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

Offering for sale or selling traveling bags or other luggage having an outer covering of leather that is backed with cardboard or material other than leather, without affirmatively disclosing the use of such backing, on said products in such a manner that said disclosure cannot be readily hidden or removed.

## ORDER TO FILE REPORT OF COMPLIANCE

*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 [as required by said declaratory decision and order of May 8, 1954].

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[1] FTC Matter re: Samuel Brier, 24 FTC 905.
FTC Matter re: George Landon, et al., 24 FTC 931.
FTC Matter re: Louis Hoffman, 31 FTC 793.
FTC Matter re: Israel Zaveloff, 25 FTC 742.

IN THE MATTER OF

# FLORIDA CITRUS MUTUAL ET AL.

*Docket 6074. Order and opinions, May 10, 1954*

Before *Mr. J. Earl Cox* and *Mr. Everett F. Haycraft*, hearing examiners.

*Mr. Fletcher G. Cohn* and *Mr. Lewis F. Depro* for the Commission.

*Mabry, Reaves, Carlton, Anderson, Fields & Ward* and *Mr. Counts Johnson*, of Tampa, Fla., and *Mr. Robert E. Freer*, of Washington, D. C., for respondents.

*Mr. A. Y. Milam*, of Jacksonville, Fla., for Florida State Chamber of Commerce, intervenor.

*Mr. William H. Dial*, of Orlando, Fla., for Florida Bankers Ass'n, intervenor.

## ORDER SUSTAINING APPEAL OF COUNSEL IN SUPPORT OF COMPLAINT, REVERSING INITIAL DECISION, AND REMANDING CASE TO HEARING EXAMINER

This matter coming on to be heard by the Commission upon an appeal, filed by counsel in support of the complaint, from the hearing examiner's initial decision dismissing the complaint herein without prejudice; and

The Commission having decided, for the reasons set forth in the written opinion which is being issued simultaneously herewith, that said initial decision was improvidently issued:

*It is ordered*, That the appeal of counsel in support of the complaint be, and it hereby is, sustained.

*It is further ordered*, That the hearing examiner's initial decision filed June 12, 1953, be, and it hereby is, vacated and set aside.

*It is further ordered*, That this case be, and it hereby is, remanded to the hearing examiner with instructions to proceed in accordance with the Commission's opinion.

Commissioner Howrey dissenting in part but concurring in the result, and Commissioner Mead not participating.

## OPINION OF THE COMMISSION

MASON, Commissioner:

This matter is before the Commission on appeal by Government counsel from a hearing examiner's order dismissing the complaint.

The initial decision of the examiner granting the respondents' motion to dismiss prior to trial is reversed. The case is remanded for disposition in accord with this opinion.

The facts of record are as follows:

The complaint herein, issued December 15, 1952, charges respondents with violation of Section 5 of the Federal Trade Commission Act. Amongst other things, it charges respondents agreed with shippers, canners, packers and concentrators of citrus fruits to fix the prices and control the interstate shipments of said fruits, and to restrain the trade of other growers.

The complaint states that said practices are beyond the protection and immunities from Federal antitrust jurisdiction granted to agricultural marketing cooperatives by the Capper-Volstead Act[1] and other related Federal statutes. Under these Acts growers are permitted to form marketing associations through which they may perform all of the necessary practices incident to the processing, sale, shipment, marketing and distribution of their products so long as they do not include in such efforts the participation of third parties, that is, in this matter the said handlers, etc., to whom title to the products passes from respondents.

One of the averments of this complaint was that the Commission had "reason to believe" it was in the public interest to bring suit against respondents for an alleged conspiracy to fix prices and restrain trade.

At first respondents filed a general denial. This answer has not been withdrawn and still controverts the essential allegations in the complaint. After some delay, during which efforts to adjust or settle the issues were attempted and failed, the respondents tendered a motion to dismiss, challenging only the Commission's averment that the suit was in the public interest.

From the state of the record it is difficult to determine whether respondents wish to stand on their presumption of innocence and await the introduction of evidence by the Government, or seek confession and avoidance as they do by their motion to dismiss. All we are certain of is that respondents feel the case lacks public interest. This is a feeling common to all defendants.

In issuing the complaint herein the Commission, acting in its administrative capacity, made the preliminary determination that there were reasonable grounds to believe respondents had conspired to restrain trade and that it appeared to the Commission the proceeding would be to the interest of the public (Section 5 (b)). That it was in the public interest for the Commission to challenge said alleged conspiracy was a natural sequitur. On this basis a complaint was filed on December 15, 1952.

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[1] Act of Congress, Feb. 18, 1922, 7 U. S. C. A. 291, 292.

Prior to the issuance of the complaint and prior to trial, the administrative discretion of the Commission regarding the existence of public interest is not subject to review. After trial, it is subject to review by the courts. The respondents' motion to dismiss on the ground of a lack of public interest, therefore, does not present an issue on which a hearing examiner has authority to rule. An examiner has no power to sit in judgment on the discretionary decisions of the Commission within the range of the administrative process. Even courts are limited to challenge only the abuse of administrative discretion.[1] To hold otherwise would subvert the very policy of the Act from which the Commission derives its discretionary powers. And the Commission has not delegated to its examiners any authority to substitute their discretion for that of the Commission.

An examiner's cardinal function is to sit in a judicial capacity. He may (subject to review by the Commission) dismiss a complaint if in his opinion the facts alleged do not state a cause of action. This is an initial adjudicatory function delegated to the examiner. His decision to dismiss a complaint is based upon his review of the facts and his review of the law. But he may not search into the mental processes of the Commission to determine whether it rightfully concluded the public interest justified complaint, for to do so he would have to examine the statements, affidavits, reports, etc., of the Commission's investigators on which the averments in the complaint are founded.

To students of Government polity there are quite obvious reasons why the Commission cannot delegate these administrative functions to an examiner.

In the first place the criteria as to the quantum and quality of evidence used by the Commission in establishing the averment in the complaint is that it has "reason to believe" and that a proceeding appears to be in the public interest. These criteria are different from those used by a hearing examiner of the Commission when trying issues controverted by the pleadings in the trial of a case. Then to establish the element of guilt the final decision must be based on the "preponderance of the evidence."

But there is, however, another more compelling reason why we cannot have examiners exercising the above administrative function. Unfair acts and practices in commerce are not easy to detect. Most of them are uncovered by competitors or consumers injured by the alleged illegal practices of the proposed respondents. To publicly arraign injured parties or other informants against alleged law vio-

[1] See *F. T. C.* v. *Klesner,* 280 U. S. 19.

lators prior to the presentment of complaint would discourage the institution of any corrective proceedings.

The Commission's original administrative determination of public interest is predicated on evidence presented to it by its investigating attorneys. This preliminary marshalling of evidence is not subject to public scrutiny and necessarily has not met the test of an adversary proceeding. It is fundamental to the Anglo-American system of jurisprudence that in the initiatory stage in any proceeding, whether civil or criminal, the issuance of a complaint is of necessity based on ex parte presentations. If the Commission had to litigate the question of public interest prior to trial of its complaint in the manner the hearing examiner here seeks to innovate, the orderly trial of the controverted issues would be gutted. Nor may the examiner sort out and try any single averment in a complaint to the exclusion of all others that are at issue. This applies with special force to the question of public interest, for the answer to that question lies in the totality of all the facts in the case.

Turning now to the question of mootness presented by the proposed pretrial "adjustment"—so much of the transcript of the hearings was taken up with this subject that it is in the interest of clarity that the Commission comments on matters not properly part of the official record.

It seems to us that the adjustment or setttlement contemplated in the Administrative Procedure Act is addressed to the speedy disposition of causes where both the prosecution and the respondents can agree to its terms. It is true these efforts to adjust or settle are under the aegis of the hearing examiner, and certainly his good offices and interest in developing such proposed settlements can do much toward expediting the course of justice. In such pretrial proposed settlements, the hearing examiner's preliminary endorsement or rejection will be considered by the Commission in its final decision. In this connection the Commission has noted with approval the recent recommendations on this subject adopted by the President's Conference on Administrative Procedure.

But settlements or adjustments are, as their name implies, agreements. If a settlement proposed by a respondent does not come forward with the approval of the bureau involved, the examiner has no more authority to force dismissal of the case prior to trial than he would have to force a cease and desist order on the respondent prior to trial.

The Commission is fully cognizant of its authority to dismiss a complaint at any time during the course of a proceeding. While it would be impossible to certify that the intimate details of all pending trials are closely followed by the entire membership of the Commission, it would be equally difficult to assume that in a matter of such magnitude as the instant case, the proposals for dismissal submitted by counsel for respondents and by the then acting counsel in support of the complaint were not given the most careful consideration at the highest level.

The distinguished counsel representing respondents were fortified in their endeavors through petitions to intervene by the State of Florida, the Chamber of Commerce of the State of Florida, and the Florida Bankers Association. This veritable armamentary of support would command the respectful attention of any agency of Government, but the fact remains that the irregular procedures thus far followed have not presented evidence sufficient to persuade the Commission in its administrative capacity to accept the proposed settlement.

Respondents (in support of their motion to dismiss) averred that in May of 1952 the alleged unlawful practices were abandoned, that the subject of the complaint is moot, and that the alleged conspiracy no longer exists because it failed to accomplish its goal.

When properly introduced as a part of the respondents' defense, this may be proof of the present non-existence of an illegal practice. However, the public interest is concerned with more than the fortuitous abortion of an illegal combination in restraint of trade. To say that wrongful acts will not be repeated because in the past they proved unfeasible does not meet the burden of the Commission's responsibility.

Prior to the passage of the Federal Trade Commission Act the public interest might have to wait on the successful culmination of unlawful combinations, but the Commission's function is prophylactic, not punitive. It projects its action in the future and, while we need not proceed against illegal actions dead and buried, there is nothing to prevent our proceeding against respondents who have in the past violated the law, even though at the time of suit they may have desisted of their own accord, if there is reason to believe there may be a resumption of the illegal practices. Whether this desistance came through penitance or because the acts proved unprofitable might be considered by the Commission in determining the need for future protection of the public interest by a cease and desist order.

At any rate, in the instant case, whether or not the public interest requires a cease and desist order or may be satisfied with a dismissal rests not on the present existence or non-existence of an illegal restraint so much as it does on the entire context surrounding all actions of the respondents. This context only can be determined through a complete disclosure of the facts encompassed in the complaint.

The appeal of counsel in support of the complaint is granted and the case remanded with instructions to proceed in accordance with this opinion.

Chairman HOWREY dissenting in part but concurring in result.

This case is before us on a procedural and jurisdictional question. The merits are not now involved.

I agree that the case should be remanded to the hearing examiner but for reasons quite different from those expressed in the opinion of the Commission.

The Commission has, I believe, committed fundamental error and, perhaps without fully realizing it, dealt a serious blow to administrative law and procedural due process.

The statutory issue of public interest has been removed from the adjudicatory processes of the Commission and made a matter of administrative discretion. This has been done without so much as a passing nod to statutes, rules of practice, and Supreme Court decisions which, I think, clearly require a contrary decision. If the basic issue of public interest can be removed from the hearing table and determined by the Commission, as plaintiff instead of judge, upon the basis of information contained in secret files, so can any other issue.[1]

It was just this sort of bureaucratic action that the Administrative Procedure Act was designed to stop.

Because of the philosophy which apparently underlies the Commission's opinion I feel compelled to deal with the matter at some length.

The respondents are the Florida Citrus Mutual, a non-profit co-operative marketing association, its directors, officers and members.

The complaint charges that respondents, in violation of Section 5 of the Federal Trade Commission Act, were "parties to a combination * * * to fix prices and control the distribution of citrus fruits and citrus products moving in interstate commerce from the State of Florida." The complaint alleges that the challenged practices went beyond the protection and immunity of the Capper-Volstead Act which permits producers of agricultural products to act together in

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[1] The Commission states the basic proposition that "Prior to the issuance of the complaint and prior to trial the administrative discretion of the Commission regarding the existence of public interest is not subject to review." Based on this premise, which would seem to have no application to the instant case, the Commission holds that "The respondents' motion to dismiss on the ground of lack of public interest, therefore, does not present an issue on which a hearing examiner has authority to rule."

The complaint in this case had long since issued, answers had been filed, and the case had been at issue for more than four months before the motion to dismiss was filed. The matter became adjudicatory in nature, and the Administrative Procedure Act came into play, immediately after the complaint issued and the case was assigned to a hearing examiner.

collectively processing and marketing their products, providing this group activity is done through the medium of associations operated for the mutual benefit of their producer members.[2]

The Capper-Volstead Act has been construed as an exception to the antitrust laws insofar as collaboration among members is concerned. This immunity ends, however, at the point where they commence to act in concert with other persons who are not farmers—where, for example, they combine or agree with distributors and others to eliminate competition at successive stages in the marketing process.[3]

After answer was filed and issues joined, and after intervention on behalf of respondents by the State of Florida, the Florida State Chamber of Commerce, and the Florida Bankers Association, respondents filed a motion to dismiss upon the grounds (1) that the complaint was "improvidently issued" and the public interest required dismissal, and (2) that the issues were moot.

Respondents' contentions rest primarily on the claim that the challenged practices were abandoned prior to the issuance of the complaint.

Two basic questions are presented on appeal:

1. Does the hearing examiner have the power, on preliminary hearing, to entertain a motion to dismiss a complaint upon the ground of lack of public interest?

2. If so, does the record on the preliminary hearing show that the practices were abandoned and that there is no likelihood of their resumption?

The hearing examiner, before hearing the merits, took several days of testimony on the issues raised by the motion. Some of the evidence

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[2] Act of February 18, 1922, 7 U. S. C. 291, 292. The Capper-Volstead Act provides:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

It provides further:

"If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, * * *"

[3] *United States* v. *Borden Company,* 308 U. S. 188 (1939); *United States* v. *Maryland and Virginia Milk Producers Assn., Inc., et al.,* 179 F. 2d 426 (1949), cert. den. 338 U. S. 831 (1949).

adduced at this preliminary hearing dealt with the merits. This, of course, cannot be considered by the Commission at this time except as it may bear on the question of public interest. "On a motion to dismiss it is settled law that the complaint should be construed in the light most favorable to the plaintiff, with all doubts resolved in his favor and the allegations accepted as true. * * * No matter how unlikely it may seem that the pleader will be able to prove his case, he is entitled * * * to an opportunity to try."[4]

The facts relevant to the question of abandonment are summarized below:

Florida Citrus Mutual was chartered in 1948 and began operation on March 25, 1949. It has approximately 7,000 members and functions through its board of directors. The Board selects the officers and elects an executive committee which acts for the Board. The Board also elects an advisory committee, the membership of which includes both growers and handlers (shippers, processors, and canners). Some of the latter are not members of the association and are not engaged in the production of citrus products within the meaning of the Capper-Volstead Act.

Each member of the association must be a grower who has signed a contract to sell his citrus products only through handlers affiliated by contract with Mutual. Handlers are divided into three separate groups determined by the type of contract under which they operate—the "A" contract is for canners and concentrators who purchase raw fruit for processing, the "B" contract is primarily for handlers engaged in the packing and shipping of fresh fruit, and the "C" contract for intermediary handlers.

Mutual attempted to accomplish its objectives of stabilizing an admittedly distressed citrus industry through (1) its information service, (2) minimum or floor pricing, and (3) proration or allotment of shipments.

As part of its information service, price statistics were compiled and sent to members, shippers, processors, and other agencies. An attempt was made to keep members and all other segments of the industry fully informed on current market prices and trends and other items of interest to the citrus industry.

In November 1949, at a time of declining prices, Mutual established a minimum price for fresh fruit and on fruit for processing. These prices held until the market improved and gradually reached a rela-

[4] *United States Guarantee Co.* v. *Mountaineer Engineering Co.*, 12 FRD 520 (D. C. W. D. Pa. 1952). See also *Delaware Floor Products, Inc.* v. *Franklin Distributors, Inc., et al.*, 12 FRD 114; *Cool* v. *International Shoe Co.*, 142 F. 2d 318 (C. A. 8, 1944); *Shapiro* v. *Royal Indemnity Co.*, 100 F. Supp. 801 (D. C. W. D. Pa. 1951); *Continental Collieries, Inc.* v. *Shober*, 130 F. 2d 631 (C. A. 3, 1942).

tively satisfactory level; it remained stable until April 1950. In the fall of 1950, price minima were again established and were again followed by increasing fruit prices, which maintained a satisfactory level until April 1951.

In the year 1951 further attempts were made to establish minimum prices. These moves, unlike the previous ones, were not successful in stabilizing prices. Handlers refused either to pay or maintain the minimum prices established by the association.

Early in 1952 Mutual undertook a mandatory proration program under which shipments of fresh fruit were to be strictly limited. Mutual's effort in this direction is shown by a motion adopted by its executive committee authorizing "a compulsory allotment of 1,100 cars of oranges and 700 cars of grapefruit for interstate shipment, effective 12:01 A. M., February 4, 1952, to 12:00 P. M., February 9, 1952, and that such an allotment be prorated over the entire industry, based upon the performance of each shipper for the last three years." These attempts at compulsory proration were not very successful. In lieu thereof a so-called voluntary allotment program was adopted which is still in effect.

The Department of Agriculture made a series of studies of the Florida Citrus Industry and the operation of Mutual. Three reports were published, one in October 1950, one in May 1951, and the third in June 1952. They largely parallel each other insofar as recommendations are concerned. In the 1952 report the Department commented on the three primary features of Mutual's program, as follows:

"Information Services. For the past three seasons Mutual has operated a successful market information service. Under present conditions the association can probably make its greatest contribution by continuing to operate an accurate and complete market information service.

"Minimum pricing. Experience with other commodity programs and the past experience of Mutual indicate that Mutual should not continue to operate a minimum price program."

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"* * * The vast differences of ownership and ways of doing business made it impossible for Mutual's minimum price program to succeed. There was no effective way for grower-handlers and cooperatives to conform to the minimum price program requirements."

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"Proration (orderly distribution to the fresh fruit market). Mutual's proration program has been operated primarily on a voluntary basis. This program has been helpful in getting an orderly distribution of citrus to the fresh fruit market; however, the difficulties of developing an equitable base have made it impossible for the program to be fully successful."

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"If Mutual were a marketing agency which fully controlled the sale of almost 100 percent of the fruit, it could effectively allocate the movement of fresh fruit from the State. However, indications are that there is little likelihood that the association could become a central sales agency for all of Florida citrus." [5]

In mid-March 1952, when Mutual was convinced that its mandatory programs could not be successful, its president appointed a committee known as the Citrus Industry Planning Committee to consider and recommend to the directors a new program. At a meeting on May 21, 1952, Mutual released a report of this committee which said that a "necessary condition to maintaining a floor price is that control or ownership of the packed or processed product be in the hands of a central agency owned and controlled by growers. Since the industry is not so organized, it follows that it is not possible, under present conditions, to enforce successfully a floor price and it is misleading for the industry to try."

The Board at the same meeting adopted a new program which included the following:

"Use a voluntary allotment program, as needed, to assist in orderly movement to the fresh fruit markets.

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"Make economic studies on price and release information to the industry of the justifiable minimums for raw fruit for processing and FOB packed fresh fruit as indicated by such studies.

"Use every means possible to develop accurate market information and promptly and currently disseminate such information to growers, handlers and the trade."

For the purpose of his decision on the motion to dismiss the hearing examiner construed the pricing and proration activities of Mutual, prior to May 1952 (to the extent they were binding on both growers and handlers), as beyond the provisions of the Capper-Volstead Act and in violation of section 5 of the Federal Trade Commission Act. He held, however, that Mutual ceased all illegal activities in May 1952, six months before the complaint was issued; that such cessation was in good faith and not because of the Federal Trade Commission investigation; that there was no reasonable probability that such illegal practices would be resumed in the future because of their

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[5] The record indicates that Mutual controls about 85 percent of the Florida citrus crop but that some of its members do not always keep in step with the association's program.

economic futility and because economic compulsion had induced their abandonment. From this he concluded that the public interest did not require further prosecution of the proceeding and ordered the complaint dismissed.

Implicit in this holding is the assumption or decision by the hearing examiner that other practices challenged by counsel supporting the complaint, for example, the handler contracts and the voluntary allotment program, were legal and proper. This latter ruling seems to us to be one on the merits improperly made at this time. Before discussing this question, however, let us consider the jurisdiction or power of the examiner to hear and decide the motion to dismiss.

## I

Section 7 (b) of the Administrative Procedure Act provides that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken * * *, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issue * * *, (7) dispose of procedural requests of similar matters, (8) make decisions or recommend decisions * * *, and (9) take any other action authorized by agency rule * * *" [6]

Rule X of the Commission's Rules of Practice provides that "During the time a proceeding is pending before a trial examiner all motions * * * shall be addressed to and ruled upon by him * * *" This clearly includes motions to dismiss inasmuch as the rule goes on to state "When a motion to dismiss is granted as to all charges of the complaint in regard to one or more respondents, or is granted as to any part of such charges in regard to any or all respondents the trial examiner shall forthwith render * * * an initial decision dismissing the complaint as to such charges or such respondents."

The enumerated powers of the examiner should be liberally construed in the light of the history and intent of the Administrative Procedure Act. It was the general statutory purpose to enhance the status and role of hearing officers.[7] The Senate Report said "This subsection [7b—Hearing Powers] is designed to assure that the presiding officer will perform a real function * * * The agency itself—

[6] 5 U. S. C. 1006 (b).

[7] See Attorney General's Manual on the Administrative Procedure Act, p. 74 (1947); Final Report of Attorney General's Committee on Administrative Procedure, pp. 43–53, particularly at pp. 45–46 and 50 (1941). See also First Report of the President's Conference on Administrative Procedure, Recommendations adopted Nov. 23–24, 1953, pp. 12, 32–33.

which must ultimately either decide the case, or consider reviewing it, or hear appeals from the examiner's decision—should not in effect conduct hearings from behind the scenes where it cannot know the detailed happenings in the hearing room and does not hear or see the private parties."[8] The House Report used substantially the same language.[9]

"It was intended that the hearing examiner stand in somewhat the same relationship to the agency as does a trial judge to an appellate judge."[10]

The courts, since the passage of the act, have placed increasing reliance on the hearing examiner's initial decision. In the *Universal Camera* case, for example, the Supreme Court referred to the examiner's special competence to determine questions involving credibility of witnesses. The Court emphasized that the "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's."[11]

Under the Commission's Rules of Practice, as modified since the enactment of the Administrative Procedure Act, the hearing examiner's initial decision becomes final unless it is set aside on appeal or is reviewed by the Commission on its own motion.[12] He must of necessity therefore consider and decide all the material and justiciable issues presented by the record whether they be ones of fact, law, jurisdiction or discretion.

In short, the jurisdiction of the presiding officer, insofar as adjudicatory matters are concerned, is largely coequal with that of the Commission itself.

The real question before us then seems to be whether "public interest" is an issue to be adjudicated or whether it is a matter of administrative discretion to be decided before the complaint issues and not thereafter questioned except by the Commission acting in its administrative capacity.

Section 5 (b) of the Federal Trade Commission Act provides that "Whenever the Commission shall have reason to believe that any * * * person, partnership or corporation has been or is using any unfair

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[8] Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong., 2d Sess. 207 (1946).

[9] Ibid., p. 269.

[10] "The Status of the Trial Examiner in Administrative Agencies" Harv. L. Rev., Vol. 66, p. 1065 (1953).

[11] *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496 (1951). See also *Folds* v. *F. T. C.*, 187 F. 2d 658 (C. A. 7, 1951) and *Minneapolis-Honeywell Regulator Co.* v. *F. T. C.*, 191 F. 2d 786 (C. A. 7, 1951) cert. den. 344 U. S. 206, in which the United States Court of Appeals for the Seventh Circuit relied heavily on the hearing examiner's initial decision in reversing the Commission's decision.

[12] Rule XXII.

method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve * * * a complaint stating its charges in that respect * * *."[13]

Section 5 then goes on to provide for notice, hearing, the taking of testimony, findings, order, and review by the courts.

This would seem to make "public interest" not only an issue to be adjudicated in the same manner as any other issue but also, like interstate commerce, a jurisdictional prerequisite.[14]

It is true that the Commission's decisions have not generally dealt with "public interest" as such except in the most cursory manner. This is probably due to the fact that the phrase lacks specificity and is rather nebulous in character. But the issue is there nonetheless and is necessarily adjudicated in every case arising under section 5 of the Federal Trade Commission Act.

