IN THE MATTER OF

WALTER J. BLACK, INC. TRADING AS THE CLASSICS CLUB AND DETECTIVE BOOK CLUB

Docket 5571. Complaint, June 30, 1948—Order, opinion and dissenting opinion, Sept. 11, 1953

Charge: Advertising falsely or misleadingly and offering deceptive inducements to purchase through representing or offering, falsely or misleadingly, free goods; in connection with the sale of books.

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

Mr. Jesse D. Kash, for the Commission.

Mr. Loring M. Black, of Washington, D. C., for respondent.

Satterlee, Warfield & Stephens, of New York City, for Doubleday & Co., Inc. et al., and *Wolfson, Caton & Moguel*, of New York City, for Book-of-the-Month Club, Inc., amici curiae.

ORDER DISMISSING COMPLAINT

This matter is before the Commission upon respondent's appeal from the initial decision of the hearing examiner and upon briefs and oral argument of counsel, including oral argument of counsel for Doubleday & Company, Inc., and Book-of-the-Month Club, Inc., as *amici curiae*.

The complaint herein charges the respondent with false, misleading, and deceptive use of the word "free" in connection with the sale and distribution of books. The hearing examiner in his initial decision found that the allegations of the complaint are sustained and his order would prohibit the respondent from "Using the word 'free' or any other word or words of similar import or meaning in advertising to designate or describe any book or other merchandise which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent." Respondent in its appeal contends generally that the hearing examiner's findings and conclusion are not supported by the evidence and that no order is warranted.

The Commission having duly considered said appeal and the record herein and being of the opinion that, for the reasons set forth in the accompanying opinion of the Commission, the complaint should be dismissed, such disposition making it unnecessary to rule specifically on each of respondent's exceptions to the initial decision of the hearing examiner:

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

Syllabus: The use of the word "Free," or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in "commerce," as that term is defined in the Federal Trade Commission Act, is considered by the Commission to be an unfair or deceptive act or practice under the following circumstances:

(1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) When, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such article of merchandise.

OPINION OF THE COMMISSION

By Carretta, Commissioner:

This matter is before the Federal Trade Commission upon an appeal by the respondent corporation from the "Initial Decision" of the Hearing Examiner and from the "Examiner's Rulings on Requested Findings as to the Facts and Conclusions." Briefs were filed by both respondent's counsel and by counsel supporting the complaint. Oral argument upon the appeal was heard by the full Commission under date of June 29, 1953.

There should be no dispute as to the basic facts in this case inasmuch as the only evidence before the Commission is in the nature of a stipulation entered into between respondent's counsel and counsel supporting the complaint. No hearing was held in this matter, and no witnesses were submitted by either side.

The respondent, Walter J. Black, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1 Park Avenue, New York, New York. Said corporate respondent trades and does business as The Classics Club and Detective Book Club.

Respondent is now and for more than two years prior to June 30, 1948, has been engaged in the sale and distribution of books.

In the course and conduct of its business, respondent caused and has caused its said products to be transported from its place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia.

Respondent maintains and at all times mentioned herein has maintained a course of trade in its said books in commerce among and between the various States of the United States and in the District of Columbia.

Respondent in the course and conduct of its said business and for the purpose of inducing the purchase of its products has made representations and statements concerning its products, said statements and representations have been disseminated by respondent between and among the various States of the United States and in the District of Columbia among respective purchasers by use of the United States mails, by advertisements in newspapers, trade journals and by means of advertising folders, pamphlets, circulars and other advertising media, all of general circulation. Among and typical of such statements and representations, but not all inclusive, are the following:

1. FREE A TRIAL MEMBERSHIP GIFT

WALTER J. BLACK, PRESIDENT OF THE CLASSICS CLUB, INVITES YOU TO ACCEPT FREE THE ILIAD OF HOMER AND THE ODYSSEY OF HOMER

Two beautifully bound volumes. In the famous translations for modern readers by Samuel Butler. Of all the magic of "the glory that was Greece" these two books cast over you the most irresistible spell! Alexander the Great treasured The Iliad so deeply that he carried it into battle with him in a jeweled casket. And The Odyssey is so teeming with unforgetable action and adventure that the very names of its fascinating characters are bywords in our culture today!

Here, in these two books, is the Greece of the gods—the whole gorgeous panorama of mighty deeds, of alluring women and warrior heroes, of tales that have thrilled millions of readers.

No wonder these two immortal books of Homer, "the blind bard," have thundered down through thirty centuries, as fresh as though they had been written only yesterday! And now—as a gift from The Classics Club, for your library of volumes you will cherish forever—you may have them both, FREE!

Why the Classics Club Offers You These Two Books Free

Will you add these two lovely volumes to your home library now—as a membership gift from THE CLASSICS CLUB? You are invited to join today . . . and to receive on approval beautifully bound editions of the world's greatest masterpieces.

At the request of The Classics Club, four authorities formed themselves into a Selection Committee to choose the great books which offer the greatest enjoyment and value to the "pressed for time" men and women of today. And The Classics Club now presents these great books to you.

Why Are Great Books Called "Classics"?

A true "classic" is a living book that will never grow old. For sheer fascination it can rival the most thrilling modern novel. Perhaps you have often wondered how these truly great books "got that way". First, because they are so readable. They would not have lived unless they were read, and they would not have been read unless they were interesting and easy to understand. And those are the very qualities which characterize these selections: readability, interest, simplicity.

Only Book Club of Its Kind

The Classics Club is different from all other book clubs in these four ways: 1. Its sole purpose is to distribute to its own members the world's great classics at low prices. 2. Its basic price is lower than that of any other book club. 3. Its members are not obligated to take any specific number of books. 4. All its volumes are bound in attractive, uniform Classics Club bindings.

A Trial Membership Invitation to You

You are invited to accept a Trial Membership in The Classics Club. With your first book will be sent an advance notice about future selections. You may reject any book you do not wish. As a Trial Member, you need not take any specific number of books. No money need be paid in advance, no membership fees. You may cancel membership at any time.

Paper, printing, binding costs are rising. They have already made it imperative that the price of the Club's books be substantially increased beginning January 1st, 1945, to readers who join on and after that date. Therefore, in order to assure yourself of the present low price on your first book and on your future selections—as well as to receive your free copies of THE ILIAD and THE ODYSSEY of HOMER—we suggest that you mail this Invitation Form to us at once. THE CLASSICS CLUB, One Park Avenue, New York 16, N. Y.

Note: The DeLuxe Edition is luxuriously bound in fine buckram (the same material as used in $5.00 and $10.00 bindings), is richly stamped in genuine gold, which will retain its original lustre for years, and has tinted page tops. For books which you and your children will read and cherish for many years, the DeLuxe Edition is most desirable.

WALTER J. BLACK, *President*,
The Classics Club,
One Park Avenue, New York 16, N. Y.

Please enroll me as a Trial Member and send me, FREE, the two-volume Classics Club Edition of The Iliad and The Odyssey of Homer, together with the current selection.

I am not obligated to take any specific number of books and I am to receive an advance description of future selections. Also I may reject any volume before or after I receive it, and I may cancel my membership whenever I wish.

For each volume I decide to keep I will send you the correct amount checked below (89c for the Regular Edition or $1.39 for the DeLuxe Edition) plus a few cents postage.

I prefer (please check) ______ Regular Edition ______ DeLuxe Edition.

Your FREE copies of The Iliad and The Odyssey of Homer will come in whichever edition you check.

Mr.
Mrs. ____
Miss

City __________________________ Zone No. if any ____ State ____________________

2. FREE To New Members—Perry Mason, Nero Wolfe, Agatha Christie

Here is a book—and an offer—to make detective fiction history! A great "three-decker" volume containing the NEWEST complete novels of THREE of the world's best modern mystery writers—Earle Stanley Gardner, Rex Stout, and Agatha Christie! THREE brand new, complete, cream-of-the-crop mystery best-sellers in ONE volume—a $6 value—NOW YOURS FREE as a new-membership gift from the Detective Book Club! Read details below at once. * * *

Mail Coupon Now for Your Free Book By accepting that FREE copy of the triple-volume described on this page now as a Charter Membership Gift from the Club, you will not be obligated to take every month's selection during the next 12 months. You may take as few as four during that time. You may cancel your membership whenever you wish. A description of the next month's selections will be sent you with each month's book, and you may reject in advance any volume you do not want.

You need send no money with the Reservation coupon. ASSURE yourself of the privilege now being offered to Charter Members. To get this 3-in-1 volume absolutely free—AND to receive, in addition, the current triple-volume which also contains three complete new detective books— address the coupon at once to:

DETECTIVE BOOK CLUB
One Park Avenue, New York 16, N. Y.

SEND NO MONEY

WALTER J. BLACK, *President*,
DETECTIVE BOOK CLUB,
One Park Avenue, New York 16, N. Y.

Please enroll me as a member and send me, FREE, the gift volume pictured on this page. In addition, send me the current triple-volume of the month, which also contains three complete new detective books.

This does not obligate me to take every monthly triple-volume during the next 12 months. I may take as few as four during this period, if I so wish.

I will receive an advance description of all forthcoming selections and may reject in advance any volume I do not wish to own. I need send no money now, but for each volume I accept I will send only $1.89, plus a few cents postage, as complete payment, within one week after I receive my book.

Mr.
Mrs. } ____
Miss
Please Print Plainly

Address ____

City ____________________ Zone No. if any ____ State ______________

The advertising matters set out herein with reference to The Classics Club was used in the last half of 1944 and said advertising has not been used since. The Detective Book Club advertisement set out herein was used between November 1944 and August 1951.

Typical of the present advertising with reference to The Classics Club is the following:

1. WALTER J. BLACK, *President*,
THE CLASSICS CLUB,
One Park Avenue, New York 16, N. Y.

Please enroll me as a Trial Member and send me, FREE, the beautiful two volume DeLuxe Classics Club Edition of THE ILIAD and THE ODYSSEY of Homer, together with the current selection.

I am not obligated to take any specific number of books and I am to receive an advance description of future selections. Also I may reject any volume before or after I receive it, and I may cancel my membership whenever I wish.

For each volume I decide to keep I will send you $2.89 plus a few cents mailing charges. (Books shipped in U. S. A. only)

(Place for signature and address)

Typical of the present advertising with reference to the Detective Book Club is the following:

2. ALL SIX BOOKS FREE Send no Money—Just mail Coupon

WALTER J. BLACK, *President*,
Detective Book Club,
One Park Avenue, New York 16, N. Y.

Please enroll me as a member and send me, FREE, in regular publisher's editions, the SIX New full-length mystery novels pictured on this page. In addition, send me the current triple-volume of the month, which contains three complete detective books.

I am not obligated to take any specific number of volumes. I am to receive an advance description of all forthcoming selections and I may reject any book before or after I receive it. I may cancel membership whenever I wish.

I need send no money now, but for each volume I decide to keep I will send you only $1.89 plus a few cents mailing charges, as complete payment, within one week after I receive it. (Books shipped in U. S. A. only)

(Place for signature and address)

Under date of July 8, 1947, respondent received a letter from the Federal Trade Commission reading as follows:

The Commission has given consideration to the facts developed by a preliminary investigation made pursuant to an application for complaint alleging violation of the Federal Trade Commission Act through the alleged misleading and deceptive use of the term "free" in advertising and sale of books by Walter J. Black, Inc., doing business as The Classics Club and the Detective Book Club, proposed respondent in the above numbered matter.

Inasmuch as it appears from the facts developed by this preliminary investigation that the proposed respondent herein sets forth clearly and conspicuously the terms and conditions of the offer under which the "free" books may be secured; and that the offer is made under conditions and circumstances that do not appear in any other respect to constitute an act, practice, or method of competition calling for corrective action in the public interest, the Commission does not contemplate at this time further proceedings in the matter. You are advised, however, that the Commission may at any time take such further action as the public interest may require.

The Commission is giving you this information in confidence and requests that you so treat it and that it not be used for advertising or publicity purposes.

By direction of the Commission.

Under date of January 30, 1948, respondent received a letter from the Federal Trade Commission reading as follows:

On January 14, 1948, the Commission adopted the following statement of policy with reference to the use of the word "free", and words of similar import, the same to be immediately effective:

The use of the word "free" or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act.

Because of the use in advertising of the word "free", under circumstances requiring the purchase of certain books in order to receive the merchandise referred to as "free", the Commission reconsidered and rescinded its action of May 20, 1947, closing this matter, reopened the case, and directed that an opportunity be extended to execute a stipulation to cease and desist; with the further direction that if a satisfactory stipulation not be tendered, formal complaint issue, in conformity with the statement of policy as above set out.

You are hereby notified that within twenty days after receipt of this letter, you may submit in writing any relevant information, data or other evidence that you may desire to have considered. Or you may apply for an informal conference with the Director of the Division of Stipulations, or his attorney-conferees, at the office of the Federal Trade Commission, 6th and Pennsylvania Avenue NW., Washington, D. C., at which time you, your authorized representatives, and any other persons you may deem necessary, may appear, be heard, and submit such data informally.

If you apply for a personal conference kindly suggest one or more convenient dates occurring within thirty days after receipt of this letter, so that we can arrange our calendar accordingly and promptly advise you thereof. If you do not desire a personal conference, any information, data, or evidence which you submit in writing will be given thorough consideration, notwithstanding your nonappearance.

If no reply is received within twenty days, I shall assume that you desire neither to confer nor submit any further evidence for consideration and shall proceed upon the basis of the evidence now contained in the investigational records, including any which you may have heretofore submitted.

The stipulation entered into between the parties to this proceeding also included a statement to the effect that the respondent made no effort to collect for the so-called "free" books or to obtain the return of same when the subscriber failed to carry out the other provisions of his contract.

The Hearing Examiner, in his Initial Decision, made the following finding of fact:

PAR. 8. The use by the respondent of the word "free" is false, misleading and deceptive. In truth and in fact the books designated as "free" are not gifts and gratuities or without cost to the recipient but, on the contrary, the prospective member of The Detective Book Club prior to August 1951, in order to receive the "free" book, was required to purchase "the current selection of the month" and four additional books during the ensuing twelve month period, and subsequent to August 1951, and currently, the enrollee is required to purchase only "the current triple-volume of the month" without more. A similar requirement respecting purchase of the "current monthly selection" has obtained since the year 1944 in the matter of The Classics Club. In both instances the purchase of the books under any plan, and the enrollment of prospective club members inures directly to the benefit and profit of the respondent.

With this finding the Commission cannot agree. Reference to the current advertising of The Classics Club and of the Detective Book Club set forth above clearly indicates that the enrollee is not obligated to take any specific number of books and that he may reject any book before or after its receipt. The finding of the Hearing Examiner in this respect is, therefore, clearly in error.

As to the advertising of the respondent prior to August 1951 relative to the Detective Book Club, there is no question that the enrollee, upon accepting the "free" book or books, obligated himself to purchase additional books during the ensuing twelve-month period. There is no evidence in the record to indicate that the respondent ever required enrollees in The Classics Club to purchase any specific number of books in order to obtain a "free" book or books.

The facts in this case very pointedly present to the Commission the following question for its determination:

MAY A BUSINESSMAN DOING BUSINESS IN INTERSTATE COMMERCE BE CHARGED WITH ENGAGING IN UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN VIOLATION OF THE FEDERAL TRADE COMMISSION ACT IF HE USES THE WORD "FREE" IN HIS ADVERTISING TO INDICATE THAT HE IS PREPARED TO GIVE SOMETHING TO A PURCHASER FREE OF CHARGE UPON THE PURCHASE OF SOME OTHER ARTICLE OF MERCHANDISE?

The businessmen of the United States are entitled to a clear and unequivocal answer to this question. The practice in question is by no means new. It has been used by businessmen in the United States for almost 100 years. This continuous use, however, in and of itself, is not reason enough for this Commission to condone the practice if, in fact, the Congress of the United States has enacted any law requiring its discontinuance. Absent such legislation, neither the Federal Trade Commission nor any other administrative agency should take it upon itself to change a business practice which has been so long prevalent among businessmen.

The word "free" is a comparative adjective. It does not have a definite and absolute meaning. In support of this statement we should like to cite the case of *Connery* v. *Brooke*, decided by the Supreme Court of Pennsylvania on May 17, 1873. (73 Pa. 80.) We have intentionally cited an old case to prove the point that for at least eighty years this word has not had a definite and absolute meaning. *Connery* v. *Brooke* involved an interpretation of the word "free" as it applied to the use of a passageway. Land had been converted to the plaintiff "with the free use, right and privilege of a passage-way . . . extending from the . . . turnpike to the hereby granted premises with free ingress and regress at all times hereafter for ever." The defendant owned a lot fronting on a turnpike road; the plaintiff owned a lot directly back of it and adjoining it. A gate had been erected at a point where the front lot led into the turnpike. The plaintiff was of the opinion that this gate did not give him "free" use of the passage guaranteed in the conveyance. The *plaintiff argued*, and this is quoted from page 82 of 73 Pa.:

> By the "free use, right and privilege of a passageway," we can only understand a way unimpaired by any means whatever.

However, this argument did not convince the Supreme Court of Pennsylvania in 1873. The Court, in its opinion, stated its decision very clearly in the following language:

> Undoubtedly, the plaintiff was entitled to the free use, right and privilege of passageway ten feet in width, with free ingress and egress at all times, for this is the language of the grant. But what is meant by the free use of a passageway? Does it necessarily mean that there shall be no gate or door hung across it, or if there is, that it shall always be kept open? Has not the owner of a passageway its free use if he hangs a gate across it at its intersection with the street? If I grant the free use, right and privilege of the hall of my house, with free ingress and egress at all times, must I take off the door leading into it, or keep it wide open in order that the grantee may have the free use of it? Or can he not have its free use if he can enter it by opening the door whenever he chooses? Without doubt I cannot unreasonably obstruct his use of it, but if the door amounts practically to little or no inconvenience, it seems to me that it is not necessarily a wrongful obstruction.

The Court continued in its opinion as follows, and we especially would like to emphasize this language:

> Free is a relative term when applied to the use of a thing. It does not follow that I have not the free use of a room because I have to open a door in order to get into it; nor does it follow that I have not the free use of an alley because I have to open a gate to go in and out of it. A gate may be so placed as to be a practical and unreasonable obstruction to the free use of a passageway; and it may be so constructed and placed as not to amount to any practical obstruction to its use. Whether the gate in this case amounted to a wrongful obstruction was, therefore, a question of fact for the jury. If it was not a practical hindrance, and, under the circumstances, an unreasonable obstruction to the plaintiff's use of the passageway, then it was not a wrongful or illegal obstruction for which an action will lie.

Hastings Manufacturing Co. v. *Automotive Parts Corp.*, D. C. Mich., 39 F. Supp. 319, decided on May 5, 1941, involved a patent infringement action by the Hastings Manufacturing Company. The patent included the following language:

> A piston ring assembly comprising spaced split thin side members disposed to present their edges to a cylinder wall, a vented intermediate member, said members being disposed side by side for free independent radial movement, * * *

In connection with this matter, the Court stated:

> It is evident that the term "free movement" is one of degree * * *

In this opinion the Court also referred to the word "free" as a comparative adjective, the interpretations and applications of which may vary substantially.

In disposing of the question raised in this proceeding, we cannot help but rely upon the reasoning contained in a brief filed in behalf of the Federal Trade Commission in September 1937 in the Supreme Court of the United States in the Matter of *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112. That brief was signed by two eminent lawyers who now sit on the Supreme Court of the United States—Mr. Stanley Reed, who was then Solicitor General of the United States, and Mr. Robert H. Jackson, who was then Assistant Attorney General of the United States. The brief, in part, contained the following language:

> Genuine offers to give something away free of charge in order to induce a person to buy something else are not unfair. It is a commonplace that persons may be induced to buy if they think they are getting a bargain. An opportunity to receive something free in addition to the article paid for is a powerful incentive to purchase. If a merchant thinks that his business will be benefitted by the distribution of gifts, prizes, or premiums to his customers, that is his affair. His customers may gain by his apparent generosity. They cannot lose, and they are not deceived. They know that the purpose of the gift is to induce them to purchase another article, and they assume that the donor expects ultimately to recover the cost of the gift in increased returns from sales.

In a footnote to this paragraph, the brief contains the following language:

> It is true that the cost of the premium is borne by the manufacturer or seller, and that this cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium the premium does not cost the customer anything. It is FREE TO HIM regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss. (Emphasis of words FREE TO HIM was included in footnote of brief.)

The brief also contains the following paragraph:

> When such an offer of a gift is made, the customer understands from the use of the word "gift" that an article is to be received without any payment being made for it. If he is told that it is to be received "Free of Charge" if another

article is purchased, the word "free" causes him to understand that he is paying nothing for that article and only the usual price for the other. If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge.

The arguments presented in the above referred to brief seem to make as good sense today as they must have made in 1937. We see no reason for taking any other view of the use of the word "Free" in advertising. However, in the public interest, and for the advice, guidance and information of businessmen, we want, through this opinion, to make the position of the Commission as clear as possible.

If a businessman desires to use the word "free" in his advertising, he must use it honestly. He may not use the word as a device for deceiving the public. For example, if he normally sells a toothbrush for 49¢, he may not advertise that he will give away "free" a package of tooth paste with the purchase of that same toothbrush at 69¢. In such a case, while the advertiser is holding out to the public that he is giving the toothpaste away "free," he is actually adding 20¢ to the price of the toothbrush which must be purchased in order to obtain the "free" toothpaste. Many examples could be cited, both as to the proper and improper uses of the word "free" in advertising. However, the essence of this opinion is that there must be truth in advertising to support the use of the word "free." If an advertiser either lies as to the facts or tells only part of the truth in his advertising, and such lies or omissions have the tendency or capacity to mislead or deceive the public, this Commission, pursuant to the authority delegated to it by Congress, must inhibit such use of the word "free" in advertising.

For the advice and guidance of the respondent herein, and also for the advice and guidance of the thousands of other advertisers who today are using the word "free" in advertising, we should like to make our position clear. Until such time as either the Congress of the United States amends Section 5 of the Federal Trade Commission Act, or until an appellate court of the United States clearly interprets the existing provisions of Section 5 of the Federal Trade Commission Act to mean otherwise, our position in this matter is as follows:

The use of the word "Free," or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in "commerce," as that term is defined in the Federal Trade Commission Act, is considered by the Commission to be an unfair or deceptive act or practice under the following circumstances:

(1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so

as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) When, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such article of merchandise.

In view of the foregoing, the complaint herein is dismissed. By reason of this action, it appears unnecessary for the Commission to pass upon the appeal of respondents from the "Examiner's Rulings on Requested Findings as to the Facts and Conclusions".

* * * * * * *

Commissioners Mead and Spingarn, while concurring in the result, dissent in part from the views expressed in the majority opinion, and Mr. Mead will file a separate opinion.

DISSENTING OPINION OF COMMISSIONER JAMES M. MEAD

This is a case about "free" books which were not free.

The Commission announced its decision in this case during my absence. The majority of the Commission noted that while I concurred in the result, I dissented in part from the views expressed by the majority. It was stated that I would file a separate opinion. I am taking advantage of that opportunity.

Customers of respondent were required to purchase or to agree to purchase other books as a condition precedent to obtaining the "free" book. The opinion of the Commission states fully the facts which I shall not repeat. The majority opinion: (1) dismisses the complaint (with which action I agree because respondent has apparently discontinued the alleged illegal practice); and (2) publishes a statement "for the advice and guidance of the thousands of other advertisers who today are using the word 'free' in advertising" (with which I disagree).

This "advice and guidance" statement by the present majority of the Commission constitutes a reversal of the policy statement issued by the then Commission majority in 1948.

I was not a member of the Commission when the 1948 policy statement on the use of the word "free" was issued. However, when I was appointed to the Commission, I accepted that policy statement and the cases which had been decided consistent therewith as a part of the established case law of the Commission. The consuming public and the business community are entitled to a substantial degree of consistency in the interpretation of the laws administered by this Commission. I saw no persuasive reason when I was appointed to the Commission and I see no persuasive reason now, either in fact, law or public interest, to reverse the previous Commission statement of policy or the decided cases.

The law in this subject was fully discussed by me in the then majority Commission opinion in re Book-of-the-Month Club, Inc., F. T. C. Docket No. 5572.

Some persons may ask why the Commission is concerned with the use of the word "free." Every new Commissioner has asked substantially the same question. After a Commissioner has had more experience on the Commission, he learns the answer. It is simply because the word "free" is used so extensively in advertising and selling, that the Commission as a result receives many complaints from consumers and competitors regarding its use. This is particularly true during a buyers market. A city police force must have a balanced law enforcement program. Some citizens after receiving an overtime parking ticket ask the policeman the age old question of why he doesn't spend his time chasing murderers and robbers instead of distributing parking tickets. The answer, of course, is that a city must control automobile traffic in addition to apprehending murderers. The policing of the use of the word "free" and other potential deceptive phrases in advertising is to the Commission much as the policing of overtime parking is to the city police force. Neither is a very heroic endeavor but they must be carried on in order to prevent a substantial public injury.

A brief review of the history of this problem at the Commission may be helpful. There have been changes in Commission policy and these changes are expressed in decisions in various cases, stipulations, etc. The Commission at one time apparently had decided to pursue a rather strict policy as to inhibiting the use of the word "free." Thereafter in the Samuel Stores matter the Commission decided to permit the use of the word "free" to describe merchandise which was not given unconditionally, provided that the terms of the condition were adequately disclosed to the purchasing public. The Commission attempted to live with this so-called "reasonable" policy. But after considerable experience therewith, the majority of the Commission determined that this relaxed enforcement policy was not workable and decided to issue the 1948 policy statement.

The Samuel Stores policy was based on the proposition that the use of the word "free" should not be inhibited unless there was deception in its use. Many advertisers would readily agree not to use the word "free" in a manner to deceive the public. That is, of course, only a general promise and the real enforcement problem was in obtaining compliance with this general promise. The value of the use of the word "free" is that it is a short expressive word which can be used in headlines and in bold print to catch the eye of the reader.

A perusal of the advertisements in any daily paper will reveal the various catch phrases used by advertising specialists to attract the eye of the reader. The unqualified use of the word "free" in advertisements is usually untrue. The problem under the Samuel Stores policy was to persuade the advertiser to place the qualifying words in reasonable connection with the word "free" which latter word was usually placed in the headlines.

By "qualifying words" is meant the reference to the merchandise which must be purchased or the services which must be performed by the customer in order to receive the "free" goods. The qualifying statement should describe fully, conspicuously and clearly the "gimick".

More and more the Commission found that the qualifying language was being placed in smaller and smaller print in less and less connection with the word "free". The qualifying language was treated very much as are poor relations at the family dinner table—who are usually placed at the end of the table in a very inconspicuous place, almost out of the dining room and into the kitchen. From the Samuel Stores policy to the 1948 policy the Commission tried very valiantly to bring the qualifying words from the kitchen into the dining room where they could be seen.

Some advertisers used the asterisk method by which an asterisk was placed near the word "free" and the qualifying language was placed in fine print at the bottom of the page. The asterisk is useful to indicate an omission. But in such use, the asterisk has caused as much, if not more, confusion and misunderstanding than any other symbol used by literate men to convey ideas to each other.

Obtaining compliance with the Samuel Stores policy consisted more of an endurance contest for the Commission because of the various proposals of the advertisers to place the qualifying language here or there or elsewhere in advertisements generally as inconspicuous as possible. After these experiences the majority of the Commission decided that the public interest required the 1948 policy.

The 1948 policy was adopted by a vote of Commissioners Davis, Ayres and Ferguson. The late Commissioner Davis was a distinguished Judge from Tennessee who served for many years in the Congress and was appointed to the Commission in 1933. The late Commissioner Ayres was a distinguished lawyer from Kansas who also served for many years in Congress and was appointed to the Commission in 1934. Commissioner Ferguson is a distinguished lawyer from North Carolina and had served on the Commission since 1927. These gentlemen had had many, many years of experience on the Commission and had finally determined that in order to protect the public interest the 1948 policy statement was necessary. I am not aware of any compelling reasons to change that policy. The case before the Commission was on a stipulated record and presented no new issue of fact or law.

After I was appointed to the Commission and a number of free goods cases were reviewed by the Commission, I was impressed with the fact that some persons were interpreting the 1948 policy too strictly and not realistically. I collaborated with Commissioner Ayres in his opinion in the Unicorn Press case, Docket 5488 in which the Commissioner stated that the 1948 free goods policy "must be applied realistically, and hypertechnical applications designed to condemn the use of the word 'free' in advertising under all conditions must be avoided." I am of the opinion that the 1948 policy as interpreted by Commissioner Ayres in the Unicorn Press case is sound.

As to the general proposition relative to the use of the word "free," the following is quoted from my opinion in the Book-of-the-Month Club case, Docket 5572.

> The enrollment books are either free or they are not free. They cannot be both. The advertisements feature a representation that the books are free. Elsewhere in the advertisements is the statement which indicates that such books are not free. At best, these statements are contradictory. One of the statements must therefore be contrary to fact. This is obviously the statement that the books are free.
>
> The word "free" is one of the those dynamic terms in our language which alerts us and calls to action certain emotions within us. It has both political and monetary connotations. Cynics may say that all of us should know that we cannot get something for nothing, yet the hope of getting something free has the habit of springing eternal in the human breast. Alas, however, on closer inspection there generally are found a few "provided, however", or other conditional strings to the so-called "free" offer. Such is the case here. The customers who did not buy the other books were obliged to pay for the "free" book.
>
> * * * * * * *
>
> A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end.
>
> * * * * * * *
>
> The distribution of books which are in fact free may not be a profitable business endeavor. That decision, however, is for the respondent corporation. If the respondent does not choose to distribute free books, there are sufficient words in the English language available to respondent which will accurately, truthfully and vividly describe the offer of respondent to its prospective purchasers.

The present majority of the Commission has now modified the 1948 policy by in effect allowing a seller to describe a product as "free" which is not free if the seller will adequately disclose that the product is not free (the seller, of course, may not deceive by a practice of fictitious price markings or reducing quality). The new rule or guidance statement may be referred to as a "Rule of Reason" in regard to free goods offers. This is to be distinguished from the 1948 policy which held it unreasonable and untrue and therefore illegal per se to describe goods as free which were not free. At best, the 1948 policy was definite. The advertiser was specifically informed that he could not describe goods as free unless they were free. Under the new policy the advertiser is allowed to use a literally untrue statement provided he uses it reasonably. The new policy has the virtue of flexibility and the vice of uncertainty.

One or more States have eliminated the speed limits on highways as expressed in specific miles per hour and have substituted a prohibition against driving at an unreasonable rate of speed under the particular circumstances. That is an interesting experiment. You and I, of course, drive reasonably but the other fellow takes too many chances.

What is a reasonable and non-deceptive use of the word "free" to describe goods which are not free? If the word "free" is in bold type headlines (as it usually is), where should the qualifying words appear—also in the headlines?—not if the advertiser can help it because there would then be too many words in the headlines. Would it be sufficient for the words to be placed in the first paragraph or the second or third paragraph of the advertisement, and what should be the size of the type in relation to the type and prominence of the word "free"? Should the qualifying words be repeated each time the word "free" is mentioned in the advertisement? Is our old friend the asterisk method permissible which places the qualifying words at the bottom of the page, practically illegible except with the aid of a microscope?

Not every factual situation coming within the purview of the laws administered by this Commission has been determined by the Congress or adjudged by this Commission and the Courts as being illegal per se. Subject, however, to a finding by this Commission that it is in the public interest to take corrective action, the dissemination of false advertisements of a commodity sold in interstate commerce is illegal per se under the Federal Trade Commission Act.

I do not mean to suggest in this opinion that the foundations of our competitive system will crumble because of the action of the majority of the Commission in this case. I rather think the majority believe that they have made a Solomon decision and have neatly disposed of a vexatious problem. I suggest that their decision has not solved the problem. It has only postponed a problem which will return in a different but more difficult and virulent form on the question of compliance.

The majority decision, however, does represent a change in Commission policy. I trust that this action by the majority is not a shadow cast by future actions which would result in modifications or revisions of the more basic and important concepts of this Commission. I do not now believe that it portends such future actions. I believe that my colleagues on the Commission will dutifully enforce the law. The Congress writes the law and the Commission enforces it. I do not believe the enforcement of the law should be a matter of partisanship or personalities. Differences of opinion among the Commissioners as to controversies of fact and as to appropriate remedies in individual cases will, of course, arise. Honest and intelligent differences promote the public interest. There should be no differences in enforcement as to the principles formulated by the Congress and interpreted by the courts.

I am for a reasonable enforcement of the laws administered by this Commission, having in mind our limited budget and the avoidance of test or doubtful cases in which there is no substantial public interest. I do not favor any diminution of a vigorous enforcement policy by a process of rationalization which leads to a compromise of principle.

Public law (as distinguished from private law) is more directly and immediately concerned with the general public interest and must therefore reflect the will of the people. I am reminded of the inscription on the Archives Building in Washington which reads "What Is Past Is Prologue." Let us hope that when and if the pendulum swings in the field of the antitrust laws, including the Federal Trade Commission Act, the agencies charged with enforcing those laws will have learned and profited from legal and economic history.

From the standpoint of the public interest a strong and vigorous policy is usually the most reasonable policy both in the antitrust and deceptive practices fields of law enforcement.

I dissent from the opinion of the majority for the reasons above stated.

403443—57——17

IN THE MATTER OF

PERRY HALSETH TRADING AS PERRY SALES COMPANY

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

Docket 6009. Complaint, July 16, 1952—Decision, Sept. 14, 1953

Where an individual, engaged in the interstate sale and distribution of cameras, radios, pens, dolls, cutlery, bedspreads, and other articles, with a volume of business in excess of $1,000,000 a year; in soliciting orders for and in selling and distributing his merchandise—

Made use, among other courses, of a plan of merchandising which involved, or might involve, the operation of games of chance, gift enterprises, or lottery schemes, pursuant to which he sent out in great quantities to members of the public, along with return envelopes, form letters, circulars, order blanks, and "sales" or push cards, for use, in accordance with a scheme, as typical, pursuant to which the customer who selected by chance that one of 39 girls' names displayed on the particular card which corresponded with that concealed under the card's master seal, received as a prize the comforter, bedspread, or other article pictured thereon; those pushing certain discs as disclosed by the numbers concealed thereunder, received certain lesser prizes; amount paid by customer for chance was similarly determined; and prospective customers or operators of the cards received, according to the aforesaid circulars, as a premium or prize for their efforts, in disposing of the merchandise through the use of such cards, a bedspread or other article equal in value to the main item, plus a premium of lesser value if an order was placed with respondent within 15 days following receipt of the offer; and

Thereby supplied to and placed in the hands of others, contrary to an established public policy of the United States Government, the means and instrumentality of conducting games of chance, gift enterprises, or lottery schemes in connection with the sale and distribution of merchandise, in which persons who selected and paid for the lucky or winning name and numbers received the designated articles, without additional expense, at prices which were much less than the normal retail prices thereof; those who did not select such a name or number received nothing for their money other than the privilege of making the push or punch; and whether a purchaser received an article or nothing for the money paid and the amount paid for the merchandise or chance to receive it were determined wholly by lot or chance:

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

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

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

Wilkenfeld & Harris, of Chicago, Ill., for respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on July 16, 1952, issued and subsequently served its complaint in this proceeding upon respondent Perry Halseth, individually and trading as Perry Sales Company, charging him with the use of unfair acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, the answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested, and said hearing examiner, on February 9, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, respondent filed an appeal from said initial decision and the Commission, after duly considering said appeal and the record herein, issued its order denying said appeal.

The Commission is of the opinion, however, that the initial decision of the hearing examiner is deficient in certain respects, principally in that the order therein is inconsistent with the form of order which the United States Court of Appeals for the District of Columbia Circuit has determined is appropriate in cases where the facts are essentially similar to those in this case. *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, 194 F. 2d 346, and *U. S. Printing & Novelty Co.* v. *Federal Trade Commission*, CCH Trade Reg. Serv. Par. 67,502 (June 4, 1953). Therefore, the Commission, being now fully advised in the premises, 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, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

Paragraph 1. Respondent, Perry Halseth, is an individual trading and doing business under the name of Perry Sales Company with office and principal place of business located at 1250 West Van Buren Street in the City of Chicago, Illinois.

Respondent is now and for more than three years last past has been engaged in the sale and distribution of cameras, radios, pens, dolls, cutlery, bed-spreads and other articles of merchandise and has caused said merchandise when sold to be transported from his place of business in Chicago, Illinois, to purchasers thereof located in the various other States of the United States and in the District of Columbia. Respondent's volume of business has been in excess of $1,000,000.00 per year and there is now and has been for more than three years last past a substantial course of trade by respondent in such merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 2. In the course and conduct of his aforesaid business in soliciting orders, selling and distributing merchandise, respondent sometimes deals directly with jobbers, retail stores and other business firms; sometimes respondent uses circulars, form letters, order blanks and return envelopes in direct mail solicitation; at other times respondent uses and has used a plan of merchandising which involves or may involve the operation of games of chance, gift enterprises or lottery schemes. Under the latter plan, respondent mails to each prospective customer advertising and solicitation material consisting of a form letter, circular, order blank, push card referred to by respondent as a sales card, and return envelope, copy for all of which is prepared by respondent or under his supervision. This literature is sent out to members of the public in great quantities—hundreds of thousands at a time—and orders are received from approximately 0.3 to 1 percent of the total number of recipients of said literature.

The circulars describe the merchandise which respondent offers and the letters explain how, through the use of the push cards, sales can be made to "friends, relatives, neighbors and co-workers" who may obtain the merchandise offered usually "for as little as 1¢ and not more than 39¢." Prospective customers also are told that as a premium or prize for their efforts in disposing of the described merchandise through use of the push card they may receive without cost a bedspread or other article of merchandise equal in value to the main item described in the circular, plus a premium of lesser value if an order is placed with the respondent within 15 days following receipt of the offer. Fountain pens or other small articles of merchandise are often included in the merchandise offered and shipped by respondent for use as additional prizes to purchasers of chances in connection with "push" card sales.

A typical push card has thirty perforated discs each of which is designated by a feminine name, and concealed within each disc is a number by which is determined the cost of each push. On the back of the card is a list of the names on the discs with spaces for writing in the names of the persons who may have pushed the corresponding discs. Upon the face of the card is a large master seal under which is one of the names appearing on the discs. This seal is to be removed only after all the discs have been sold and the person having pushed the disc bearing the name corresponding to the one under the seal receives the comforter, bedspread, tablecloth, or other main article of merchandise pictured on the push card and described in the circular accompanying it. In addition to this main prize there are lesser prizes, such as fountain pens, which are distributed to persons who have pushed certain other specified discs.

The typical push card has on its face the following legend and instruction:

(Picture of comforter and bedspread)

S Do Not S
E Remove Seal E
A Until Entire A
L Card is Sold L

Numbers
1–19–22
Each Receive
A $1.00
Fountain Pen

4 PRIZES
Lucky Name Under Large Red Seal
Receives Choice of a Beautiful
QUILTED COMFORTER,
BEDSPREAD OR TABLECLOTH
Numbers 1 to 39 Pay What You Draw
Numbers Over 39 Pay Only 39c
None Higher

Push out with Pencil

Panel bearing
Discs.

Persons having selected and paid for the lucky or winning name and numbers receive the designated articles of merchandise, without additional expense, at prices which are much less than the normal retail prices of said articles, but persons who do not select such lucky or winning name or numbers receive nothing for their money other than the privilege of making a push or punch from said card. Whether a purchaser receives an article of merchandise or nothing for the money paid, and the amount to be paid for the merchandise or the chance to receive said merchandise are thus determined wholly by lot or chance, and articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Respondent furnishes and has furnished various other similar push cards, form letters, circulars, and order blanks for use in the sale and distribution of his merchandise. The sales plan used in the sale and distribution of merchandise by means of these other push cards is the same as that hereinabove described varying only as to the merchandise offered, the price of each chance and the number of chances on each card.

PAR. 3. The order form used by respondent in connection with the aforesaid sales method contains no reference to the push card. Upon receipt of such an order properly filled out the respondent sends out his merchandise. He has no control over the buyer and has in fact no direct means of knowing whether the buyer will retain the merchandise himself or dispose of it by use of the push card or by some other method. However, the respondent does distribute push cards extensively, sends out accompanying letters describing their use, and does know that if his suggested plan is followed the merchandise shipped by him, excepting the special premium offered the operators of the push cards, will reach the ultimate purchaser through sales made under the push card plan through the sale and purchase of the push card chances.

The record specifically establishes that some individuals have used the push cards furnished by respondent in the distribution of merchandise received from respondent. Respondent's wide and continued use of the push cards confirms the conclusion that a substantial number of persons to whom respondent has furnished and furnishes said push cards have used and now use the same in selling and distributing respondent's merchandise in accordance with the aforementioned sales plan. Respondent thus supplies to and places in the hands of others the means and instrumentality of conducting games of chance, gift enterprises or lottery schemes in connection with the sale and distribution of his merchandise, all of which is contrary to established public policy of the Government of the United States.

PAR. 4. The sale and distribution of merchandise in the manner above described involves games of chance or the sale of chances to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plan or method used by respondent and by the element of chance involved therein and thereby have been and are induced to buy and sell respondent's merchandise.

The use by respondent of a sales plan or method involving sales and distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

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

ORDER

It is ordered, That respondent Perry Halseth, trading as Perry Sales Company or under any other name or names, his representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of cameras, radios, pens, dolls, cutlery, bedspreads or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or any other lottery device or devices which are designed or intended to be used in selling or distributing said merchandise to the public by means of games of chance, gift enterprises or lottery schemes.

2. Shipping, mailing or transporting to agents or distributors, or to members of the purchasing public, push cards or any other lottery device or devices which are designed or intended to be used in the sale or distribution of respondent's merchandise to the public by means of games of chance, gift enterprises or lottery schemes.

3. Selling or otherwise disposing of any merchandise by means of or under a plan involving a game of chance, gift enterprise, or lottery scheme.