The Commission in the instant case has confused its administrative duties with its adjudicatory responsibilities. This, of course, is one of the grave dangers against which an administrative agency must always be on guard. In its administrative capacity the Commission ordered the issuance of the complaint because it had "reason to believe" that the statute may have been violated. But it did not thereby and must not in any case prejudge any of the issues raised by the complaint. When the Commission assumes its adjudicatory role the decision on all issues, including that of public interest, must be decided on the public record and not on information hidden in its private investigative files.[15]

It may be helpful, at the risk of repetition, to consider the question of public interest as coming to bear at two stages: (1) as justifying the issuance of a complaint, and (2) as justifying a cease and desist order. The Commission's decision to issue a complaint is, as we have indicated, a matter of administrative discretion. The Commission's decision to issue an order, on the other hand, is adjudicatory and reviewable in the courts. In considering the issue of "public interest" after complaint, the hearing examiner is looking toward the second stage. It is his duty to make a decision that will stand up before the Commission and in court. The Commission's decision to issue a complaint merely means that it is at that time, in its administrative capacity, of the opinion that the public interest requires a proceeding. It cannot mean that the Commission is of the opinion, in its adjudicatory capacity, that it is to the interest of the public to issue an order,

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[13] 15 U. S. C. 45 (b).

[14] *F. T. C.* v. *Klesner,* 280 U. S. 19 (1929).

[15] See sections 5, 7 and 8 of the Administrative Procedure Act, 5 U. S. C. 1004, 1006, 1007.

for that would be to prejudge the case and do violence to fundamental principles of administrative and constitutional law.

It is well settled that the Commission can and should dismiss a proceeding at any time when it appears there is a lack of public interest. *F. T. C.* v. *Klesner*, 280 U. S. 19 (1929). The Commission has regularly dismissed complaints on this basis.[16]

In the *Klesner* case the Court said: "The specific facts established may show, as a matter of law, that the proceeding which is authorized is not in the public interest, within the meaning of the Act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the Court should, *without enquiry into the merits*, dismiss the suit." (Italic supplied.)

In *Moretrench Corp.* v. *F. T. C.*, 127 F. 2d 792 (C. A. 2, 1942), Judge Learned Hand observed that the *Klesner* case, *supra*, "did indeed decide that the public interest in the controversy was a justiciable issue * * *."[17]

Counsel supporting the complaint urge, however, that regardless of the Commission's right in this respect, the hearing examiner has no such power.

As indicated above I believe that the jurisdiction of the hearing examiner is the same as that of the Commission insofar as adjudicatory matters are concerned. Furthermore the hearing examiner has long

[16] See, for example, *In the Matters of Wildroot Co., Inc.*, Docket 5928, June 30, 1953; *Denver Chemical Mfgr. Co.*, Docket 5755, March 25, 1954; *Metal Lath Mfgrs. Assn.*, Docket 5449, 1954.

[17] The following decisions have also cited the *Klesner* case with approval and have treated the existence of public interest in a proceeding under the Federal Trade Commission Act as a justiciable issue:

*Motion Picture Advertising Service Co. Inc.* v. *F. T. C.*, 194 F. 2d 633 (C. A. 5, 1952), *reversed on other grounds* 344 U. S. 392 (1953). *See also*, statement of Justice Frankfurter in his dissent in the same case on page 404.

*Branch* v. *F. T. C.*, 141 F. 2d 31 (C. A. 7, 1944).

*Royal Milling Co.* v. *F. T. C.*, 58 F. 2d 581 (C. A. 6, 1932), *reversed on other grounds* 288 U. S. 212 (1933).

*Flynn & Emrich Co.* v. *F. T. C.*, 52 F. 2d 836 (C. A. 4, 1931).

*F. T. C.* v. *Raladam*, 283 U. S. 643, 646 (1931).

In the *Royal Milling Co.* case *supra*, the lower court set aside the Commission's order for lack of public interest in the proceeding. This was reversed by the Supreme Court of the United States, which held that the proceeding was in the interest of the public. In its opinion the Court stated:

"To sustain the orders of the Commission, three requisites must exist: (1) that the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public." (*F. T. C.* v. *Royal Milling Co.*, 288 U. S. 212, 216 (1933).) (The second requirement was changed by the Wheeler-Lea Act to permit, as an alternative, a showing that they are "unfair or deceptive acts or practices in commerce," 52 Stat. 111 (1938).)

See also *Standard Oil Co.* v. *F. T. C.*, 282 Fed. 81 (C. A. 3, 1922), *affirmed* 261 U. S. 463 (1923).

been under a Commission directive to include in his decision a finding on the question of "public interest." The language usually employed is:

"* * * and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order." [18]

Manifestly the examiner cannot make a finding on public interest without considering the question.

Counsel supporting the complaint also question the wisdom of ruling on the "public interest" issue prior to a hearing on the merits. They suggest that public interest cannot be determined until all the facts are in the record. There is much to be said for the argument and certainly restraint should be exercised in ruling on such motions before counsel in support of the complaint have closed their case-in-chief. As I have indicated, public interest lacks specificity and cannot be directly measured; it is usually determined from all the facts and circumstances of the particular case. However, this is not to say that such motions should never be granted. In exceptional instances, like the *Klesner* case, for example,[19] the hearing examiner should by all means consider and decide the matter on a preliminary motion. This is consistent with recent decisions of the Commission, with court cases, and with the best interests of the public—which include economies resulting from early focusing on the decisive issue and speedy disposition of cases.

In the *Eastman Kodak* case the Commission broadly interpreted Rule X of its Rules of Practice and held that the hearing examiner had jurisdiction, prior to hearing the merits, to entertain a motion to dismiss because of the failure of the complaint to state a cause of action.[20]

The conclusion that "public interest" is lacking flies no more in the face of the complaint, and is no more of an attack on the Commission's prerogatives, than a conclusion that its complaint is faulty.

## II

The other question we are called upon to decide is whether the examiner, while acting within the scope of his authority, reached the right or wrong decision.

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[18] *In the Matters of Mink Traders Association, Inc., et al.,* Docket 5844, 1952; and *Associated Greeting Card Distributors of America, et al.,* Docket 5983, 1954.

[19] See *F. T. C.* v. *Klesner,* 280 U. S. 19 (1929).

[20] *In the Matter of Eastman Kodak Co.,* Docket 6040 (Sept. 25, 1953).

From the partial record now before the Commission it appears that respondents have abandoned their mandatory minimum price program and their compulsory allotment program. It seems equally clear that they have not abandoned their contracts with handlers, nor their voluntary allotment program. Counsel for respondents claim that the latter are entirely proper and within the provisions of the Capper-Volstead Act. Counsel supporting the complaint vigorously deny this. They say that the contracts, particularly the "B" contract, and the voluntary allotment program are two of the principal activities on which they rely to support the allegations of the complaint that the Federal Trade Commission Act has been violated. These conflicting positions seem to us to present issues which go to the merits of the case, and which can only be decided after regular hearings.

Under the provisions of the contracts Mutual has the power, according to the examiner, to control its handlers in various respects which would be violative of the law. The "B" contract requires a handler to sell, ship, and distribute fresh fruit according to "rules, regulations, orders and instructions" issued by Mutual. If he fails to do so he is required to pay Mutual 25¢ per box as liquidated damages.[21]

The examiner held that "The mere existence of a power * * * is not something against which the Federal Trade Commission proceeds, and the contracts go no farther than to give Mutual a power which has not been exercised, so far as the record discloses at least since May 1952."

This assumes, without adequate proof or the type of hearing required by the Administrative Procedure Act,[22] that the voluntary allotment program is entirely proper. As we have indicated, counsel supporting the complaint challenge this assumption. They refer to a newsletter of November 21, 1952, approved by Mutual's Board of Directors, which says, "It will give widespread publicity to the names of shippers who stay within the allotments and furnish these names to the officers of its Grower Councils. In that way, all grower members of Mutual can know who cooperated in this effort." They say that whether an allotment program is compulsory or voluntary is immaterial; that the issue is whether there was an agreement or combination in restraint of trade. They cite *Arkansas Wholesalers Grocers Assn., et al.* v. *Federal Trade Commission*, 18 F. 2d 866 (C. A. 8, 1927), cert. den. 275 U. S. 533, which held that a "restraint produced by peaceable

[21] Mutual claims that the "B" handlers are "marketing agents in common" within the meaning of the Capper-Volstead Act; that title does not pass to such agents but remains in the growing number. Counsel supporting the complaint deny this and point to a Mutual letter which states: "of the 186 B contracts presently effective there are 135 contracts that would be classified as independents, in other words, handlers who purchase part or all of their supplies for cash."

[22] 5 U. S. C. 1004.

persuasion is as much within the prohibition as one accomplished by force or threats of force."

Counsel supporting the complaint urge further that the operation of the voluntary allotment program and a comparison between it and the compulsory program can only be demonstrated and made in a full hearing on the merits. With this I agree.

Furthermore, the continued existence of a large number of handler contracts, which the examiner says gives Mutual the power to do wrong, is not consistent with the viewpoint that there is no likelihood of resumption of the illegal practices. Counsel for respondents claim that the handlers having "B" contracts are "marketing agents in common" specifically authorized by the Capper-Volstead Act.[23] This may or may not be the case—we don't know, and, of course, cannot decide without evidence.

In the *Wildroot* case the Commission held that where the practices had been stopped and there was no likelihood of resumption, that where everything that could be accomplished by a cease and desist order had already been accomplished by cooperative effort, the present public interest was adequately served by dismissing the complaint, without prejudice. But there was no uncertainty in that case about abandonment. The challenged practices had been stopped and the management had filed an affidavit to the effect that the company had no intention of resuming such practices. And there was "no reason to doubt respondent's . . . declaration that it has already ceased and will permanently refrain from use of the practices complained of by the Commission." [24]

In the instant case the record does not establish that all the questioned practices have been abandoned and there is no clearcut declaration by respondents against resumption. In the latter connection the hearing examiner said that the compulsory programs were abandoned because of their economic futility; that "no representations of respondent or their counsel in this respect would be as convincing or as binding as the economic compulsion which induced the abandonment." This statement overlooks, it seems to me, the fact that the price stabilization programs were relatively successful in the years 1949 and 1950, although entirely unsuccessful in 1951 and the first part of 1952.

The questions raised by the motion to dismiss, other than the jurisdiction of the hearing examiner, should not in my opinion be foreclosed. I would permit them to be renewed and reargued when the matter comes before the Commission on a full record.

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[23] See footnote 21.

[24] *In the Matter of Wildroot, Inc.*, Docket 5928, June 30, 1953.

IN THE MATTER OF

## PAUL TENNENBAUM TRADING AS TENEN QUILT COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

*Docket 6151. Complaint, Dec. 14, 1953—Decision, May 11, 1954*

Where an individual engaged in the manufacture and interstate sale and distribution of wool products as defined in the Wool Products Labeling Act—

(a) Misbranded certain of said products within the intent and meaning of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that certain quilts or comforters, labeled as containing "All New Material Consisting of ALL WOOL" or "All New Material Consisting of ALL WOOL BATTING," did not contain all new material or "All Wool"; and

(b) Misbranded certain of said products in that they were not stamped, tagged, or labeled as required under the provisions of said Act and Rules:

*Held*, That such acts and practices were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. J. Earl Cox*, hearing examiner.

*Mr. George E. Steinmetz* and *Mr. John J. McNally* for the Commission.

*Mr. Samuel Rosenthal*, of Newark, N. J., for respondent.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated May 11, 1954, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that the respondent, Paul Tennenbaum, trading as Tenen Quilt Company of 16 Main Street, Newark, New Jersey, has violated the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, and has engaged in acts and practices which constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Specifically, it is alleged in the complaint that the respondent has manufactured, offered for sale, and sold in interstate commerce certain wool products, quilts and comforters, which were falsely and deceptively labeled as containing "All New Material Consisting of ALL WOOL," or "All New Material Consisting of WOOL BATTING," when in fact the material was neither all wool nor all new.

By answer the respondent admitted the jurisdiction of the Federal Trade Commission and the other allegations of the complaint but stated that the acts of misbranding were not willful. Respondent further consented to the entry of a cease and desist order in the form set forth in the notice attached to the complaint.

Under these circumstances the facts are found to be as stated in the complaint and since willfulness is not an element of the offense charged, the conclusion is reached that the acts and practices of respondent are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Therefore,

*It is ordered*, That respondent, Paul Tennenbaum, trading as Tenen Quilt Company, or trading under any other name, and respondent's 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 quilts or comforters 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 as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers 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 products, exclusive of ornamentation not exceeding five per centum 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 is five per centum or more, and (5) the aggregate of all other fibers.

(b) The maximum percentage of the total weight of such wool products of any nonfibrous loading, filling or adulterating material.

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(c) The name or registered identification number of the manufacturer of such wool products or of one or more persons engaged in introducing such products into commerce or in offering for sale, selling, transporting, distributing, or delivering for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

*Providing*, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by Paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939.

*Providing further*, That nothing contained in this order shall be construed as limiting any applicable provision of the Wool Products Labeling Act of 1939 or the Rules and Regulations promulgated thereunder.

ORDER TO FILE REPORT OF COMPLIANCE

*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 [as required by said declaratory decision and order of May 11, 1954].

Commissioner Carretta not participating.

IN THE MATTER OF

# PHILIP MORRIS & CO., LTD., INC.

*Docket 4794. Complaint, Aug. 5, 1942. Original decision, Dec. 29, 1952, 49 F. T. C. 703. Order vacating, etc., May 19, 1954*

Charge: Advertising falsely comparative and protective qualities, etc., of Philip Morris cigarettes.

Before *Mr. Earl J. Kolb*, hearing examiner.

*Mr. Frederick J. McManus* and *Mr. Daniel J. Murphy* for the Commission.

*Lee, Toomey & Kent*, of Washington, D. C., and *Pennie, Edmonds, Morton, Barrows & Taylor* and *Conboy, Hewitt, O'Brien & Boardman*, of New York City, for respondent.

## ORDER VACATING DECISION OF THE COMMISSION AND INITIAL DECISION OF THE HEARING EXAMINER, REOPENING PROCEEDING AND REMANDING CASE TO HEARING EXAMINER

The United States Court of Appeals for the District of Columbia Circuit having granted the Commission's motion to set aside the order to cease and desist entered in this proceeding on December 29, 1952, and having remanded said proceeding to the Commission "for reconsideration and such disposition as the public interest, the facts, and the law may warrant"; and

The Commission having reconsidered its former decision, and being of the opinion that the record in support thereof did not provide an adequate basis for an informed determination of the principal issue in the case, namely, whether or not Philip Morris cigarettes are less irritating than other leading brands of cigarettes; and

The Commission being of the further opinion that the public interest requires that this deficiency in the record be corrected:

*It is ordered*, That the Commission's decision entered herein on December 29, 1952, its order ruling on the respondent's appeal from the hearing examiner's initial decision, entered on the same date, and the hearing examiner's initial decision, filed January 23, 1952, be, and they hereby are, all vacated and set aside.

*It is further ordered*, That this proceeding be, and it hereby is, reopened and remanded to the hearing examiner for the receipt of such further testimony and evidence as may be offered in support of and in opposition to the allegations of the complaint in the light of this order.

IN THE MATTER OF

# PRICE VACUUM STORES, INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6150. Complaint, Dec. 14, 1953—Decision, May 20, 1954*

Where a corporation and its officer engaged in the competitive interstate sale to the purchasing public, of vacuum cleaners and of sewing machines made in Japan, upon which machines the words "Made in Japan," displayed on an easily removable medallion on the front of said machine, were so small and indistinct as not to constitute adequate notice to the purchasing public that said machines were imported—

(a) Failed to disclose adequately the Japanese origin of their said machines, upon which they placed no other mark showing foreign origin or otherwise informing the public, before their offer or sale to the public, of said fact;

(b) Falsely represented through use of the word "Admiral" as a trade or brand name for their said sewing machines and vacuum cleaners, as conspicuously displayed on the front horizontal arm of the sewing machine head and on the tank of the cleaner, and use thereof in their advertising matter, that their products had been manufactured by or were connected in some way with a well and favorably known American firm with which said name had long been associated;

(c) Represented that they were making a bona fide offer to sell rebuilt Singer portable electric sewing machines for the sum of $29.50 and rebuilt General Electric or Hoover and Electrolux vacuum cleaners for the sums of $11.95 and $18.50 through such statements in their advertising as "Reconstructed and Electrified * * * Rebuilt SINGER. Use the Coupon!", together with a picturization of a portable electric sewing machine, and the words "Full Cash Price $29.50," and other similar statements with respect to the aforesaid various makes;

When in fact said offers were not genuine or bona fide offers, but were made to obtain leads and information as to those interested in purchasing such products, following which respondents or their salesmen called upon such persons disparaging the products advertised, attempted to sell different and more expensive machines and cleaners:

*Held*, That such acts and practices constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. John Lewis*, hearing examiner.

*Mr. Michael J. Vitale* for the Commission.

*Caesar & Rivise*, of Philadelphia, Pa., for respondents.

CONSENT SETTLEMENT[1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on December 14, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with unfair and deceptive acts and practices and unfair methods of competition in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of the law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents' consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Price Vacuum Stores, Inc., is a corporation organized and existing under and by virtue of the laws of the

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on May 20, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

State of Pennsylvania with its office and principal place of business located at 39 N. 8th Street, Philadelphia, Pennsylvania.

Respondent Jack Price, who has his business address at 39 N. 8th Street, Philadelphia, Pennsylvania, is an officer of corporate respondent. He directed and controlled the advertising, sales activities and policies of said corporate respondent with respect to the acts and practices herein set forth. Although the complaint also names Raphael Bielitsky and Isadore H. Schwartz as respondents, it appears that neither of these individuals participated in the direction or control of the corporate respondent with respect to the acts and practices herein set forth, as stated in affidavit of respondent Jack Price, President of corporate respondent. Accordingly, the Commission finds that the complaint should be dismissed as to them in their individual capacities. The term "respondents," as hereinafter used, does not include Raphael Bielitsky or Isadore H. Schwartz.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the sale of sewing machines which are made in Japan, and vacuum cleaners to the purchasing public. In the course and conduct of their business respondents cause and have caused their said products, when sold, to be transported from their place of business in the State of Pennsylvania to purchasers thereof located in various other States in the United States, and maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. When the sewing machines are sold by respondents, they are marked with a medallion placed on the front of the sewing machine upon which the words "Made in Japan" appear. These words are, however, so small and indistinct that they do not constitute adequate notice to the public that the sewing machines are imported. Furthermore, said medallion can be easily removed and when the medallion is so removed, no visible mark or origin appears on the machine.

Respondents place no other mark on the sewing machines showing foreign origin, or otherwise inform the public that the sewing machines are of foreign origin, before they are offered for sale to the public.

PAR. 4. When sewing machines or sewing machine heads are exhibited and offered for sale to the purchasing public and such products are not labeled or otherwise marked clearly showing they are of foreign origin, or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such products to be wholly or substantially of domestic origin.

There is among the members of the purchasing public a substantial number who have a decided preference for sewing machines and sewing machine heads which are manufactured in the United States over such products originating in whole or in substantial part in foreign countries.

PAR. 5. Respondents have used the word "Admiral" as a trade or brand name for their sewing machines and vacuum cleaners, which word was printed or embossed on the front horizontal arm of the sewing machine head and on the tank of the vacuum cleaner in large, conspicuous letters, and used said trade or brand name in their advertising matter. The word "Admiral" used as aforesaid by respondents is a name or part of a name of, or used as a trade name, mark or brand by one or more business organizations transacting and doing business in the United States, which are and have been well and favorably known to the purchasing public and which are and have been well and long established in various industries.

PAR. 6. By having used a trade or brand name such as "Admiral" respondents represented, directly or by implication, that their products had been manufactured by, or connected in some way with, the well and favorably known American firm or firms with which said name has long been associated, which is contrary to the fact.

PAR. 7. There is and has been a preference among members of the purchasing public for products manufactured by well and favorably known and long established concerns, as the Admiral Corporation, who have acquired the reputation of selling to the purchasing public merchandise of high quality and whose identity is connected with the word "Admiral." The use of said trade or brand name by respondents on their sewing machines and vacuum cleaners enhanced the belief on the part of the public that the said sewing machines and vacuum cleaners were products of or sponsored by the well and favorably known firm with which said name has long been associated.

PAR. 8. Respondents in their advertising make the following statements:

Reconstructed & Electrified
by Price with Price Parts

SEW & SAVE

SEE IT DEMONSTRATED IN OUR SHOWROOMS! Includes new motor, new Sew-Lite, new wiring and plugs; new multi-speed foot control. A complete sewing outfit in a carrying case

Complete with
8 Attachments

Rebuilt SINGER
Use The Coupon!

(Picturization of a portable electric sewing machine)

Full Cash Price

$29.50

Rebuilt by Price with Price Parts. Cleaning suction * * * hard to tell from a new cleaner. Use it on rugs, drapes, mattresses and all above-the-floor cleaning. Liberal Trade-in allowance.

Rebuilt GE Tank
Cleaner

(Picturization of a tank Vacuum Cleaner)

Full Cash Price

$11.95

Beautifully Rebuilt HOOVER or ELECTROLUX Fully guaranteed for the same length of time as a new cleaner, complete with attachments. Liberal Trade-in.

Beautifully Rebuilt
HOOVER or ELECTROLUX
(Picturization of a HOOVER vacuum cleaner and ELECTROLUX tank cleaner) $18.50

By and through the use of the aforementioned statements, respondents have represented, directly or by implication, that they were making a bona fide offer to sell rebuilt Singer portable electric sewing machines for the sum of $29.50 and rebuilt General Electric or Hoover and Electrolux vacuum cleaners for the sums of $11.95 and $18.50, respectively. Said offers, however, were not genuine or bona fide offers, but were made for the purpose of obtaining leads and information as to persons interested in purchasing sewing machines and vacuum cleaners. After obtaining such leads, respondents or their salesmen call upon such persons at their homes or wait upon them at respondents' place of business, and at such times and places respondents and their salesmen make no effort to sell the sewing machines and vacuum cleaners advertised but disparage the machines advertised and attempt to sell different and more expensive sewing machines and vacuum cleaners.

PAR. 9. Respondents, in the course and conduct of their business, were and are in substantial competition in commerce with other individuals and with firms and corporations engaged in the sale in commerce of sewing machines and vacuum cleaners.

PAR. 10. The failure of respondents to have had adequately disclosed on the sewing machines that they are made in Japan, and also the past use of trade or brand name "Admiral" on their sewing machines and vacuum cleaners, had the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that their said products have been manufactured by the well and favorably known firm or firms with which said trade or brand name has long been associated and to have induced members of the purchasing public to purchase sewing machines and vacuum cleaners because of said erroneous and mistaken beliefs.

Further, the use by the respondents of the other foregoing false, misleading, and deceptive statements and representations, has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such statements and representations were and are true and to induce the purchase of substantial quantities of said sewing machines and vacuum cleaners as a result of said erroneous and mistaken belief.

As a result thereof substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

## CONCLUSION

The aforesaid acts and practices, as herein found 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.

## ORDER TO CEASE AND DESIST

*It is ordered*, That the respondents Price Vacuum Stores, Inc., a corporation, and its officers, Jack Price, individually and as an office of said corporation, and respondents' representatives, agents, an employees, directly or through any corporate or other device, in cor nection with the offering for sale, sale, or distribution of sewir machines and vacuum cleaners and other merchandise, in commer as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Offering for sale, selling, or distributing foreign made sewi machines, or sewing machines of which foreign made heads ar

part without clearly and conspicuously disclosing on the heads, in such a manner that it will not be hidden or obliterated, the country of origin thereof.

2. Using the word "Admiral," or any simulation thereof, as a brand or trade name, or as part thereof, to designate, describe, or refer to their sewing machines and vacuum cleaners; or representing through the use of any other word or words, or in any other manner, that said sewing machines and vacuum cleaners are manufactured by anyone other than the actual manufacturer.

3. Representing, directly or by implication, that certain merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.

*It is further ordered*, That the complaint be, and it hereby is dismissed as to Raphael Bielitsky and Isadore H. Schwartz in their individual capacities.

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

Price Vacuum Stores, Inc.
By (Sgd) Jack Price,
*Pres.*

JACK PRICE,
(Sgd) Jack Price.

Date: April 12, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 20th day of May 1954.