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

IN THE MATTER OF

LAGOMARCINO-GRUPE COMPANY OF IOWA, DAVENPORT BROKERAGE COMPANY, AND ANDREW S. LAGOMARCINO ET AL.

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

Docket 5784. Complaint, June 26, 1950—Decision, Sept. 15, 1953

Where a corporation, which was engaged in the buying and selling of fruits, vegetables, canned goods, sugar, candy, and other food products, and had become one of the largest wholesalers thereof in the United States and numbered among its stockholders a family group, allied by blood or marriage, which owned a substantial majority of all its stock and all of that of a corporate broker—

(a) Purchased through said corporate broker substantial requirements of its food products from vendors, all, or substantially all, of whom paid said broker commissions or brokerage fees on said purchases; and

Where said broker, controlled as aforesaid, and acting as agent of or representative for said wholesaler, and subject to the direct control of those individuals who were members by blood or marriage of the aforesaid families, made up the group referred to, and owned a majority of the capital stock of said broker—

(b) Received and accepted said fees as income from which dividends were paid to and received and accepted by its aforesaid stockholders:

Held, That such acts and practices of said corporations and of their aforesaid stockholders were in violation of subsec. (c) of Sec. 2 of the Clayton Act as amended by the Robinson-Patman Act.

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

Mr. Edward S. Ragsdale for the Commission.

Mr. Smith W. Brookhart and *Mr. Russell Hardy*, of Washington, D. C., 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 Act) as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), (15 U. S. C. A. Section 13), the Federal Trade

[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 September 15, 1953, 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.

Commission, on June 26, 1950, issued and subsequently served its complaint on the respondents, and each of them, named in the caption hereof, charging them, and each of them, with receiving and accepting commissions, brokerage fees or other compensation, allowances or discounts in lieu thereof, on purchases of food products in commerce made directly or indirectly for their own account in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

The respondents, and each of them, 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, and 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 the answer and supplemental answer to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, are to be withdrawn from the record, 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, and each of them, 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 has 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 Lagomarcino-Grupe Company of Iowa (named in the complaint as Lagomarcino-Grupe Company) is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Iowa, with its principal office and place of business located at 101 Valley Street, Burlington, Iowa.

Said respondent, on the date of the issuance of the complaint and since several years prior to June 19, 1936, has been engaged in the business of buying and selling food products at wholesale within the United States. Such products include fruits, vegetables, canned goods, sugar and candy. It has become one of the large wholesalers of food products in the Middle Western States. On the date of the issuance of the complaint, it owned a 34% stock interest in Lagomarcino-Grupe Fruit Company, located at Galesburg, Illinois, and owned and operated a large number of branches, some of which were located at Creston, Ottumwa, Burlington, Cedar Rapids, Iowa City, Clinton, Muscatine, Fort Madison, Keokuk, Iowa, and Quincy, Illinois.

Lagomarcino and Grupe are family names. On the date of the issuance of the complaint and all times mentioned herein, a substantial majority of the capital stock of said respondent was owned by individuals who were members of the Lagomarcino or Grupe families by blood or marriage. For some time prior to June 26, 1950 and on that date, said respondent had issued and outstanding approximately 5,588 shares of capital stock, a substantial majority of which was, and for some time prior has been owned by those individuals who are named as individual respondents herein and as set forth in Paragraph 3 hereof.

From April 20, 1925 until dissolution of the latter on September 1, 1934, respondent, Lagomarcino-Grupe Company of Iowa, made substantial purchases of food products through Davenport Brokerage Company, a corporation not named as a respondent herein, the stock of which was 76% owned by said respondent. During the period from September 1, 1934 until September 1, 1936, Mr. E. H. Beattie operated a brokerage business as a sole proprietor doing business as Davenport Brokerage Company. Mr. Beattie held 10 shares of stock in Lagomarcino-Grupe Company during this period.

PAR. 2. Respondent Davenport Brokerage Company (named in the complaint as Davenport Brokerage Company, Inc.) is a corporation, organized, existing, and doing business under and by virtue of the laws of the state of Iowa, with its principal office and place of business located at 301 Union Arcade Building, Davenport, Iowa.

Said respondent was incorporated September 2, 1936, to engage, and since its incorporation and continuing to the present time it has engaged, in the business theretofore conducted by E. H. Beattie, doing business as Davenport Brokerage Company, and prior to that, by the original Davenport Brokerage Company, a corporation. During said period of time, respondent Lagomarcino-Grupe Company made substantial purchases of food products through respondent Davenport Brokerage Company.

Upon incorporation, 24% of the stock of respondent Davenport Brokerage Company was issued to E. H. Beattie, and the remainder to members of the Lagomarcino family and Grupe family. E. H. Beattie died on March 7, 1946. Thereafter, on January 2, 1947, the stock owned by his widow was purchased by members of the Lagomarcino family and members of the Grupe family.

After January 2, 1947, all of the capital stock of respondent Davenport Brokerage Company, was issued to, and at all times thereafter mentioned herein has been owned by, those stockholders of respondent Lagomarcino-Grupe Company of Iowa, who were members of the Lagomarcino or Grupe families by blood or marriage. For some time, and at the time of issuance of this complaint, respondent Davenport Brokerage Company has issued and outstanding approximately 1,000 shares of capital stock, all of which was and for some time had been, owned by those individuals who are named as individual respondents herein and as set forth in Paragraph 3 hereof.

PAR. 3. Each of the following respondents is an individual; is a member of the Lagomarcino or Grupe families by blood or marriage as indicated; and at the date of issuance of the complaint and for some time prior had owned the number of shares of capital stock of respondent Lagomarcino-Grupe Company of Iowa and/or respondent Davenport Brokerage Company, which is set forth opposite his or her name in columns appropriately designated:

Capital Stock Ownership of Lagomarcino-Grupe Co. of Iowa and of Davenport Brokerage Co., as of June 26, 1950

Members of Lagomarcino Family	Lagomarcino-Grupe Company of Iowa	Davenport Brokerage Co.
Andrew S. Lagomarcino	232	43
C. L. Lagomarcino	272	56
Joe J. Lagomarcino	280	57
John Lagomarcino	42½	9
Richard Lagomarcino	73	21
Gertrude Lagomarcino	35	169
Mayme Lagomarcino	195	15
Mamie Lagomarcino	472	72
Katherine S. Lagomarcino	89	20
Theresa Bley	17	23
Trula E. Voss	267	39
Subtotal owned by individual respondents who are members of Lagomarcino family	1974½	524

Members of Grupe Family	Lagomarcino-Grupe Company of Iowa	Davenport Brokerage Co.
Harold W. Grupe	586½	146
John D. Keehn	None	2
Dorothy D. Keehn	465	114
Helen Parker	479½	90
Edward Dornsife	None	1
Marion (Mrs. Edward) Dornsife	502	82
Patricia P. Filipowski	21	41
Subtotal owned by individuals who are members of Grupe family	2054	476
Total owned by individuals who are members of either Lagomarcino or Grupe families	4028½	1000

The following named respondents died on dates indicated:

Rosanna Ogesbly	July 28, 1948
Edward Dornsife	December 10, 1950
Harold W. Grupe	June 12, 1952

At the date of the issuance of the complaint, individuals who were members of the Lagomarcino or Grupe families by blood or marriage, and for some time prior thereto, the above-named individual respondents, directly or indirectly as owners of a substantial majority of the capital stock of respondent Lagomarcino-Grupe Company of Iowa and of all of the capital stock of respondent Davenport Brokerage Company have through such stock ownership elected the directors who in turn elected officers of the corporate respondents responsible for formulating, authorizing and directing all of their policies, practices and acts referred to herein. The individual respondents, who were neither officers nor directors of either of respondent corporations did not actively participate in said acts.

PAR. 4. In the course and conduct of its wholesale food business prior to and since September 2, 1936, respondent Lagomarcino-Grupe Company of Iowa, through the original Davenport Brokerage Company or through respondent Davenport Brokerage Company, continuously made such purchases of food products from many vendors with places of business located in several states of the United States; and respondents caused such food products so purchased to be transported from said states to destinations in other states.

PAR. 5. In the course of said business in commerce, beginning some years prior to September 1, 1934, and ending shortly thereafter, respondent Lagomarcino-Grupe Company of Iowa purchased through the original Davenport Brokerage Company, not named as a respondent, substantial quantities of food products from vendors, all or substantially all, of whom paid Davenport Brokerage Company commissions or brokerage fees on said purchases.

From 1925 until September 1, 1934, Davenport Brokerage Company, not named as a respondent herein, received and accepted as income said fees from which dividends were paid to, and they were received and accepted by, respondent Lagomarcino-Grupe Company of Iowa, in the form of dividends on the capital stock of the original Davenport Brokerage Company.

In turn, respondent Lagomarcino-Grupe Company of Iowa, transmitted and paid said fees to, and they were accepted and received by, the stockholders of said respondent in the form of dividends upon its capital stock.

In making said purchases, and in receiving and accepting and in transmitting and paying said fees, as above alleged, the original Davenport Brokerage Company was acting as agent or representative for respondent Lagomarcino-Grupe Company of Iowa, subject to its direct control and to the indirect control of those individuals who were members of the Lagomarcino or Grupe families by blood or marriage who owned a majority of its capital stock.

PAR. 6. In the course of said business in commerce, beginning September 2, 1936, and continuing to the present time, respondent Lagomarcino-Grupe Company of Iowa purchased through respondent Davenport Brokerage Company, substantial quantities of its requirements of food products from vendors, all, or substantially all, of whom paid respondent Davenport Brokerage Company, commissions or brokerage fees on said purchases.

Respondent Davenport Brokerage Company received and accepted said fees as income from which dividends were paid to and were received and accepted by, its stockholders as dividends on its capital stock.

In making said purchases, and in receiving and accepting and in transmitting and paying said fees, as above stated, respondent Davenport Brokerage Company was acting as an Agent or representative of respondent Lagomarcino-Grupe Company of Iowa, subject to its indirect control through, and subject to the direct control of, those individuals who were members of the Lagomarcino or Grupe families by blood or marriage who owned a substantial majority of the capital stock of respondent Lagomarcino-Grupe Company of Iowa and all of the capital stock of respondent Davenport Brokerage Company.

CONCLUSION

PAR. 7. The acts and practices of respondents individually and collectively, since June 19, 1936, in accepting and receiving commissions or brokerage fees, as above alleged, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. In receiving and accepting commissions, brokerage fees or other compensation, allowances or discounts in lieu thereof on purchases of food products in commerce as set forth in Paragraph 6 hereof, respondents, and each of them, have violated the provisions of Section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

I. *It is ordered*, That the respondent, Davenport Brokerage Company, a corporation, its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, vegetables, canned goods, sugar, candy and other products of whatsoever nature in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

(a) Receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage. or other compensation, or any allowance or discount in lieu thereof, upon any purchase in connection with which respondent Davenport Brokerage Company is the agent, representative, or other intermediary acting for, or in behalf of, or subject to the direct or indirect control of any buyer, including such control by any buyer exercised through the ownership or control of capital stock of Davenport Brokerage Company, by any stockholder or cooperating group of stockholders in such buyer who directly or indirectly controls such buyer.

(b) Transmitting, paying, or granting, directly or indirectly, any part of any commission, brokerage, compensation, allowance or discount, which is referred to in paragraph I (a) above, to any buyer or to any stockholder in any buyer, who is referred to in paragraph I (a) above, in the form of money, dividends, credits, services, facilities, or in any other form.

II. *It is further ordered*, That the respondents Lagomarcino-Grupe Company and its officers, directors, agents, representatives, and employees, directly or through any intermediary (including Davenport Brokerage Company) in connection with the purchase of fruits, vegetables, canned goods, sugar, candy and other products of whatsoever nature in commerce as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Receiving or accepting from any seller, or from any agent, representative, or other intermediary acting for, or in behalf of, or subject to the direct or indirect control of respondents Lagomarcino-Grupe Company, including such control by said respondent exercised through the ownership or control of capital stock of any such agent, representative, or other intermediary by any stockholder or cooperating group of stockholders of respondent Lagomarcino-Grupe Company, who directly or indirectly controls said respondent, anything of value as a commission, brokerage, or other compensation, or any discount or allowance in lieu thereof, in the form of money, dividends, credits, or in any other form, upon purchases for their own accounts.

III. *It is further ordered*, That the respondents Andrew S. Lagomarcino, C. L. Lagomarcino, Joe J. Lagomarcino, John Logamarcino, Richard Lagomarcino, Gertrude Lagomarcino, Mayme Lagomarcino, Mamie Lagomarcino, Katherine S. Lagomarcino, Theresa Bley, Trula E. Voss, John D. Keehn, Dorothy D. Keehn, Helen Parker, Marion Dornsife, and Patricia P. Filipowski, either in their individual or representative capacities, in connection with the purchase of fruits, vegetables, canned goods, sugar, candy, and other products of whatsoever nature in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Receiving or accepting any part of any commission, brokerage, compensation, allowance, or discount which, in paragraphs I (a) and I (b) above, respondent Davenport Brokerage Company, is ordered to cease and desist from receiving or accepting and from transmitting, paying or granting, and which, in paragraph II above, respondent Lagomarcino-Grupe Company is ordered to cease and desist from receiving or accepting.

It is further ordered, That the complaint be dismissed as to Rosanna L. Ogesbly, Harold W. Grupe, and Edward Dornsife, deceased.

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

LAGOMARCINO-GRUPE COMPANY OF IOWA, a corporation; DAVENPORT BROKERAGE COMPANY, a corporation; and ANDREW S. LAGOMARCINO, C. L. LAGOMARCINO, JOE J. LAGOMARCINO, JOHN LAGOMARCINO, RICHARD LAGOMARCINO, GERTRUDE LAGOMARCINO, MAYME LAGOMARCINO, MAMIE LAGOMARCINO, KATHERINE S. LAGOMARCINO, ROSANNA L. OGESBLY, THERESA BLEY, TRULA E. VOSS, HAROLD W. GRUPE, JOHN D. KEEHN, DOROTHY D. KEEHN, HELEN PARKER, EDWARD DORNSIFE, MARION DORNSIFE, PATRICIA P. FILIPOWSKI, individuals, individually and collectively as the owners of all the capital stock of Davenport Brokerage Company, Inc., and a substantial majority of the capital stock of Lagomarcino-Grupe Company.

(sgd.) Smith W. Brookhart,
By SMITH W. BROOKHART,
Counsel for Respondents,
and each of them.

Dated: July 21, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and entered of record on this 15th day of September 1953.

IN THE MATTER OF

BEGA SEWING MACHINE, INC. ET AL.

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

Docket 5893. Complaint, June 27, 1951—Decision, Sept. 18, 1953

Where a corporation and three officers thereof, engaged in the competitive interstate sale and distribution of completed sewing machines, and of imported sewing machine heads, on the back of the vertical arm of which the word "Japan" became covered by the attachment of a motor thereto, and on the front of some of which a bronze-colored metal medallion displayed the words "Made in Japan," "Made in Occupied Japan", or "Japan" in such small and indistinct fashion as not to be legible to those who bought the product or to the public—

(a) Failed adequately to disclose on the said sewing machine heads imported by them that they were manufactured in Japan;

With the result of placing in the hands of dealers in their said products a means and instrumentality whereby they might mislead and deceive the purchasing public as to the place of origin thereof, and with tendency and capacity to lead members of the purchasing public into the erroneous belief that said machines were of domestic origin and thereby induce their purchase of such products; whereby trade was unfairly diverted to them from their competitors, including manufacturers and sellers of the domestic product and sellers also of the imported machines; and

(b) Represented through the use of the phrase "Warranty Certified" in advertising brochures sent to dealers for use by them as a resale sales aid, and so implied, that they were guaranteeing their said sewing machines without limitation;

The facts being they did not guarantee the same to the purchasing public, but furnished dealers with an unsigned "20-Year Guarantee" certificate with each machine sold, for the use and signature of the dealer, if he so desired; terms of the guarantee certificate limited it to one year for the motor and accessories; and the certificate, as to the rest of the machine, limited the guarantee to the replacement of defective parts;

With tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that they were absolutely guaranteeing their said sewing machines and thereby induce members of the public to purchase the same:

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. Everett F. Haycraft*, hearing examiner.
Mr. William L. Taggart and *Mr. J. C. Williams* for the Commission.
Goldberg & Kelter, of New York City, for respondents.

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DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 27, 1951, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with unfair methods of competition and unfair and deceptive acts and practices, in commerce, in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held, at which testimony and other evidence in support of the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, no testimony being offered by respondents in opposition to the allegations of the complaint, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter on May 26, 1952, the hearing examiner filed his initial decision which was duly served on the parties.

Within the time permitted by the Commission's Rules of Practice, counsel supporting the complaint filed an appeal from said initial decision. Thereafter this proceeding regularly came on for consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal (oral argument not having been requested) and the Commission issued its order granting said appeal; and the Commission, being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion and order to cease and desist, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Bega Sewing Machine Corporation (erroneously named in the complaint as Bega Sewing Machine, Inc.) is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 26 West 22d Street, New York, New York. Respondents Tola Bega, Sarah Saul, and Rose Saltio are President, Secretary and Treasurer, respectively, of corporate respondent and acting as such officers, formulate, direct and control the policies, acts and practices of said corporation. The address of said respondents is the same as that of corporate respondent.

PAR. 2. Respondents are now, and have been for several years last past, engaged in the sale of sewing machine heads imported by them from Japan, and of completed sewing machines of which such imported heads are a part, to distributors and also to retailers who in turn sell to the purchasing public. In the course and conduct of their business respondents cause their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in various other 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 now substantial.

PAR. 3. When the sewing machine heads were first imported from Japan by respondents, the words "Made in Japan" usually were printed or stenciled on the back of the vertical arm. Before the heads were sold to the purchasing public as a part of a complete sewing machine respondents attached a motor to the head on the back of the vertical arm so that the aforesaid words "Made in Japan" were covered by the motor and were not visible. In some instances said sewing machine heads, when received by respondents, were also marked with a bronze-colored metal medallion attached to the front of the vertical arm upon which the words "Made in Japan," "Made in Occupied Japan" or "Japan" appeared. These words were, however, so small and indistinct that they were not legible to those who bought them from the respondents or to the public.

PAR. 4. When respondents advertised said sewing machines of which sewing machine heads imported from Japan are a part, in brochures or catalogs that were issued to the retail dealer trade, they displayed a picture of the sewing machine head equipped with accessories including the motor featuring the name "Bega" with the following printed matter in connection therewith:

(Picture of Bega Sewing Machine Head)

NEW "BEGA" SEWING MACHINE

(Picture of mechanism of sewing machine)

This style machine is better known as "The World's Finest"

Also available with name

"SEWMASTER"

The desirable qualities of this machine are:

- Hinged Presser Foot
- Interchangeable with 15–83 parts
- Lock Stitch
- Sews over pins
- Forward and Reverse
- Self Releasing Bobbin Winder
- Warranty Certificate

The picture of the sewing machine had a medallion on the large vertical arm but the insignia thereon is not legible. In billing said sewing machines under the trade name "Bega" and "Sewmaster" respondents, prior to January 1951, did not indicate on invoices that any part thereof was manufactured in Japan. Beginning on or about November 1950 some of the invoices contained the abbreviation "Imp." which, it was asserted by respondents, meant "imported," but was not so understood by a dealer who testified. Beginning in August 1951 respondents in their invoices to dealers described said sewing machines as "Made in Japan." The retail dealers, in turn, in their invoices to the public, described said sewing machines as "Sewmaster" without indicating their origin.

PAR. 5. When sewing machines are exhibited and offered for sale to the purchasing public and such products are not adequately marked to show that they are manufactured in Japan, or if marked and the markings are covered or otherwise concealed, the purchasing public understands and believes such products to be wholly or substantially of domestic origin. There are among the members of the purchasing public a substantial number who have a decided preference for sewing machines which are manufactured in the United States over sewing machines originating in whole or in substantial part in Japan, where other considerations such as style and quality are equal.

PAR. 6. Respondents by placing in the hands of dealers their said sewing machine heads and completed sewing machines, as hereinabove described, provide said dealers a means and instrumentality whereby they may mislead and deceive the purchasing public as to the place of origin of said sewing machines.

PAR. 7. Respondents in the course and conduct of their said business are in substantial competition in commerce with the manufacturers and sellers of domestic sewing machines and also sellers of imported sewing machines.

PAR. 8. The failure of respondents adequately to disclose on the sewing machine heads, imported by them as aforesaid, that they are manufactured in Japan has the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that the said sewing machines are of domestic origin, and to induce members of the purchasing public to purchase said sewing machines because of such erroneous and mistaken belief. As a result thereof, trade has been unfairly diverted to respondents from their said competitors and substantial injury has been done to competition in commerce.

PAR. 9. By the use of the phrase "Warranty Certificate" in their advertisement set out in Paragraph 4 of these findings, respondents represented that they were guaranteeing their "Bega" and "Sewmaster" sewing machines without limitation. Respondents' brochures containing said advertisements, although sent by respondents only to dealers, were designed by respondents and were used by their dealers as a retail sales aid. Said brochures were shown to prospective purchasers by retailers of respondents' products to assist them in selling said products.

PAR. 10. In fact, respondents did not guarantee said sewing machines to the purchasing public. Respondents furnished the dealers an unsigned "20 Year Guarantee" certificate with each sewing machine sold. These certificates were never signed by respondents but were intended for the use of the dealer, if he so desired, and were to be signed by him. Further, the terms of the guarantee certificate limited it to one year for the motor and accessories. As to the rest of the sewing machine, the certificate limited the guarantee to the replacement of defective parts.

PAR. 11. The use by respondents of the misleading and deceptive representations as found in Paragraphs 9 and 10 hereof has the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that the respondents are absolutely guaranteeing their said sewing machines and to induce members of the public to purchase said sewing machines because of such erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of respondents, as hereinabove set out, 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. The acts and practices of respondents hereinabove set out in Paragraphs 3 through 8 also constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Bega Sewing Machine Corporation, a corporation, and its officers, and Tola Bega, Sarah Saul and Rose Saltio, as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

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

2. Representing, directly or by implication, that their sewing mamachine heads or sewing machines are warranted, unless the nature and extent of the warranty and the manner in which the seller will perform thereunder are clearly and conspicuously disclosed.

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

IN THE MATTER OF

DOUBLEDAY AND COMPANY, INC.

Docket 5897. Order and opinions, Sept. 18, 1953

Before *Mr. Frank Hier*, hearing examiner.

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

Satterlee, Warfield & Stephens, of New York City, for respondent.

ORDER AFFIRMING IN PART AND SETTING ASIDE IN PART THE HEARING EXAMINER'S RULINGS ON RESPONDENT'S MOTIONS TO DISMISS, AND REMANDING PROCEEDING TO HEARING EXAMINER

This matter having come on to be heard by the Federal Trade Commission upon the appeal of counsel supporting the complaint from the hearing examiner's ruling on respondent's motion to dismiss Count I of the complaint herein to the extent that it grants said motion and from his initial decision dismissing Count III, and upon briefs in support of and in opposition to this appeal and oral argument of counsel; and

The Commission, upon consideration of the entire record herein, having decided, for the reasons stated in the written opinion of Chairman Howrey which is being issued simultaneously herewith, that the hearing examiner correctly ruled that respondent's practice of granting exclusive book club publishing rights is not in violation of the Federal Trade Commission Act, but erroneously ruled that its practice with reference to the fixing of publication dates comes within the protection of the Copyright Act; and

The Commission being of the opinion that the hearing examiner's initial decision dismissing Count III of the complaint should be set aside (Commissioners Spingarn and Carretta each having set out in a separate opinion their reasons for this action, which reasons differ from those stated in the opinion of Chairman Howrey and concurred in by Commissioner Mead); and

The Commission being of the further opinion that this proceeding should be remanded to the hearing examiner for completion of the taking of evidence and for such other action as may be necessary to finally dispose of the case, with leave to respondent, however, to renew its motion for dismissal of Count III at the close of the taking of evidence;

It is ordered, That the hearing examiner's ruling as to Count I of the complaint herein be, and it hereby is, affirmed insofar as it holds that respondent's practice of granting exclusive book club publishing rights is not in violation of the Federal Trade Commission Act, and that said ruling be, and it hereby is, set aside insofar as it relates to respondent's practice of fixing publication dates.

It is further ordered, That the initial decision of the hearing examiner dismissing Count III of the complaint be, and it hereby is, set aside.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course, with leave granted to respondent to renew its motion to dismiss Count III at the close of the taking of evidence.

Commissioner Mason not participating.

Chairman HOWREY delivered the opinion of the Commission with reference to Count I.

This is an interlocutory appeal by counsel supporting the complaint from the Hearing Examiner's decision granting respondent's motion to dismiss Count III and from his rulings granting in part respondent's motion to dismiss Count I.

Respondent is one of the major publishers of trade books[1] in the country. In number of titles published it ranked second among American publishers in 1952. In the course of its business it enters into agreements with authors of books under which the respondent becomes the licensee or assignee of the copyrights covering such books. These agreements provide that respondent is to receive the exclusive rights to make, publish and sell the books of the copyright holder. In addition, respondent receives rights to exploit the copyrighted material in arrangements with newspapers, magazines, motion picture producers, radio and television broadcasters, and others.

Respondent sells books published by it to independent retail book stores throughout the country. It also furnishes books to twenty-five wholly-owned retail book shops located in various states.

With respect to the literary works covered by its agreements with authors, respondent enters into further agreements with so-called book clubs.[2] Under these agreements, or sub-licenses, the book clubs obtain exclusive rights to publish and sell "book club editions." In addition to these intangible rights, respondent undertakes to furnish printing plates for the work. No resale price requirements are imposed upon the book clubs and it is agreed that they shall be expressly excluded from the operation of any fair trade agreement entered into with others.

[1] Popular fiction and non-fiction books are known as trade books.

[2] See Commission Exhibits 8 (a) to (d).

Respondent is also engaged in the business of publishing and distributing the same books as "publisher's editions." These editions are sold by respondent to independent retail book sellers for the purpose of resale, oftentimes under fair trade agreements fixing minimum resale prices under applicable State laws. Respondent also furnishes the same publisher's editions to its own retail book shops.

As a part of a typical agreement or sublicense with respect to a book club edition, the book club and respondent agree that the publication date of the publisher's edition will not precede that of the book club.

The case as to Count I depends upon the contention that the following operative facts establish violations by respondent of Section 5 of the Federal Trade Commission Act:

(a) Its failure to extend the same publication rights to retail book stores as granted to book clubs;

(b) Its agreement with book clubs that it will not print, publish, or release to retail book sellers copyrighted publisher's editions prior to the date by which the book clubs are able to print, publish, or distribute book club editions; and

(c) Its fixing of resale prices under the fair trade laws as to publisher's editions sold to independent retail stores while leaving the book clubs free from any resale price requirements.

The Hearing Examiner held that (a) and (b) above did not violate Section 5 of the Act for the reason that such practices did not extend or increase the legal copyright monopoly; that "a copyrightee or his licensee may legally agree or do anything which accomplishes no more than to preserve or exploit the monopoly given him, but that he may not by restrictions or restraints add to that monopoly, extend it or increase its effective orbit of operation. *Mercoid Corporation* v. *Mid Continent Co.*, 320 U. S. 661." (Rulings, p. 2.)

As to (c) above, the Hearing Examiner held that this practice was illegal in that "such an undertaking does not merely preserve intact to the respondent its copyright, that is, its exclusive right to print and publish free from duplication, but instead restricts price-wise one avenue of distribution thereby holding a price umbrella over another and competitive avenue, and extends restraint of competition below and beyond the orbit of the licensee's own field" (Rulings, p. 2). Since there was no interlocutory appeal from the ruling described in (c) above, this practice is not now before the Commission for decision.

The facts in the partial record now before us seem to present a case of competitive disadvantage to retail book sellers. The Hearing Examiner thought it obvious "that a retail bookseller, paying respondent $2.10 for a book he must resell at $3.50" might have difficulty in selling "to potential purchasers who may obtain the same book for anywhere from nothing, in case it is a premium or gift or bonus, up to $2.00 or so, merely by subscribing to a book club * * *."[3]

The question for decision is whether this competitive situation results from practices which are violative of law. Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail bookseller has lost sales to a book club or cannot successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent. "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair." *Federal Trade Commission* v. *Paramount Famous-Laskey Corp.*, (C. A. 2, 1932) 57 F. 2d 152, 157. "Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face." *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 582.

Counsel supporting the complaint attempt to equate respondent's licensing practices with discriminatory pricing practices under the Robinson-Patman Act. They say:

"When it [respondent] does lease the plates to the book clubs [[4]], with the knowledge and intention that the book clubs utilize the plates to print book club editions to be sold in competition with the publisher's editions of the same title, and with both editions being of the same grade and quality, then in so leasing at such figures as make it impossible for the retail book sellers to compete with the book clubs, the respondent certainly is discriminating against its retail bookseller customers." (brief, p. 14)

This, they admit, is not a violation of the Robinson-Patman Act in that the granting of book club rights and the leasing of plates constitute a license to manufacture and sell, not a sale of commodities. They contend, however, that it is a form of discrimination which can be corrected under Section 5 of the Federal Trade Commission Act.

This argument conveniently ignores the very question the Commission is called upon to decide, namely, whether the factors contributing to the alleged discrimination are themselves illegal acts.

Thus, we come back to the question decided by the Hearing Examiner: Is the granting of an exclusive license of publication rights in copyrighted property a violation of law? We think not. We agree

[3] Rulings, p. 1.

[4] The heart of the matter is not the leasing of plates but rather the licensing of publication rights.

with the Hearing Examiner that exclusivity is the essence of a copyright (35 Stat. 1075, 17 U. S. C. sec. 1), and that a licensee (such as respondent) has the right arbitrarily to sublicense one and refuse to sublicense another. A holder of a patent or copyright may clearly license one party to the exclusion of other parties. *Extractal Process, Ltd.* v. *Hiram Walker & Sons, Ltd.*, (C. A. 7, 1946) 153 F. 2d 264, 268.

Economic effect in such a situation is immaterial. As the Hearing Examiner said, "Copyrights and patents, being monopolies, of necessity produce economic disadvantage to non-sharers. The very nature of the grant prevents competition and restrains commerce and the exclusive enjoyment thereof is an inherent and fundamental part of the grant itself." (Rulings, p. 2)

The book club, instead of using independent distributors or retail book stores, sells its books primarily by mail direct to readers. The presence of two publishers in the field, each using different distributional methods, results in a duality in consumer price. While the impact of this dual price is felt by the retail bookseller, its mere existence is not violative of law.

While the foregoing disposes of the first issue raised under Count I, we are not unmindful of the issue of public interest. Disadvantage to retail booksellers may be perpetuated by the decision we have been compelled to make. On the other hand, a contrary decision would have an adverse effect on authors, publishers, book clubs, and a large section of the reading public. On balance, the overriding public interest (as well as the law) seems to lie with the views held by the Hearing Examiner.

The second issue under Count I concerns respondent's agreement with book clubs with reference to publication dates. The Hearing Examiner found that respondent "contracts that it will not print, publish or release to its distributive outlets, the copyrighted trade edition, prior to the date which the book club can print, publish or distribute to its members" (Rulings, p. 1). He held, however, that this was a valid use by respondent of its copyright monopoly; that the postponement of distribution of the copyrighted book to its own customers was "no imposition on the activities of another but is solely a voluntary restriction upon itself" (Rulings, p. 2). This conclusion, we think, is unrealistic; it disregards the purpose and effect of the agreement.

Obviously the prohibition against prior publication and sale is for the benefit of the book club. It "effectively insulates" the latter from prepublication competition. It prevents competitors, including retail booksellers, from offering their higher priced edition to the public prior to the date when the lower priced book club edition hits the market. The retail booksellers are thus deprived, by agreement between respondent and the book club, of any opportunity of reaching the market first. The prohibition has the purpose and effect of restraining not only the respondent but also third parties (respondent's customers) who are competitors of the book club.

Without deciding whether or not this violates the Federal Trade Commission Act, it seems to fall within the class of contractual provisions not protected by the Copyright Act (35 Stat. 1075, 17 U. S. C. 1).[5] The distribution of books in the open market is restrained in order to protect the book club from advance competition, or, to put it another way, from a competitive advantage the retail booksellers might otherwise enjoy.

We want to make it clear that the facts in the instant case are in no wise analogized to those in the *Interstate Circuit* case. We rely on that case merely to indicate the type of agreement which we think is beyond the protection of the Copyright Act. We expressly reserve judgement on the question as to whether or not the agreement involved here constitutes an unreasonable restraint of trade or an unfair method of competition.

Clearly the prior publication prohibition is not illegal *per se*. Cf. *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 145, affirming 66 F. Supp. 323, 341. In determining whether the prohibition is unreasonable, the following factors (among others) are relevant:

(1) The simultaneous publication by trade publishers and licensed book club;

(2) The character and location of book club readers as compared with those who buy from retail book stores;

(3) The character of the competition involved—potential versus actual competition;

(4) The fact that the largest sale of a popular book takes place shortly after its publication and gradually dwindles thereafter;

(5) The policy of operation of book clubs, such as the purchase of books by subscribers which they might not voluntarily purchase at a retail book store, etc.

The evidence should be reviewed by the Hearing Examiner in the light of these and other appropriate standards in order to determine whether the simultaneous publication clause is reasonable or unreasonable.

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[5] See *Interstate Circuit* v. *United States*, 306 U. S. 208, 227. We think the Hearing Examiner misread portions of the *Interstate Circuit* opinion. He said it was not in point because "There the contract involved the use of uncopyrighted films and there was an agreement among all distributors that each severally would enter into the same individual restrictive contract with its exhibitors." The part of the opinion on which we rely (306 U. S.), beginning at page 227, deals specifically with the protection afforded by the Copyright Act to the separate agreements between the distributor and the exhibitor.

With respect to Count I, we affirm the ruling of the Hearing Examiner to the effect that the grants to book clubs of exclusive book club publication rights are not in restraint of trade and do not constitute unfair methods of competition or unfair acts or practices within the meaning of Section 5 of the Federal Trade Commission Act. The remaining issue under Count I is remanded to the Hearing Examiner for further consideration in conformity with this opinion.

Commissioner MASON took no part in the consideration or decision of this Count.

Separate opinion of Chairman HOWREY, with whom Commissioner MEAD concurs, with reference to Count III.

At issue under Count III is the relationship of the McGuire Act (66 Stat. 631, 15 U. S. C. 45) to respondent's activity of selling publisher's editions direct to the public, through its wholly-owned or controlled retail book shops, while selling the same editions to independent retail book stores under fair trade contracts. It is not disputed that respondent owns or controls some 25 retail shops located in various parts of the country.

The principal purpose of the McGuire Act is to exempt vertical resale price maintenance contracts from the operation of federal antitrust statutes—as did its predecessor the Miller-Tydings Amendment—where such contracts are lawful under State laws in their application to intrastate transactions (House Report No. 1437, 82nd Cong., 2nd Session). It was the purpose of both Acts to withhold from horizontal arrangements any immunizing effect.[6]

The McGuire Act, which is the same as the Miller-Tydings Amendment in many respects, went beyond the statutory provisions of the latter to the extent felt necessary by the Congress to remove any doubt as to the binding effect of fair trade contracts upon nonsigners who "willfully and knowingly" advertise, offer for sale, or sell the commodity at a lower price (see Section 3 of the McGuire Act). The Supreme Court had held in the *Schwegmann* case (341 U. S. 384) that the Miller-Tydings Amendment did not authorize the enforcement of resale price contracts against dealers who were not signatories to such contracts, where the commerce involved was interstate. Thus, for purposes of the present case, there are no significant differences in the application of the two statutes.

The question raised by this count is whether respondent, being partially engaged in the business of selling books at retail, is author-

[6] Senate Report No. 879, 75th Cong., 1st Sess., as to the Miller-Tydings Amendment, and House Report 1437, 82nd Cong., 2nd Sess., on the McGuire Act. Also see *General Electric* v. *Klein On Square, Inc.*, 1953 CCH Trade Cases, para. 67,443 (N. Y. Sup. Ct. 1953) decided February 20, 1953; *Sunbeam* v. *Payless Drug Stores*, 1953 CCH Trade cases, para. 67,492.

ized by the McGuire Act to specify minimum resale prices in fair trade contracts entered into with independent retailers.

In view of the fact that respondent sells books through the 25 stores which it owns or controls, it is contended that its resale price maintenance contracts with independent retail stores are "between retailers," and therefore respondent's contracts are beyond the protective limits of the McGuire Act.[7]

Section 5 (a) (5) of the Act reads as follows:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to * * * between manufacturers or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

The Hearing Examiner held that Section 5 (a) (5) does not apply to contracts between retailers who are not shown to be in competition with each other or where the retailing operation is incidental to a different major endeavor.

While these two factors are pertinent to the issue under consideration, the ultimate question for decision was not reached by the Hearing Examiner.

The purpose of the McGuire Act, as we have said, was to exempt from the operation of the Federal Trade Commission Act and the antitrust acts vertical agreements prescribing minimum or stipulated resale prices. Horizontal agreements of the same type were expressly *not* exempted. The ultimate question for consideration, therefore, is whether the agreements under scrutiny are "vertical" or "horizontal." When negotiating the fair trade agreements with retailers was respondent acting in its capacity as a manufacturer-publisher or in its capacity as a retailer? [8]

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[7] Respondent also owns, through a subsidiary corporation, one of the largest book clubs, the Literary Guild, which in 1947 had about 900,000 members. However, neither brief nor argument raised the question as to whether the Literary Guild was a retailing operation within the meaning of the McGuire Act.

[8] Senator Humphrey, the leading proponent for the enactment of the McGuire Act in the Senate, explained that the test of:

> "whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.
>
> "It is important to keep this distinction in mind, because many producers of trademarked items sell them to consumers, retailers, and wholesalers alike.
>
> "Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make

In other words, it is necessary to study the particular agreement, examine its form, economic purpose, intent and effect and then decide whether it is a vertical or horizontal resale price-maintenance agreement. Form alone, of course, is not conclusive—the vertical form must not be used as a subterfuge or as a cloak to cover an arrangement having all the effects of a horizontal agreement in restraint of trade.

The fact that respondent functions in a dual capacity—as a publisher and as a retailer—is not determinative of the issue.[9] The practice of manufacturers of selling their products direct to consumers through their own outlets, while at the same time selling to independent wholesalers and retailers is a widespread marketing practice.[10]

Neither the Miller-Tydings amendment nor the McGuire Act, nor their legislative histories, show that Congress intended to discriminate between integrated and nonintegrated manufacturing enterprises in securing the benefits of resale price maintenance for themselves or their customers. In fact, some of the testimony at the Hearings on the McGuire Bill indicates that one of the purposes of

> contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trademarked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers."

While floor remarks of the proponent need not necessarily be considered presuasive of legislative intention, the foregoing statement is of interest in view of the fact that Committee reports are silent on the point.

[9] This basic question, while undecided directly by any court, has been anticipated in legal periodicals. One writer has said: "It would seem consistent with the spirit of the legislation that its benefits should be denied only where there is a substantial degree of horizontality between the contracting parties." 32 Harv. L. Rev. 287.

It has also been stated: "All of the legislation is expressly made inapplicable to horizontal price-fixing contracts, but this provision has not been deemed to prohibit contracts between a retailer and a manufacturer with a retail outlet, or between a manufacturer and a manufacturing retailer." Williams, *Resale Price Maintenance and Minimum Price Legislation* (1950 Institute on Antitrust Laws and Price Regulations, page 141). See also Callman, *Unfair Competition and Trade Marks*, Vol. 1, page 377. Cf. Statement of Thurmond Arnold appearing in *Final Report and Recommendations of the TNEC* (1941), page 238.

[10] For a discussion of the economic purposes that are frequently served by such methods, see Phillips, *Marketing by Manufacturers* (1946), Chicago, Illinois, particularly page 144, where it is explained:

> "The third type of selling directly to consumers is that in which the manufacturer owns and operates retail stores. Such retail stores may be operated in limited number, as, for example, those owned by the Dennison Manufacturing Company; in larger number but limited to the larger cities, as by the Eastman Kodak Company; or as large chains extending over a broad area, as exemplified by such organizations as the Melville Shoe Corporation, Thom McAn stores) and the United-Rexall Drug Company (Liggett, Owl, and Sontag stores). Retail stores have been opened by manufacturers for a variety of reasons, including, among others, the following: (1) to secure distribution for the manufacturers' product under conditions that the manufacturer desires, as, for example, the control of prices; (2) to enable the manufacturer to 'keep his fingers' on the pulse of the market, so to speak; (3) to act as laboratories in which to test market reactions to certain products, policies, procedures, and so on; and (4) to act as 'service stations' for the manufacturers' products."

the proponents of the Act was to place nonintegrated businesses on the same footing as integrated enterprises. This is shown by the colloquy between Congressmen Patman and Hale—Mr. Patman on the stand:

"Mr. Hale. Mr. Patman, I infer from what you have said that you thought the vertical pricing was all right and horizontal price fixing objectionable. Will you explain the philosophical difference between the two?

Mr. Patman. Well I am talking about this particular case only. * * * But in this particular case, vertical price fixing is all right and is all this bill permits. In other words, the national chains now engage in vertical price fixing and they are engaging in it. No one objects to it. It is perfectly legal under our existing laws because they own the manufacturing plant and they own the wholesale houses, the retail outlets, and fix the prices from the manufacturer of the product, or the producer, right on down to where it is sold over the counter.

The theory behind this bill is to give the small independent merchant the same privilege and opportunity as the big man, from the manufacturer to the middleman, and right on down to the retail outlet . . ." (Hearings, p. 13).

There have been several occasions on which the courts have passed upon resale price maintenance contracts between integrated concerns and retailers. In none that we have seen has it been held that a manufacturer or producer having retail functions has gone beyond the protective limits of either the Miller-Tydings Amendment or the McGuire Act merely by concluding resale price contracts with independent retailers. See, for example, *General Electric Co.* v. *R. H. Macy & Co.*, 103 N. Y. S. (2d) 440 (1951); *General Electric Co.* v. *S. Klein On Square, Inc.*, 1953 CCH Trade Cases, para. 67,443 (N. Y. Sup. Ct. 1953) decided February 20, 1953.