IN THE MATTER OF

# HELEN WILSON DOING BUSINESS AS MAIL TODAY COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6127. Complaint, Oct. 19, 1953—Decision, June 8, 1954*

Where an individual engaged in the competitive interstate sale and distribution of perfumes, manufactured and bottled for her by a Detroit chemical concern, and of a product for the hair—

(a) Falsely represented in advertising that her said perfumes were made by manufacturers of famous perfumes who were making the offer possible to get more people acquainted with their products;

(b) Represented, as aforesaid, that they were the same in quality as perfume advertised in leading fashion magazines to sell for $35 a bottle, and that five million people had taken advantage of such offer in the past few months;

(c) Falsely represented that the offer was for a limited time only and that if any person ordering the perfume offered was dissatisfied after receiving the same, the purchase price would be refunded; notwithstanding the fact that this was not uniformly done;

(d) Made use on the labels and in the advertising of her said perfumes of such names as "Christmas Night," "Sensation," "Twilight in Paris," "Aphrodesia," "Morocco," and "Indiscretion," and thereby simulated and suggested the names of certain well and favorably known perfumes;

(e) Made use of such French names as "Bouchet," "La Velle," "Michele," "Francois," "La Farge," and "Helene," as the manufacturers or creators of her said perfumes; and

(f) Undertook, in advertising her hair preparation, to refund the purchase price to dissatisfied customers; notwithstanding the fact she did not uniformly perform such undertakings and promise:

*Held*, That such acts and practices constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. James A. Purcell*, hearing examiner.
*Mr. Ames W. Williams* for the Commission.

## DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated June 8, 1954, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 19, 1953, issued and subsequently served its complaint herein upon Helen Wilson, an individual trading under the name and style of Mail Today Company, charging her with violation of said Act. Subsequent to service of said complaint ample notice, in conformity with law, was served upon the parties pursuant to which a hearing for the taking of testimony and the reception of evidence was convened in Washington, D. C., on the 12th day of April 1954. Respondent having failed to file her answer to the complaint (pursuant to the provisions of Rule VIII of the Commission's Rules of Practice), and having failed to make appearance or to be represented at the aforesaid time and place, or in anywise having conveyed or indicated her desire or intention to contest the charges of the complaint, the provisions of Rule V (b) of the Commission's Rules of Practice prescribing procedure in event of default, become operative.

Thereafter, the proceeding regularly came on for final consideration by the above-named Hearing Examiner, theretofore duly designated by the Commission, upon said complaint and default, and said Hearing Examiner having decided that this proceeding is in the public interest and having duly considered the entire record herein, makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACT

I. Business of the Respondent

Respondent, Helen Wilson, is an individual trading as and under the name of Mail Today Company, having her principal place of business at No. 6507 Rosemont Avenue, Detroit, Michigan.

Respondent sells perfumes of divers types and aromas designated by various names, as also a product used for application to the hair and designated "W. W. Hair Preparation," to purchasers located in various States of the United States other than Michigan, and during the period of time involved herein has regularly caused said products, when sold, to be shipped from her place of business in the State of Michigan to these purchasers, thus engaging in interstate commerce. Respondent is now, and during the period of time involved herein, has been in substantial competition with others engaged in the sale of perfumes and hair preparations.

## II. The Products and False Representations of Same

The complaint charges numerous false statements and representations concerning respondent's products which are perfumes and a hair preparation, and sets forth specifically certain of respondent's advertising by means of radio continuities, leaflets and by other means. The gravamen of the charges concerning false representations in connection with the sale of perfumes are: 1.) That they are made by manufacturers of famous perfumes; 2.) are the same quality as those advertised in leading fashion magazines; 3.) are the same quality as perfumes advertised at $35.00 per bottle; 4.) have been sold to a larger number of consumers than is the truth and fact; 5.) that the offer is for a limited time; 6.) that the full purchase price will be refunded to dissatisfied customers; 7.) the use of simulated foreign names of manufacturers indicating French origin of manufacture without disclosing domestic origin, and; 8.) use of simulated trade names to mislead the public and thus promote sales.

The charge concerning the hair product, "W. W. Hair Preparation," is that, contrary to direct representation and promise, respondent did not, uniformly, refund the full purchase price thereof to dissatisfied customers.

## III. The Advertising

Most Amazing Perfume Offer Ever Made
Full Bottles of Fragrances of Your Choice
This Beautiful Custom Case Contains 3
For Only $2.50

Rhodesia by Le Bourget
Indiscretion by Carlisle
Christmas Eve by Caro
Morocco by La Velle
Star of India by Bouchet
LaTosca by Romero
Ceylon by Michele
Twilight in Paris by Helene
Stacatto by Francois
Sensation by Correlli
Odessey by La Farge

* * * * * * *

These are the same quality of genuine perfumes that you've seen in Seventeen, Vogue, Charm, Madamoiselle, Harper's Bazaar and all other leading fashion magazines advertised to sell for as much as $35.00 a bottle.

The manufacturers of these famous perfumes want to acquaint you with their product. This bargain offer is sent to you so that you can try each one and then decide which best suits your personality.

Five million people from Maine to California in the past few months have taken advantage of the greatest perfume offer ever made.

For a limited time only * * *.

Nationally advertised perfumes and the amount given is 6 to 9 months' supply and if not satisfied the money will be refunded.

## IV. Meaning of the Advertising Generally

The foregoing advertisements are found to directly or impliedly represent that the perfumes offered for sale were made by manufacturers of famous perfumes who were making this offer possible to get more people acquainted with their products; that the perfumes offered were the same quality perfumes advertised in leading fashion magazines to sell for $35.00 a bottle; that 5 million people had taken advantage of this offer in the past few months; that the offer was for a limited time only; and that if any person ordering the perfumes offered was dissatisfied after receiving the products, the purchase price would be refunded.

## V. Use of Simulated Names of Perfumes

Among perfumes on the American market which are well and favorably known to, and preferred by, a substantial portion of the purchasing public are those bearing the names "Christmas Night," "Intoxication," "Evening in Paris," "Aphrodesia," "Sirocco" and "Indiscrete." Respondent has selected names for her perfumes which she uses on the labels and in advertising simulating or suggesting the above-named well-known perfumes. Among such names are "Christmas Eve," which simulates and suggests "Christmas Night"; "Sensation," which simulates and suggests "Intoxication"; "Twilight in Paris," which simulates and suggests "Evening in Paris"; "Rhodesia," which simulates and suggests "Aphrodesia"; "Morocco," which simulates and suggests "Sirocco," and "Indiscretion," which simulates and suggests "Indiscrete." The use of said names by respondent for her perfumes and in advertising has the capacity and tendency to cause purchasers and prospective purchasers to believe, contrary to the fact, that respondent is selling and offering for sale perfumes compounded by other manufacturers and which are well and favorably known to, and preferred by, a substantial portion of the purchasing public.

## VI. Use of Simulated Names of Manufacturers Falsely Implying and Indicating that Perfumes are of French Origin

The use by the respondent of French names such as Bouchet, La Velle, Michele, Francois, La Farge, and Helene, as the manufacturers or creators of her perfumes has the tendency and capacity to mislead the purchasing public into the belief that they are of French origin. For many years perfumes manufactured by or created by the French have enjoyed widespread popularity and demand among the members of the purchasing public, many of whom believe and consider that such perfumes are superior to perfumes manufactured or created by others.[1] As a fact, all of respondent's perfumes are manufactured and bottled for the respondent by a chemical concern located in the city of Detroit, Michigan.

### VII. Respecting the Hair Preparation

Respondent, through her advertisements furthering sale of the hair product designated "W. W. Hair Preparation," represented and undertook to refund to dissatisfied customers purchasing same the purchase price paid therefor. This undertaking and promise respondent has not uniformly performed.

### VIII. Findings Representing the Diverse Representations

(a) Respondent's perfumes are not the same in quality as the perfumes advertised in leading fashion magazines to sell for $35.00 per bottle.

(b) Respondent has not sold her products to five million people, nor have such a number taken advantage of respondent's offer within the "last few months."

(c) Respondent's offer was not for a limited time only but extended over the entire period of her engagement in this enterprise.

(d) Respondent has not uniformly made refunds of the purchase price to dissatisfied customers.

## CONCLUSIONS

On the basis of above findings of fact it is concluded that respondent has been guilty of the use of false, deceptive, and misleading representations and that the advertisements and brand names used for her perfumes has the capacity and tendency to mislead and deceive a substantial portion of the public into the erroneous belief that such were genuine and true, and as a result thereof to purchase substantial quantities of respondent's products in commerce, thus resulting in injury to the public as also unfair divergence of substantial trade in commerce from her competitors, with consequent injury to competition in commerce.

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[1] *Fioret Sales Co.* v. *F. T. C.*, 100 F. 2d 358 and cases therein cited, S. & D. (1930–1938)—481.

## CONCLUSION OF LAW

The acts and practices of respondent, as herein found are all to the prejudice and injury of the public and of respondent's 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.

## ORDER

*It is ordered*, That the respondent, Helen Wilson, an individual doing business under the name of Mail Today Company or under any other name, her agents, representatives 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 perfumes, hair preparations, or any other similar products, do forthwith cease and desist from:

1. Representing, directly or by implication, that the perfumes offered for sale

(a) are made by the manufacturers of famous perfumes;

(b) are the same quality perfumes as those advertised in leading fashion magazines;

(c) are the same quality perfumes advertised to sell for $35 per bottle or for any other particular designated price, contrary to the fact.

2. Representing that 5 million people have purchased perfumes from respondent or that any of respondent's products have been sold to any number of purchasers in excess of the number which, in fact, have purchased respondent's product.

3. Representing directly or by implication:

(a) That any offer is for a limited time only, when such offer is not in fact limited in point of time, but is made by respondent in the regular course of business;

(b) That the purchase price of products sold by respondent will be refunded to dissatisfied customers when in fact respondent does not in all instances refund the purchase price;

4. Using the words Bouchet, La Velle, Michele, Francois, La Farge or Helene, or any other words indicating French origin or manufacture of perfume, without clearly and conspicuously stating in immediate connection and conjunction therewith that such products originated and are compounded in the United States.

5. Using the names "Christmas Eve," "Sensation," "Twilight in Paris," "Rhodesia," "Morocco," or "Indiscretion" as trade names for

her perfumes; or using or simulating the trade names of any other product.

ORDER TO FILE REPORT OF COMPLIANCE

*It is ordered*, That the respondent herein shall within sixty (60) days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with the order to cease and desist [as required by said declaratory decision and order of June 8, 1954].

403443—57——64

IN THE MATTER OF

# AERATION PROCESSES, INC., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE CLAYTON ACT, AS AMENDED

*Docket 6152. Complaint, Dec. 18, 1953—Decision, June 10, 1954*

Where a corporation engaged in the competitive interstate sale and distribution throughout the United States of the aerated food products "Instantwhip" and "Instantwhip Topping" through some 48 licensees, whom it supplied with containers, processing machinery and equipment, and to whom it sold vanilla and nitrous oxide, and who processed said materials, together with others locally procured into the finished food products "Instantwhip" and "Instantwhip Topping" for sale to drug stores, soda fountains, etc.; four licensees of said corporation, engaged, under its direction and control, in processing and selling said food products in and around the four cities of Worcester, Mass., Providence, R. I., Baltimore, Md., and Bridgeport, Conn.; and seven officers or directors of said corporate licensor, and two of whom were officers also of said four corporate licensees; engaged in their various capacities in the competitive interstate sale and distribution of such products and acting in cooperation with each other—

(a) Discriminated in price between different purchasers of such food products of like grade and quality by selling said products to some of their customers at higher prices than to others in that said corporate licensor and corporate respondent licensee, Instantwhip-Worcester, Inc., acting by and through their individual respondent officers—

(1) Following the adoption on May 1, 1950, of a cumulative monthly discount schedule applicable to all customers in the entire territory of said corporate licensee, and the adoption on January 1, 1951, of a less favorable discount schedule applicable to customers therein, failed to put into effect in Springfield, Mass., and surrounding territory said Jan. 1, 1951, schedule, but kept in effect the former and lower May 1, 1950, discount schedule; and

(2) Following the adoption on Jan. 14, 1952, of a less favorable discount schedule applicable to customers located in said licensee's territory, failed to put into effect in Springfield and surrounding territory said schedule, but adopted instead a lower discount schedule;

(b) Discriminated in price as aforesaid in that said corporate licensor and corporate respondent licensee Instantwhip-Providence, Inc., acting by and through their individual respondent officers—

(1) Following the adoption on May 1, 1950, of a cumulative monthly discount schedule applicable to all customers in the entire territory of said Instantwhip, including a "single stop", individual customer schedule and a "multiple stop" schedule applicable to two or more individual customers on the basis of their cumulative purchases under the "multiple stop" schedule, failed to put into effect in the State of Connecticut the "multiple stop" portion of aforesaid discount schedule, but sold to customers in said State solely on the basis of the more favorable "single stop" portion of the schedule in question; and

(2) Following the adoption on Jan. 1, 1951, of a less favorable cumulative monthly volume discount or schedule of prices applicable to customers located within the territory of said "Instantwhip-Providence," failed to put into effect said schedule in said State, but continued to sell to customers located therein pursuant to the old and lower May 1, 1950, "single stop" schedule of prices, and did not alter or affect the character or extent of said discriminations through increasing the Jan. 1, 1951, discount schedule by one cent, while similarly increasing their May 1, 1950, "single stop" schedule by a like amount;

(c) Discriminated in price as aforesaid in that said corporate licensor and licensee Instantwhip-Baltimore, Inc., acting by and through their individual respondent officers, while selling, during 1952, their 30% butterfat aerated food products pursuant to a cumulative monthly discount schedule to customers in said licensee's entire territory, failed to put into effect in Washington, D. C., said schedule, but instead, through a branch office, sold to its said Washington customers pursuant to a different and more favorable one; and

(d) Discriminated in price as aforesaid in that said corporate licensor and corporate licensee Instantwhip-Bridgeport, Inc., acting by and through their individual respondent officers—

(1) Following the establishment, on May 1, 1950, of a cumulative monthly volume discount schedule applicable to all customers in the entire area of said corporate licensee, proceeded to establish higher schedules of monthly volume discounts through the New England area during the years 1951 and 1952 than the aforesaid discount schedule; and

(2) Following the adoption, on Jan. 1, 1951, of a cumulative monthly discount schedule of prices which were applicable to customers located within the territory of said corporate licensee and which were less favorable than said May 1, 1950, schedule, and were increased on Feb. 11, 1952, by one cent as to each and every price bracket therein contained, continued in force and effect, as to all purchasers located in the territory of said corporate licensee, the old original cumulative monthly discount schedule established on May 1, 1950;

With the result that many retail outlets, by reason of aforesaid discriminatory prices by respondents, discontinued the purchase of such aerated food products from respondents' competitors, either in whole or in part:

*Held*, That such discriminations in price, under the circumstances set forth, constituted a violation of the provisions of Subsection (a) of Section 2 of the Clayton Act, as amended.

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

*Mr. William C. Kern* and *Mr. Andrew C. Goodhope* for the Commission.

*Mr. John A. Eckler*, of Columbus, Ohio, for respondents.

## CONSENT SETTLEMENT [1]

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton

[1] See footnote on following page.

Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission, on December 18, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with violation of subsection (a) of Section 2 of said Clayton Act, as amended.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purposes of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

## FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Aeration Processes, Inc., is a corporation organized and existing under the laws of the State of Ohio with its principal office and place of business located at 869 McKinley Avenue, Columbus, Ohio.

Respondent Instantwhip-Bridgeport, Inc., is a corporation organized and existing under the laws of the State of Delaware and has its

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on June 10, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

principal office and place of business at 278 East Main Street, Bridgeport, Connecticut.

Respondent Instantwhip-Providence, Inc., is a corporation organized and existing under the laws of the State of Rhode Island and has its principal office and place of business located at 881 Charles Street, North Providence, Rhode Island.

Respondent Instantwhip-Worcester, Inc., is a corporation organized and existing under the laws of the State of Massachusetts and has its principal office and place of business at 1068 West Boylston Street, Worcester, Massachusetts.

Respondent Instantwhip-Baltimore, Inc., is a corporation organized and existing under the laws of the State of Maryland and has its principal office and place of business at 420 West 24th Street, Baltimore, Maryland.

Respondent G. Frederick Smith is an individual and is president of respondent Aeration Processes, Inc.

Respondent Allyne H. Smith is an individual and is vice president and treasurer of respondent Aeration Processes, Inc.; he is also the president of respondents Instantwhip-Bridgeport, Inc., Instantwhip-Providence, Inc., Instantwhip-Worcester, Inc., and Instantwhip-Baltimore, Inc.

Respondent John Elmer Jones, Sr., is an individual and is vice president and secretary of respondent Aeration Processes, Inc.; he is also the secretary of corporate respondents Instantwhip-Bridgeport, Inc., Instantwhip-Providence, Inc., Instantwhip-Worcester, Inc., and Instantwhip-Baltimore, Inc.

Respondent John Elmer Jones, Jr., is an individual and director of corporate respondent Aeration Processes, Inc.

Respondent Ernest R. Oldham is an individual and director of corporate respondent Aeration Processes, Inc.

Respondent R. A. Grieve is an individual and director of corporate respondent Aeration Processes, Inc.

Respondent S. S. Oldham is an individual and director of corporate respondent Aeration Processes, Inc.

PAR. 2. Corporate respondent Aeration Processes, Inc., is a closely held corporation whose principal officers are respondents G. Frederick Smith, President, Allyne H. Smith, Vice President-Treasurer, and John Elmer Jones, Sr., Vice President-Secretary. All of the individual respondents named in these findings direct and control the sales policies and business activities of the corporate respondents with which they are connected in the capacities described in Paragraph 1 and all of said respondents act together and in cooperation with each other in doing the acts and practices hereinafter found.

PAR. 3. All of said respondents are now, and for many years last past have been, engaged in the sale and distribution throughout the United States of aerated food products under the trade name "Instantwhip" and Instantwhip Topping." Corporate respondent Aeration Processes, Inc., supplies its various licensees, hereinafter more fully described, with containers, vanilla, nitrous oxide, processing machinery and equipment and replacements parts therefor with which such licensees process the said food products. The containers and processing equipment remain the property of Aeration Processes, Inc., even though they are in possession of respondents' licensees, and vanilla and nitrous oxide are sold by Aeration Processes, Inc., to its various licensees. Said licensees generally procure cream mix, vegetable fats and sweetening materials from local sources and together with the said products procured from Aeration Processes, Inc., process same with the processing machinery and equipment similarly obtained into the said finished food products "Instantwhip" and "Instantwhip Topping."

PAR. 4. Respondent Aeration Processes, Inc., has a written license agreement with approximately 48 licensees (hereinafter sometimes referred to as "points"). Pursuant to these agreements, respondents' licensees are permitted to process and sell "Instantwhip" and "Instantwhip Topping" and pay respondent Aeration Processes, Inc., a royalty on each container of such products sold. The licensees sell these filled containers to drug stores, clubs, soda fountains, restaurants, and other similar retail establishments for use on various food products, such as pies, sundaes and other like products.

Respondents Instantwhip-Bridgeport, Inc., Instantwhip-Providence, Inc., Instantwhip-Worcester, Inc., and Instantwhip-Baltimore, Inc., are all corporations that are licensees of respondent Aeration Processes, Inc., and process and sell aerated food products pursuant to a written license agreement which each has with respondent Aeration Processes, Inc. These various corporations sell in and around the various cities whose names are a part of the corporate title of each.

PAR. 5. Corporate respondent Aeration Processes, Inc., acting under the direction of the individual respondents above named who are officials of said corporate respondent, directs and controls the operations, including pricing practices and other policies, of all the other corporate respondents named in these findings with whom said corporate respondent Aeration Processes, Inc., has entered into license agreements.

PAR. 6. All respondents, whether individuals or corporations, are engaged in the various capacities hereinabove described in the business of distributing aerated food products in commerce throughout the United States or are officials, directors, or stockholders in corporations so engaged. In the course and conduct of their business, the respondents have sold and shipped, and do now sell and ship, the products hereinbefore described in commerce between and among the various States of the United States from the States in which their respective factories or processing plants are located to purchasers thereof located in other States of the United States and the District of Columbia, within the intent and meaning of the word "commerce" as used in said Clayton Act, as amended. There is, and has been at all times herein mentioned, a continuous current of trade in commerce in said products across State lines between respondents and purchasers of respondents' products. Said products are sold and distributed for use, consumption, and resale within the various States of the United States and the District of Columbia.

PAR. 7. In the course and conduct of their business, as aforesaid, the respondents have been and are now engaged in competition in commerce with other persons, corporations, and firms likewise engaged in the business of processing and selling aerated food products between and among the various States of the United States and in the District of Columbia.

PAR. 8. The respondents, in the course and conduct of their business, as hereinabove set forth, have been and now are discriminating in price between different purchasers of aerated food products of like grade and quality by selling said products to some of their customers at higher prices than to other of their customers.

PAR. 9. The discriminations in price referred to in Paragraph 8 hereof have been and now are effective in the northeastern area of the United States and are more particularly described as follows:

1. (a) Corporate respondent Aeration Processes, Inc., and corporate respondent Instantwhip-Worcester, Inc., acting by and through their said individual respondent officials above named, on May 1, 1950, adopted the following cumulative monthly discount schedule applicable to all customers in the entire territory of said corporate respondent Instantwhip-Worcester, Inc.:

| *Single Stop* | | *Multiple Stop* | |
|---|---|---|---|
| *Containers* | *Price* | *Containers* | *Price* |
| 1–49 | 35¢ | 1–299 | 35¢ |
| 50–99 | 33¢ | 300–499 | 31¢ |
| 100–149 | 31¢ | 500–999 | 29¢ |
| 150–199 | 30¢ | 1000–up | 27¢ |
| 200–299 | 29¢ | | |
| 300–up | 27¢ | | |

(In all instances where used in these findings, the term "single stop" customers refers to an individual customer whose volume discount was given on the basis of the purchases made by that individual customer during a monthly period. "Multiple stop" refers to two or more individual customers whose cumulative purchases form the basis for granting the monthly discount under the multiple stop quantity discount schedule applicable.) Moreover, on January 1, 1951, said respondents, with the exception later described, adopted the following cumulative monthly discount schedule applicable to customers located in said territory of the corporate respondent Instantwhip-Worcester, Inc.:

| *Single Stop* | | *Multiple Stop* | |
|---|---|---|---|
| *Containers* | *Price* | *Containers* | *Price* |
| 1–100 | 35¢ | 1–300 | 35¢ |
| 101–200 | 33¢ | 301–400 | 33¢ |
| 201–300 | 32¢ | 401–500 | 32¢ |
| 301–up | 31¢ | 501–800 | 31¢ |

However, said discount schedule of January 1, 1951, was not put into effect in Springfield, Massachusetts, and surrounding territory by said respondents but instead the former and lower May 1, 1950, discount schedule was kept in effect by said respondents in said Springfield territory.

(b) Said respondents on January 14, 1952, adopted, with the exception later described, the following cumulative monthly discount schedule applicable to all customers located in the territory of said corporate respondent Instantwhip-Worcester, Inc.:

| *Containers* | *Price* |
|---|---|
| 1–100 | 37¢ |
| 101–200 | 35¢ |
| 201–300 | 34¢ |
| 301–up | 33¢ |

However, said discount schedule was not put into effect in Springfield, Massachusetts, and surrounding territory, but rather the following lower cumulative monthly discount schedule was adopted by said respondents for said territory:

| *Containers* | *Price* |
|---|---|
| 1–49 | 37¢ |
| 50–99 | 34¢ |
| 100–149 | 32¢ |
| 150–199 | 31¢ |
| 200–299 | 29¢ |
| 300–up | 27¢ |

2. (a) Corporate respondent Aeration Processes, Inc., and corporate respondent Instantwhip-Providence, Inc., acting by and through their said individual respondent officials above named, on May 1, 1950,

adopted, with the exception later described, the following cumulative monthly discounts schedule applicable to all customers in the entire territory of said corporate respondent Instantwhip-Providence, Inc.:

| *Single Stop* Containers | Price | *Multiple Stop* Containers | Price |
|---|---|---|---|
| 1–49 | 35¢ | 1–299 | 35¢ |
| 50–99 | 33¢ | 300–499 | 31¢ |
| 100–149 | 31¢ | 500–999 | 29¢ |
| 150–199 | 30¢ | 1000–up | 28¢ |
| 200–299 | 29¢ | | |
| 300–up | 28¢ | | |

However, said respondents did not put into effect the multiple stop portion of said discount schedule above described in the State of Connecticut but sold to customers in the State of Connecticut solely on the basis of the single stop portion of said discount schedule above described.

(b) Furthermore, on January 1, 1951, said respondents adopted, with the exception below noted, the following cumulative monthly volume discount schedule of prices applicable to customers located within the said territory of corporate respondent Instantwhip-Providence, Inc.:

| *Single Stop* Containers | Price | *Multiple Stop* Containers | Price |
|---|---|---|---|
| 1–100 | 35¢ | 1–300 | 35¢ |
| 101–200 | 33¢ | 301–400 | 33¢ |
| 201–300 | 32¢ | 401–500 | 32¢ |
| 301–up | 31¢ | 501–up | 31¢ |

However, said discount schedule was not put into effect by said respondents in the State of Connecticut and said respondents continued to sell to customers located in Connecticut pursuant to the old and lower May 1, 1950, single stop schedule of discounts.