The theory of counsel supporting the complaint involves, it seems to us, a direct administrative nullification of Congressional intent. Under their interpretation any retail selling—regardless of degree, i. e., the volume of retail sales as compared with non-retail activities—would disqualify a manufacturer and his customers from the benefits of fair trade protection. Presumably the same theory would apply to manufacturers selling at wholesale.

It is common knowledge that many manufacturers engage to a lesser or greater degree in some wholesaling or retailing activity.[11] Con-

[11] In 1939, according to the Census of Business, manufacturers made 2.8 percent of their sales through their own retail stores, 1.8 percent of their sales direct to consumers, and 43.7 percent of their sales direct to retailers or through their own wholesale branches.

sequently the effect would be to nullify the newly passed McGuire Act insofar as large segments of our economy are concerned. Such a disregard of Congressional intent is neither logical nor necessary. It does violence to the fundamental principle that legislation should be construed in the light of its basic purpose.

In this connection we cannot close our eyes to the long and controversial history, both legislative and litigious, of resale price maintenance. Certainly Congress, in enacting the McGuire Bill by an overwhelming vote, left us in no doubt concerning the basic purpose and intent of the legislation. It approved resale price maintenance and it is not the Commission's business to nullify that approval.[12]

One further contention of counsel supporting the complaint requires brief comment. They urge that a horizontal agreement between retailers to fix resale prices comes under Section 5 (a) (5) of the Act "irrespective of whether or not said retailers are in competition with each other" (brief, p. 16). This may be true—although we do not now decide the question—but it does not necessarily follow that such an agreement constitutes a *per se* violation of Section 5 of the Federal Trade Commission Act.

Section 5 (a) (5) does not contain any affirmative prohibition or create any new categories of illegality. Horizontal price fixing agreements are merely left to be tested under the general principles of antitrust law. Ordinarily such agreements are between (or relate to) competitors and for that reason the courts have in some cases considered them illegal *per se*. We seriously doubt, however, that the *per se* doctrine can be stretched to cover a situation where the parties affected by the agreement are not in competition with each other. How can injury to competition be presumed where no competition exists?

Commissioner Mead and I believe that the issues raised by this appeal under Count III should be remanded to the Hearing Examiner

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Except in the case of sales direct to consumers, these percentages had increased since 1929. Subsequent information is available only for wholesale levels, but it indicates that direct wholesaling by manufacturers has increased further since 1939.

Wholesale and retail distribution by manufacturers varies widely in importance from industry to industry. In many industries there appears to be a considerable amount of direct distribution alongside sales to independent wholesalers and retailers. In 1939, wholesale branches owned and operated by manufacturers of distilled liquors made 13.1 percent of the sales of such manufacturers. In the same year, such wholesale branches made 43 percent of the sales of rectified or blended liquors, and, in addition, direct sale by manufacturers to retailers amounted to 12½ percent of manufacturers' sales. In the case of perfumes and cosmetics, manufacturers made 32.4 percent of their sales directly to independent retailers and an additional 15.7 percent through manufacturer-owned wholesale outlets. Moreover, manufacturers made 7.2 percent of their sales to consumers at retail. In the case of drugs and medicines, manufacturers made 29.4 percent of their sales through their own wholesale branches and an additional 16.4 percent direct to retailers.

[12] The Congress also reiterated the policy of preventing illegal horizontal agreements, and we should be equally careful to observe this part of the Congressional intent.

for further consideration and action in conformity with this opinion. Commissioners Spingarn and Carretta agree that Count III should be remanded but for different and separate reasons. Because of this conflict of opinion, Count III has been remanded to the Hearing Examiner with instructions to proceed in the regular course, with leave to respondent to renew its motion to dismiss at the close of the evidence.

Commissioner MASON took no part in the consideration or decision of this count.

SEPARATE OPINION OF COMMISSIONER SPINGARN

I concur with the action of the Commission as to the appeal from the hearing examiner's ruling relating to Count I of the complaint.

I also concur with its action reversing the hearing examiner's ruling dismissing Count III of the complaint—the count involving the construction of the new resale price maintenance law—and remanding the case to the hearing examiner for further consideration. However, with respect to Count III, I arrive at this result by a course of reasoning substantially different than that of two of my colleagues who share the same views (which are incorporated in the separate opinion of Commissioner Howrey). I believe that the adoption of their views would direct the hearing examiner down the wrong road; one which will inevitably result in his returning to the Commission with another ruling again dismissing Count III of the complaint.

I believe that my two colleagues erroneously make the form of the agreements and the economic purpose and intent of the respondent determinative factors to be considered by the hearing examiner in deciding whether the agreements between retail book stores and a publisher who operates book stores are legal resale price fixing agreements or whether they are illegal price fixing agreements between retailers. In my opinion, proper decision of this case requires a determination as to whether the effect of these agreements has been to restrict price competition between respondent's book stores and their competitors in the retail market. To the extent that these agreements have such a restrictive effect on competition, they are illegal and should be prohibited regardless of their form and regardless of the economic purpose or intent of the parties to the agreements.

The record shows that among the retail stores owned and operated by respondents, 16 are located in States in which respondent has entered into resale price maintenance agreements and in which all retailers are bound by such agreements whether they have signed an agreement or not. Respondent admits that wherever its fair trade contracts were executed, nonsigners were duly notified as required by State law, resulting in valid and binding fair trade protection on a substantial number of its book titles. Respondent admits that it sells to other retail stores in each of the cities in which its above-referred to retail outlets are located. Testimony as to three of these retail outlets located in New York City, Philadelphia, and Boston, respectively, shows they are in close competition with retail stores buying from respondent. All of the book stores in New York, Pennsylvania, and Massachusetts are bound by respondent's fair trade contracts. Thus, the record clearly shows that respondent's fair trade contracts have fixed prices of competitors of its retail outlets.

It is settled law that any agreement fixing prices between competitors is an unreasonable restraint on trade. (*UnitedStates* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927), *Ethyl Gasoline Corporation, et al.* v. *United States*, 309 U. S. 436 (1940), *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944), *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945).

It is well established that agreements in unreasonable restraint of trade are unfair methods of competition within the meaning of that term as used in Section 5 of the Federal Trade Commission Act. (*Federal Trade Commission* v. *Cement Institute, et al.*, 333 U. S. 683 (1948).)

Therefore, to the extent that respondent's agreements fix prices between its retail outlets and competing retailers, they are in violation of Section 5 of the Federal Trade Commission Act unless they fall within the exemption provided by the McGuire Act. This act, which legalizes certain resale price maintenance agreements, specifically states that it does not legalize agreements between retailers establishing their resale prices. I agree with my two colleagues that it would void the obvious desire of Congress in passing this act to interpret it as not legalizing any resale price fixing agreement if the producer of the goods also sold at wholesale or retail even through one outlet. However, I feel that it would likewise be contrary to the clear meaning of the exemption to the McGuire Act to interpret it as legalizing agreements which fix prices between respondent's retail outlets and competing retailers. Also I believe it is immaterial whether the agreement is signed both by respondent and the competing retailer (as respondent admits in its answer is the fact in certain cases) or if the competing retailer is bound to observe the fixed prices as a non-signer by respondent's agreement with a different retailer within the same State.

Companies engaged in the dual functions of producing and selling at retail who wish to avail themselves of the protection of the McGuire Act must avoid agreements which bind their retail competitors from engaging in price competition with them. Respondent in this matter has entered into agreements fixing the prices at which its retail competitors can sell certain books in competition with its retail stores. In my opinion, such agreements are outside the exemptions of the McGuire Act and are in violation of Section 5 of the Federal Trade Commission Act.

Therefore, I believe that the present record contains a prima facie case upon which, if no further evidence were presented, the Commission could issue an order prohibiting respondent from entering into agreements with retailers of books which agreements would fix the resale prices of books sold by retail stores in competition with respondent's retail stores. In my opinion, the hearing examiner should be so instructed and the case returned to him for appropriate action in accordance with these instructions.

SEPARATE OPINION OF COMMISSIONER ALBERT A. CARRETTA

This matter is before the Commission upon an interlocutory appeal by counsel supporting the complaint from the Hearing Examiner's ruling granting in part respondent's motion to dismiss Count I and from his Initial Decision granting respondent's motion to dismiss Count III of the complaint herein.

As to the Hearing Examiner's ruling relative to respondent's motion to dismiss Count I of the complaint, I am in agreement with the reasoning and with the conclusion expressed in the opinion of the Commission as prepared by Chairman Howrey.

As to the Hearing Examiner's Initial Decision granting respondent's motion to dismiss Count III of the complaint herein, I agree with the other Commissioners that the Hearing Examiner should be reversed and that the case should be remanded to said Hearing Examiner with instructions to proceed in the usual course, reserving to the respondent the privilege of renewing its motion to dismiss after the introduction of evidence by all parties to this proceeding. However, my reasons for arriving at this conclusion are not exactly the same as those set forth by Chairman Howrey in his Separate Opinion and by Commissioner Spingarn in his Separate Opinion.

Because of the importance of this case, in addition to reading all of the pleadings in this proceeding as well as the excellent briefs filed by all counsel in this case, I have seen fit to review the legislative history of both the Miller-Tydings Act and of the McGuire Act.

Section 5 (b) of the Federal Trade Commission Act provides, among other things, that "Whenever the Commission *shall have reason to believe* that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, * * * it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect * * *". When the Commissioners of the Federal Trade Commission on June 29, 1951, decided to issue the complaint herein (which complaint contained four separate and distinct counts), they undoubtedly, in their individual minds, "*had reason to believe*" that the respondent herein had been using unfair methods of competition in commerce within the intent and meaning of Section 5 (a) of the Federal Trade Commission Act. [By the passage of the McGuire Act amendment to the Federal Trade Commission Act on July 14, 1952, Section 5 (a) was redesignated as Section 5 (a) (1).]

The record indicates that counsel in support of the complaint has submitted his evidence in support of the allegations contained in the complaint. Counsel for respondent, under date of December 1, 1952, filed a motion with the Commission requesting that each of the four counts contained in the complaint herein be dismissed upon the ground that the Commission had failed to establish a "prima facie" case of violation. The Hearing Examiner, among other things, saw fit to grant respondent's motion with respect to Count III of the complaint, and counsel in support of the complaint then appealed said decision to the full Commission.

I am of the opinion that the Hearing Examiner was in error in granting respondent's motion to dismiss Count III of the complaint and in finding that there was no showing of competition between respondent's retail stores and customers of the respondent. While I do not now pass upon the merits of this case, I am of the opinion that counsel in support of the complaint has established a prima facie case in violation of Section 5 (a) (1) of the Federal Trade Commission Act. In other words, based upon the present record before the Commission, *I have reason to believe* that respondent's practices, insofar as Count III of the complaint is concerned, are in violation of Section 5 (a) (1) of the Federal Trade Commission Act. It is now up to the respondent to introduce evidence to rebut this prima facie case.

This case, for the first time, makes it necessary for the Commission to interpret the words of Section 5 (a) (2) and of Section 5 (a) (5) of the Federal Trade Commission Act, which sections were added to said Act by the passage of the McGuire Act. There is no doubt in my mind that by the enactment of the McGuire Act amendment to the Federal Trade Commission Act, the Congress of the United States did not label as illegal any method of competition, or any act or practice, which had not theretofore been labeled as illegal under either the Federal Trade Commission Act or any of the antitrust acts.

What Section 5 (a) (2) of the McGuire Act amendment to the Federal Trade Commission Act did was to provide that whenever certain pricing agreements defined therein were lawful under a State statute in its application to intrastate commerce, those specified pricing agreements were not to be deemed illegal in violation of either the Federal Trade Commission Act or any of the antitrust acts. In effect, this section of the McGuire Act amendment to the Federal Trade Commission Act provides an exemption of certain pricing agreements from the operation of the Federal Trade Commission Act and from other Federal antitrust acts.

After providing this exemption, the Congress of the United States further included in Section 5 (a) (5) of the McGuire Act amendment of the Federal Trade Commission Act a provision which, in effect, is an exception to the exemption provided in Section 5 (a) (2) of the same amendment. Paragraph 5 (a) (5) reads, specifically, as follows:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

The foregoing quoted subsection of the McGuire Act amendment is the one which has caused most concern to the Commission and which must be carefully analyzed in conjunction with the legislative history affecting this subsection. In my opinion, in order to better understand the intent of Congress in enacting this particular subsection, we should divide it into two parts. The first part would read as follows:

Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers. (The last phrase of Section 5 (a) (5) has been omitted.)

The second part would read as follows:

Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, * * * between persons, firms, or corporations in competition with each other. (There has been omitted herefrom that section of 5 (a) (5) which refers to the various classifications of businessmen.)

What Section 5 (a) (5) does is to state that insofar as the pricing agreements referred to therein are concerned, no one can point to Section 5 (a) (2) of the McGuire Act amendment and say that by reason of its enactment, the pricing agreements set forth in Section 5 (a) (5) are legal. Section 5 (a) (5) in and of itself does not specifically say that the pricing agreements specified therein are "illegal." In my opinion, all that it says is that insofar as the pricing agreements enumerated in Section 5 (a) (5) are concerned, this Commission must continue to look to the provisions of Section 5 (a) (1) of the Federal Trade Commission Act to determine whether such enumerated practices are illegal. *As to these particular enumerated pricing agreements, it is just as though the McGuire Act amendment was never enacted.*

In view of the foregoing, if any minimum resale price fixing agreement is entered into between one manufacturer and another manufacturer, or between one retailer and another retailer, in connection with a trade marked product, such an agreement does not come within the exemption provided in Section 5 (a) (2) of the McGuire Act amendment. However, this failure to come within such exemption does not, in and of itself, cause such an agreement to be an illegal agreement. We must then look to the provisions of Section 5 (a) (1) of the Federal Trade Commission Act to determine whether the contracting parties are in competition with each other. If they are, the Commission may find such an agreement to be in violation of the Federal Trade Commission Act. If they are not in competition, as, for example, when one retailer doing interstate business is located in San Francisco and another retailer doing interstate business is located in New York City, then the pricing agreement very probably would not be held to be in violation of Section 5 (a) (1) of the Federal Trade Commission Act.

In support of this opinion, I rely somewhat upon the definition of Senator Humphrey, wherein he stated that "the test of whether a resale price maintenance contract is horizontal is if it is between *competing* sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved." (Italics added.)

Now, with regard to a minimum resale price-fixing agreement affecting a trade marked commodity which is entered into between "persons, firms, or corporations in competition with each other," the test appears to be that there must be competition between the contracting parties. It appears to be of no importance whether the contracting parties are both of the same class or of different classes. For example, if a manufacturer enters into a minimum resale price-fixing agreement with a retailer, and that manufacturer is also in competition with that retailer, such agreement is not made lawful by anything contained in Section 5 (a) (2) of the McGuire Act amendment. Here, then, we must look to Section 5 (a) (1) of the Federal Trade Commission Act to determine whether such an agreement is illegal. There is nothing in the McGuire Act amendment which makes it either legal or illegal.

We next come to the situation in which one of the contracting parties operates in a dual capacity, that is, either as a manufacturer-wholesaler, or as a manufacturer-retailer, or as a wholesaler-retailer. Regardless of whether such contracting party is more of a manufacturer than he is a wholesaler, or whether he is more of a manufacturer than a retailer, if that manufacturer-wholesaler or manufacturer-retailer is *actually* in competition with the other contracting party, then such manufacturer-wholesaler or manufacturer-retailer cannot claim the exemption provided in Section 5 (a) (2) of the McGuire Act amendment. This is due to the language of Section 5 (a) (5) of the McGuire Act amendment. This position I hold whether the manufacturer conducts his wholesaling activities or his retailing activities as an incidental adjunct of his manufacturing enterprise or whether such manufacturer conducts his wholesaling operations or his retailing operations through the medium of wholly owned subsidiary corporations or where the record is clear that even if such manufacturer does not wholly own the subsidiary corporation, such manufacturer dominates the control and operation of such subsidiary.

Of course the competition envisaged by Congress, in my opinion, cannot be merely *de minimis*. It will suffice if the competition offered by one contracting party to the other is something more than casual or incidental competition.

Syllabus

IN THE MATTER OF

DICTOGRAPH PRODUCTS, INC.

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

Docket 5655. Complaint, May 2, 1949—Decision, Sept. 24, 1953

Where one of the largest corporate manufacturers of hearing aids, engaged in the manufacture and competitive interstate sale and distribution of its "Acousticon" instruments and parts and accessories therefor; in selling its said products to about 220 independently owned and operated distributors located throughout the United States, who were part of a group of about 1,000 devoted solely to the sale of hearing aids and related products, and as such offered the best market therefor, and one which was used generally by manufacturers of such products as distributive mediums—

(a) Consistently followed, since 1937, a policy of making sales and contracts for sales of its products on the condition, agreement, and understanding that the purchasers thereof should not use or deal in hearing aid instruments or parts or accessories therefor sold and distributed by competitors;

(b) Required also that all its distributors refrain from selling any used hearing aids or any which had been traded in as part payment for a new hearing aid;

(c) Provided in its said contracts for the appointment of sub-distributors by its distributors in the territory allotted to them, on contract forms supplied by it and subject to the same restrictive exclusive-dealing provisions contained in the contract between it and the distributors;

(d) Provided in its said contracts that they might be cancelled at any time, with or without cause, and that in said event the distributor would cancel the franchises of all its dealers and would not for a year engage in any hearing aid business in the territory concerned;

(e) Required its distributors to sign supplements to such agreements by which they agreed that, upon termination of the contracts, they would surrender their telephone directory listing and authorize that any mail upon which appeared the name "Acousticon" or any variation of the word "Acoustic," be forwarded to its home office, said latter agreement being in such form as to constitute a directive to the Postal Department to forward all mail so addressed direct to it;

(f) Brought to the attention of each distributor at the time of the execution of the written contract that such distributor must handle only its products; and through its exclusive-dealing clause in conjunction with the right of cancellation and the prohibitions against continuing in business for a year after cancellation, intimidated and coerced distributors and compelled them to purchase products concerned solely from it; and

(g) Instructed its field representatives to check the stock of products carried by its dealers and distributors to determine whether any competitive products were being carried, and threatened those whom it discovered to be carrying such products with immediate discontinuance of the distributor's franchise pursuant to the cancellation provisions contained therein, and in the event of any such distributor's persistence in carrying such products, immediately discontinued him:

Held, (a) That such acts and practices, under the circumstances set forth, constituted unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act; and

(b) That the acts and practices of respondent in selling and making contracts for sale of hearing aids and parts and accessories therefor on the condition, agreement, or understanding that the purchasers thereof should not sell or deal in similar products of a competitor constituted a violation of Sec. 3 of the Clayton Act.

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

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

Mr. Theodore F. Tonkonogy and *Mr. George J. Feldman*, of New York City, for respondent.

Orders and Decision of the Commission

Order denying appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 5655, September 24, 1953, follows:

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

The Commission, upon consideration of the record herein, having decided, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the findings as to the facts contained in the initial decision are supported by reliable, substantial, and probative evidence of record; that the conclusions contained herein are correct; and that the order to cease and desist therein provides proper relief from the respondent's illegal practices; and

The Commission, therefore, being of the opinion that respondent's appeal from and exceptions to the hearing examiner's initial decision are of no merit and that said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of respondent from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner shall on the 24th day of September, 1953, become the decision of the Commission.

It is further ordered, that respondent Dictograph Products, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in said initial decision * * *.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

Pursuant to the provisions of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, commonly known as the Clayton Act, and the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 2, 1949, issued and subsequently served its complaint in this proceeding upon the respondent Dictograph Products, Inc., a corporation, charging it with the violation of the provisions of section 3 of the Clayton Act and use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of the Federal Trade Commission Act. After the filing of answer to the complaint, hearings were held at which testimony and other evidence in support of, and in opposition to, the allegations of the complaint were introduced before the above-named Hearing Examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, and said Hearing Examiner, having duly considered the record herein, makes the following findings as to the facts and conclusions drawn therefrom and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Dictograph Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, having its principal office and factory at 95-25, 149th Street, Jamaica, Long Island, New York. Respondent maintains branch offices located in New York, New York; Chicago, Illinois; and Los Angles, California.

PAR. 2. Since its incorporation in 1938 or 1939 and prior thereto, as a Delaware corporation, the respondent has been engaged in the manufacture and the sale and distribution of hearing aid instruments under the trade name "Acousticon" and of parts and accessories therefor. Respondent is one of the largest manufacturers of hearing aids and parts and accessories therefor located in the United States. Respondent causes said products when sold to be transported from its place of business and factory located in the State of New York to purchasers thereof located in the various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business hereinbefore described, respondent is now, and has been for many years, engaged in competition in the sale of hearing aids and parts and accessories therefor in commerce among and between the various States of the United States and in the District of Columbia with other corporations and with persons, partnerships and firms engaged in the manufacture and sale of similar products.