Although on February 11, 1952, said respondents increased their January 1, 1951, discount schedule by 1¢ and their old May 1, 1950, single stop schedule by 1¢, this did not in any way alter or effect the character and extent of the discriminations in price above described, which continued in full force and effect.

3. Corporate respondent Aeration Processes, Inc., and corporate respondent Instantwhip-Baltimore, Inc., acting by and through their said individual respondent officials above named, during the year 1952 sold their 30% butterfat aerated food products, with the exception later described, pursuant to the following cumulative monthly discount schedule to all customers in the entire territory of said corporate respondent, Instantwhip-Baltimore, Inc.:

| *Single Stop* | | *Multiple Stop* | |
|---|---|---|---|
| *Containers* | *Discount* | *Containers* | *Discount* |
| 1–50 | 45¢ (base price) | 0–300 | 45¢ (base price) |
| 51–100 | 7½% | 300–400 | 7½% |
| 101–200 | 12½% | 401–500 | 12½% |
| 200–300 | 15% | 500 up | 15% |

However, said discount schedule during said period was not put into effect in Washington, D. C., but rather said respondents, through a branch office of said corporate respondent Instantwhip-Baltimore, Inc., sold to its customers in Washington, D. C., pursuant to the following cumulative monthly discount schedule:

| *Single Stop* | | *Multiple Stop* | |
|---|---|---|---|
| *Containers* | *Discount* | *Containers* | *Discount* |
| 1–50 | 40¢ (base price) | 0–300 | 40¢ (base price) |
| 51–100 | 7½% | 300–400 | 7½% |
| 101–200 | 12½% | 400–500 | 12½% |
| 201–300 | 15% | 500 up | 20% |
| 301 up | 20% | | |

4. Corporate respondent Aeration Processes, Inc., and corporate respondent Instantwhip-Bridgeport, Inc., acting by and through their said individual respondent officials above named, established on May 1, 1950, a cumulative monthly volume discount schedule applicable to all customers in the entire area of said corporate respondent Instantwhip-Bridgeport, Inc., as follows:

| *Containers* | *Price* | *Containers* | *Price* |
|---|---|---|---|
| 1–49 | 35¢ | 150–199 | 30¢ |
| 50–99 | 33¢ | 200–299 | 29¢ |
| 100–149 | 31¢ | 300 up | 27¢ |

Corporate respondent Aeration Processes, Inc., acting by and through its individual respondent officials and by and through the other corporate respondents and their individual respondent officials herein named as respondents, other than corporate respondent Instantwhip-Bridgeport, Inc., proceeded to establish higher schedules of monthly volume discounts throughout the New England area during the years 1951 and 1952 than the said discount schedule of corporate respondent Instantwhip-Bridgeport, Inc. For example, as above found, corporate respondent Aeration Processes, Inc., and corporate respondent Instantwhip-Worcester, Inc., acting by and through their said individual respondent officials above named adopted on January 14, 1952, the following cumulative discount schedule applicable to all customers located in the territory of said corporate respondent Instantwhip-Worcester, Inc.:

| Containers | Price |
|---|---|
| 1–100 | 37¢ |
| 101–200 | 35¢ |
| 201–300 | 34¢ |
| 301–up | 33¢ |

Likewise, on January 1, 1951, as hereinabove found, corporate respondent Aeration Processes, Inc., and corporate respondent Instantwhip-Providence, Inc., acting by and through their said individual respondent officials above named, adopted the following cumulative monthly discount schedule of prices applicable to customers located within the said territory of said corporate respondent Instantwhip-Providence, Inc.:

| *Single Stop* | | *Multiple Stop* | |
|---|---|---|---|
| *Containers* | *Price* | *Containers* | *Price* |
| 1–100 | 35¢ | 1–300 | 35¢ |
| 101–200 | 33¢ | 301–400 | 33¢ |
| 201–300 | 32¢ | 401–500 | 32¢ |
| 301–up | 31¢ | 501–up | 31¢ |

Moreover, on February 11, 1952, as hereinabove found, said respondents increased said January 1, 1951, discount schedule by 1¢ as to each and every price bracket contained in said cumulative monthly discount schedule.

However, corporate respondent Aeration Processes, Inc., and corporate respondent Instantwhip–Bridgeport, Inc., by and through their said individual respondent officials, continued in force and effect as to all purchasers located in the territory of corporate respondent Instantwhip-Bridgeport, Inc., the old original cumulative monthly volume discount schedule established on May 1, 1950.

PAR. 10. As a result of the discriminatory prices of respondents in the sale of aerated food products, as found in Paragraph 9 hereof, and by reason of respondents' said discriminatory prices, many retail outlets discontinued the purchase of aerated food products from respondents' competitors, either in whole or in part.

The effect of the discriminations in price made by the respondents in the sale of aerated food products as set forth in Paragraph 9 hereof may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondents are engaged and to injure, destroy, or prevent competition between respondents and their competitors.

## CONCLUSION

The aforesaid discriminations in price by the respondents, as found in Paragraph 9 hereof and having the effects and tendencies as found in Paragraph 10 hereof constitute a violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

## ORDER TO CEASE AND DESIST

*It is ordered*, That each of the respondents Aeration Processes, Inc., a corporation, Instantwhip-Bridgeport, Inc., a corporation, Instantwhip-Providence, Inc., a corporation, Instantwhip-Worcester, Inc., a corporation, Instantwhip-Baltimore, Inc., a corporation, and their respective officers, and G. Frederick Smith, Allyne H. Smith, John Elmer Jones, Sr., John Elmer Jones, Jr., Ernest R. Oldham, R. A. Grieve, and S. S. Oldham, individually, and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in the sale of aerated food products in commerce, as "commerce" is defined in the said Clayton Act, do forthwith cease and desist from discriminating in price by selling said aerated food products of like grade and quality to any purchaser at prices lower than those charged other purchasers when the respondents or any of them is in competition with any other seller in the sale of such products.

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

Aeration Processes, Inc.
By (Sgd) John Elmer Jones, Sr.
*Secretary.*

Date: Feb. 19, 1954.

Instantwhip-Bridgeport, Inc.
By (Sgd) John Elmer Jones, Sr.
*Secretary.*

Date: Feb. 19, 1954.

Instantwhip-Providence, Inc.
By (Sgd) John Elmer Jones, Sr.
*Secretary.*

Date: Feb. 19, 1954.

Instantwhip-Worcester, Inc.
By (Sgd) John Elmer Jones, Sr.
*Secretary.*

Date: Feb. 19, 1954.

Instantwhip-Baltimore, Inc.
By (Sgd) John Elmer Jones, Sr.

Date: Feb. 19, 1954.

(Sgd) G. Frederick Smith
G. FREDERICK SMITH

Date: March 20, 1954.

(Sgd) Allyne H. Smith
ALLYNE H. SMITH

Date: Feb. 19, 1954.

(Sgd) John Elmer Jones, Sr.
JOHN ELMER JONES, SR.

Date: Feb. 19, 1954.

(Sgd) John Elmer Jones, Jr.
JOHN ELMER JONES, JR.

Date: Feb. 25, 1954.

(Sgd) Ernest R. Oldham
ERNEST R. OLDHAM

Date: March 15, 1954.

(Sgd) R. A. Grieve
R. A. GRIEVE

Date: March 8, 1954.

(Sgd) S. S. Oldham
S. S. OLDHAM

Date: March 6, 1954.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 10th day of June 1954.

IN THE MATTER OF

# DR. POSNER SHOE CO., INC., FORMERLY KNOWN AS DR. A. POSNER SHOES, INC.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6003. Complaint, June 19, 1952—Decision, June 15, 1954*

Where a corporation engaged in the manufacture and interstate sale and distribution to dealers and the public generally, of its "Dr. Posner's Muscle Builder Shoe", "Dr. Posner's Scientific Shoe", and "Dr. Posner's Ritestart Shoe"; through statements on labels on its shoe boxes and in advertisements in magazines and in folders and circulars—

(a) Represented falsely that its said "Scientific Shoes" would give correct body balance, perfect posture, better foot and bodily health, and correct walking position and assure the growth of straight feet;

(b) Represented falsely that its "Muscle Builder Shoes" would prevent pronation, help build muscles, and keep feet healthy;

(c) Represented falsely that its "Ritestart Shoes" would help give proper posture and correct body balance and assure foot health for children;

(d) Represented falsely that its said shoes were "health shoes" and as such would prevent and cure abnormalities and disorders of the feet; and

(e) Represented falsely that use thereof would have a beneficial effect on the condition known as "weak foot", i. e., as used by it in its advertising and literature:

*Held*, That such representations were false, deceptive, and misleading, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Earl J. Kolb*, hearing examiner.
*Mr. Ames W. Williams*, for the Commission.
*Mr. Maurice Knapp*, of New York City, for respondent.

## DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated June 15, 1954, the initial decision in the instant matter of hearing examiner Earl J. Kolb, as set out as follows, became on that date the decision of the Commission.

## INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned Hearing Examiner for final consideration on the complaint, answer thereto and a stipulation as to the facts, in lieu of testimony, which was entered upon the record herein, whereby it was stipulated that the Hearing Examiner may proceed upon the basis of such stipulation of facts to make his initial decision upon such facts without the filing of proposed findings and conclusions or the presentation of oral arguments by counsel.

### FINDINGS AS TO THE FACTS

1. Respondent, Dr. Posner Shoe Co., Inc., formerly known as Dr. A. Posner Shoes, Inc., is a corporation organized under the laws of the State of New York with its principal place of business located at 101 West 31st Street, New York, New York.

2. For several years last past, the respondent has been engaged in the manufacture and in the sale and distribution in interstate commerce of shoes designated as "Dr. Posner's Muscle Builder Shoe", "Dr. Posner's Scientific Shoe" and "Dr. Posner's Ritestart Shoe." Respondent sells said shoes to dealers and the public generally and its volume of business in the sale of said shoes in such commerce is and has been substantial. In addition, respondent also manufactures certain other shoes known as "Dr. Posner's Anti-pigeontoe Shoe", "Dr. Posner's Prewalker Clubfoot Shoe" and "Dr. Posner's Muscle Builder No. 2 Anti-Pronation Shoe" which it claims to distribute upon prescription by physicians and orthopedic specialists. These latter shoes were not included in the complaint and are not a part of this proceeding.

3. In the course and conduct of its business and for the purpose of inducing the purchase of its said shoes, respondent has made certain statements and representations to the public generally concerning the nature and usefulness of said shoes by means of labels on its shoe boxes, advertisements inserted in magazines of general circulation, and in folders and in circulars. By means of these statements and representations, the respondent has represented, directly and by implication—

(a) That respondent's shoes known as Dr. Posner's Scientific Shoes will give correct body balance, perfect posture, better foot and bodily health, and correct walking position and assure the growth of straight feet.

(b) That respondent's shoes known as Dr. Posner's Muscle Builder Shoes will prevent pronation, build muscles and keep feet healthy.

(c) That respondent's shoes known as Dr. Posner's Ritestart Shoes will help give proper posture and correct body balance and assure foot health for children.

(d) That respondent's said shoes are health shoes and as such will prevent and cure abnormalities and disorders of the feet.

(e) That the use of respondent's said shoes will have a beneficial effect on the condition known as "weak foot" which term has been used by the respondent in its advertising and literature as being synonymous with pronation.

4. Respondent's Dr. Posner's Muscle Builder Shoe contains a built-in wedging on the inner border of the heel and Dr. Posner's Scientific Shoes are constructed in such a manner as to effect a wedge by the insertion of a cork filling on the inner border of the shoe. These devices, incorporated in said shoes, if prescribed by physicians and orthopedic specialists are recognized as capable of performing the same function as wedges inserted at the direction of physicians and orthopedic specialists. Consequently, said shoes contain features which may tend to aid in preventing the persistence of pronation or in alleviating the symptoms of mild pronation.

5. Most children's feet in the early stages of life are in the position of pronation, and such condition may or may not be accompanied by systemic disease and may or may not be symptomatic. In the absence of congenital abnormality, some disease or other interference, the pronation usually disappears as the child develops. One of the recognized medical procedures intended to prevent the persistence of mild pronation exhibited in early childhood is the use of the wedge in the inner border of the child's shoe; the thickness of the wedge varying with the individual requirements of the child, but usually about ⅛th of an inch thick in the beginning. Such a wedge is intended to temporarily tilt the heel bone or os calcis and improve its relationship to the forefoot in cases of mild pronation and when such a measure is individually indicated may have value in the proper development of a child's feet. While said wedge tends to prevent the persistence of pronation in children's feet, it cannot be held as a medical fact and with certainty that wedging will accomplish such a result.

6. Respondent's shoe, designated Dr. Posner's Muscle Builder Shoe, does not build muscle. The use of respondent's aforesaid shoes, including Dr. Posner's Ritestart Shoe, or any features contained therein, will not in and of themselves result in correct body balance, perfect posture, better foot or bodily health, correct walking position or assure the growth of strong and straight feet. Respondent's said shoes are not health shoes and will not prevent or cure diseases, abnormalities, deformities or disorders of the feet.

## CONCLUSION

Within the limitations of the stipulation and the findings herein, respondent's representations hereinbefore described are false, deceptive, and misleading and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

*It is ordered*, That respondent, Dr. Posner Shoe Co., Inc., formerly known as Dr. A. Posner Shoes, Inc., a corporation, and its officers, representatives, agents 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 respondent's shoes, designated "Dr. Posner's Muscle Builder Shoe," "Dr. Posner's Scientific Shoe," and "Dr. Posner's Ritestart Shoe," or any other shoe of similar construction or performing similar functions irrespective of the designation applied thereto, do forthwith cease and desist from representing directly or by implication:

1. That the said shoes are "health" shoes or will keep the feet healthy;

2. That the said shoes will prevent or cure diseases, abnormalities, deformities, or disorders of the feet;

3. That the use of said shoes in the case of children will result in correct body balance or perfect posture, or better foot or bodily health, or feet that grow strong and straight, or representing in any manner that any special features or construction contained in respondent's shoes will improve body balance, posture, or bodily health, or assure proper growth or development of the feet;

4. That the built-in wedges contained in said shoes will of themselves and without further measures prescribed by physicians or orthopedic specialists place the heel bone in proper position;

5. That the use of said shoes causes the toes to point straight ahead or results in the correct walking position;

6. That the use of said shoes has any value in the proper development of the muscles of children's feet;

7. That through the use of the words "muscle builder" as part of the brand name "Dr. Posner's Muscle Builder Shoe," or any other name, said shoes are muscle builder shoes or build muscle; and

8. That the use of said shoes will prevent or correct pronation or weak foot:

*Provided, however*, That nothing herein contained shall prevent respondent from representing that said shoes embody antipronation devices or factors which are often approved by physicians as beneficial in preventing the persistence of pronation and alleviating the symptoms of mild pronation in children when such measures are found to be individually indicated.

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ORDER TO FILE REPORT OF COMPLIANCE

*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 [as required by said declaratory decision and order of June 15, 1954].

IN THE MATTER OF

# VCA LABORATORIES, ET AL.

*Docket 6071. Complaint, Dec. 12, 1952. Order, June 16, 1954*

Charge: Advertising falsely as to ailments and symptoms, results of product, free goods, etc. in sale of "Rybutol" food and drug preparation.

Before *Mr. James A. Purcell*, hearing examiner.

*Mr. Jesse D. Kash* for the Commission.

*Mr. Richard A. Mahar*, of Washington, D. C., and *Rogers, Hoge & Hills*, of New York City, for respondents.

## ORDER CLOSING CASE WITHOUT PREJUDICE

This matter has been certified to the Commission by the hearing examiner for consideration of a proposed stipulation and agreement to cease and desist of respondent VCA Laboratories offered in settlement of this proceeding.

Counsel supporting the complaint does not oppose this proposal stating that he believes the acceptance of the proposed stipulation would constitute an adequate settlement of the matter and that such a settlement would result in a great saving of time and expense.

The Commission having considered the proposed settlement and being of the opinion that its acceptance would result in the elimination of the complained of practices, and that, therefore, further proceedings herein are unnecessary:

*It is ordered*, That the proposed stipulation and agreement to cease and desist submitted by respondent VCA Laboratories be, and it hereby is, accepted.

*It is further ordered*, That the case growing out of the complaint herein, be, and it hereby is, closed, without prejudice, however, to the right of the Commission to reopen the same or to take such further or other action against the respondents at any time in the future as may be warranted by the then existing circumstances.

IN THE MATTER OF

# THE NIK-O-LOK COMPANY ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6124. Complaint, Oct. 5, 1953—Decision, June 18, 1954*

Where five corporations, including two wholly owned subsidiaries, which were engaged in the production of coin toilet locks, and in the leasing, installation, and maintenance thereof in comfort stations and public restrooms, in hotels, railroad stations, bus stations, airport stations, and other public buildings; occupied a substantial and dominant position in the business of leasing such locks; were the sole members of an unincorporated association; and were in competition except as competition had been restricted as below set forth—

With intent and effect of restricting and injuring competition in commerce in the manufacture and production of said locks and in the leasing and maintenance thereof, and as part and parcel of a combination, conspiracy, cooperation, and planned common course of action; acting individually and through and by means of their said association—

(a) Fixed prices and terms and conditions for the leasing, installation, and maintenance of their respective locks; refused to quote prices or other terms in the leasing of said locks where a member of their association had installations; and arranged and agreed as to the portion of the proceeds from the installation of said locks to be allocated between them and their said customers;

(b) Engaged in collusive bidding; arranged for one respondent to receive a share or portion of the income which another respondent received from its installation; abstained from soliciting each other's customers and from the removal of each other's locks at the solicitation of lessees, except in accordance with previous understanding and agreement, and otherwise refused to compete with each other in leasing or maintaining said locks; and exchanged from time to time the locations of the installation of their locks as a means or method of assuring that there would be no competition between themselves;

(c) Allocated customers among themselves; united their facilities, acting under and through the association, to eliminate competitors, and to prevent others from engaging therein; and agreed to and did refuse to sell, or otherwise supply their respective locks to others desiring to purchase the same, and agreed to and did prevent such others from securing sources of supply; and

(d) Punished and penalized for violations of rules and practices established by respondents, through and by means of the association; arranged for each of respondents, as members of the association, to be kept fully informed as to the activities, rules, and practices of the association as a means and method whereby respondents effectuated the aforesaid acts and practices; and employed the association as an instrumentality and means of carrying out and making effective the aforesaid combination, conspiracy, cooperation, and planned common course of action:

*Held*, That such acts and practices were all to the prejudice of their competitors and to the public; had a dangerous tendency to hinder and prevent competition and to create in respondents a monopoly in such business; and constituted unfair acts and practices and unfair methods of competition in commerce.

Before *Mr. James A. Purcell*, hearing examiner.

*Mr. George W. Williams* for the Commission.

*Mantel & Doyle*, of Indianapolis, Ind., for Nik-O-Lok Co. and Pacific Nik-O-Lok Co., Inc.

*Mr. Lee Hervey* and *Mr. Nelson C. Doland*, of Boonton, N. J., for General Service Co., Inc., and General Service Coin Lock Co., Inc.

*Sherpick, Gilbert, Regan & Davis*, of New York City, for American Coin Lock Co., Inc.

## Decision of the Commission

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated June 18, 1954, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

### INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

### STATEMENT OF THE CASE

The Federal Trade Commission on October 5, 1953, issued a complaint charging respondents, The Nik-O-Lok Company, a corporation; Pacific Nik-O-Lok Company, Inc., a corporation; General Service Company, Inc., a corporation; General Service Coin Lock Company, Inc., a corporation; and American Coin Lock Company, Inc., a corporation, with having violated the Federal Trade Commission Act by the use of unfair acts and practices and unfair methods of competition and by conspiring in divers particulars to hinder and restrict competition in the manufacture, production, leasing and maintenance of coin operated toilet door locks.

Thereafter respondents filed their respective answers by which they severally admitted all of the material allegations of the complaint and waived all intervening procedure and further hearing as to said facts.

Thereafter the proceeding regularly came on for final consideration by the above-named Hearing Examiner upon the complaint and answers thereto and said Hearing Examiner, having duly considered the record herein finds that this proceeding is in the interest of the public and makes the following findings as to the fact, conclusion drawn therefrom, and order.

FINDINGS OF FACT

I. *The Respondents*

(a) Respondent, The Nik-O-Lok Company, is a corporation organized and doing business under the laws of the State of Indiana, with its principal office and place of business in the Terminal Building, 110 North Illinois Street, Indianapolis, Indiana.

(b) Respondent, Pacific Nik-O-Lok Company, Inc., is a wholly owned subsidiary of respondent, The Nik-O-Lok Company, organized and doing business under the laws of the State of California, with its principal office and place of business in the Pacific Electric Building, 610 S. Main Street, Los Angeles, California.

(c) Respondent, General Service Company, Inc., is a corporation organized and doing business under the laws of the State of Maryland, with its principal office and place of business located at 518 Main Street, Boonton, New Jersey.

(d) Respondent, General Service Coin Lock Company, Inc., is a wholly owned subsidiary of General Service Company, Inc., organized and doing business under the laws of the State of Maryland, with its principal office and place of business at 518 Main Street, Boonton, New Jersey.

(e) Respondent, American Coin Lock Company, Inc., is a corporation organized and doing business under the laws of the State of Maine, with its principal office and place of business at 453 Cottage Street, Pawtucket, Rhode Island.

II. *Business Engaged In*

Respondent companies are now, and have been, during the time hereinafter mentioned, engaged in the production, either through manufacture or otherwise, of coin toilet locks, and in the leasing, installation and maintenance of said locks, which locks are placed either on the doors leading to comfort stations or on the doors leading to the toilet stalls in public restrooms located in hotels, railroad stations, bus stations, airport stations and other public buildings.

III. *Interstate Commerce*

Respondents are now and have been for more than five years last past, in the course of their aforesaid businesses, shipping or causing to be shipped said locks, in commerce, among or between the various

States of the United States and the District of Columbia, and during all of said time have carried on a constant course of trade and commerce therein.

IV. *The Coin Lock Industry*

The coin lock industry consists of two distinct groups, namely, the "bought" lock manufacturers and the "lease" lock manufacturers. The former sell the coin locks outright, either to the owner or operator of public restrooms or to companies which are engaged in the business of leasing locks. The latter manufacturers rent their locks to the owners or operators of public restrooms and the income derived from such leasing is divided between the lessee and lessor according to the terms of the lease agreement. The respondents lease, and do not sell, said locks. There are but a few companies engaged solely in the business of selling locks outright. However, there are numerous companies who purchase such locks and who in turn lease them to owners or operators of public restrooms.

V. *Respondents' Position in the Industry*

Respondents occupy a substantial and dominant position in the business of leasing said locks and as such are able to and have, by combining and conspiring with each other, accomplished and are still accomplishing the illegal acts, practices and effects hereinafter set forth.

VI. *Use of the Coin Lock Manufacturers Association as a Means of Carrying out the Acts and Practices Charged*

Respondents are the sole members of an unincorporated association known as the Coin Lock Manufacturers Association, hereinafter referred to as the "Association." Said Association does not have permanent offices nor a permanent place of business, but representatives of respondents meet as such an association several times a year. At such meetings they discuss their mutual problems. Said Association acts and has acted as a means and method whereby the respondents have carried on the acts and practices hereinafter set forth.

VII. *In Competition with Others*

The respondents are now and have been for more than five years last past, engaged in competition in leasing, installing and maintaining said locks, with one another and with others who are engaged in one or more of such activities in commerce, as "commerce" is defined in the

Federal Trade Commission Act, except as such competition has been, and is now restricted, hindered, lessened or restrained by the acts and practices of the respondents, as hereinafter described.

## VIII. *Specific Violations*

For more than five years last past, and continuing to the present time, the respondents, acting individually and through and by means of the aforesaid Association, for the purpose and with the effect of restricting and hindering competition in commerce, in the manufacture and production of coin toilet locks, and in the leasing and maintenance of same, have, through combination, conspiracy, cooperation and planned common course of action, and as part and parcel thereof, done and performed, and are still doing and performing, the following acts and practices:

1. Fixed prices and the terms and conditions for the leasing, installation and maintenance of their respective locks.
2. Refused to quote prices or other terms in the leasing of said locks where a member of respondent Association has installations.
3. Arranged and agreed as to the portions of the proceeds from the installation of said locks to be allocated to themselves and to their customers.
4. Engaged in collusive bidding.
5. Arranged for one respondent to receive a share or portion of the income which another respondent received from its installation.
6. Abstained from soliciting each other's customers and from the removal of each other's locks at the solicitation of lessees, except in accordance with previous understanding and agreement, and otherwise refused to compete with each other in leasing or maintaining said locks.
7. Exchanged from time to time the locations of the installation of their locks as a means or method of assuring that there would be no competition between themselves.
8. Allocated customers among themselves.
9. United their facilities, acting under and through the Association, to eliminate competitors, and to prevent others from engaging therein.
10. Agreed to refuse, and have refused to sell, or otherwise supply their respective locks to others desiring to purchase the same, and have agreed to prevent, and have prevented such others from securing sources of supply.
11. Punished and penalized for violations of rules and practices established by respondents, through and by means of the Association.
12. Arranged for each of respondents, as members of the Association, to be kept fully informed as to the activities, rules and practices

of the Association as a means and method whereby respondents effectuated the aforesaid acts and practices.

13. Employed the Association as an instrumentality and means of carrying out and making effective the aforesaid combination, conspiracy, cooperative and planned common course of action.

IX. *Stipulation Affecting Respondent American Coin Lock Company Respecting Use and Payment for "Sterileseats".*

Respondent, American Coin Lock Company, Inc., as set forth in a stipulation between counsel and appearing of record herein, not only is engaged in the activities hereinabove set forth, but is also engaged in the installation of "Sterileseats," a toilet seat which, under agreement with location owners, this respondent places in toilet cubicles, rest rooms and the like. All such places where "Sterileseats" are installed are serviced with coin lock devices hereinabove referred to, and there is no practical method by which collections may be effected for use of the seats aside from a portion or percentage of the "take" from the use of such coin locks attached to the outside door of each compartment. Therefore, a provision in this behalf, saving to this respondent the privilege of securing payment for their "Sterileseats" will be incorporated in the order to follow, which proviso will not, however, affect the obligation of said respondent to fully observe and comply with the terms of said order as to all of the remaining provisions thereof.

CONCLUSIONS

The acts and practices hereinabove found are all to the prejudice of competitors of respondents and to the public, have a dangerous tendency to hinder and prevent competition in the sale, distribution, leasing, installation and maintenance of coin toilet locks in "commerce," within the intent and meaning of the Federal Trade Commission Act; have a dangerous tendency to create in respondents a monopoly in the sale, distribution, leasing, installation and maintenance of coin toilet locks in said commerce, and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

ORDER

*It is ordered*, That the respondents, the Nik-O-Lok Company, Pacific Nik-O-Lok Company, Inc., General Service Company, Inc., General Service Coin Lock Company, Inc., and American Coin Lock Company, Inc., their officers, directors, agents and employees, directly or indirectly, in or in connection with, the selling, leasing, installing or maintaining, in commerce, between and among the several states of the United States, and the District of Columbia, coin toilet locks, do forthwith cease and desist from entering into, cooperating in, carrying out or continuing in any combination, conspiracy, agreement, understanding, or planned common course of action between any two or more of said respondents, or between one or more of said respondents and any person or persons so engaged in any line of commerce as to ordinarily compete with any of said respondents, to do or perform any of the following acts or things, namely:

1. Fixing the prices, terms or conditions for leasing, installing and maintaining of their respective locks.

2. Refusing to quote prices or other terms in the leasing of said locks where a member of the Association has installations.

3. Entering into or carrying out any arrangement as to, or pertaining to, the portion of the proceeds from the installation of said locks to be allocated to the lessees or customers thereof.

4. Engaging in collusive bidding.

5. Entering into any arrangement whereby one manufacturer or lessor of said machines is to receive any portion or share of the income which another manufacturer or lessor receives from the installation of its machines.

6. Abstaining from soliciting each other's customers, and from displacing each other's installations at the solicitation of lessees except in accordance with the agreement or understanding between them.

7. Exchanging with each other locations of their installations.

8. Allocating customers.

9. Uniting their facilities or acting, by or through the Association, or by any other means or method, for the purpose, or with the effect of, eliminating competitors or of preventing or attempting to prevent new competition.

10. Agreeing to refuse, or refusing, to sell or otherwise supply their said locks to others desiring to purchase the same.

11. Agreeing to prevent or preventing others from securing said locks from any sources of supply other than the respondents.

12. Punishing or penalizing, by any means or methods, for any violation of any rules or practices established or promulgated by the Association, or any similar Association to which the respondents belong or are affiliated.

13. Keeping each other informed as to the activities, rules, or practices of the Association, or any similar group or association to which the respondents belong, or to which they are affiliated, for the purpose of effectuating, or attempting to effectuate, any of the prohibitions or injunctions contained in this order.

14. Using or employing the Association, or any other association or group to which the respondents belong, or with which they are affiliated, or through any other means or method, for the purpose or with the effect of carrying out or attempting to carry out any of the prohibitions or injunctions of this order.

*Provided, however*, That nothing contained in subparagraphs 3 and 5 of this order shall be construed to prohibit any lawful license arrangement or lawful lease arrangement by respondent American Coin Lock Company, Inc., whereby the use of Sterileseats are licensed or leased in return for a percentage or share of the income received by another from the installation of locks.

ORDER TO FILE REPORT OF COMPLIANCE

*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 [as required by said declaratory decision and order of June 18, 1954].

In the Matter of

# LAMAR J. GORE DOING BUSINESS AS LAMARR PORTRAIT COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6169. Complaint, Feb. 10, 1954—Decision, June 20, 1954*

Where an individual engaged in the interstate sale and distribution of photographic enlargements and frames therefor through field representatives whom he supplied with sample enlargement, frames, and other supplies, including suggested sales talks, and who solicited prospective purchasers under a practice in accordance with which the first representative advised the purchaser of an enlargement that another would call upon him at a later date, show proofs, and exhibit suitable frames but with no obligation to purchase, and collected at that time all or a part of the purchase price of the enlargement—

(a) Falsely represented, in soliciting for the sale of said enlargements, that the product would be finished or painted by hand in oil by some famous named artist, would be equal in appearance, quality, and workmanship to the samples exhibited, and that the price of $5.95 or $9.90 charged therefor was a special and reduced price;

(b) Neglected to advise the purchaser of the enlargement, at the time of purchase, that the finished product would be of a special shape requiring a special frame which the representative stated to the purchaser, when exhibiting the proofs along with the frame, could be purchased only from respondent:

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.
*Mr. William J. Tompkins* for the Commission.
*Wingo & Finch*, of Hattiesburg, Miss., for respondent.

## Decision of the Commission

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated June 20, 1954, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

## INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondent with the use of unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. After the filing of respondent's answer to the complaint, counsel supporting the complaint and counsel for respondent entered into a stipulation of facts which provides that, subject to the approval of the hearing examiner, the statement of facts included in the stipulation may be taken as the facts in the proceeding and in lieu of evidence in support of or in opposition to the charges in the complaint, and that the hearing examiner may proceed upon such statement of facts to make his initial decision, stating his findings as to the facts, including inferences which may be drawn from the facts stipulated, and his conclusion based thereon, and enter his order disposing of the proceeding without the filing of proposed findings or conclusions or the presentation of oral argument. The stipulation further provides that if the proceeding should come before the Commission upon appeal from the initial decision of the hearing examiner or by review upon the Commission's own motion, the Commission may, if it so desires, set aside the stipulation and remand the case to the hearing examiner for further proceedings under the complaint. The stipulation having been approved by the hearing examiner, and the proceeding having regularly come on for final consideration upon the complaint, answer, and stipulation, the hearing examiner finds that this proceeding is in the interest of the public and makes the following findings as to facts, conclusion drawn therefrom, and order.

## FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Lamar J. Gore is an individual doing business under the trade name of LaMarr Portrait Company, with his office and principal place of business located at 1903 Hardy Street, Hattiesburg, Mississippi.

PAR. 2. Respondent is engaged in the sale of photographic enlargements and frames therefor to the purchasing public. In the course and conduct of his business respondent causes his photographic enlargements and frames, when sold, to be transported from his place of business in the State of Mississippi to purchasers located in various other states. He maintains a course of trade in such products in commerce among and between the various states of the United States, the volume of such trade being substantial.

PAR. 3. Respondent employs field representatives who call upon prospective purchasers in their homes and solicit the sale of enlargements and frames. Respondent furnishes his representatives with sample enlargements, frames and other materials and supplies, including suggested sales talks, which the representatives use in soliciting the sale of enlargements and frames therefor. When soliciting the sale of enlargements, the representatives exhibit the sample enlargements and state that they are hand painted with oils by a famous artist and that, if the prospect desires to purchase an enlargement, it will be finished or painted by hand in oil by such artist or some other artist and will be equal in appearance, quality and workmanship to the samples exhibited; and that the price of $5.95 or $9.90 charged for an enlargement is a special and reduced price. In case the prospect agrees to buy an enlargement, the representative then states that another representative will call upon the purchaser at a later date and show a proof or bromide of the enlargement and that, while the finished enlargement does not come with a frame, such representative will exhibit suitable frames at the time he shows the proof but that there is no obligation to purchase one. In the event a sale is made, the first representative collects all or a part of the purchase price. When the proofs are later exhibited to the purchaser, along with frames, by the second representative, the purchaser is informed and learns for the first time that the finished enlargement will be of a special shape requiring a special frame which the representative states can only be purchased from respondent.

PAR. 4. These representations are false and misleading. Actually, the enlargements are not finished or painted by any artist or by hand or in oil. The finished enlargements delivered to purchasers are inferior in appearance, in quality and in workmanship to the samples exhibited. The prices of $5.95 and $9.90 are not special or reduced prices for the enlargements but are the prices at which respondent usually and regularly sells them.

PAR. 5. It appears that the representations in question, while made to prospective purchasers by respondent's field representatives in the regular course of their employment, were never authorized by respondent, being made without his knowledge, consent or approval, and that respondent had instructed his representatives to make no misrepresentations regarding his products.

PAR. 6. The use of the representations set forth above has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to respondent's products, and the tendency and capacity to cause such members of the public to purchase such products as a result of the erroneous and mistaken belief so engendered. And the failure of respondent's representatives to disclose, prior to the taking of an order and the payment by the purchaser of the purchase price or a part thereof, that the enlargements are of a special shape for which frames can be purchased only from respondent has the tendency and capacity to induce members of the public to purchase respondent's enlargements when they would not have done so had such fact been disclosed.

## CONCLUSION

The acts and practices of respondent as herein found are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That the respondent, Lamar J. Gore, an individual doing business as LaMarr Portrait Company, or under any other name, his 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 photographic enlargements or frames, do forthwith cease and desist from:

1. Representing, directly or by implication,

(a) That said enlargements are finished or painted by hand or in oil, unless such is the fact.

(b) That said enlargements are equal in appearance, quality, workmanship, or in any other respect to samples exhibited, unless such is the fact.

(c) That any price is a special or reduced price when it is the price at which said enlargements are usually and regularly sold.

2. Concealing from, or failing to disclose to, customers at the time enlargements are ordered that the finished enlargement will be so shaped or designed that it can ordinarily be used only in an odd-style frame which is sold by respondent.

## ORDER TO FILE REPORT OF COMPLIANCE

*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 [as required by said declaratory decision and order of June 20, 1954].

IN THE MATTER OF

# ZONITE PRODUCTS CORP. AND H. W. KASTOR & SONS ADVERTISING CO., INC.

*Docket 4755. Order and opinion, June 23, 1954*

*Mr. R. P. Bellinger* for the Commission.

*Littlefield & Marshall*, of New York City, for Zonite Products Corp.

*Mr. Harris F. Williams* and *Mr. B. Blakeney Harris*, of Chicago, Ill., for H. W. Kastor & Sons Advertising Co., Inc.

## ORDER RULING ON MOTION OF RESPONDENT ZONITE PRODUCTS CORPORATION

This matter having come on to be heard upon the motion of the respondent above named which requests under date of March 25, 1954, that this proceeding be reopened and that subparagraph (a) of Paragraph 1 of the order to cease and desist as entered herein on May 17, 1944, be stricken and eliminated; and

The Commission having duly considered such motion and the answer in opposition thereto as filed by counsel who appeared in support of the complaint, and having concluded for the reasons stated in the accompanying opinion that the motion should be denied:

*It is ordered*, That the respondent's motion be, and it hereby is, denied.

## OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter came on for our consideration upon the letter dated March 25, 1954, and submitted on behalf of Zonite Products Corporation by its Vice President-Treasurer, requesting that the order to cease and desist heretofore entered by the Commission on May 17, 1944, be modified by striking or eliminating subparagraph (a) of Paragraph 1 therefrom. Answer in opposition to the granting of such request has been filed by counsel who appeared in support of the complaint during the course of the original proceedings, and we are treating such letter as a motion duly filed on this respondent's behalf.

The provision of the order to which the request relates forbids the dissemination in commerce of any advertisement relating to the medicinal preparations "Zonite Liquid" and "Zonitors" which represents, directly or by inference:

"(a) That said preparations will destroy all germs or bacteria in the genital tract, or destroy germs or bacteria which they contact in the genital tract, or that they constitute a treatment for infections of the genito-urinary tract, unless it is clearly and conspicuously revealed in immediate connection therewith that it is not always possible for said preparations to contact all germs and bacteria in the genito-urinary tract."

In support of the motion, it is stated that other companies in promoting sales of their feminine hygiene preparations have for many years been disseminating advertisements containing statements similar to those to which the proscriptions of the challenged paragraph relate but that no revealing statements, however, have been included in them to the effect that it is not always possible to contact all germs in the genito-urinary tract as required of respondent in similar circumstances under the order. The motion contends that the apparent failure of the Commission following its decision in the instant case to institute additional proceedings directed to practices used in connection with the advertising of similar products and the serious competitive disadvantage assertedly stemming from the respondent's compliance with the order support conclusions that requirements for disclosures or revealing statements no longer are deemed by the Commission to be in the public interest and that elimination of such requirement in connection with respondent's future advertising would be in the public interest.

Under the Federal Trade Commission Act, the Commission is empowered and directed to prevent the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce and it is the intention and purpose of the Commission, in keeping with that mandate, ultimately to reach all who violate the laws administered by the Commission. The circumstance that the Commission has not instituted additional proceedings directed to practices engaged in by others in connection with the advertising and sale of products used for feminine hygiene purposes should not be construed as indication that the Commission regards the dissemination of advertisements in commerce which are in fact false or misleading as other than unlawful, or that it has determined as a matter of administrative policy that advertisements which are false by reason of a failure to reveal facts material in the light of other representations made therein are not appropriate subjects for corrective action in the public interest. In appraising the foregoing contentions of the respondent, it must be noted also that elimination from the order of the provision as challenged manifestly would free respondent from its restraints against unqualified representations to the effect, among others, that the respondent's preparations are effective in destroying germs and bacteria in the genital tract and constitute adequate treatments for infections in the genito-urinary tract. These representations, and others as formerly used by respondent in its advertising, were found to be false, misleading, and grossly exaggerated and no rational basis exists for an assumption that such representations, if resumed, would not have the same capacity and tendency to mislead the purchasing public and to induce the purchase of respondent's preparations under such erroneous and mistaken beliefs as characterized their use in the first instance. Elimination of the provision as requested, therefore, would essentially serve to subordinate the interests of the consuming public to other considerations and the contentions that such modification is required in the public interest either by reason of a change in Commission policy or in recognition of competitive advantages assertedly denied to respondent must be rejected.

As additional grounds for requesting elimination of this paragraph of the order, it is contended also that no adequate standard is provided as to when the revealing statement or qualifying phrase there referred to should be used, that such provision is seriously deficient as a guide either to respondent or to members of the Commission's staff whose duties look to securing compliance with and enforcement of the Commission's orders to cease and desist and that any attempted enforcement thereof would be impracticable. If well taken as to this particular provision, these alleged deficiencies would be equally applicable to subparagraph (b), the next succeeding provision of the order to cease and desist, respecting which no request for its elimination appears in the motion.

As to the argument that "no adequate standard is provided as to when the qualifying phrase is required", we note that the order specifically relates to advertisements for the preparations which are disseminated in commerce or disseminated by any means for the purpose of inducing or which are likely to induce, directly or indirectly, their purchase in commerce. Furthermore, as expressly stated by the respondent in its letter of March 25, 1954, "The effect of the * * * order quoted above is to require this company, in advertising its products Zonite Liquid and Zonitors, to reveal conspicuously that it is not always possible for said preparations to contact all germs or bacteria in the genito-urinary tract, in immediate connection with certain representations." The representations to which the challenged subparagraph refers, manifestly, are clearly described and identified in its provisions. It is true, however, that such language does not attempt the obviously impracticable task of enumerating or calling a roll of the diverse words, phrases and statements which, if used in various situations and word settings, would imply that the respondent's preparations can be relied upon to afford the benefits referred to in the conditions under which they are to be used. This circumstance, however, does not mean that the order is lacking in clarity as to when the revealing statement should be used or deficient as a guide in that respect or that its enforcement would be impracticable. It nowise appearing that the scientific facts which were bases for the findings as to the facts issuing in the original proceeding have changed or are erroneous, we have concluded that modification of the order as requested is not required in the public interest, and our order which is issuing separately here accordingly denies the respondent's motion.

IN THE MATTER OF

# THE LEBLANC CORP. ET AL.

*Docket 5925. Amended complaint, Feb. 8, 1952—Decision, June 24, 1954*

Charge: Advertising falsely therapeutic qualities, composition, testimonials, etc.; in connection with sale of "Hadacol" drug preparation.

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

*Mr. Joseph Callaway* for the Commission.

*Cahill, Gordon, Reindel & Ohl*, of New York City, and *Cahill, Gordon, Zachry & Reindel*, of Washington, D. C., for The LeBlanc Corp.

*Voorhies & Labbe*, of Lafayette, La., and *Mr. Robert E. Freer*, of Washington, D. C., for Dudley J. LeBlanc.

## DECISION OF THE COMMISSION

This matter coming on to be heard by the Commission upon its review of the hearing examiner's initial decision dismissing the complaint herein; and

The Commission having considered the entire record and being of the opinion that said initial decision is appropriate to dispose of the proceeding:

*It is ordered*, That the hearing examiner's initial decision, a copy of which is attached, shall, on the 24th day of June 1954, become the decision of the Commission.

Commissioner Mead not participating.

## INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On February 8, 1954, counsel for the Trustee of the Estate of the LeBlanc Corporation submitted his thirteenth motion for a further extension of time within which to answer the complaint herein, and counsel supporting the complaint responded thereto by submitting a motion to dismiss the complaint without prejudice. To this motion respondents have offered no opposition.

The original complaint herein was issued on September 28, 1951, and an amended complaint on February 8, 1952. These documents allege that respondent corporation and Dudley J. LeBlanc, individually and as President and Sales Manager of the LeBlanc Corporation, have violated Sections 5 and 12 of the Federal Trade Commission Act by the dissemination of false advertisements of a preparation designated "Hadacol." All alleged violations are asserted to have occurred during the period during which the respondent corporation was under the control and management of the individual respondent, Dudley J. LeBlanc.

Counsel supporting the complaint avers that shortly after the issuance of the original complaint, and before the time for filing answer thereto had expired, the corporate respondent went into bankruptcy under the jurisdiction of the United States District Court for the Southern District of New York. Subsequently the corporate respondent has been under the control of the trustee appointed by the Court, who has given repeated assurances that the corporate respondent would not violate the provisions of the Federal Trade Commission Act. As a result, repeated motions of counsel for the Trustee for the Estate of the LeBlanc Corporation, requesting extensions of time for the filing of an answer to the complaint herein, pending decisions to liquidate or to reorganize that corporation, have been granted.

Counsel supporting the complaint states that it is believed that respondent Dudley J. LeBlanc now has no voice in the management and control of the business of the corporate respondent. Counsel further states that it is believed that no advertising disseminated since the issuance of the original complaint contains any violations alleged therein or in the amended complaint. Furthermore, counsel assert that they expect the corporate respondent to be reorganized with new capital, new management, and new ownership and control.

Counsel supporting the complaint concludes, firstly, that if the plan for reorganization does not succeed, the affairs of the corporate respondent will be terminated by the Bankruptcy Court, in which event there will be no point in a continuation of this proceeding. Secondly, he concludes, presumptively, that if the plan for reorganization does succeed, the corporate respondent will operate thereafter under new management, which will have had no connection with the management which was in control at the time of the alleged violations of law set forth in the original and amended complaints. Thirdly, he concludes that if the newly-reorganized corporate respondent should disseminate false advertising of the preparation now known as "Hadacol," a new complaint should issue, based upon those violations rather than upon violations alleged to have occurred more than two years ago.

Since the factual statements and conclusions presented by counsel supporting the complaint are unquestioned, and since it appears that his conclusions are reasonable in the light of the circumstances shown, it is believed that his motion should be granted. Accordingly,

*It is ordered*, That the complaint and amended complaint herein be, and the same hereby are, dismissed without prejudice to the right of the Commission to take such further action as future facts may warrant.

IN THE MATTER OF

# EXCEL AUTOMATIC PRODUCTS, INC., ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6063. Complaint, Nov. 21, 1952—Decision, June 25, 1954*

Where a corporation and its two responsible officers, engaged in the manufacture and competitive interstate sale and distribution of their "Taylor-Made Dry Shaver"—

(a) Falsely represented in printed booklets and pamphlets distributed to prospective purchasers that their said product soothed the skin as it shaved;

(b) Falsely represented, as aforesaid, that its cutting parts were precision ground, were made of the highest grade surgical steel, were properly tempered, and were self-sharpening;

(c) Represented, as aforesaid, that it was fully and unconditionally guaranteed against defective workmanship and materials and that necessary repairs and replacement of defective parts would be made without charge; when in fact they exacted a handling charge of 50¢ for each shaver returned for such repairs or replacement; and

(d) Represented that the usual and customary retail price of their said product was $19.50 in the United States through attaching thereto, before shipment to purchasers, a tag so stating; when in fact said price was fictitious and greatly in excess of the amount at which said product was ever sold:

*Held*, That such acts and practices were all to the prejudice and injury of the public and of their competitors and constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. John Lewis*, hearing examiner.

*Mr. Andrew S. Scott, Jr.* and *Mr. William J. Tompkins* for the Commission.

*Mr. Joseph Bohrer*, of Newark, N. J., for respondents.

## DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated June 25, 1954, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

## INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

### STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on November 21, 1952, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act. Said respondents, after being duly served with the complaint herein, filed their answer, in which they admitted the jurisdictional allegations of the complaint, but denied having engaged in any illegal practices as alleged in the complaint.

Pursuant to notice, hearings were held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding, on the dates and at the places following: On February 16, 1953, in New York, New York; on February 27, 1953, in Washington, D. C.; on April 13, 1953, May 27, 1953, and August 7, 1953, in New York, New York.

At said hearings testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. Counsel supporting the complaint and counsel for respondents both waived opportunity to argue orally before the hearing examiner. However, they availed themselves of the opportunity for filing proposed findings and conclusions, together with the reasons therefor, which have been carefully considered by the examiner.

Upon consideration of the entire record herein, and from his observation of the witnesses, the hearing examiner makes the following:

## FINDINGS OF FACT

### I. The business of respondents

Respondent Excel Automatic Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 57–59 Twelfth Avenue, Newark, New Jersey. Respondents Stephen J. Gwoosh and Clarence E. Taylor are president and vice president, respectively, of the corporate respondent and formulate, direct and control the policies, acts and practices of said respondent, including the acts and practices hereinafter found. Their address is the same as that of the corporate respondent. Said respondents are now, and for more than two years last past have been, engaged in the manufacture, sale and distribution of a product designated as Taylor-Made Dry Shaver.

Respondents cause their product, when sold, to be transported from their place of business in the State of New Jersey to purchasers thereof located in various other states of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce among and between the various states of the United States and in the District of Columbia. Their volume of trade in said product has been, and is, substantial.

## II. The unfair and deceptive practices

### A. *Background and issues*

The complaint charges respondents with having made certain false, misleading and deceptive statements with respect to the quality, value and price of their product in printed booklets and pamphlets distributed to prospective purchasers and on price tags attached to said product. In their answer, as filed, respondents admitted having made certain of the statements and representations attributed to them, but denied that any of such statements or representations were false, misleading and deceptive. However, at the initial hearing held herein, counsel for respondents and counsel supporting the complaint entered into a stipulation modifying the original answer filed by respondents, as a result of which stipulation it was agreed that respondents admitted having made all of the statements and representations set forth in the complaint, and admitted further that said statements and representations were false, misleading and deceptive, with the exception of the representation that respondents' product "will render effective and satisfactory service as a dry shaver." With respect to the last-mentioned representation, respondents denied the falsity thereof. Respondents having admitted all of the allegations of the complaint, except that concerning whether their shaver will render effective and satisfactory service as a dry shaver, no proof was offered in support of or in opposition to the other allegations of the complaint, and all of the testimony and other evidence adduced at the hearing was with respect to this single issue.