PAR. 4. The method of distribution used by respondent is to sell its hearing aids and parts and accessories therefor to approximately 220 independently owned and operated distributors located throughout the United States, who are not agents, servants or employees of respondents, but independent contractors in the purchase of respondent's products. This method of distribution is generally followed by manufacturers and distributors of hearing aids and parts and accessories therefor except for a few who also sell to dealers for over the counter sales. The best market for the manufacturers of hearing aids is the independently established retail distributor whose business is devoted entirely to the fitting and sale of hearing aids to the hard of hearing public. There is a total of approximately 1,000 distributors located in the United States who devote their entire time and business efforts solely to the sale of hearing aids and related products. Such distributors also serve as the best market for parts and accessories for hearing aid instruments since the purchaser thereof generally returns to the distributor from whom he purchased the hearing aid for any further purchases of parts or batteries or for any repairs or replacements or parts in the hearing aid purchased.

PAR. 5. The dollar volume of business done by the respondent with its distributors has been substantial. During the years 1944 to 1949 inclusive, sales of hearing aids and parts and accessories therefor by respondent to its distributors were as follows:

Year	*Hearing Aids*	*Parts & Accessories*
1944	$741, 874	$257, 933
1945	1, 041, 097	162, 100
1946	2, 231, 570	187, 761
1947	1, 937, 432	269, 182
1948	1, 763, 955	200, 757
10 Months 1949	1, 546, 797	142, 025

PAR. 6. In the course and conduct of its business, respondent has since 1937 consistently followed a policy of making sales and contracts for sale of its hearing aid instruments and parts and accessories therefor on the condition, agreement and understanding that the purchasers thereof shall not use or deal in hearing aid instruments or parts or accessories therefor sold and distributed by competitors of the respondent. The respondent also required that all of its distributors refrain from selling any used hearing aids or any hearing aids which have been traded in as part payment for a new hearing aid.

PAR. 7. The standard form of contract entered into by respondent and its distributors has been substantially the same since 1937 and contains, among other things, the following provisions:

2. Subject to the reservations hereinafter stated, the Company hereby grants to Distributor an exclusive franchise to purchase Acousticon Products for resale in the following described territory:

(Description of territory allotted)

It is agreed that Company may at any time enlarge, reduce or otherwise change said territory in any way and at any time Company may see fit and without prior notice, without otherwise affecting the terms of this agreement, and without incurring any liability whatsoever to Distributor by reason thereof. Any such enlargement, reduction or change of territory, shall be effective from the date of written notice thereof.

4. (a) Distributor hereby accepts the franchise upon the terms, covenants and conditions set forth in the agreement and in acting hereunder he agrees to appoint dealers to sell Acousticon Products in all towns and cities mutually agreed upon by Company and Distributor.

(b) Distributor agrees to file with Company a fully executed copy of each latest Dealer Franchise Agreement entered into by him with any and all dealers, which Dealer Franchise Agreements shall be on appropriate forms supplied by Company. In event any such Dealer Franchise Agreements are terminated for any reason, Distributor will immediately furnish Company with a copy of the notice of termination.

5. Distributor agrees that during the term of this agreement, Distributor will not manufacture, sell, market, distribute or offer for sale in any way, directly or indirectly, any hearing aid instruments, parts or accessories, other than Acousticon Products, except as otherwise authorized by Company.

13. Distributor agrees that Distributor shall bear any and all expense incident to the operation of his business as an Acousticon Distributor including, without limiting the foregoing, the cost of furnishing and equipping Distributor's place of business, and cost of maintaining said place of business, and Distributor will at his expense and at his sole discretion, in the event Distributor decides he requires employees or assistants, hire such assistants or employees as Distributor requires for the operation of his business, and Distributor shall pay the wages, salaries or commission of all such assistants and employees and assume full direction and control over and responsibility for all such assistants and employees. It is understood and agreed that if Distributor hires such assistants or employees, such assistants and employees are the assistants and employees of Distributor and not of Company.

17. (a) This agreement shall continue in force and govern all relations and transactions between Company and Distributor until terminated, as hereinafter provided; Provided, however, that in event Distributor for any reason whatsoever violates or breaches this agreement, Company may at its option treat such breach as a termination of this agreement, as though the same were terminated by Distributor.

(b) This agreement may be terminated at any time with or without cause by either party hereto by posting in the United States Registered Mail, return receipt requested, postage prepaid, a written notice of termination in an envelope properly addressed to the last known address of the other party, or by personally delivering a written notice of termination to the other party. In event of termination of this agreement by either party, Distributor agrees that he will within ten days after receipt of notice of termination, or within ten days after the mailing of notice of termination, cause the franchises of all Distributor's dealers handling Acousticon Products as of the effective date of cancellation, to be cancelled in accordance with the provisions of such franchises.

(c) It is agreed that any such termination of this agreement will not release Distributor from payment of any sum which may then be owing Company.

(d) Notice of termination of this agreement by either party will immediately act as cancellation of all orders which may have been sent by Distributor for Acousticon Products and standard repair or replacement parts, if said orders had not been shipped prior to Company's sending or receiving notice of termination.

21. In the event of the termination of this agreement by either party, Distributor expressly covenants and agrees that for a period of one year from the date of said termination Distributor will not, directly or indirectly, carry on, or be engaged, employed or interested in any hearing aid business within the territory outlined in Paragraph "2" hereof, either alone or jointly with, or as agent or employee of, any person, firm or corporation, and that during said one year period, within the aforesaid territory Distributor will not, in any manner whatever, solicit or accept the custom, trade, or business of any user of or prospect for hearing aids. Distributor further covenants and agrees not to do any other act that shall or may prejudice the business of the Company or any other Distributor of the Company within the territory outlined in Paragraph "2" hereof.

PAR. 8. Pursuant to the provisions of the Distributor Agreement hereinbefore described respondent's distributors have appointed sub-distributors or dealers to sell respondent's products using contract forms supplied by respondent to distributors for this purpose. These contracts were subject to the restrictive exclusive dealing provisions contained in the contracts between respondent and its distributors. As of November 1, 1949, there were approximately thirty-six such dealers under contract with respondent's distributors.

PAR. 9. In addition to respondent requiring its distributors to enter into formal written contracts with it containing the provisions hereinbefore described, the respondent at the same time required its distributors to sign supplements to such agreements by which they agreed that, upon termination of said contracts, they would surrender their telephone directory listing and authorize that any mail upon which appears the name "Acousticon" or any variation of the word "Acoustic" be forwarded to the home office of respondent. This latter agreement was in such form as to constitute a directive to the Postal Department to forward all mail so addressed direct to the respondent.

PAR. 10. In the general course and conduct of respondent's business relations with its distributors, respondent has required strict compliance with, and its distributors have strictly adhered to, the exclusive dealing requirements of its contracts. Furthermore the exclusive dealing clause of respondent's contract, when considered in conjunction with the right of cancellation by respondent and the prohibitions against continuing in the business of selling hearing aids after cancellation, is a sufficient deterent to require compliance with the contract. Such contractual provisions and the requirement of strict compliance therewith has the effect of intimidating and coercing distributors and compelling them to purchase hearing aids and parts and accessories therefor solely from respondent.

PAR. 11. In the course of its dealings with its distributors, respondent has adopted other acts and practices which were designed to and did intimidate such distributors and which caused and compelled them to purchase hearing aids and parts and accessories therefor solely from the respondent and which prohibited purchases from competitiors of respondent. Among such acts and practices were instructions issued by respondent to its field representatives to check the stock of products carried by respondent's dealers and distributors to determine whether any competitive products were being carried and to report any such violations of respondent's contract to the respondent. The various field representatives followed these instructions and did check on dealers' and distributors' stocks and reported violations of the respondent's requirement to deal only in its products to the respondent.

PAR. 12. Respondent in order to enforce and implement requirement that distributors handle only respondent's products to the exclusion of any products of a competitor of respondent, not only has brought to the attention of each distributor, at the time of the execution of the written contract, that such distributor must handle only respondent's products, but also has threatened distributors whom it discovered to be carrying competitve products with an immediate discontinuance of the distributor's franchise pursuant to the cancellation provisions contained therein and if any such distributor persisted in carrying any competitive products, he was immediately discontinued.

PAR. 13. As a part of its defense the respondent called representatives of nine competing manufacturers of hearing aids in an attempt to establish that during the period the respondent has been requiring its distributors to deal exclusively in respondent's products, that some of these manufacturers have commenced the manufacture of hearing aids and that their sales of hearing aids have increased despite the fact that they were unable to sell to any of respondent's dealers or distributors. The mere fact that some competitors have entered the field and that the sales of some competitors have increased during the period that respondent has required its distributors to handle its products exclusively, constitutes no defense to this proceeding where it affirmatively appears that such competitors were foreclosed from a substantial portion of the market. Respondent's distributors constitute a substantial segment of the outlets for sale of hearing aids and supply coverage for the more important trade areas of the United States. In such segment the respondent has effectively established a monopoly. Competing manufacturers of hearing aids have suffered substantial injury in the form of loss of sales and inadequate distribution of their competing products as a result of the respondent's requirements that its distributors and dealers handle only the products manufactured and sold by the respondent, and such competing manufacturers have been forced to sell less desirable outlets for their products such as optical stores, department stores and drug stores.

PAR. 14. As a further defense to this proceeding it was contended by the respondent that its hearing aids are developed along the highest lines of scientific research, that its products are superior, that the fitting techniques developed by the respondent and utilized by its distributors and dealers to fit its hearing aids to the hard of hearing are superior and that no other competing company's products are adapted to or capable of performance as efficiently for the hard of hearing nor do such other competing companies employ fitting methods and procedures comparable to those of respondent. While the hearing aids manufactured and sold by respondent cover a variety of responses and are adaptable to various degrees of hearing loss, there are also other competing manufacturers whose hearing aids cover a variety of responses and which are adaptable to various degrees of hearing loss though not on as elaborate a scale as that developed by the respondent. Competing manufacturers as well as respondent have developed techniques for the fitting of hearing aids. All these techniques have for their purpose the fitting of a hearing aid most satisfactory to the purchaser to be fitted, and to compensate for the hearing loss involved.

PAR. 15. The relative merits of respondent's hearing aids or its fitting techniques does not constitute a defense to this proceeding. No matter how compelling the advantage of handling the respondent's products might be either to the distributor or his customer this does not justify the evasion or violation of the statutory provisions dealing with exclusive dealing contracts. While the distributor is engaged in an entirely private business and has a right to freely exercise his own independent discretion as to parties with whom he will deal or stop dealing for reasons sufficient unto himself, this right should be left to the dealer free of any contractual requirement to deal only in respondent's products.

CONCLUSIONS

1. The distributors' and dealers' contracts and agreements and methods of sale as hereinbefore described constitute sales or contracts for sale of respondent's hearing aids and parts and accessories on the condition, agreement or understanding that the purchasers thereof shall not deal in similar products sold and distributed by competitors of respondent.

2. Distributors who have executed written contracts with respondent suffer substantial injury to their respective businesses, because of the fact that they are foreclosed from making any independent judgment or decision as to what products they shall handle and sell in their business enterprises and lose substantial sales because they are unable to carry and sell competitive hearing aids.

3. Distributors who refuse to abide by respondent's exclusive dealing policy and insist on carrying competitive hearing aids and who are, therefore, promptly discontinued by respondent as such distributors for no other reason, are injured in their businesses because of the fact that they are unable to make the normal sales which they would ordinarily make of respondent's products, solely because they refused to handle respondent's products exclusively.

4. The acts and practices and policy of the respondent, relative to exclusive dealing, adversely affects the ability of competitive manufacturers and suppliers to sell hearing aids and parts and accessories therefor to independent distributors under contract with respondent and deprives such manufacturers and suppliers of an equal opportunity to obtain the business of such distributors and such practices restrain, restrict and lessen the market for the sale of such products of such independent manufacturers and suppliers.

5. The dollar volume of such products annually sold by respondent to its distributors under restrictive conditions, understanding and agreements was substantial and has materially lessened competitive sales in each of the trade areas covered by respondent's distributors, and respondent, during all the times mentioned herein, would have been, and would now be, in free and open competition in the sale of similar merchandise in commerce in said trade areas were it not for

the suppression of such competition by such restrictive policy and practices and conditions, understandings and agreements imposed upon its distributors as hereinbefore found.

6. The use by the respondent of the acts and practices hereinbefore described has had, and now has, the capacity and tendency to, and does, intimidate respondent's distributors and coerce and compel them to purchase hearing aids and parts and accessories therefor only from the respondent with the result that substantial trade has been diverted to the respondent from its competitors who are engaged in the manufacture and in the sale and distribution of similar products as sold by the respondent.

7. The acts and practices of respondent as hereinbefore described are all to the injury and prejudice of the respondent's competitors and of the public, and have the tendency to, and have, hindered and prevented competition in commerce, and tends to, and has, hindered competition in the sale of the products sold by the respondent, and has a tendency to, and has, obstructed and restrained such competition in commerce.

8. The effect of the sale and contracts for sale of hearing aids and parts and accessories therefor on the condition, agreement and understanding that the purchaser thereof shall not sell or deal in similar products of competitors has the effect of substantially lessening competition and has the tendency to create a monopoly in respondent in the sale of such hearing aids and parts and accessories therefor sold by respondent.

9. The acts and practices of the respondent, as herein found, constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act; and the acts and practices of the respondent in selling and making contracts for the sale of hearing aids and parts and accessories therefor on the conditions, agreement or understanding that the purchasers thereof shall not sell or deal in similar products of a competitor constitute a violation of section 3 of that 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 Act).

ORDER

It is ordered, That the respondent, Dictograph Products, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of hearing aids and parts and accessories therefor 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 hearing aids or parts and accessories therefor or other similar correlated 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 hearing aids or parts and accessories therefor or other similar or related products supplied by any competitor or competitors of respondent.

It is further ordered, That the respondent Dictograph Products, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of hearing aids and parts and accessories therefor and other similar products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly—

1. Selling or making any contract 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 the goods, wares or merchandise of a 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 sales contract, which condition, agreement or understanding is to the effect that the purchaser of said products shall not use or deal in the goods, wares or merchandise of a competitor or competitors of respondent;

3. Cancelling, or directly or by implication threatening the cancellation of, any contract or franchise or selling agreement with respondent's distributors or with any other customers, for the sale of said products, because of the failure of such purchasers to purchase or deal exclusively in the products sold and distributed by respondent.

4. Instituting litigation, or directly or by implication threatening the institution of any litigation against any of respondent's distributors or other customers because of the failure or refusal of such purchasers to purchase or deal exclusively in the products sold and distributed by respondent.

5. Enjoining or attempting to enjoin any of respondent's distributors or customers from engaging in the hearing aid business for the

period of one year or any other period pursuant to any injunctive provision contained in respondent's distributor contracts or otherwise; or obstructing or attempting to obstruct by way of litigation or otherwise any of respondent's distributors from procuring their mail; or obstructing or attempting to obstruct by way of litigation or otherwise any of respondent's distributors from the continued use of their telephone listing, where any of such actions are taken by respondent for the purpose either of coercing or intimidating such distributors into dealing in respondent's products exclusively to the exclusion of products of competitors or for the purpose of retaliating against such distributors for their failure or refusal to purchase or deal exclusively in the products sold and distributed by respondent.

6. The performance of any act of intimidation or coercion either through statements, oral or written, made by representatives of the respondent either at the time when a distributor agrees to purchase any products from respondent or during the course of any calls made upon distributors or customers at their places of business or at any other place, or the use of any other plan, practice, system or method of doing business for the purpose or having the effect of intimidating or coercing the respondent's distributors or other customers to purchase the products or merchandise in which they deal exclusively from the respondent.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That respondent Dictograph Products, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist * * * [as required by aforesaid order and decision of the Commission]:

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter involves the practice of the Dictograph Products, Inc., respondent herein, of entering into and enforcing exclusive dealing agreements with its purchasers. This company, one of the three largest in the hearing aid industry in volume of sales, sells its products to independently owned and operated distributors located throughout the United States. Since 1937 the forms of contract entered into by respondent with its distributors have contained a provision to the effect that the distributor shall not sell hearing instruments other than those manufactured by respondent. The hearing examiner in his initial decision held that the use of these exclusive dealing provisions is in violation of Section 3 of the Clayton Act and that respondent's practice of entering into and enforcing them is in violation of Section 5 of the Federal Trade Commission Act.

Respondent in its appeal does not deny that its practice is to require exclusive dealing contracts from its distributors. It contends rather that its exclusive dealing contracts are legal and proper in all respects, that they are essential to its business and beneficial to the public and that they do not have the adverse effect on competition required to make their use a violation of law. Respondent also takes exception to certain findings of fact and to the conclusions in the initial decision and, in addition, contends that certain procedural rulings of the hearing examiner were in error and seriously prejudiced its defense in this proceeding.

Respondent contends that it takes an entirely different and superior approach to the problem of assisting persons who are hard of hearing than do other sellers of hearing aids. It is of the opinion that the great majority of hard of hearing cases are not helped by an instrument which just amplifies sound but require one which amplifies a particular range of sound frequencies more than it does others. Respondent, therefore, manufactures and sells at least ten different types of receivers, each of which is designed to emphasize a different range of frequencies. It has developed special tests to determine the needs of each customer and has instructed its distributors in conducting these tests and in selecting the proper type of its instruments for use in each case. Respondent claims that many other brands of hearing aids do not follow this principle or do not offer as wide a range of types. It, therefore, contends that to permit its distributors to sell other brands which require different, conflicting and erroneous tests and sales approach, would destroy its efforts to properly present its hearing aids to the purchasing public to its injury and to the injury of the public.

This contention is believed to be of no merit. It is recognized that it may be an advantage to a seller to have the distributors of his products concentrate their sales efforts on his products only. This may be particularly true where the seller has developed a sales approach and technique which conflicts with the sales approach required to sell competitive products. However, exclusive dealing agreements between independent distributors and a seller are expressly prohibited by Section 3 of the Clayton Act where the requisite effect on competition is present. The economic advantage to respondent of requiring its distributors to contractually agree not to sell competing products will not justify a violation of this section of the Act. The purpose of this Act is to preserve competitive conditions. Congress by passing this Act has determined that the public interest requires that the advantage of requiring its distributors to agree to deal exclusively in its products must be denied a seller where the effect of such agreements may be to substantially lessen competition or to tend to create a monopoly.

In support of its contention that its exclusive dealing agreements have not had the requisite effect on competition, respondent urges that competition in the industry has in fact increased, that respondent did not take over existing distributors but established its own and that its distributors do not have a monopoly of the hearing aid market in any city or area of the country.

The record shows that respondent sells its hearing aids to approximately 220 well-established distributors who specialize in the hearing aid field. These distributors are retailers who sell directly to the public. These distributors, each of which has entered into an exclusive dealing agreement with respondent, comprise a substantial portion of the established responsible distributors specializing in the sale of hearing aids in the United States. One informed estimate in the record is that there are only approximately 1,000 such accounts in the United States. These accounts which specialize in the sale of hearing aids constitute the best market for these products. The nature of this market is such that to sell effectively potential users of hearing aids must be sought out and convinced of the advantages of hearing aids to them. Many persons who are hard of hearing are reluctant to wear hearing aids and will not shop for this product. Well-established distributor accounts specializing in the sale of hearing aids employ a field sales force and concentrate their sales efforts on locating and selling such potential users. In this manner a market is reached which is not accessible to accounts selling across the counter only. Also, well-established distributor accounts build up a satisfied clientele which constitutes an excellent market for the sale of improved models. Thus, effective control of a substantial number of these established distributors is of great advantage to a manufacturer of hearing aids.

During the last fifteen years, due to great technical advances in the product, there has been a tremendous growth in the hearing aid industry. Sales have boomed. The number of producing companies in the field has increased from twenty to over eighty. Respondent, which has used its exclusive dealing contracts throughout this period, has maintained its position as one of the top three in the industry.

During this period of expansion, hearing aid manufacturers trying to break into this field found that they were foreclosed from selling to respondent's distributors by the exclusive dealing requirement in respondent's contract with its distributors. These newcomers in the field were forced to turn to other nonexclusive distributors and to less desirable outlets, such as optical, drug, and department stores. Certain of them, notably Zenith Radio Corporation, which is now first in volume of sales in the industry, were able to successfully enter this field despite this handicap. They are now in the process of locating and establishing other independently owned purchasers for their products who will specialize in the sale of hearing aids.

Respondent's exclusive dealing contracts contain provisions authorizing termination at any time by either party. However, they also provide that after termination by either party the distributor will not engage in the hearing aid business in the same sales area for a period of one year. Thus, under the terms of this contract the distributor agrees to go out of the hearing aid business for one year if he becomes unwilling to continue to sell respondent's hearing aids exclusively. Respondent's policy has been to require compliance with the exclusive dealing requirement and to threaten cancellation of the distributorship for selling competing products. Respondent in several instances has cancelled distributorships for violation of the exclusive dealing requirement and has brought legal proceedings seeking enforcement of the termination provisions. As a result respondent has restricted its independently owned distributors in their choice of products and has to a great extent foreclosed to its competitors access to the customers served by its distributors.