### B. *The representations made*

It has been stipulated, and is so found by the hearing examiner, that respondents, for the purpose of inducing the purchase of their product, Taylor-Made Dry Shaver, have made the following representations, either directly or by implication, in printed booklets and pamphlets distributed to prospective customers or purchasers thereof:

1. That their product will render effective and satisfactory service as a dry shaver;
2. That it soothes the skin as it shaves;

3. That its cutting parts are precision-ground, are made of the highest grade surgical steel, are properly tempered and are self-sharpening;

4. That it is fully and unconditionally guaranteed against defective workmanship and materials;

5. That necessary repairs and replacement of defective parts will be made without charge.

It has been further stipulated, and is so found by the examiner, that before respondents ship their products to purchasers, they attach a tag thereto containing a statement that the price of the shaver in the United States is $19.50. It is found that by means of the statement appearing on the said tag, respondents represent that the usual and customary retail price of their said product is $19.50 in the United States.

### C. *The falsity of the representations*

It is admitted by respondents, and is so found by the hearing examiner, that certain of the statements and representations made with respect to their product, as above found, are false, misleading and deceptive in the following respects:

1. Respondents' product does not soothe the skin as it shaves;

2. Its cutting parts are not precision-ground, are not made of the highest grade surgical steel, are not properly tempered, and are not self-sharpening;

3. The said product is not fully or unconditionally guaranteed against defective workmanship or materials;

4. Respondents do not make necessary repairs or replacements of defective parts under the aforesaid guarantee without charge, but exact a handling charge of 50 cents for each shaver returned for repairs or replacement of defective parts;

5. The price of $19.50, represented as the usual and customary retail price of their product in the United States, is a fictitious price and is greatly in excess of the amount at which said product was ever sold.

The only issue on which there is any dispute is that as to whether respondents' shaver will render effective and satisfactory service as a dry shaver. In support of his contention that respondents' shaver will not perform satisfactorily counsel in support of the complaint relies on the testimony of two individuals who purchased and briefly used the shaver, on the testimony of three employees of the National Bureau of Standards who conducted shaving tests with respondents' shaver, and on the testimony of two representatives of competing electric shaver companies. In support of their position that their shaver will render effective and satisfactory service respondents rely on the testimony of three customers who actually used the shavers for periods varying from one month to approximately ten months, and on shaving tests conducted by the New York Testing Laboratories.

1. Evidence in support of the complaint

The two individual customers called by counsel in support of the complaint testified that when they attempted to use respondents' shaver it would not shave, and that they sent it back to respondents under the guarantee. According to one of the individuals, when the shaver was returned to him by respondents it still would not shave. The other individual testified that when the shaver was returned it did cut some hair, but he claimed that it did not give him a "good, clean shave." Both witnesses admitted having strong, tough beards and indicated that they had had no previous experience with electric shavers.

The tests at the National Bureau of Standards were conducted under the supervision of S. H. J. Womack, an electrical engineer. The tests consisted of Womack and two of his associates attempting to shave with several of respondents' shavers and with two other brands of shavers, and then measuring the length of the hairs cut. Womack gave the following account of his experience with the shavers: After acquiring a two-days' growth of beard he attempted to shave with one of respondents' shavers but found, after ten minutes, that it only cut his hair "slightly." He then let his beard grow for another ninety hours and again attempted to shave but found, after five minutes, that it shaved "very poorly." Upon examining the shaver under microscope, Womack found that the upper and lower cutting plates were not in contact for about one third the length of the cutting head. Two days later Womack attempted to shave with another of respondents' shavers and found that although it did cut hairs, the results were poor and not uniform, and that his face was irritated. After using respondents' shaver on one side of his face, Womack attempted to use a Schick shaver on the other side and found that he was able to get a "smooth" shave within five minutes. He measured the length of the cut hairs remaining on his face with an instrument known as a "feeler-gauge," and found that the length of the hair which had been cut by respondent's shaver was 14/1000 of an inch, while the hair cut by the Schick shaver was 8/1000 of an inch. When Womack was asked how much hair on his face was actually cut to any extent by respondent's shavers, he estimated that only about one percent was cut with the first shaver and about three percent with the second shaver; but he admitted that he had made no notation of these figures at the time of the experiments and that there was nothing in his report of the tests to substantiate these estimates. Womack also testified that the upper platen (cutting head) on respondents' shaver measured 14/1000 of an inch, and expressed the opinion that the thickness of the platen affected the cutting ability of the shaver.

The test conducted by the second witness from the Bureau of Standards, Richard W. Armstrong, consisted of shaving the hair on his wrist for a distance of two square inches with one of respondents' shavers and then performing the identical operation with a Philip's shaver. Although respondents' shaver cut all the hair to some extent, Armstrong testified that upon measuring the remaining hair with a feeler-gauge, he found that it measured 14/1000 of an inch in length, while similar measurements of the hair after being cut with a Philip's shaver revealed the length of the remaining hair as 8/1000 of an inch. Although Armstrong claimed that he also attempted to use respondents' shaver on his face and could not get satisfactory results, he admitted that he had made no record of this test in his notes of the experiments and that, with respect to this part of the test, he could not "recall precisely enough to testify."

The third witness from the Bureau of Standards, Leon D. Orbach, testified to having used two different shavers of respondents on two different days, after acquiring a beard of several days' growth. On the first occasion he observed that while some of the hair was cut after five minutes of shaving, the largest portion remained uncut. On the second occasion, while more of the hair appeared to be cut, a considerable amount of the beard remained and the shaver seemed to pull his skin. Orbach then used a Schick shaver and claimed that he received a "complete shave" with "no visible beard" in five to eight minutes. No measurements were made by him of the length of hair remaining after any of the shaves.

Counsel in support of the complaint called as rebuttal witnesses representatives from two competing electric shaver companies, the Schick Company and the Remington Rand Company. These representatives testified in substance that the thicker the shear plate, the slower and more unsatisfactory the shave received. The representative of the Schick Company testified that the shear plate of the Schick shaver is between 2 to 3/1000 of an inch, and that tests made by his company indicated that where the thickness goes beyond 4/1000 of an inch, the shaver will not produce a satisfactory shave. While the representative of the Remington Rand Company indicated that the thickness of the outer shell or plate on the Remington shaver measures from 2.2 to 2.6/1000 of an inch, he indicated that the company also had a thicker plate, measuring 6/1000 of an inch, for use by people having a thin skin which might be irritated by the thinner plate.

2. Respondents' evidence

The three individual users called by respondents had used the shaver for approximately one, three and ten months, respectively. All of them testified that it gave them a satisfactory shave. Although one of the witnesses, Leo Rossi, had not shaved with respondents' shaver since the previous morning, his face at the time of the hearing, despite a one-day's growth of beard, appeared to be fairly clean. Counsel supporting the complaint suggests that these witnesses should not be believed because "for the most part they were shown to be friendly to the respondents." The examiner cannot agree with this observation. Only one of the witnesses was shown to have known any of the respondents prior to the hearing. The testimony discloses that respondent Gwoosh purchases gasoline at the service station of the witness Julius De Falco. However, it also appears that this witness had purchased his shaver prior to the time he had come to know Gwoosh as a customer, and has been using it since. The only other witness as to whom any question was raised was the witness Rossi, who testified that respondents' salesman in Massachusetts had paid his expenses in coming from his home in that state to the place of hearing in New York City. However, this is no reason for disbelieving a witness any more than the fact that Government witnesses receive a witness fee is a ground for not crediting their testimony. So far as appeared from their demeanor and testimony, these three witnesses all appeared to be testifying truthfully.

The tests conducted for respondents by the New York Testing Laboratories consisted of five different individuals (three employees of the testing company and the two individual respondents) shaving with respondents' shaver and with three other well-known brands of shavers on three different days. Each of the participants appeared at the laboratory on Monday, March 23, 1953, with a two-days' growth of beard and then shaved one side of his face with one of respondents' shavers and the other side of his face with a Remington, Sunbeam or Schick shaver. This test was repeated on Wednesday, March 25, 1953, with each participant using a different one of respondents' shavers and a different one of the well-known brands above mentioned. On Friday, March 27, 1953, the test was again repeated. On the first day of the tests photographs of both sides of the face of each of the five individuals participating in the tests were taken, before and after shaving with one of respondents' shavers and with one of the other brands. Photographs were again taken on the second and third days of the tests, showing both sides of each individual's face after shaving with another of respondents' shavers and another of the known brands. These photographs, which were received in evidence, reveal that while the shaving results of the first day's test were for the most part only fair, both with respondents' shaver and the other shavers, as the tests proceeded most of the participants received progressively better shaves. By the last day, and in some cases on the second day, most of the participants received what appeared to be a fairly clean shave with respondents' shavers. Several of the participants testified that as they became more accustomed to using the shavers and as their faces became adjusted to them, they were able to get a better shave. The evidence does reveal that the length of time required to get a clean shave with respondents' shavers was somewhat longer than with the other brands, but not inordinately so. The shaves received with the other brands also appear from the photographs to be somewhat closer in most instances than those received with respondents', but not excessively so.

After the tests described above, the New York Testing Laboratories conducted an additional test for the purpose of measuring the length of the hairs remaining after shaving with one of respondents' shavers and then after shaving with a Sunbeam shaver. Under this test, one of the laboratory's employees who had participated in the shaving tests returned on the Monday following the first group of tests, with a two-days' growth of beard, and shaved an area of about three-quarters of an inch on one side of his face with one of respondents' shavers and a similar area on the other side with a Sunbeam. The hair remaining on his face in the area where the shavers had been used was then measured with a calibrated optical microscope to ascertain its length. The side of the face which had been shaved with respondents' shaver was found to be level with the skin for 73 percent of the area, while the side that was shaved with a Sunbeam shaver was revealed to be level with the skin for about 65 percent of the area. However, most of the remaining hair, which had not been cut level with the skin, was found to have been left longer on the side where respondents' shaver had been used than on the side where the Sunbeam had been used.[1] The employee at the New York Testing Laboratories who set up and supervised the test, Isaac Stewart, a licensed professional engineer,

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[1] Of the remaining hair on the side where respondents' shaver was used, 7.7% measured 1.5/1000 of an inch, 11.5% was 3/1000 of an inch, 3.85% was 6/1000 of an inch and 3.85% was 9/1000 of an inch. On the side where the Sunbeam was used, all the remaining hair (34.8%) measured 1.5/1000 of an inch.

testified that all the measurements had been made with a calibrated optical microscope because that was the most accurate way that he knew of to take measurements of the fineness involved in measuring the length of hairs. The witness testified that a similar measuring device had been used in making tests on the sharpness of blades for a razor company. According to Stewart he attempted, at the request of the respondent Gwoosh, to use a feeler-gauge in the measurement of the hair, but found it unsatisfactory because the interference of adjacent hairs, the flexibility of the skin and the angular growth of the beard hairs made it impossible to measure the length of the hair accurately with this instrument.

### 3. Concluding findings

Counsel supporting the complaint contends that a satisfactory shave is one which is an "optimum" combination of closeness, speed and comfort. In the opinion of the examiner this is not an appropriate test, since the issue is not whether respondent's shaver will produce the best possible shave, but whether it shaves in a sufficiently satisfactory or effective manner to entitle it to be called a dry shaver. This does not, of course, mean that because a device cuts some hair, to some extent, and within some unspecified time, there is justification for designating it a dry shaver. A shaver can be said to be satisfactory and effective, in the opinion of the examiner, if the average individual, under ordinary conditions of use, can receive a shave which is reasonably close, within a reasonable length of time, and without undue irritation or discomfort. What is reasonable depends on a number of pertinent factors. For example, the testimony of a number of the witnesses, both from the Bureau of Standards and the New York Testing Laboratories, who had at one time used various dry shavers for personal use, suggests the existence of certain limitations on the closeness of the shave received with such devices as compared with conventional wet-shaving methods. Yet it cannot be said that such shavers are not satisfactory or effective by reason of this fact. The standard of comparison must be the performance of dry shavers as a class and not the type of shave received with conventional shaving methods. It must also be recognized that there are degrees of satisfaction and effectiveness among dry shavers, and that one shaver may be satisfactory and effective even though another shaver may give a closer shave within a somewhat shorter period of time. Consideration must also be given to the matter of price. The same type of performance cannot be expected from a shaver retailing at \$4–\$5 as from one selling at \$15–\$20, any more than the same performance can be expected from a Chevrolet and a Cadillac, albeit in both instances the lower-priced article must meet certain minimum standards of performance to fall within the category of satisfactoriness and effectiveness.

With these considerations in mind, the examiner turns to an evaluation of the evidence introduced in this proceeding. It may be noted at the outset that there was no notable indication that any of the witnesses was attempting to give an untruthful or biased account of his experiences with respondents' shaver. There were, however, differences in the substantiality of their experiences and the reliability of their observations. It must also be borne in mind that it was not incumbent on respondents to establish that their shaver was satisfactory and effective, but that counsel in support of the complaint, as the proponent of the issue, had the burden of establishing to the contrary.

The two lay witnesses called in support of the complaint gave respondents' shaver a very brief try (not more than two or three times) and then concluded that it was not satisfactory. There were even differences between them with regard to the effectiveness of the shaver. One witness conceded that the shaver did cut somewhat after it had been adjusted by respondents, while the other claimed it didn't cut any hair even after adjustment. Both had stiff, tough beards, had had no previous experience with dry shavers, and appeared to expect a degree of performance similar to that received from the wet-shaving methods to which they were accustomed. Compared to these two witnesses, there is the testimony of the three lay witnesses called by respondents who had been using the shaver for a longer period of time and appeared to be getting satisfactory results.

With respect to the tests which were conducted by both the Bureau of Standards and the New York Testing Laboratories, it should be noted that there is no standard, recognized scientific test for the cutting ability of electric shavers. The so-called tests merely consisted in the participants going through the same procedure as any lay witness, namely, using the instrument in shaving. In the absence of a standard, scientific test it was deemed advisable to test other brands of shavers, as well as respondents', so as to give some idea, on a comparative basis, as to the degree of effectiveness of respondents' product.

In considering the reliability of the two groups of tests made, there are a number of factors which favor those conducted by the New York Testing Laboratories as against those conducted by the Bureau of Standards. First there is evidence indicating that one of the shavers used by the Bureau was out of alignment, since the upper and lower cutters were admittedly not in contact for a distance of about one-third of the length of the head. This would hardly give a representative picture of the performance of respondents' shaver. The other shaver used by the witnesses Womack and Orbach appears to have had better cutting ability, although they claimed that this too did not give them a satisfactory shave. Orbach made no measurements of the cutting ability of the shaver. While Womack did measure the hair with a feeler-gauge, this instrument was described by respondents' witnesses as an unsatisfactory measuring device. The calibrated optical microscope used by the New York Testing Laboratories had been used by them previously in tests conducted for a razor blade company. Significantly, the witness from the Schick Company, who testified in support of the complaint, used an optical instrument, called a jewelers' loupe, in making examinations of respondents' shaver at the hearing.

Certain of the important observations alleged to have been made by the Bureau witnesses were not recorded in their notes, and they relied on their recollections of an experiment conducted more than a year prior to the hearing. Thus the witness Womack conceded that there was nothing in his notes to bear out his estimates of one percent and three percent as the amount of hair cut with respondents' shavers. The witness Armstrong likewise made no record of the fact that he had endeavored to use one of respondents' shavers on his face as well as on his wrist.

Certain of the comparisons made between respondents' shaver and other shavers are open to question. Thus the witness Orbach claimed that within five to eight minutes he was able to get a satisfactory shave with a Schick shaver, after getting only partial results with one of respondents' shavers. Yet the Schick shaver had a triple head which could cut a much greater area than respondents' single-headed shaver. The witness Armstrong, although conceding that respondents' shaver cut all the hair on his wrist, claimed that it left hairs of 14/1000 of an inch. Aside from the question of the accuracy of the measurements with the feeler-gauge which he used, there is no evidence that shaving conditions on the face and wrist are comparable. In fact, respondents' advertising literature shows that they sell another type of shaver for cutting longer hair on other parts of the body. Moreover, even the Schick shaver did not shave the hair flush with the skin, but left it 8/1000 of an inch.

In evaluating the tests of the New York Testing Laboratories, the examiner is not confined to consideration of the subjective reactions of witnesses and their present recollections of prior experiences. The photographs taken during the tests are concrete evidence of the results achieved. While these photographs indicate that most of the subjects only received fair results on the first day of the tests, this was true of the other shavers as well as respondents'. Further, as the tests progressed, most of the subjects received progressively better shaves with both groups of shavers, thus corroborating the testimony that a certain period of adjustment is necessary to get the best results from an electric shaver. While for the most part the shaves with respondents' shavers were not quite as close as those obtained from the more expensive shavers, and were accomplished somewhat more slowly than those received from the latter, the length of time consumed does not appear to be unreasonable, and the results achieved appear to be within the realm of being satisfactory and effective. As indicated previously, the issue is not whether respondents' shaver is as good as or better than other shavers on the market, but whether it falls within the category of being a satisfactory and effective shaver. The photographs taken of the results of the tests conducted by the New York Testing Laboratories, and the measurements made by that organization, would appear to indicate that the shaver does render satisfactory and effective service.

No reason has been suggested why the photographs and measurements made by the New York Testing Laboratories should not be considered reliable. At the hearing counsel supporting the complaint seemed to suggest by some of his questions that the laboratory was not objective because it was being paid for the tests. However, the examiner sees no reason to question the objectivity of this organization or its reliability, simply by reason of the fact that it is in business for the purpose of conducting tests on commercial products. The record shows that the company has been in business for many years, that it has conducted tests for a number of well-known commercial and industrial enterprises, for contractors under Government contract, and for Government agencies themselves, and that an inspector of one of the Government agencies is stationed on its premises. The fact that the first photographs of the tests made by it indicate only fair results, and that these photographs were, nevertheless, introduced in evidence, would tend to indicate the objectivity and reliability of the organization.

Counsel supporting the complaint also places considerable emphasis on the opinion expressed by a representative of the Schick Company that any shaver with a shearing head thicker than 4/1000 of an inch will not produce a satisfactory shave. It may be noted, in this connection, that the head of the Sunbeam shaver was found to measure 5.4/1000 of an inch and that the Remington Rand Company produces a shaver with a head of a thickness measuring as much as 6/1000 of an inch. In any event, whatever may be the validity of such theoretical claims, on the basis of comparative satisfactoriness and effectiveness, the tests actually conducted by the New York Testing Laboratories would indicate that a shaving head having a greater thickness can produce a shave which can be called satisfactory.

Considering the record as a whole, it is the opinion of the examiner, and is so found, that counsel supporting the complaint has failed to establish, by a preponderance of the reliable, probative, and substantial evidence, that respondents' shaver is not a satisfactory and effective shaver. The allegation of the complaint making this charge will, accordingly, be dismissed.

### D. *Effect of the unfair practices*

It is admitted, and so found by the examiner, that respondents have been and are now in substantial competition with other corporations and with firms and individuals in the sale and distribution of electric dry shavers in commerce. It is further admitted, and is so found, that respondents' practice of attaching a tag to their product stating that the price is $19.50 in the United States places in the hands of purchasers for resale a means and instrumentality by and through which they may mislead the public as to the usual and customary price of said product. It is further found that the use by respondents of the false, misleading, and deceptive statements and representations, above found, other than the representation that their product will render satisfactory and effective service as a dry shaver, has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and it may reasonably be inferred that a substantial portion of the purchasing public, because of such erroneous and mistaken belief, has purchased and will purchase substantial quantities of respondents' said product. As a result thereof, substantial trade in commerce has been and may be unfairly diverted to respondents from their competitors, and substantial injury has been and may be done to competition in commerce.

## CONCLUSION OF LAW

It is concluded that counsel in support of the complaint has failed to establish by a preponderance of the reliable, probative, and substantial evidence that respondents have engaged in any unfair and deceptive acts and practices or any unfair methods of competition in commerce by representing that their product will render effective or satisfactory service as a dry shaver. However, it is concluded that the other acts and practices of respondents, as hereinabove found, 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. It is accordingly concluded that this proceeding is in the interest of the public and that an order to cease and desist should issue against respondents.

## ORDER

*It is ordered*, That the respondent, Excel Automatic Products, Inc., a corporation, and its officers, and Stephen J. Gwoosh and Clarence E. Taylor, individually and as officers of said corporation, and said 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 their product designated as Taylor-Made Dry Shaver, or any product of substantially similar construction, do forthwith cease and desist from:

1. Representing that the said product soothes the skin as it shaves.
2. Representing that the cutting parts of the said products are precision ground, are made of the the highest grade surgical steel, are properly tempered, or are self-sharpening.
3. Representing that the said product is fully or unconditionally guaranteed against defective workmanship or materials, unless respondents do in fact make, without expense to the purchaser or owner, any repairs or replacements of parts which may be necessitated by reason of defective workmanship or materials; provided, however, that nothing contained in this order shall be construed as prohibiting respondents from guaranteeing their product against defective workmanship or materials, even though a charge is imposed by respondents in connection therewith, if the amount of such charge is clearly and conspicuously disclosed in immediate conjunction with such guarantee.
4. Representing as the retail price of said product any price which is in excess of that at which such product is regularly and usually sold at retail.

*It is further ordered*, That the allegation of the complaint that respondents have violated the Federal Trade Commission Act by representing that their product will render effective and satisfactory service as a dry shaver be, and it hereby is dismissed.

IN THE MATTER OF

# HARRISON MILLS, INC., GRANITE FABRICS CORP. ET AL.

*Docket 5981. Complaint, April 30, 1952—Order, June 28, 1954*

Charge: Neglecting to disclose flammability of brushed rayon fabrics.

Before *Mr. Webster Ballinger*, hearing examiner.

*Mr. J. W. Brookfield, Jr.*, for the Commission.

*Tenzer, Greenblatt, Fallon & Kaplan*, of New York City, for respondents.

## ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter having come on to be heard by the Commission upon respondents' appeal from the initial decision of the hearing examiner and upon briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons stated in the accompanying opinion of the Commission, that the complaint should be dismissed without prejudice, such disposition of this case rendering it unnecessary to rule specifically on each of the points raised by respondents in their appeal:

*It is ordered*, That the complaint herein be, and it hereby is, dismissed without prejudice.

Commissioner Mead not participating for the reason that he did not hear oral argument and Commissioner Gwynne not participating for the reason that oral argument was heard prior to his appointment to the Commission.

## OPINION OF THE COMMISSION

By MASON, Commissioner:

This matter is before us on respondents' appeal from the hearing examiner's initial decision.

The respondents are charged with having violated the Federal Trade Commission Act by failing to disclose that their rayon fabrics are composed of rayon and by failing to reveal the flammable characteristics of their brushed rayon fabrics. The hearing examiner found the facts to be substantially as alleged in the complaint, except with respect to two of the individual respondents as to whom the complaint is dismissed, and his order directs the remaining respondents to cease and desist from:

"1. Offering for sale or selling said fabrics without clearly disclosing thereon their rayon content.

"2. Offering for sale or selling fabrics made of brushed rayon which, because of the length of the fibers on the raised surface or because of any other reason, is highly inflammable, without affirmatively and clearly disclosing thereon that said fabrics are made of a highly inflammable material and garments made therefrom are dangerous and unsafe to be worn as articles of clothing."

The facts material to our consideration of this matter are these: The respondents are engaged in the manufacture and sale of fabrics, some of which are made of rayon but resemble wool in texture and appearance, and some of which are made of brushed rayon and are highly inflammable because of the length of the nap on the brushed up surface of the fabrics. Respondents formerly did not, by label or otherwise, inform purchasers of these fabrics that they were composed of rayon or that they were highly inflammable.

On December 11, 1951, the Commission promulgated Trade Practice Rules for the Rayon and Acetate Textile Industry. These rules declare that it is an unfair trade practice to sell or advertise products, including fabrics, composed of rayon without disclosure that they are rayon. The record shows that respondents, since February 11, 1952, more than two months prior to the issuance of the complaint, have been complying with the provisions of those rules with respect to the labeling of fabrics sold by them. There is no reason for us to believe that respondents will not continue to comply with these rules. Therefore, with respect to the allegations of the complaint relating to respondents' failure to disclose the rayon content of their rayon fabrics, it appears that everything that can be accomplished by a cease and desist order has already been accomplished by cooperative effort. The factual situation thus presented is similar in many respects to the one which was recently before us in the *Matter of Wildroot Company, Inc.*, Docket 5928, in which the complaint was dismissed without prejudice. We are of the opinion that similar action with respect to respondents' failure to disclose the rayon content of their rayon fabrics is appropriate in this case.