By the Clayton Act, Congress designated exclusive dealing contracts as unreasonable restraints on trade where their effect may be to substantially lessen competition. That test is met here where one of the largest producers in the field has tied up a substantial portion of the established retail outlets with exclusive dealing contracts containing such termination provisions, and where the contracts not only tend to foreclose a substantial portion of the market to respondent's competitors, but also deny competitive opportunities to respondent's distributors. Under such agreements the distributors must refuse all opportunities to sell competing brands, including those desired by their customers. They are also denied any opportunity to handle superior or better priced products which may come on the market. Such contracts affect a substantial volume of business and tend to substantially lessen competition in violation of Section 3 of the Clayton Act. It is believed, therefore, that respondent's contention that the record does not establish a violation of the Clayton Act is of no merit and should be rejected.

Similarly, it is believed that the hearing examiner correctly held in his initial decision that respondent's practices of entering into contracts containing exclusive dealing provisions with its distributors and of intimidating and coercing them into complying with these provisions were unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Also, respondent's coercive practices, in addition to being unfairly used to enforce an illegal exclusive dealing arrangement, constitute unfair restrictions on respondent's distributors in the operation of their independently owned businesses. Respondent's contracts with its distributors, by not providing any means by which a distributor can withdraw from the arrangement without bringing into effect his agreement to go out of the hearing aid business completely for one year in that sales area upon termination of the agreement, and by permitting respondent to cancel any distributorship without cause and thus bring this termination provision into effect, have provided respondent with the means of coercing and intimidating its distributors into operating their businesses in accordance with respondent's dictates. Respondent has used these means to exert pressure on distributors who were selling used hearing aids and on others who were considering taking on other lines of hearing aids in place of respondent's products. The use by respondent of these means to coerce and intimidate its distributors in this manner constitutes an unfair act and practice and an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

Respondent has specifically excepted to certain of the findings of fact and to the conclusions set out in the initial decision. These exceptions are believed to be of no merit for the following reasons:

Respondent contends that there is no record basis for the finding that its method of distribution is generally followed by competitors. Respondent misinterprets this finding which does not hold that competitors follow respondent's practices to the extent of assigning exclusive territories, furnishing confidential lists of prospects and encouraging their distributors to operate under names incorporating their trade names. The excepted to finding only states that respondent's method of selling to independently owned distributors is followed generally by most competing manufacturers. Certain competitors sell through optical, drug and department stores. However, the record indicates that established distributors specializing in this field are very desirable accounts and that most manufacturers in this field attempt, with varying degrees of success, to sell to such accounts.

The record contains an estimate by Mr. Charles Leyman, who has been very active in this field for over thirty years, that there are approximately 1,000 responsible dealers specializing in the sale of hearing aids in the United States. This estimate excluded accounts selling other products and subdealer accounts. These are the approximately 1,000 distributor accounts referred to in the finding excepted to by respondent. This estimate is not in conflict with the testimony of representatives of respondent's competitors stating the number of their sales outlets, as the record does not show how many of those outlets, so referred to, can properly be defined as responsible distributors specializing in the sale of hearing aids only. It is clear from the record that certain of those accounts do not fit into this category.

The record clearly supports the finding that respondent required its distributors to refrain from selling used hearing aids. It shows that respondent gives its distributors a trade-in allowance and requires all used hearing aids to be turned in to it. This requirement was included in the distributor agreements until 1945. The practice was abandoned for a short period in 1945 but was soon resumed, being placed in effect by oral directions to the distributors from respondent's sales representatives. Respondent's exception to this finding, therefore, is of no merit.

Respondent contends that its distributors voluntarily agreed to deal exclusively in its products in return for other considerations and that its desire to enforce these agreements is improperly found to be coercion and intimidation. The record shows that when respondent finds that one of its distributors is selling competing products, it threatens to terminate the distributorship and calls attention to the provision of the agreement requiring the distributor to withdraw from the hearing aid field in that sales area for one year, in an attempt to intimidate and coerce the distributor into continuing to sell its products on an exclusive basis. Respondent's exception to the finding of coercion and intimidation, therefore, is believed to be of no merit.

The contention that the findings erroneously state that respondent's hearing aids are adaptable only to various degrees of hearing losses is of no merit. The findings, in effect, further state that respondent's line of instruments provides a broad variety of frequency responses, as contended by respondent.

Respondent's exception to Paragraphs Thirteen, Fourteen, and Fifteen of the findings as to the facts and to the conclusions set out in the initial decision as not being supported by the evidence of record is rejected by the Commission.

Respondent's contention that the hearing examiner committed prejudicial error by certain of his procedural rulings is also rejected. His refusal to compel counsel supporting the complaint to furnish respondent with a list of witnesses prior to the hearings does not constitute a violation of due process as full opportunity to cross-examine each witness called was available to it. If later investigation had revealed the existence of documents or other material which would have enabled respondent to impeach or otherwise materially affect previously given testimony, that witness could have been recalled for further cross-examination on respondent's motion.

The hearing examiner acted within his discretion in refusing to compel Commission's witness Whitcomb to turn over to respondent's counsel a file of his papers which he had with him in the hearing room. This witness made no reference to these papers on direct examination and only referred to them on cross-examination when pressed to give exact dates upon insistence of counsel for respondent. There is no indication that any of these papers contain anything in conflict with the witness' testimony. It is well settled that where a witness is testifying from his recollection and not upon the basis of documents, the opposing party has no absolute right to inspect documents in his possession for exploratory purposes. Similarly the hearing examiner was acting well within his discretion in refusing to direct witness Ranson to produce written communications between himself and attorneys for the Commission and in refusing to direct counsel supporting the complaint to produce a written statement of witness Englis made during the preliminary investigation of this matter. These documents were not used by the witnesses in testifying and there is no indication that they contain anything in conflict with the witnesses' testimony. The hearing examiner also properly refused to compel witness Ranson to produce from his office copies of his contracts with competing companies, it not having been shown that these documents are relevant in any manner to this proceeding.

The hearing examiner's rulings refusing to admit certain documents into evidence which are specifically excepted to by respondent are sustained by the Commission. Respondent's exhibits 90 through 92 for identification, which consist of a Sears, Roebuck and Company advertisement and pages from its catalogs, have not been shown to be material in any respect. The other proposed exhibits, the rejection of which is specifically excepted to, consist of documents relating to the nature of a Public Health Survey which purportedly recommended a new approach to helping persons who are hard of hearing, documents indicating the superiority of this new approach and documents showing respondent's adoption of this approach in its business and its efforts in developing instruments and procedures for use in carrying out the recommended program in its business. These documents were properly rejected as being immaterial to the issues herein. Other valid reasons for rejecting these documents were given by the hearing examiner in his rulings which specifically apply to the individual offers.

The Commission, therefore, is of the opinion that respondent's appeal from the initial decision of the hearing examiner is of no merit and should be denied.

Chairman Howrey and Commissioner Mason are of the opinion that since the order to cease and desist contained in the initial decision is sustained by the Commission's interpretation of Section 3 of the Clayton Act as applied to the facts of this case, it was not necessary to go on to consider whether it might also be sustained by Section 5 of the Federal Trade Commission Act. See *Standard Oil Co. of California* v. *U. S.*, 337 U. S. 293, 314.

IN THE MATTER OF

CHARLES F. HARAD AND SARA E. HARAD TRADING AS INDUSTRIAL ENGINEERING ASSOCIATES

Docket 5992. Complaint, May 16, 1952—Order denying, etc., Sept. 24, 1953

Charge: Advertising falsely or misleadingly as to qualities, results and comparative merits of product; in connection with the sale of a device designated as "Sportsman Athletic Truss" or "Sportsman Athletic Lift".

Before *Mr. John Lewis*, hearing examiner.
Mr. J. W. Brookfield, Jr. for the Commission.
Mr. Charles F. Harad, of Mooresville, Ind., for respondents.

ORDER DENYING THE APPEAL OF COUNSEL SUPPORTING THE COMPLAINT FROM THE INITIAL DECISION OF THE HEARING EXAMINER, AND DECISION OF THE COMMISSION DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter came on to be heard upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision proposing dismissal of the complaint herein without prejudice and briefs filed in support of and in opposition to such appeal.

The complaint charges that respondents have engaged in the dissemination of false advertisements by various means in commerce for the purpose of inducing, and which have been likely to induce, the purchase of a therapeutic device designated as "Sportsman Athletic Truss" offered by respondents to those afflicted with hernia. In proposing to dismiss the complaint without prejudice, the hearing examiner concluded that certain of the advertising statements used by respondents should not be construed to contain or embrace the representations attributed thereto under the charges of the complaint and that such advertisements accordingly would not appear to have the capacity to mislead and deceive as therein alleged, and he additionally concluded that other challenged advertising representations were not shown by the greater weight of the evidence to be false or to have the capacity to deceive, all of which conclusions are challenged by counsel supporting the complaint in his appeal.

One of the allegations of the complaint is that respondents have represented in their advertising that their truss will retain all reducible hernias, it being further charged in such connection that some reducible hernias will not be retained by respondents' device. The hearing examiner concluded that the over-all import of respondents' advertising statements have constituted representations only that retention will be afforded for reducible hernias of the inguinal variety and that the likelihood of purchase of respondents' product by a member of the public under the impression that it would be effective for all types of hernia is remote. Counsel supporting the complaint, in excepting to this conclusion, points out that at least two of the advertisements received into the record do not mention inguinal hernia but offer the device for reducible hernias, and it is further contended by counsel that other advertising matter furnished by respondents for stores' display in which the device is offered to those who are "ruptured" also implies that the truss will retain all hernias.

Only one of the advertisements typical of those disseminated by respondents in soliciting mail order for their truss fails to mention inguinal hernia or otherwise to restrict claims for product value to reducible inguinal hernia but, in addition to its written text, this advertisement contains added pictorial matter indicating that the area to be supported is the inguinal region or area of the groin. In addition to the display for stores' use previously referred to, one other advertisement designed for promoting over the counter sales in retail stores likewise fails to mention inguinal hernia, but it also contains pictorial matter somewhat similar to the advertisement used in promoting sales by mail. Noted in passing with respect to these advertisements is an additional circumstance referred to by the hearing examiner, namely, that clear-cut instructions for use have accompanied the truss, and other language appears in large type on the device's container or package indicative that it is for use in retaining reducible inguinal hernias.

The matters cited by counsel supporting the complaint in connection with this first exception have been carefully considered by the Commission and the Commission is of the view that the greater weight of the evidence received into the record does not establish that respondents' advertising has been likely to induce the purchase of their device by others than those believing their impairments to be reducible inguinal hernia. This exception accordingly is deemed to be without merit.

Under his second exception, counsel supporting the complaint states that he objects to the hearing examiner's finding that all reducible hernias will be retained by respondents' truss, under his third exception he asserts that he is interposing objection to the hearing examiner's finding that the device will not slip, and his fourth exception interposes objection to the conclusions reached by the hearing examiner as to the extent to which hernias will be retained under abnormal conditions of strain. With respect to the first of these, the hearing examiner concluded instead, however, that the greater weight of the evidence did not establish that a representation that respondents' truss will retain all reducible inguinal hernias is substantially untrue and he additionally observed, in such connection, that the situations or conditions cited by certain expert medical witnesses under which they believed the device might not successfully retain the defect were not of such nature as to require revision of respondents' advertising statements in the public interest. In this connection, counsel supporting the complaint contends that the evidence shows that there are approximately a dozen situations in which reducible inguinal hernias will not be retained under conditions of normal stress, including, among others, those where the rubber pad may be smaller than the body opening which is the situs of the protrusion and those where the wearer has a leg deformity, malignant tissue or thinned-out tissue in the vicinity where worn, or where increased pressure through coughing incident to a respiratory disease is presented. It seems clear from the record that respondents' device is basically effective in retaining reducible hernias in the average person under normal conditions of stress and it would not appear, therefore, that any lessening of product effectiveness which may occur by reason of some physical impairment other than hernia should be controlling in a determination as to whether respondents' advertisements have been false advertisements. Moreover, the greater weight of the evidence does not establish that the pads furnished with respondents' truss are not sufficiently large to fully cover the inguinal canal and there accordingly appears to be insufficient support in the record for a conclusion here that respondents' truss will be ineffective where the opening into that canal is a very large one. The Commission is of the view that certain of the conclusions reached by the hearing examiner in evaluating the weight of the evidence introduced in support of and in opposition to the charge of the complaint here pertinent are substantially correct conclusions and the Commission accordingly has concluded that such charges are not supported by the greater weight of the evidence.

Reverting to counsel's third and fourth exceptions, the hearing examiner found that counsel supporting the complaint had failed to establish by substantial evidence that respondents have engaged in misrepresentation through statements in their advertising to the effect that their truss will not slip and will hold hernias under conditions of unusual stress and strain, including those associated with sports. The hearing examiner manifestly has accorded weight to the fact that one of the medical witnesses testifying in support of the complaint, at one point in his testimony, appeared merely to express doubt as to the ability of respondents' truss to hold a hernia under conditions of abnormal strain and stress instead of stating with certainty that ιilures of retention would result and the hearing examiner has noted ill another statement by one of the witnesses called by counsel ιpporting the complaint, made after a visual demonstration of the russ in use, which is to the effect that it would be difficult for the russ to slip when worn in the manner adopted in the demonstration. 'he evidentiary matters to which counsel supporting the complaint irects attention in connection with these exceptions have been conιdered, but, in the light of the evidence including that introduced y respondents and the fact that evidence in rebuttal thereof was not ffered, the Commission is of the view that these charges of the comlaint are not supported by the greater weight of the evidence received ιto the record. Counsel's second, third and fourth exceptions, accordngly, are denied.

In support of his fifth and sixth exceptions, counsel objects to findngs asserted by him to appear in the initial decision to the effect that espondents' truss is comfortable at all times and that such device s self-fitting, and cannot be worn incorrectly. The hearing examner, however, concluded that the evidence introduced in support of he complaint's allegation that the device, in many cases, may not be omfortable was not substantial evidence, and he additionally stated, n effect, that the evidence offered in support of the charges that respondents have falsely represented that their device is self-fitting and annot be worn incorrectly was inconclusive. In reference to the first of these matters, evidence was introduced by counsel supporting the omplaint tending to show that some perspiration and redness of the skin may be induced by the pressure of the truss, but it appears also from the record, however, that these reductions in comfort are akin to and perhaps no more consequential than those ordinarily caused by such friction as attends the wearing of a wristwatch, ring or eyeglasses. The evidence additionally referred to by counsel in support of these exceptions has been considered but the Commission has concluded that the matters cited are not controlling here and are otherwise lacking in merit. Exceptions 5 and 6 are denied, accordingly.

Counsel, under his seventh exception, interposes objection to the conclusion expressed in the initial decision that the evidence does not adequately support the charge of the complaint that respondents have falsely represented that their truss will be effective where all other trusses fail. The statement which has appeared in respondents' advertising to which this charge relates is that their product will be effective under conditions where most trusses fail, and the greater weight of the evidence does not support a conclusion that respondents' truss composed primarily of webbed elastic may not be effective under some conditions where another widely used type of truss may be ineffective. The Commission has determined that the allegations of the complaint here pertinent are not sustained by the greater weight of the evidence and counsel's exception is not being granted.

Equally without merit are the contentions advanced in support of counsel's eighth exception inasmuch as it appears from the record that the advertising statements representing that respondents' truss will be beneficial following treatment of hernias by the injection method and by surgery were disseminated only to physicians and that the record accordingly does not support a conclusion here that the public interest requires that respondents be directed to limit representations of product value in these respects to instances in which their device is used upon the advice of and under the supervision of a physician. Similar considerations to others noted hereinbefore apply in an appraisal of counsel's ninth and tenth exceptions interposing general objections to the hearing examiner's action in concluding that the complaint herein should be dismissed, and these exceptions likewise are denied.

The Commission being of the opinion that the appeal of counsel supporting the complaint is without merit and that this proceeding should be dismissed without prejudice as provided in the initial decision of the hearing examiner:

It is ordered, therefore, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 24th day of September, 1953, become the decision of the Commission.

Order Dismissing Complaint Without Prejudice

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

This proceeding came on to be considered by the above-named hearing examiner, heretofore duly designated by the Commission, upon the complaint of the Commission, the answer of respondents thereto, and testimony and other evidence introduced in support of and in opposition to the allegations of the complaint at hearings held herein. The complaint charges the respondents with having disseminated certain false advertisements concerning the effectiveness and qualities of their product, a device known as "Sportsman Athletic Truss" or "Sportsman Athletic Lift." The undersigned, being of the opinion that the record is lacking in substantial evidence to sustain the allegations of the complaint and that under all the circumstances the public interest does not require any corrective action in this case, will order that the complaint issued herein be dismissed. The reasons and basis for such dismissal are hereafter discussed in connection with the various allegations of the complaint, which are summarized below under separate headings for convenience of discussion.

1. *The Retention of All Reducible Hernias*

For a better understanding of the issues involved, brief reference should be made to the nature of a hernia. A hernia, according to the record, is any protrusion of the body contents through an opening in the body wall, congenital or acquired. The most common type of hernia is the inguinal hernia, in which there is a protrusion of some of the body contents through an opening in the abdominal wall in the region of the groin. Such hernias may be reducible or irreducible. They are said to be reducible when the protruding mass can be pushed back into the cavity from whence it came, either by manipulation or spontaneously.

The complaint alleges that respondents have falsely represented that their truss will retain "all reducible hernias." Respondents deny that they have represented their product as retaining *all* reducible hernias, contending that their claim is limited to reducible hernias of the inguinal variety. It is therefore necessary, before considering whether the representation made with respect to the truss is false, to determine the extent of the representation.

The record discloses that in advertising their product in a number of newspapers respondents have used the phrases: "For All Reducible Hernias." However, in all but one instance there appears in the body of the same advertisement the language: "Provides maximum retention for all reducible *inguinal* hernias." Moreover, in each advertisement there appear several drawings of a male in a state of undress, wearing a truss in the inguinal region, and there is attached a form for ordering the truss which requires the prospective purchaser to check the appropriate box to indicate whether his hernia is on the "Right side," "Left side," or "Both sides," and to give his "waist" measurement. The record also contains other advertising matter distributed by respondents to druggists for use in advertising the truss, which refers to the product as providing protection "For All Reducible Inguinal Hernias." The box in which respondents' product is sold contains on the outer cover thereof, in letters of clearly legible size, the words: "For All Reducible Inguinal Hernias." The booklet of instructions which is enclosed in the box with each truss sold likewise contains on the outer cover thereof the words: "For All Reducible Inguinal Hernias," as well as a picture of a man wearing a truss in the inguinal region. The inner portion of the booklet contains detailed instructions and diagrams regarding the fitting of the truss, which leave no doubt that it is intended to give relief for inguinal hernias only.

Considering respondents' advertising as a whole, it is the opinion of the undersigned that respondents' claim of effectiveness for their product is limited, substantially, to hernias of the inguinal variety. While the expression "For All Reducible Hernias" used in some of the advertising matter might, if considered by itself, appear to suggest the respondents are making a broader claim, this is put in proper perspective by the balance of the information contained in these same advertisements.

In the light of the testimony in the record that the word "hernia" is generally associated in the public mind with the region of the groin, and the absence of any testimony to show that members of the public have ever construed respondents' advertising matter as claiming that the truss is intended for all types of hernias, it is the opinion of the undersigned that the likelihood of deception is very remote. Moreover, the clear-cut instructions accompanying the truss render unlikely the possibility that anyone would attempt to use the truss for another type of hernia, in the remote circumstance that he might have misconstrued respondents' newspaper advertising. Under all the circumstances, and considering the effectiveness of the device for the purpose for which it is intended, as will hereafter more fully appear, the undersigned does not regard the possibility of deception to be such as to require any corrective action in the public interest. Moreover, the undersigned is confident, in the light of the attitude displayed by the respondents throughout this proceeding, that there was no intention on their part to permit even the remote possibility of deception, and that any ambiguity appearing in their advertising material will be clarified.

Construing respondents' claims as being limited to inguinal hernias, the next question is whether their truss will, in fact, retain all reducible inguinal hernias. By way of definition of terms, it should be noted that a truss is said to "retain" a hernia when it is able, by the application of pressure to the opening in the abdominal wall, to keep the contents from protruding through the wall after the mass has been pushed back by manual or other means. There is no claim by respondents that this will accomplish a permanent cure or that the truss will be effective other than during the time it is being worn. In this connection it may be noted that the position of the doctors who testified in support of the complaint was that, in general, the only permanently effective method of treating a hernia is by way of surgery. They regarded a truss as a palliative to be used only by persons whose state of health was such that they could not withstand surgery. However, the merits of the surgical versus the support method in the treatment of hernias is not one which concerns this examiner. The question for disposition here is whether respondents' truss will retain a hernia during the period of its use, not whether other methods are medically more effective or desirable. It is the God-given right of every individual to put up with what may be regarded by some as a lifetime of inconvenience in wearing a support which will give relief only during the period of its use, rather than submit his body to the surgeon's knife in the hope of obtaining a quick, permanently effective cure of his hernia.