Subsequent to the hearings in this matter, an Act entitled "Flammable Fabrics Act" (67 Stat. 111) was passed. This Act becomes effective June 30, 1954, one year from the date of its passage. The Act declares, among other things, that the sale or offering for sale in commerce of any fabric which, under the standard of flammability contained in the Act, is so highly flammable as to be dangerous when worn by individuals, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act. Wilful violation of the Act is punishable by a fine of not more than $5,000, or by imprisonment of not more than a year, or both. If the brushed rayon fabrics involved in this proceeding are highly flammable within the meaning of this Act, respondents will be prohibited after June 30, 1954, from selling or offering for sale such fabrics in commerce regardless of whether they are labeled. The record in this proceeding does not warrant an order directing the respondents to cease and desist from selling or offering for sale fabrics which are highly flammable. It would support an order directing the respondents to cease and desist from selling or offering for sale in commerce highly flammable fabrics which are not properly labeled to show that they are highly flammable, but such an order obviously would not be appropriate in view of the absolute prohibition in the Flammable Fabrics Act against the sale or offering for sale of highly flammable fabrics.

In view of the above considerations, we are of the opinion that the public interest will be adequately served by dismissing the complaint, without prejudice. Such disposition of this case renders it unnecessary for us to rule more specifically on each of the points raised by respondents in their appeal from the hearing examiner's initial decision.

Syllabus

IN THE MATTER OF

# HARLEY-DAVIDSON MOTOR CO.

DECISION AND OPINION IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT AND OF THE FEDERAL TRADE COMMISSION ACT

*Docket 5698. Complaint, Sept. 14, 1949—Decision, June 29, 1954*

Where a corporation which was engaged in the manufacture and competitive interstate sale, advertisement, and distribution, under its trade name, of motorcycles, "servi-cars", sidecars, and package trucks, and a complete line of parts and accessories therefor, including oil, tools, shop supplies, and operators' clothing and equipment; was the largest manufacturer of motorcycles and related products in the United States; while selling some of its products directly to police departments, the Government, and some large fleet operators, sold the great majority thereof to some 800 independently owned franchise retail dealers which were considered by competing manufacturers to constitute the largest and best dealer organization in the field, and which, by virtue of said corporation's position as the dominant seller, and the functions performed by the motorcycle dealers in maintaining adequate service facilities, and engaging in various promotional activities designed to interest prospective purchasers, and to maintain their interest, constituted the largest existing potential market for motorcycles, equipment, parts, accessories, and motorcycle oil—

(a) Entered into agreements with its dealers—who, with very rare exception, sold and repaired only its motorcycles and concentrated only on motorcycle riders of its product—whereby the dealer was obligated not to sell substitute component parts, accessories or oil for respondents' motorcycles; and, following the end of World War II, and while the period of scarcity still existed, resumed its policy of requiring and seeking, in effect, such exclusive dealing on the part of dealers;

(b) Sanctioned or acquiesced in activities of its employees directed to that end, including periodic calls by its field representatives and the checking by them of dealers' stock for the purpose, among others, of ascertaining and reporting competitive products found, orders, in certain cases, to dispose of competitive merchandise, the exacting of promises so to do, and the holding up of dealer contracts pending the disposition of all such products and threats thereof, and, on one occasion, the preparation of a written pledge for the members of one of its dealer associations whereby the members undertook not to deal in parts and accessories not manufactured and sold by it, and the solicitation and securing of the executions thereof by the dealers at a meeting of the association and certain other action in said connection;

With the result that such dealer contracts and exclusive-dealing understandings and its efforts to enforce them resulted in loss of business by competitive sellers of parts, oils, and accessories; its dealers, insofar as appeared, complied strictly with their agreement to deal in its oil and parts exclusively; and while such dealers, despite a similar agreement as to accessories, did purchase the same from competitors, and were not forced out of the market by strict enforcement of the exclusive-dealing agreements, they were caused to lose business through the exercise of its power, sporadically, under such agreements, to foreclose such competitors from their principal market, and their said business continued at its sufferance; and

(c) While there was no written agreement between it and its dealers as to said matter, dealt on an exclusive-dealing-agreement basis with its dealers, through its firm policy of requiring exclusive dealing by them in its new motorcycles, and its enforcement thereof, and their understanding and compliance therewith, in accordance with which, and in response thereto, a manufacturer of a competitive lightweight motorcycle was practically completely shut out of the market;

With the result that competitors generally lost business and in varying degrees were foreclosed from the market represented by its dealers, and said exclusive-dealing agreements had the capacity and probability of causing a substantial adverse effect on competition in the field involved and of creating a substantial tendency toward monopoly in the line of commerce in which it was engaged:

*Held,* That such acts and practices in the sale of merchandise for use and for resale within the United States, on the agreement and understanding that the purchaser should not use or deal in merchandise of its competitors, under the circumstances set forth, constituted a violation of Section 3 of the Clayton Act.

Before *Mr. Earl J. Kolb*, hearing examiner.

*Mr. William C. Kern* and *Mr. Andrew C. Goodhope* for the Commission.

*Shaw, Muskat & Paulsen* and *Mr. Robert J. Davidson*, of Milwaukee, Wis., for respondent.

## Decision of the Commission

### STATEMENT OF THE CASE

The Federal Trade Commission on September 14, 1949, issued and served on respondent Harley-Davidson Motor Co., a complaint charging it with having violated section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act by entering into and enforcing agreements requiring its dealers to sell its products exclusively. Respondent filed an answer denying that it had violated either Act as alleged.

Pursuant to notice, hearings were held in twelve cities throughout the United States from June 28, 1950, to October 24, 1951, before Earl J. Kolb, a hearing examiner duly designated by the Commission to hear this proceeding. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded respondent and counsel supporting the complaint. All testimony and other evidence was recorded and filed in the office of the Commission.

After receiving proposed findings of fact and hearing oral argument of counsel, the hearing examiner filed his initial decision on

August 26, 1952, in which he concluded that respondent had violated the Clayton Act and Federal Trade Commission Act as alleged. Within the time permitted by the Commission's Rules of Practice, respondent appealed to the Commission from this initial decision.

Upon consideration of the entire record herein, including the briefs in support of and in opposition to the initial decision and oral argument of counsel, and having determined that the rulings of the hearing examiner are free of prejudicial error, the Commission, for the reasons stated in its written opinion, hereby denies respondent's appeal and in lieu of the initial decision issues its findings of fact, conclusion and order as follows:

## FINDINGS OF FACT

### I. The Business of the Respondent

Harley-Davidson Motor Co. is a Wisconsin corporation having its principal place of business in Milwaukee, Wisconsin. It manufactures and sells motorcycles, servi-cars, sidecars and package trucks and a complete line of parts and accessories therefor, including oil, tools, shop supplies, operators' clothing and equipment all of which are advertised and sold under the trade name "Harley-Davidson."

Respondent sells its products to motorcycle dealers located throughout the United States and regularly causes its products to be shipped from its factory and warehouse facilities in Milwaukee, Wisconsin, to the places of business of its purchasers in other States of the United States. It is engaged in competition in the sale of its products with others engaged in the sale of similar products in interstate commerce.

Respondent is the largest manufacturer of motorcycles and related products located in the United States. It sells some of its products directly to police departments, the United States Government, and some large fleet operators, but the great majority of all of its products are sold to its independently owned franchised retail dealers.

The dollar volume of business done by the respondent with its dealer-customers has been substantial. During the years 1946 to 1949, inclusive, sales by respondent to its dealer-customers of its various products were as follows:

| *Sales to Dealers by Product* | *1946* | *1947* |
|---|---|---|
| Motorcycles | $4,201,034.29 | $6,806,750.55 |
| Sidecars | 54,994.03 | 93,811.97 |
| Servi-Cars | 564,659.38 | 1,068,950.65 |
| Package Trucks | 15,718.38 | 13,913.36 |
| Accessories | 166,414.70 | 513,439.55 |
| *Parts | 2,716,831.18 | 3,686,058.26 |
| Oil | 227,714.50 | 393,090.70 |

*Includes tools and shop supplies which are of comparatively small dollar value.

| *Sales to Dealers by Product* | *1948* | *1949* |
|---|---|---|
| Motorcycles | $10,810,408.30 | $10,916,841.01 |
| Sidecars | 79,895.72 | 48,836.79 |
| Servi-Cars | 998,637.14 | 609,789.67 |
| Package Trucks | 9,777.72 | 7,783.25 |
| Accessories | 649,733.06 | 458,070.16 |
| *Parts | 3,709,517.89 | 2,791,452.00 |
| Oil | 392,540.26 | 302,418.34 |

*Includes tools and shop supplies which are of comparatively small dollar value.

## II. Respondent's Dealer Organization

Respondent sells its products to approximately 800 dealers. These dealers are independent business organizations furnishing their own capital. This dealer organization is considered by competing manufacturers to be the largest and best in the field.

The majority of motorcycles sold at retail in the United States are purchased primarily for sport and recreational use. The motorcycle dealer performs a valuable function in maintaining adequate service facilities and engaging in various promotional activities designed to interest purchasers in the purchase of motorcycles and to keep their continued interest. Included in these are the organization of clubs and the promotion of various recreational activities. When a motorcycle dealer makes a sale of a motorcycle, the purchaser generally returns to the dealer from whom he purchased the machine for any further purchases of motorcycle equipment or accessories and also for any repairs or parts replaced on the machine. Consequently, as respondent is the dominant seller in the United States, the Harley-Davidson dealers constitute the largest existing potential market for motorcycles, equipment, parts, accessories, and motorcycle oil.

Of the 786 motorcycle dealers who handled respondent's products on January 1, 1950, 572 (with 585 outlets) had entered into respondent's standard form of dealer contract. The others had entered into special contracts designed for the State of Texas or sold respondent's products pursuant to a letter agreement designating them as Harley-Davidson dealers. All of these dealers are independently owned concerns and are not representatives or agents of respondent.

## III. Exclusive Dealing Understandings as to Parts, Accessories and Oil

Respondent's standard form of contract with its dealers, which has remained unchanged for over 15 years, contains the following provisions:

(11) The Dealer agrees not to sell substitute component parts, accessories or oil for Harley-Davidson Motorcycles, Sidecars, Servi-Cars, Package Trucks,

and Chassis, and that he will not use substitute component parts in repairing Harley-Davidson Motorcycles, Sidecars, Servi-Cars, Package Trucks, and Chassis.

* * * * * * *

(14) If the Dealer shall violate, or fail, or neglect to perform any of the terms or conditions of this agreement on his part to be kept or performed, the Seller may at its election terminate this contract after mailing written notice to this effect to the Dealer, or to his representative, at his above address, or such other place as the Dealer may have in writing last indicated.

(15) Either party may cancel or terminate this Agreement at any time, provided the party desiring to so terminate and cancel the same gives unto the other a written notice of such intention at least THIRTY DAYS prior to the date of such proposed termination and cancellation.

(16) * * * (b) After the expiration of the term of this Agreement, the continued sale of Motorcycles, Sidecars, Servi-Cars, Package Trucks, Chassis, Parts and Accessories by the Seller to the Dealer or the referring by the Seller of inquiries from said territory to the Dealer, shall not be construed as a renewal or extension of this Agreement; but all such orders accepted by the seller and all such sales made by the Dealer, shall be governed by the stipulations of this Agreement. The Seller reserves the right under the condition described in this paragraph to appoint a new Dealer or to discontinue supplying Motorcycles, Sidecars, Servi-Cars, Package Trucks, Chassis, Parts and Accessories to the former Dealer at any time without notice.

* * * * * * *

(19) The failure of the Seller to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the Dealer of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the Seller to thereafter enforce each and every such provision. (Com. Ex. 1.)

During World War II when respondent was engaged primarily in war work and when materials were in short supply, it did not object to its dealers handling parts and accessories purchased from other sources. However, after the conclusion of the war and while the period of scarcity still existed, respondent again put its policy of requiring exclusive dealing on the part of its dealers into effect.

On October 29, 1946, respondent's sales manager of parts and accessories, Mr. H. A. Devine, in a letter to respondent's salesmen stated:

The management has decided that it is fully time that we start an active campaign to change all Harley-Davidson dealers back to stores that handle only Harley-Davidson trademark products. As this department is primarily interested in spare parts, accessories and oil, this letter is to tell you what to do about these items with the various dealers in your territory.

During the war when this company was primarily interested in whether we were going to win the war with Germany and Japan, we did not object—in fact we rather encouraged some dealers to add parts and accessories from other sources to their Harley-Davidson line. That stand was all right in wartime, but this is no longer wartime, and there is every reason now why the dealer should change back to 100% Harley-Davidson trademark merchandise.

* * * * * * *

It is true that there are still many shortages. In spite of these shortages, we insist that this is the time to change back to 100% Harley-Davidson goods. If we wait until the supplies of Genuine Harley-Davidson accessories are more than sufficient to take care of the demand, we will have to wait until there is some recession in business. This would be inadvisable for the dealers or for ourselves.

* * * * * * *

Our accessory line is growing rapidly. We expect by the turn of the year to have a fairly complete line of accessories to ship to dealers. Already such things as spotlights, fender lights, parking lamps, chrome stacks and similar items are being shipped in reasonable quantities. Before the first of the year we will have such items as chrome rear bumpers and optional types of fender tips, and quite a number of other items that we have not heretofore been in a position to furnish. Riding breeches will be here, and we hope to have some arrangements made on riding boots. If the leather is available at all, we will have Harley-Davidson jackets.

We do not want dealers to be caught with a large stock of other than Harley-Davidson merchandise which would be extremely difficult to liquidate, when we have the same items to sell in an ample supply. We will be actively advertising these items to the dealers' customers, and it is very likely that our quality will be higher than that of competitive goods and prices even more reasonable.

* * * * * * *

By all means, start the ball a-rolling immediately whenever you talk to a Harley-Davidson dealer, either individually or in a group. Adopt a slogan, "It is better to be out of merchandise than to provide a substitute." The time to stop buying outside merchandise is now. If the purchase of this material is stopped now, many of our dealers will be very fortunate if they have liquidated such stocks by the first of the year.

The writer has talked to 30 or 40 dealers on this same subject, and has found them to be in agreement with our views. Most of the dealers we talked to are in the bigger cities. Apparently, they were just waiting for word from us and expected to be told that they would, of necessity, have to sell Harley-Davidson merchandise exclusively. It is not too soon to make the change right now. (Com. Ex. 20–A, B.)

Again in 1948 Mr. Devine, as sales manager in charge of parts and accessories, sent a letter to all of respondent's salesmen dated September 3, 1948, which read in part, as follows:

The dealer who decides to buy certain accessories elsewhere than from Harley-Davidson hurts himself much more than he does us. Here is what he is doing:

* * * * * * *

6. He is acting in bad faith when he denies us a full market for our products. We did not establish him as a dealer so he could sell some other manufacturer's merchandise. (Com. Ex. 25.)

Respondent's standard dealer contract does not prohibit its dealers from selling or using competitive parts, accessories, or oil on brands of motorcycles other than Harley-Davidson. However, as, with very rare exception, the only new motorcycles sold by respondent's dealers are Harley-Davidson motorcycles, and the only motorcycles repaired by them are Harley-Davidson Motorcycles, and as their sales policy is to concentrate on Harley-Davidson motorcycle riders, the effect of this contract and the understanding between respondent and its dealers, as illustrated by the above-quoted excerpts from respondent's sales manager's letters, is that its dealers are not to sell competitive parts, accessories, or oil purchased from other sources.

Further indication of the understanding between respondent and its dealers as to handling competitive parts and accessories is shown by the following excerpts from the reports of Mr. William Gardner, one of respondent's sales representatives:

Parts and Accessories. Parts bins have been added to make more room and these have been enclosed. Accessories are being displayed in two show cases and in wall displays. Has stocked a few "other-than-H-D" items and was advised to carry our line exclusively. (Com. Ex. 57–A.)

Parts and Accessories: * * * Has very limited amount of other than H-D mdse. and this is being discontinued. (Com. Ex. 58–A.)

Parts and Accessories. * * * Has been able to get his "other-than-H-D" mdse down to less than $400.00 and is moving it out fast. Well on the way to being exclusive. (Com. Ex. 64–A.)

Parts and Accessories. * * * Estimate that he has about $1,000.00 in other than H-D mdse which he will discontinue. Has stated that he is anxious to become an exclusive dealer and he will be held to his promise as far as discontinuing competitive merchandise is concerned. (Com. Ex. 65–A.)

Parts and Accessories. * * * Has less than $1,000 in other than H-D items which will be discontinued as soon as they can be moved. This amount consists mainly of jackets, sport shields, bumpers, etc. Store is nicely arranged and mdse is well displayed. Will be exclusive. (Com. Ex. 85–A.)

Another field representative of respondent, Mr. Hartwick, prepared a written pledge that members of a dealer association, known as the Ohio-Indiana-Kentucky Harley-Davidson Motorcycle Dealers Association, would not deal in parts and accessories not manufactured and sold by respondent. He solicited and secured the execution thereof by the dealers assembled at a meeting of the Association on September 13, 1948, secured the signature of at least one absent dealer-member of the Association and sent the signed pledge to respondent. The pledge was returned at once to the Association.

Respondent contends that the above activities of its sales representatives were neither authorized nor condoned by respondent. However there is no indication that Mr. Gardner, the author of the above-quoted reports, was reprimanded in any way. And as to the activities o Mr. Hartwick in connection with the exclusive dealing pledge of th Ohio-Indiana-Kentucky Harley-Davidson Motorcycle Dealers Ass ciation, it is clear that his objective of securing an exclusive dealir agreement from the dealers was in accordance with the wishes respondent's sales officials. The original impetus for the pledge w provided by irritation of the dealers at Joseph Buegeleisen Company for selling its accessories to chain stores. Various ineffective resolutions restricting purchases of competitive products, but short of exclusive dealing, were voted by the Association early in 1948.

The participating dealers contemplated reporting to respondent, dealers who did not cooperate. The Association asked respondent to have its factory representative take this subject up with Harley-Davidson dealers not present at the meetings. Mr. Devine, Manager of respondent's Parts and Accessories Department, informed the Association that Mr. Hartwick, the factory representative, would be more than glad to cooperate with the Association in every way possible. Later, on May 3, 1948, Mr. J. G. Kilbert wrote the Secretary-Treasurer of the Association as follows:

> We understand pressure is being put on the officers regarding the Association's stand on accessories. Don't give an inch. Your stand is sound and to back up would discredit the officials and break down the thing you are working for.

With this background it is clear that Mr. Hartwick was acting in accordance with the wishes of respondent's sales officials in encouraging its dealers to pledge that they will deal exclusively in its products. The fact that Mr. Devine returned the signed pledge, mailed in by Mr. Hartwick to the Association, is not sufficient to disassociate respondent from his actions.

Respondent's dealer contracts and exclusive dealing understandings and its efforts to enforce them resulted in loss of business by competitive sellers of parts, oil and accessories. For example, during 1947, Ray Phillips, a Harley-Davidson dealer in Anderson, Indiana, discontinued handling a motorcycle fork for the front wheels of motorcycles which was manufactured and sold by Vard, Inc., of Pasadena, California. On May 23, this dealer wrote Vard, Inc., a letter which read in part as follows:

> Enclosed is a sample of advertisement I used at Daytona. Since then several persons receiving them sent them in to the Harley Davidson factory. Being a Harley Davidson dealer HD they have been on me like a wet shirt. They even informed me that unless I stopped selling Vard forks they would shut me off. J. B. Jones is employed by us and a good friend of Harley-Davidson factory. J. B. also told them off, of course for Vard.
>
> I offered to let Harley Davidson ride my motorcycle and they refused by saying they had not tested your forks and they were not going to. We have been having a lot of fork trouble on Harley Davidson. As soon as we install Vard forks trouble vanishes. I told Harley Davidson one life was worth more than their whole Harley Davidson factory in which they replied I did not know. Then stated I had a good idea as I have ridden them 2400 mi. I sure wished you were here to help me when they get on me. They have been at the shop times to see me and one time we were installing a set and the other time they had came after his Harley who had a set installed. Boy is things popping. (Com. Ex. 155-A.)

On May 19, 1947, this same dealer again wrote Vard, Inc., in part as follows:

We are very sorry to advise you that we are now cancelling all of our unfilled orders. The HD factory has put so much pressure on us we are now asking you to terminate our agreement to handle Vard products in Indiana. (Com. Ex. 156.)

When Ray Phillips was called as a witness in this proceeding, he stated that he had not given the real reason he had canceled with Vard in the correspondence as he was seeking an easy way to discontinue purchasing Vard, Inc.'s product. He also contradicted certain other statements in the correspondence. However, the hearing examiner, after noting the demeanor of this witness upon the stand and certain discrepancies in his testimony, found that his explanation was an afterthought. The admission by the witness that he did not tell the truth in the first instance, tends to destroy his reputation for veracity as a witness and the written statement made at the time that this controversy arose is accepted as stating the real reason for this discontinuance.

Other of respondent's dealers testified that they dealt in respondent's parts and oil exclusively. There is no evidence that respondent's dealers did not strictly comply with their agreement to deal in Harley-Davidson oil and parts exclusively.

Despite a similar agreement as to accessories, respondent's dealers did purchase accessories from competitors. If they had not so purchased, the result would have been to practically put respondent's competitors in the accessories field out of business. For example, Joseph Buegeleisen Company, one of the largest manufacturers of motorcycle accessories, sold over sixty percent of its products to Harley-Davidson dealers. They constitute its principal market, without which it could not keep its salesmen on the road. However, while these competitors were not forced out of this market by strict enforcement of the exclusive dealing agreements, sporadic enforcement caused them to lose business and clearly shows respondent's power under these agreements to foreclose competitors from their principal market. For example, certain dealers when told by respondent's salesman William Gardner to discontinue handling competing accessories, did discontinue or greatly reduced their purchases of competitors' products. Also, members of the Ohio-Indiana-Kentucky Harley-Davidson Motorcycle Dealers Association, upon being asked to sign a pledge not to buy accessories competitive with Harley-Davidson's and upon being informed by respondent's representative at their meeting that those not cooperating may lose the factory's blessing, signed the pledge and greatly reduced their purchases of competing accessories. For example, sales to members of this latter group by the Joseph Buegeleisen Company dropped off in the year of the pledge to slightly over one-third of the dollar volume of the previous year. This occurred during a period of rising sales in the motorcycle field.

## IV. Exclusive Dealing Understandings as to Motorcycles

There is no written agreement between respondent and its dealers as to exclusive dealing in Harley-Davidson motorcycles. However, it is respondent's firm policy to require exclusive dealing by its dealers in its new motorcycles. Respondent's dealers understand and comply with this requirement. With only the rarest exception, none of its dealers sell any brand of new motorcycles other than Harley-Davidson.

The existence of this understanding between respondent and its dealers is well illustrated by the manner in which respondent's dealers stopped buying "Servi-cycles," a lightweight motorcycle manufactured by the Simplex Manufacturing Corporation of New Orleans, Louisiana, when respondent came out with a new competitive lightweight motorcycle late in 1947. Prior to this time Harley-Davidson dealers constituted a major part of the market for "Servi-cycles." Soon after this time only in the rarest case was a "Servi-cycle" sold to a Harley-Davidson dealer.

The president of Simplex Manufacturing Corporation personally informed Mr. William Davidson, respondent's president, that respondent's policy of not allowing its dealers to handle his product was unfair to the dealers and to himself. Mr. Davidson replied that that was respondent's firm policy and would be adhered to.

An illustration of the methods used by respondent to secure compliance with and agreement to its exclusive dealing policy as to motorcycles is shown by the letter written by Mr. J. G. Kilbert, respondent's Domestic Sales Manager, to Mr. Rudy Bolling of the J. R. Bolling Co., Inc., a Harley-Davidson dealer in Winston-Salem, North Carolina, on August 29, 1947, which stated as follows:

> We heard recently that you were selling English motorcycles. We have also heard that you were distributing Servi-cycles. I believe you either operate or are interested in an electric appliance business. Inasmuch as George Balmer is covering a lot of territory and is not able to call on you as regularly as in normal times we will appreciate it if you will tell us exactly what lines you are selling, and, if you care to, whether you are interested in any other business besides J. R. Bolling Co.
>
> During the war some of our dealers took on side lines and we did not say anything because we did not have enough merchandise for them because the army was taking almost everything we made. However, the time is here to find out what the thinking of the dealers is who took on outside lines, and that is the purpose of this letter.

Naturally we are going to try to protect our own interests, and if a dealer is going to divide his efforts we are going to have to take such steps as we see fit and assure us of adequate sales coverage. We will hold up any action on your 1948 dealership (the 1948 season starts October 1, 1947) until we have heard from you and Mr. Balmer has been on the ground. (Com. Ex. 32.)

Subsequent to this time Rudy Bolling discussed this matter with Joseph G. Kilbert, Domestic Sales Manager of the Harley-Davidson Motor Co., and on October 23, 1947, notified George Balmer, Sales Representative of the Harley-Davidson company, as follows:

After long consideration Nell and I have decided to go along with Harley Davidson. We have decided, and agree too, that in the long run, we will be better off with the Harley Davidson franchise. Therefore, we are taking steps to sell out our holdings—both in the retail and also wholesale of Servi-cycles.

We also agree not to sell competitive makes of new motorcycles after our present stock are exhausted, so long as we are authorized Harley Davidson Dealers.

Thanking you for your personal interest in getting this matter straightened out, I remain (Com. Ex. 33)

During the year 1947 the J. R. Bolling Co., Inc., made purchases in the amount of $138,509.67 from the Simplex Manufacturing Corporation. Subsequent to this exchange of correspondence between Harley-Davidson and the J. R. Bolling Co., Inc., the purchases by J. R. Bolling Co., Inc., from Simplex Manufacturing Corporation consisted of only minor purchases of parts and accessories but no Servi-cycles.

When Mr. Kilbert was asked about respondent's policy as to new motorcycles, he testified:

Well, you may say our policy has been to require our dealers to sell only our product. We have always maintained that we have that inherent right, but we have not always enforced it.

As a result of respondent's policy of compelling its dealers to discontinue competing lines of motorcycles, the Simplex Manufacturing Corporation was effectively excluded from seeking any distribution through Harley-Davidson dealers. These dealers constitute 80 percent of the potential market for the Servi-cycle; and when Simplex was denied access to these dealers as the result of respondent's policy, it was unable to distribute its Servi-cycles effectively and was forced to take its eight salesmen off the road because they were not able to secure sufficient dealers outside the Harley-Davidson organization to pay their expenses and make it profitable. From 1947 to 1949 sales of Servi-cycles dropped 50 percent. During this same period of time respondent's sales increased 60 percent. Since then the sales of Servi-cycles have further dropped to approximately 25 percent of its 1947 sales.

Respondent contends that this loss of business was a result of the preference of its dealers to sell its new lightweight motorcycle which it contends was a superior product. However, the above-quoted excerpt from the October 23, 1947, letter of Mr. Bolling and the following statements of reasons for cancellation by other dealers show that the fact respondent required its dealers to deal exclusively in its new motorcycles was the real reason for cancellation.

Late in the year 1947 Mr. Otis Lee, Harley-Davidson dealer located at Mobile, Alabama, called upon the president of the Simplex Manufacturing Corporation at New Orleans, Louisiana, and informed him that while he owed a great deal of his success to his association with Simplex, he had a bigger investment and a greater volume of sales with Harley-Davidson and that he was compelled to discontinue sale of Servi-cycles at the insistence of the Harley-Davidson Motor Co. During the year 1947, Lee purchased products from Simplex in the amount of $39,143.87, but subsequent to this conversation he purchased only an inconsequential amount of parts and only one Servi-cycle.

On January 16, 1949, Howard Griffin, a Harley-Davidson dealer in Monroe, Louisiana, wrote the Simplex Manufacturing Corporation as follows:

You will recall that I called you on the phone over two months ago and explained our difficulties that we were having with Harley-Davidson about handling their line exclusively.

At that time I asked that we be permitted to represent Simplex in an unofficial way for the time being until we could see what was going to develop.

Since then Harley has kept a watchful eye on our operation to such an extent that I feel that we are not doing any sort of decent job for Simplex, being handicapped as we are now.

Therefore, in all fairness to you, Simplex, and Mr. Treen I am relinquishing our position as dealer for Monroe and vicinity. Of course, we shall be glad to handle all service matters until such time as you are able to get a suitable dealer in Monroe and, in this connection, would like to be allowed to order parts on the same basis as formerly until such time as you have been able to establish proper service facilities in Monroe.

Jack, I want you and Paul to know that doing this is exceedingly difficult for me, that I have always enjoyed the very fine business relationship with Simplex and its capable organization, and that I am not overlooking the fact that your product has helped us in no small measure in building up this business to what it is today.

Taking full cognizance of all this makes it hard, indeed, to make this decision, but we have to consider the cold facts of business and analization of potential markets which forced us to remain with Harley because of the increased demand for large motorcycles.

If we can be of any assistance in helping you locate another dealer please do not hesitate in calling on us and I would appreciate your dropping me a line, Jack, about our getting parts until you do get your new dealer. (Com. Ex. 116)

During the year 1947, Howard Griffin made purchases from Simplex in the amount of $17,085.23, but since the writing of said letter his purchases have been only inconsequential purchases of parts. Howard Griffin appeared as a witness and testified that Bob Brandenberg, salesman for the Harley-Davidson Motor Co., asked him to drop the Cushman Scooters and Servi-cycles from his line and that he agreed to drop these lines.

On June 4, 1949, Ted Edwards, a Harley-Davidson dealer at Atlanta, Georgia, wrote the president of the Simplex Manufacturing Corporation in part as follows:

> We have just taken on the Harley-Davidson motorcycle franchise and are giving up Indian here in Atlanta.
>
> As you probably know, Harley-Davidson will not allow us to handle any other line. Therefore it looks as though I am going to have to give up my Servicycles, which I certainly feel bad about as I have enjoyed being connected with Simplex the past eight years and our business relations have always been most pleasant, not to mention our personal friendship of which I am sure you know how I feel and will always continue to feel the same. * * * (Com. Ex. 111)

The purchases made by Ted Edwards from Simplex amounted to $33,060.38 in 1947, $7,559.10 in the fiscal year 1948, and $3,995.55 during period from September 1948 to June 1949. Subsequent to letter of June 4, 1949, Simplex has been unable to sell any of its products to said dealer.

## V. Justification

Respondent does not admit the existence of any exclusive dealing contract, agreement or understanding. It does admit it has actively encouraged its dealers to deal exclusively in its new motorcycles. It contends that its contract requiring the sale or use of Harley-Davidson parts, accessories and oil in Harley-Davidson motorcycles is not an exclusive dealing contract as it does not prohibit other sales for other motorcycles.

Respondent has presented evidence to justify its contract provision as to parts, accessories and oil. It has shown its general warranty guaranteeing its new motorcycles against mechanical defects for either 90 days or 4,000 miles, whichever comes first. It has introduced evidence that, in order to maintain its goodwill and to protect itself under its guarantee, it must be assured of the use of genuine Harley-Davidson parts and, at least, functional accessories. Evidence was also introduced tending to establish that parts and oil supplied by respondent are considered by its dealers to be of better quality and more satisfactory for use in Harley-Davidson motorcycles than parts and oil from other sources. It is established, however, that there are other brands of oil, especially designed for air-cooled motors, which are also suitable for use in motorcycles. Many accessories do not have any relationship to the mechanical operation of a motorcycle and their use has no bearing upon respondent's guarantee. Further, many Harley-Davidson dealers and their customers prefer to buy certain accessory items manufactured by respondent's competitors.

Evidence has also been presented by respondent to the effect that it is more satisfactory from an economic standpoint for a dealer to confine his activities to one brand of motorcycles because it reduces the inventory outlay so far as parts are concerned. Evidence has also been introduced showing that the respondent furnishes assistance to its dealers in promoting the sale of motorcycles and equipment which are of substantial value to the dealer.

## VI. General Conclusions

Respondent's contracts with its dealers which require exclusive selling and use of respondent's parts, oil and accessories for Harley-Davidson motorcycles are interpreted as and are in fact exclusive dealing agreements as its dealers, with rare exceptions, repair only Harley-Davidson motorcycles and attract only the business of riders of Harley-Davidson motorcycles.

Respondent's policy of requiring its dealers to sell its new motorcycles only, its acts and practices to enforce this policy, and its dealers' compliance with this policy constitute exclusive dealing agreements between them as to new motorcycles.

The size and importance of the market for motorcycles and motorcycle parts, oil and accessories controlled by respondent's dealers, the foreclosure of this market to certain competing sellers, competitors' loss of sales of parts, oil, and accessories to this market as a result of said exclusive dealing agreements, to the extent herein found, considered together with respondent's power under these agreements to foreclose this market to its competitors, establish that the effect of these agreements may be to substantially lessen competition or tend to create a monopoly in respondent in this line of commerce.

## CONCLUSIONS OF LAW

For the reasons stated in the written opinion of the Commission, respondent's acts and practices as herein found establish that respondent has sold merchandise for use and for resale within the United States on the agreement and understanding that the purchaser thereof shall not use or deal in merchandise of competitiors of respondent, where the effect of such sale and agreement or understanding may be to substantially lessen competition and tend to create a monopoly in respondent in the line of commerce in which respondent is engaged, in violation of section 3 of the Clayton Act.

ORDER

*It is ordered*, That the respondent, Harley-Davidson Motor Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of motorcycles and motorcycle equipment, parts, accessories, oil, and other similar or related products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement, or understanding that the purchaser thereof shall not use, or deal in, or sell motorcycles, motorcycle equipment, parts, accessories, oil, or other similar or related products supplied by any competitor or competitors of respondent.

2. Enforcing or continuing in operation or effect any condition, agreement, or understanding in, or in connection with, any existing contract of sale, which condition, agreement, or understanding is to the effect that the purchaser of said products shall not use or deal in motorcycles, motorcycle equipment, parts, accessories, oil, or other similar or related products supplied by any competitor or competitiors of respondent.

3. Causing any of its dealers or other purchasers of its said products to refuse to purchase any competitive product from its competitors by:

(a) Threatening, directly or by implication, the cancellation of its franchise, contract, or selling agreement with said dealer or other purchaser.

(b) Participating in or encouraging by any overt act efforts to secure, either individually or through associations of dealers, pledges or agreements of any of said dealers or other purchasers to deal exclusively in any or all of its said products.

(c) Intimidating or coercing its dealers or other purchasers in any way for the purpose or with the effect of causing them or any of them to deal exclusively in any or all of its said products.

*Provided*, *however*, That nothing in this order shall prohibit respondent from entering into an agreement with its dealers prohibiting them from using or selling for use, in a Harley-Davidson motorcycle, oil or parts which would adversely affect its mechanical operation.

*It is further 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.

Commissioners Howrey and Gwynne not participating for the reason that oral argument was heard prior to their appointment to the Commission.

## OPINION OF THE COMMISSION

By MASON, Commissioner:

This matter is before the Commission upon an appeal by respondent, Harley-Davidson Motor Co., from an initial decision of a hearing examiner of the Commission holding that it has violated Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act. This initial decision holds that respondent has entered into and enforced agreements with its dealers requiring them to deal exclusively in its motorcycles and its motorcycle equipment, parts, accessories, and oil. It further holds that these agreements have had the effect of substantially lessening competition and the tendency to create a monopoly in this company in the sale of these products. Respondent in its appeal contends that it has had no such agreements with its dealers and that its business practices have had no adverse effect on competition.

### I

The record shows that respondent is the largest manufacturer of motorcycles in the United States. Its total domestic sales to its dealers has increased greatly since the war, totalling over 15 million dollars in 1949. It is one of a very few remaining motorcycle manufacturers in this country. Its principal competition in the motorcycle field now comes from foreign manufacturers, its largest domestic competitor having encountered production and financial difficulties in recent years, according to respondent. There are numerous domestic competitors for the accessories and supplies business.

Respondent sells its products to approximately 800 independently owned, franchised dealers. This is the largest and best dealer organization in the field.

Motorcycles have an appeal to a very special class of customers. While their facility makes them useful in police, traffic, and certain forms of commercial work, these functions absorb only a minor share of the total production. The great majority are sold to people young in spirit who love motion, the rush of air, the sense of freedom, the joy of the open, uninhibited by glass windows, plush arm rests, adjustable seats, and thermodynamic air conditioning. It is this appeal that sells three-fourths of all motorcycles.

When the American spirit of adventure and competition sputters out, there'll be no market for motorcycles.

Whether it be the world famous Isle of Man Tourist Trophy or our American contests such as the Jack Pine Endurance Run, the Daytona 200 Mile Road Race, or the 500 other sanctioned motorcycle sporting events—these sell motorcycles, as a half a million young Americans can tell you.

To be a success a motorcycle dealer has to be, first of all, a lover of motorcycles. He has to ride one himself. He has to go out with the boys on Sundays, not just to sell them motorcycles but to sell them on motorcycling and to supply the sport and activity that goes with it. A motorcycle is of no value to a boy unless he has fun with it, and to be a success a dealer must encourage that fun. He must organize motorcycle clubs and promote races, hill climbs and other competitive events. He must have that motorcycle atmosphere around his place of business that makes the motorcycle crowd like to hang out there. He must eat, sleep, live and talk motorcycles. This takes an unusual type of person—one who has a feeling for motorcycles and is willing to do all these things because he enjoys them himself.

Harley-Davidson has done an excellent merchandising job in this field. It has long realized that what is good for sport is good for its business, and it has carefully selected its dealers and encouraged and helped them stimulate motorcycling for sport. As a result respondent has grown and prospered. Likewise the independently owned companies dealing in its motorcycles have become the largest market for motorcycles, parts, accessories and supplies in the country. Access to these dealers is almost essential in the selling of motorcycle parts, supplies, accessories and oil in the American market.

During World War II when products were in short supply, respondent did not object to its dealers selling competitors' products. For example, many of them sold Servi-cycles, a lightweight motorcycle manufactured and sold by the Simplex Manufacturing Corporation of New Orleans. However, shortly after the close of the war, respondent campaigned to get its dealers to sell Harley-Davidson products exclusively.

When respondent introduced a lightweight motorcycle into its line in the fall of 1947, its representatives got in touch with franchise dealers which were selling Servi-cycles and let them know that they were expected to sell Harley-Davidson motorcycles exclusively, including its new lightweight motorcycle. Respondent held up renewing and threatened to cancel dealers' franchises until they agreed not to sell competitive makes of new motorcycles.

These dealers constituted a major percentage of the market for Servi-cycles; and when they became unable to handle this motorcycle, the sales of the Simplex Manufacturing Corporation dropped off sharply while respondent's sales increased greatly. Shortly thereafter Simplex laid off all of its salesmen and its sales were reduced 75 percent. The President of Simplex Manufacturing Corporation testified that he personally complained to respondent's President, Mr. Walter Davidson, about respondent's practice of not allowing its dealers to handle Servi-cycles and that Mr. Davidson replied that that was the firm policy of his company and would be adhered to. At the present time, with rare exceptions, respondent's dealers sell Harley-Davidson motorcycles only.

In the parts and accessories field, respondent has placed in its standard form of contract with its dealers a requirement that the dealer agrees not to sell any component parts, accessories or oil other than respondent's for Harley-Davidson motorcycles. The record shows that this provision has been interpreted by respondent as meaning that all dealers are to deal in Harley-Davidson parts, accessories and oil exclusively. Respondent's field representatives called periodically on dealers and on such visits checked the dealers' stock for the purpose, among others, of ascertaining and reporting competitive products found. In certain cases these representatives have ordered dealers to dispose of the competitive merchandise, have exacted promises from the dealers to dispose of such merchandise, and have held up and threatened to cancel dealer contracts unless the dealers disposed of all such products.

On one occasion respondent's representatives and officials encouraged a dealer association known as the Ohio–Indiana–Kentucky Harley-Davidson Motorcycle Dealers Association to solicit and secure the written pledge of all of the members of that association that they would not deal in parts and accessories not manufactured and sold by respondent.

The record shows that these unsportsmanlike activities in the accessories field were only sporadic. They only happened from time to time and in different areas. Too zealous salesmen (but with the encouragement and knowledge of company officials) took the initiative in most of these cases. On occasion a complaint to respondent's home office by an indignant competitor would cause a halt in a particularly obnoxious form of coercion. In the field of accessories, respondent's competitors have continued to do business with respondent's dealers despite the restrictive agreements. They constitute their most important market. However, at all times respondent has had the power under its agreements with its dealers to foreclose competitors from this market. And from time to time it has given its competitors a little squeeze.

Respondent does not defend those acts of coercion and intimidation by its salesmen in this field. It denies responsibility for them and denies it has committed any illegal act. But it stated through counsel in oral argument before the Commission that it would not object to an order relating to the practices in the accessories field.

We are glad no defense is made of these unsportsmanlike practices themselves. Just like what is good for sports is good for the motorcycling business; what is good for free and fair competition is good for all business. But in both competitive fields, there must be rules to govern the game. When the enthusiasm of a contestant clouds his better judgment, there must be a referee or umpire to call the contestant to account. Sometimes, when a motorcyclist drifts out on the turn to force out a rival, it is difficult to determine whether it was deliberate or accidental. The same holds true in the field of industry. The Federal Trade Commission is to interstate commerce what the American Motorcyclists' Association referee is to a sanctioned race meet. Whether the challenged action was intentional or not, the turn must be called when someone fudges on the rules. In the realm of business that's our job. We do not fine; we do not disqualify; we do not penalize, such as referees in the world of sports may do. We interpret the rules and relate them to a specific business practice. If the practice is illegal, we point it out to the offender. The great majority of American Businessmen need only have their attention directed to a bad business practice to correct it.[1]

The respondent in this instant case finds itself before us in just such a situation. Its practices, if engaged in by a lesser company, might not lessen or restrain commerce seriously. But Harley-Davidson is the dominant domestic factor in an industry which at one time counted many vital producers. This is all to its credit for we reject the idea that success and resultant bigness in a company makes it a threat to our free competitive system. But in a field where large and small companies compete, the larger ones must be especially careful to stay within the rules. Size brings with it increased responsibilities, commensurate with its increased power.

## II

The facts of record establish that the Harley-Davidson Motor Co. in selling its products to its franchised dealers under an agreement and understanding that the dealers will not deal in motorcycles, parts, accessories or oil of its competitors. This constitutes a violation of Section 3 of the Clayton Act if the effect of such agreements and understandings may be to substantially lessen competition or tend to

[1] Under the Clayton Act, violation of a Commission order carries no penalty. If respondents do not clear up their practices, however, the Commission can secure a Court order, violation of which would be penalized.

create a monopoly in any line of commerce. These exclusive dealing agreements do have this requisite substantial likelihood of future adverse effect on competition.

In reaching this conclusion, we have not restricted ourselves to determining only whether or not respondent had a substantial share of the market in this field. We have looked at the actual effect on competition of respondent's practices in the past and have considered their potentialities for future lessening of competition.

Section 3 of the Clayton Act does not prohibit all exclusive dealing agreements. It only prohibits those agreements which have the capacity and likelihood of lessening competition or tending to create a monopoly in any line of commerce. The legislative history of this Act shows that Congress believed that exclusive dealing agreements by a small business trying to break into a market should not be prohibited.[2] Such agreements would not provide a substantial threat to free competition even though all exclusive dealing agreements by their very nature foreclose some accounts to competitors.

Thus, such restrictive agreements standing alone might not merit the attention of the Commission. However, here these agreements are between the largest domestic manufacturer of motorcycles and its large and effective dealer organization in a field where the bonds between the motorcyclist and the dealer are especially strong.

In addition, competitors of respondent have lost business and in varying degrees have been foreclosed from the market represented by respondent's dealers. The manufacturer of the competitive lightweight motorcycle Servi-cycle has been practically completely shut out of this market while competing manufacturers of accessories have lost business and to a great extent are continuing in business at the sufferance of respondent as long as these exclusive dealing understandings are continued.

These facts establish that these exclusive dealing agreements have the capacity and probability of causing a substantial adverse effect on competition in this field and of creating a substantial tendency toward monopoly. We, therefore, conclude that respondent has violated Section 3 of the Clayton Act.

## III

Respondent urges that it has a right to require its dealers to agree to sell and use only those functional parts purchased from it for Harley-Davidson motorcycles. While the record shows that respondent has

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[2] See McAllister, "Where the Effect may be to Substantially Lessen Competition or Tend to Create a Monopoly," Proceedings of the American Bar Association, Section on Antitrust Law, August 26–27, 1953, p. 130.

gone beyond this in its agreements, still this question is squarely raised in determining the proper remedy.

It is urged that such a requirement is necessary to protect respondent's good will and to protect owners of its motorcycles who expect to get genuine, high-quality parts from a Harley-Davidson dealer. In opposition to this contention counsel supporting the complaint cite *Judson L. Thompson Mfg. Co.* v. *F. T. C.*, 150 F. (2d) 952 (C. A. 1, 1945) as holding that the open market, not the court, is the place for presentation of claims as to the relative merits of competitive products. However, in that case, involving a tying contract for the use of rivets in a leased riveting machine, the court carefully distinguished *F. T. C.* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923) which permitted an agreement restricting the use of Sinclair's pumps leased to dealers, to the sale of Sinclair gasoline saying:

"A different question is presented from that in the Sinclair case * * *. As the only use made of the gasoline was to sell it, and as there was no restraint upon the purchase and sale of competing gasoline, there was no violation of the Clayton Act." *International Business Machines Corporation* v. *United States*, 298 U. S. 131, 135 (1936).

It seems to us that respondent has a real interest in the proper repair of Harley-Davidson motorcycles by it dealers. In the absence of any exclusive dealing requirement, it could certainly require its dealers to agree not to use defective parts or improper oil in the repair and servicing of Harley-Davidson motorcycles. In its order in the matter of *General Motors Corporation*, 34 F. T. C. 58, 86 (1942), the Commission recognized this right as to automobile parts necessary to the mechanical operation of an automobile, even though, where there was no other source of proper parts, the agreement might have the effect of requiring exclusive dealing as to such parts.

The paramount need in this case is to prohibit respondent from restricting its independently owned dealers from exercising their right to make their own decisions as to what they want to sell. Harley-Davidson Motor Co. can select its own dealers, but it cannot legally, by threats of cancellation, force its dealers to agree to sell any class of its products exclusively. However, as to functional parts and oil, we believe that an agreement prohibiting the use of oil or parts which would adversely affect the mechanical operations of Harley-Davidson motorcycles would be proper in all respects.

Having determined that respondent's acts and practices constitute a violation of Section 3 of the Clayton Act, and inasmuch as they all can be prohibited under that Act, we believe that it is not necessary to consider whether they might also violate Section 5 of the Federal Trade Commission Act. See *Standard Oil Co. of California* v. *U. S.*, 337 U. S. 293, 314.

This conclusion necessitates a revision of the initial decision which holds that certain of respondent's practices violated Section 3 of the Clayton Act and others Section 5 of the Federal Trade Commission Act. In our opinion all of the acts found in the initial decision relate to respondent's exclusive dealing practices and should be considered in the light of Section 3 of the Clayton Act which specifically relates to such practices.

IV

In reaching the conclusion that respondent has violated Section 3 of the Clayton Act, we have considered each of respondent's exceptions to the initial decision.

We wish to refer specifically to its exceptions to the inclusion in the findings of the excerpts of letters by certain of respondent's dealers to its competitors telling them that they do not intend to buy from them in the future because of respondent's insistence on exclusive dealing. Respondent excepts to these letters as being hearsay. Especially do they object in those cases where the author testified that he had given false reasons in the letters for cancelling. The hearing examiner did not believe this testimony.

It has long been established that under the circumstances of this case letters of third party dealers are admissible under an exception to the hearsay rule to show the reason why they refused to deal with competitors of respondent. Standing alone, these letters could not establish the existence of an exclusive dealing agreement. But where the exclusive dealing arrangement has been established, and where certain of respondent's dealers have stopped buying certain competitive products, letters of these dealers to the sellers cut off are competent to show the reason for this action given by the dealer at the time. Taken together with other evidence showing the existence of respondent's activities to enforce its exclusive dealing policy, and the actual stopping of purchases from the competitor, these letters are very persuasive, competent, and clearly material as part of the evidence showing the effect of respondent's practices on competition.

We do not believe that the testimony of the author of a letter that it does not state the real reasons he stopped buying competitive products destroys its evidentiary value where the hearing examiner does not believe this explanation. The hearing examiner, who has had the opportunity to observe the demeanor of the witnesses, is the best judge of the credibility of their testimony.

Further exception is taken to the hearing examiner's refusal to permit certain additional cross-examination of witnesses McDonald and Treen. We are of the opinion that the hearing examiner's ruling did not constitute prejudicial error as the evidence sought to be elicited by the additional cross-examination would only have been surplusage tending to prove facts otherwise established and would not have affected the outcome of this case if allowed. The record contains the comparative sales volume of Mr. Treen's company for the years in question and establishes that the great bulk of respondent's dealers sold competitors' accessories.

We conclude, therefore, that respondent's appeal should be denied.

Commissioners Howrey and Gwynne did not participate for the reason that oral argument was heard prior to their appointment to the Commission.