Despite differences of opinion between the experts called in support of the complaint and those testifying for respondents, as to the extent that rspondents' device would be effective in retaining hernias, there was substantial agreement on the fact that respondents' device would be at least effective in retaining reducible inguinal hernias in the average, normal individual under ordinary conditions of stress. The main instances cited where there was any doubt as to the ability of the device to hold a reducible inguinal hernia under normal conditions of stress were (1) where the opening in the inguinal canal through which the hernia might protrude was larger than the rubber pad which is attached to the truss and which is intended to cover the canal, and (2) where a person was so excessively obese that the truss might not give him a snug fit, or had suffered some radical change in weight or body contour so that the truss which might once have fitted would no longer do so. With respect to the first situation, the experts who testified in support of the complaint conceded that the instances where the opening in the abdominal wall would be larger than the supporting rubber pad in the truss would be "a very small percentage, possibly not more than 1 or 2 percent." They agreed that the cases where the pad would not adequately cover the opening in the wall would be "unusual" situations and that in "at least" 98 percent of the cases the pad would be sufficient to cover the inguinal canal. With respect to those situations involving excessively stout persons or marked changes of weight or body contour, it does not appear from the record that this is a significant or common occurrence. It may also be noted that respondents' device is sold in four standard sizes, up to size 46, and that it is also made up specially in larger sizes to accommodate stouter individuals. Likewise the straps used to hold the device to the body may be adjusted to the exact needs of the particular individual.

Considering the fact that respondents' device is basically effective in retaining reducible inguinal hernias in the average person under normal conditions of stress, and the rare and atypical nature of the instances where it was claimed that it would not do so, it is the opinion of the undersigned that there has been no showing that the representation made by respondents concerning the ability of the truss to hold such hernias is substantially untrue. In any event, the instances cited where it was claimed that the truss would not be effective are not such as to require any corrective action in the public interest.

2. *The Retention of Hernias Under Conditions of Physical Strain*

The preceding discussion has related mainly to the question of whether the truss will retain reducible inguinal hernias under ordinary conditions of stress. To the extent that the claims made for it in retaining reducible hernias may be regarded as extending to conditions of abnormal stress, they are discussed herein in connection with another allegation of the complaint, which charges that respondents have falsely represented that their device will not slip and that it will retain hernias under conditions of physical strain such as might arise when the wearer is engaged in strenuous activity, including sports.

The doctors called by the attorney in support of the complaint, while substantially conceding the effectiveness of the truss in holding reducible inguinal hernias in the average individual under normal conditions, expressed doubt as to the device's ability to hold a hernia under conditions of physical stress and strain. Their attitude is best summarized in the following testimony of Dr. D. C. Richtmeyer:

"I would say under those circumstances [i. e., with the truss properly adjusted on an average individual] it probably would hold a hernia under most circumstances. I would not be sure it would hold it under conditions of abnormal straining or stress. I would be a little doubtful about that."

As an example of a condition where he did not "think" the truss would hold, the doctor referred to "a patient [who] had pneumonia with severe cough and was coughing all the time." The witness also expressed the opinion that in activities such as would be involved in some parts of the game of tennis or in football the truss "might possibly slip." While the doctor several times expressed doubt that the truss would retain a hernia under conditions of stress, he appeared reluctant to express a positive opinion that it would not. This is not intended as a reflection on the doctor's forthrightness, but is rather indicative of his scrupulous fairness and objectivity.

In evaluating the doctor's testimony it should be noted that, according to his own admission, it was based in large measure on his own brief test of the device which was submitted to him for inspection by a representative of the Commission prior to the hearing. Although admittedly not having a hernia, the doctor testified that he wore the truss on his own body for a period of four hours, and, while conceding that the truss fitted him "very well in the inguinal region," he claimed that when sitting back on a chair in a slouched position, the rubber pad in the truss did not touch his skin in the inguinal region, and that "under those circumstances if I had coughed at that time, if I had a hernia, it would have protruded, I feel." However, on cross-examination, when the doctor was asked to observe the truss on the body of respondent Charles F. Harad, who admittedly had a "very good-sized" inguinal hernia and was wearing one of his own trusses, the doctor conceded that as the truss was seated on Harad's body, it appeared to him that "it would hold an inguinal hernia in." The doctor agreed that this was true even when Harad was sitting in a relaxed position similar to that which the doctor had previously testified he himself had occupied when the truss had slipped. He also conceded that there appeared to be no additional tension on the straps holding the truss when Harad engaged in various squatting and bending exercises and that the truss was holding the hernia "very well." The doctor's own difficulty with the truss in the reclining position appears to have been that he had not tightened the straps sufficiently in accordance with the directions enclosed in the box, which provide:

"Straps should be tight to thoroughly anchor inner pads in position. BE SURE STRAPS ARE SUFFICIENTLY TIGHT TO HOLD HERNIA SECURELY. Truss must be worn snugly to assure proper results."

The other doctor called by the attorney in support of the complaint also claimed that the truss could slip during strenuous activity. This doctor had had no particular experience with respondents' truss, but based his testimony on his claim that all trusses operated on the same general principle. After being given an opportunity to observe the truss on Harad's body during cross-examination, and watching Harad engage in stretching and stooping exercises with the truss on his body, the doctor conceded that he had a somewhat different impression of the truss, and that as it was applied to Harad's body "it would be difficult [for it] to slip" (although the doctor claimed that this was because the truss was relatively new, despite Harad's assertion that he had been wearing it for about a year).

Even on the basis of the testimony of his witnesses, considering the marked change in their attitude after actually observing the truss on Harad's body, the evidently favorable impression which it made on them, and the modifications made in their direct testimony, it is doubtful whether it can be said that the attorney in support of the complaint has adduced substantial evidence to establish his contention on this issue. In any event, such doubt as may exist is, in the opinion of the undersigned, clearly overbalanced by the affirmative testimony offered on behalf of respondents. One witness, who had been wearing respondents' trusses for about four years, testified that he had worn the truss while lifting heavy bundles in his business and while engaged in golf and other outdoor activities without it having slipped. The witness, while over seventy years of age, impressed the undersigned as very spry and agile. Another witness, a physician who has practiced surgery at one time but for the past ten years had been engaged in general medicine and biochemistry, testified that he had recommended respondents' truss to about fifty patients since 1947, and that it had held their hernias under active conditions of work and play. While admittedly this doctor is not an expert herniologist, the undersigned sees no reason to question his integrity as a witness or to question the correctness of his conclusions based on the simple observation of patients. In addition to these witnesses, there is the testimony of respondent Charles F. Harad, who testified that the truss had held his own hernia while lifting bundles and while active in golf and swimming. According to Harad, when he had previously worn a so-called "spring-type" truss, he had been unable to engage in these activities without the truss slipping. While Harad was undoubtedly an interested witness, he impressed the undersigned as basically forthright and sincere, and his claims regarding the effectiveness of his truss received a large measure of support from the Commission's own witnesses.

Contrasted with the testimony of actual users of the truss and of a doctor who had prescribed it for patients and seen it in use on their bodies, it should be noted that not a single purchaser of the truss was produced by the attorney in support of the complaint to testify that the truss had slipped or had not held his hernia. In this connection it may be noted that since they started operations in 1947, respondents have manufactured 100,000 trusses, which have been distributed through mail-order houses, such as Sears Roebuck & Company; through approximately 600 drug stores; through approximately 200 doctors; and to direct purchasers through the mail. The only witness called by the attorney in support of the complaint who had any actual experience with the truss was Dr. Richtmeyer, who, as already indicated, did not actually have a hernia, and apparently had not worn the truss sufficiently tight. Even his testimony was modified considerably after he had had an opportunity to observe the truss in actual use on Harad's body.

On the present state of the record it is the opinion of the undersigned that the attorney in support of the complaint has failed to establish by substantial evidence that respondents have made any misrepresentations in claiming that the truss will not slip and will hold a hernia under conditions of physical strain. In any event, the circumstances and conditions when it was suggested that there was a possibility that it might not hold are such that, in the opinion of the undersigned, no corrective action in the public interest is required.

3. *Comfort of Truss and Conformance with Natural Body Structure*

The complaint alleges that respondents have falsely represented that their truss "conforms to the natural body structure" and that it "will be comfortable at all times." In support of the allegation that the truss does not conform to the natural body structure, the attorney in support of the complaint cites the testimony of Dr. Richtmeyer, previously alluded to, that the rubber pad did not touch the inguinal region of his body when he was in a seated, relaxed position, and further testimony to the effect that the truss would not conform to the body structure in the case of excessively stout people, or where there was marked change in body contour, or where a person had a tumor in the region of the groin or had a high thigh amputation.

It is the opinion of the undersigned that the record fails to sustain the charge that respondents' representation that the truss conforms to the natural body structure is false. As has already been indicated, Dr. Richtmeyer's claim that the truss did not conform to his body while in a seated, relaxed position appears to be attributable to the fact that he had not adjusted the straps tightly enough. In any event, the doctor admitted on cross-examination, after having observed the truss on Harad's body, that it "conforms to the outlines of the body in that particular region." The fact that it does not conform to the body in certain unusual situations, such as where the patient has a tumor in the region of the groin or has had a high thigh amputation, does not establish the falsity of respondents' claims. These and similar conditions can hardly be said to be typical of the "natural body structure," which the undersigned interprets as meaning the body in its normal state in a normal individual.

In any event, to insist that an advertiser qualify his claims because of these unusual situations would be to require an unreasonable scrupulosity in advertising, and would place the Commission in the position of an overzealous censor.

With respect to the alleged falsity of the companion allegation that the truss will be comfortable at all times, the attorney in support of the complaint relies on the testimony of his experts that the continual wearing of a truss causes irritation and discomfort. He relies particularly on the testimony of Dr. Richtmeyer, who stated that after wearing the truss for four hours he observed perspiration developing under the pad and noticed that the inguinal region was "slightly red." The doctor also testified that continuous pressure on the skin and fat would produce "atrophy" of the tissues. The doctor further testified on cross-examination, after observing Harad's body with the truss removed, that there was "a little reddened area," and that there was "a little indentation" or "atrophy" where the pad had been placed on the body. From the undersigned's observation of the redness on Harad's body, it may be noted that it was so slight as to be barely visible. Despite his claim that the truss left his own body "slightly red," the doctor conceded that "during the time I was wearing it [it] was really amazingly comfortable." With respect to the so-called "atrophy" or "indentation," the doctor conceded on cross-examination that this was not "a serious condition" and that it did not "mean very much," it being the sort of thing that would occur from continuous pressure on the skin from the wearing of a ring or a wristwatch or eyeglasses. In view of the insubstantial nature of the evidence offered in support of this allegation of the complaint, the undersigned regards it as unnecessary to discuss the countervailing evidence offered by respondents, particularly the testimony of the witness Foster to the effect that he had worn the truss day and night for as much as ten days, even sleeping in it when he was on a hunting or fishing trip, and that he had experienced no discomfort from the truss.

4. *Self-fitting and Correct Wearability*

The complaint alleges that respondents have falsely represented that their device is "self-fitting," that it will "always fit the body," and that it "cannot be worn incorrectly." Respondents admit having made the first and last mentioned representations, which they claim to be truthful, but deny ever representing that the truss "will always fit the body." A review of their advertising literature does not disclose that such a representation was ever actually made, except insofar as it may possibly be inferred from the claims made regarding the "self-fitting" character of the device. Even with respect to the alleged representation that the truss "cannot be worn incorrectly," it may be noted that, while respondents apparently concede having made it, it is doubtful whether such a broad claim can be inferred from their advertising literature. It is true that their directional leaflet states that the truss is "Automatically Self-fitting" because of the fact that it has been designed in accordance with correct anatomical measurements. However, this reference is immediately followed by the cautionary statement:

"If worn correctly and adjusted according to directions perfect fitting is assured."

A review of respondents' advertising literature indicates that the gravamen of their claim in this respect is that the truss is "Self-Fitting At Home," that it requires "No Personal Fitting" and that it may safely be bought "Over The Counter." In short, what respondents are claiming is that, unlike some devices which are made to order and fitting by an expert, their device can be purchased over-the-counter and fitted at home by the purchaser, who can thereby reasonably be assured of a correct fit because of the fact that the truss is designed to the natural body structure. The undersigned does not construe this as a representation that customers who ignore instructions are nevertheless assured of a correct fit.

The two doctors who testified in support of the complaint, while indicating the desirability of having the truss checked by an expert, did not state that it could not be fitted by the wearer. Dr. Richtmeyer testified that the truss was not self-fitting because he himself had at first put it on too low, and that it could also be put on too high, and it was "possible" for a lay person to put it on too far to the side. The doctor, who admittedly did not have a hernia, conceded that patients with hernias get so they can, by lying down and pressing on the external part of the hernia, learn to reduce it themselves. The patient would then be able to apply the truss himself except that, according to Dr. Richtmeyer, it would be better "somewhere along the line" to have it checked by a physician. The other doctor, while also stating that it was "possible," for the man in the street, not to know whether his truss had been properly applied, likewise conceded most people know when their hernias have been reduced, since "they feel a lot better, and they know it is in the right place from repetition." The doctor suggested, however, that it would be "a lot safer" to have the truss applied by an expert.

In evaluating the truthfulness of respondents' claims, it should be noted that their instruction booklet contains detailed, illustrated instructions on how to apply the truss, and recommends that it be fitted in a reclining position, similar to that referred to by the doctors who testified in support of the complaint. Likewise, it suggests that the wearer let his physician see the truss after it has been properly adjusted to check its application.

The undersigned is not convinced, on the present state of the record, that it has been established that respondents' truss is not self-fitting or that the wearer cannot reasonably be assured of a correct fit if he follows the simple instructions given. While it is possible that persons who do not properly follow instructions may not adjust the truss sufficiently tight or place it on the correct spot, the resulting discomfort will soon make them aware that the proper adjustment has not been made. The gravamen of the testimony in support of the complaint was not so much that the wearer would not generally be able to fit himself, but that because, in some instances, it was "possible" he might not make the proper adjustment, it was advisable at some point to have the fit checked by a physician. However, respondents themselves make this same recommendation in their instruction booklet.

With respect to the ability of the man in the street to fit himself with one of respondents' trusses, it may be noted that the witness Foster, called by respondents, testified that he had had no difficulty in fitting himself after purchasing the truss at Sears Roebuck, and that when he later had it checked by his physician, the latter advised him it was properly fitted. Likewise, one of the doctors testifying for respondents stated, with apparent truthfulness, that approximately 50 patients to whom he had recommended the device had fitted themselves, and that when he later examined them he found the trusses to be properly fitted. Under all the circumstances, it is the opinion of the undersigned that the attorney in support of the complaint has failed to establish by substantial evidence that respondents' claims regarding the self-fitting nature of their device are false or unduly exaggerated.

5. *Effectiveness Where Other Trusses Fail*

The complaint alleges that respondents have falsely represented that their device will be effective where "all other trusses fail," it being alleged in the complaint that the device "is not so different in construction and operation than other trusses that it can be expected to be effective in conditions where other trusses fail." Respondents deny having made any claim that their truss will function where *all* other trusses have failed, but assert that their claim of effectiveness is that their truss will function where *most* trusses have failed.

A review of respondents' advertising discloses that they have used the word "most," not "all," in comparing the effectiveness of their device to other trusses. Insofar as the truthfulness of their representations is concerned, the record discloses that the most common type of truss is the so-called "spring-type" truss consisting of a steel frame with a leather pad or ball on the end, which is applied to the inguinal region. In view of the concessions made by the experts testifying in support of the complaint as to the effectiveness of respondents' device in holding a hernia, after observing it on Harad's body and after having previously testified to the limitations of most other types of trusses which they had seen in their practice, it is the opinion of the undersigned that the attorney in support of the complaint has failed to sustain the burden of proof on this issue. It is therefore unnecessary to discuss the testimony of respondents' two expert witnesses regarding the effectiveness of respondents' truss as contrasted to the conventional spring-type truss or to consider their qualifications as experts in the field of herniology as compared to the qualifications of the Commission's experts.

6. *Use Following Surgery or Treatment by Injection*

The complaint states that respondents have falsely represented that their device will be beneficial following surgery or after treatment by the injection method, it being alleged that, on the contrary, the use of the device is not indicated under these conditions except upon advice and under supervision of a physician. Respondents admit having recommended the use of their device "post-operative" and "post-injection," but claim that this reference was made in an advertisement inserted in a journal circulated among medical men only.

With respect to its use following the injection method of treating hernias, there was a difference of opinion among the experts called in support of the complaint. While one doctor thought its use following the injection method of treatment was contra-indicated, the other testified it would be advantageous to wear a truss or appliance to hold the hernia during the injection treatment. With respect to the device's use following an operation for hernia, the doctors seemed to agree that a truss, as such, was not indicated but that a form of webbed support might be prescribed by the physician. There was some difference in opinion between the doctors who testified in support of the complaint and those called by respondents with respect to whether respondents' device, with the rubber pads detached, could furnish the necessary support.

The undersigned finds it unnecessary to resolve this difference of opinion. It seems clear that when a patient is undergoing treatment by the injection method or has had an operation performed, the form of support to be used, if any, is generally prescribed by his physician. It does not appear, therefore, that any statement made by respondents in this regard can have any significant influence on these patients. In any event, since the representation made with respect to the post-operative or post-injection use of the device was concededly made in a publication intended for circulation among physicians only, who, it can be assumed, will not be misled by anything respondents might say regarding their product, and since there is no substantial evidence that the general consuming public would be misled thereby, it is the opinion of the undersigned that the public interest does not require the taking of any corrective action based on the alleged falsity of any representation that respondents' device may be used post-operation or post-injection (cf. *Irwin, et al.* vs. *F. T. C.*, 143 F. 2d 316)

The undersigned being of the opinion that, for the reasons above given, the evidence of record does not sustain the allegations of the complaint, and being of the further opinion that under the circumstances here present the public interest does not require any corrective action in this matter,

It is ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, without prejudice to the right of the Commission to take such further action against the respondents herein, in the future, as may be warranted by the then existing circumstances.

IN THE MATTER OF

EASTMAN KODAK COMPANY

Docket 6040. Order and opinion, Sept. 25, 1953

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

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

Nixon, Hargrave, Devans & Dey, of Rochester, N. Y., and *Donovan, Leisure, Newton & Irvine*, of New York City, for respondent.

ORDER DISPOSING OF MOTION TO STRIKE AND RESPONDENT'S MOTION TO DISMISS

This matter came before the Federal Trade Commission upon respondent's motion to dismiss the complaint herein and upon the motion of counsel supporting the complaint to strike respondent's motion to dismiss. Briefs in support of and in opposition to said motions have been filed and oral argument of counsel has been heard by the Commission.

Promptly after the issuance of the complaint herein respondent filed with the hearing examiner a motion to dismiss the complaint. This motion was denied by the hearing examiner on the ground that he did not have jurisdiction to hear the motion. Respondent then filed with the Commission a motion to dismiss the complaint. Counsel supporting the complaint thereupon filed a motion to strike said motion to dismiss as being improperly filed with the Commission.

Under the Commission's Rules of Practice, respondent properly filed its original motion to dismiss with the hearing examiner, who did have jurisdiction over the motion and who should have considered it. Respondent's remedy from the hearing examiner's ruling that he lacked jurisdiction over the motion was to seek an appeal therefrom under Rule XX of the Commission's Rules of Practice. Respondent's procedure of filing a new motion to dismiss directly with the Commission was improper and the motion of counsel supporting the complaint to strike this motion was procedurally correct.

However, the Commission is of the opinion that, inasmuch as respondent's motion to dismiss has been briefed and argued before it on the merits, it would be in furtherance of a prompt decision in this matter for the Commission to rule on the issues presented therein. The Commission, therefore, has considered the motion on its merits as if the motion were properly before it rather than remanding the matter to the hearing examiner for consideration of the motion.

Under these circumstances the motion to strike respondent's motion to dismiss is denied.

Respondent's motion to dismiss is based on two separate and distinct grounds, namely:

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

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner herein for proceedings in regular course.

Commissioner Howrey dissenting insofar as this order holds that the complaint herein states a cause of action; Commissioner Mead not participating due to absence.

Chairman HOWREY, dissenting:

I feel compelled to dissent from that part of the order which holds that the complaint states a cause of action.

The complaint alleges that respondent, a manufacturer of photographic and optical products sold under the name of Kodak, enters into resale price maintenance contracts with independent retail stores which are, in some cases, in competition with respondent's own retail outlets, and that this course of conduct is unlawful under Section 5 of the Federal Trade Commission Act.

The charging paragraph, Paragraph Nine, reads as follows:

"The contracts and agreements entered into by respondent with its retail store customers, whereby it fixes and maintains the resale prices of many of its amateur photographic products, are illegal in that some of the said retail store customers are in competition with respondent's wholly owned and controlled retail stores in the sale of such products to the consuming public."

Nowhere in the complaint is it alleged, or even suggested, that respondent has entered into resale contracts for the purpose or with the effect of establishing an unlawful horizontal price-fixing arrangement, or, as a retailer, has combined or conspired with independent retailers to fix or maintain prices. Nothing is set forth with respect to the nature or degree of competition which is alleged to exist between respondent and independent retail stores. In brief, no elements of the charge are particularized except those stated above.

The McGuire Act (66 Stat. 631, 15 U. S. C. 45) established no new antitrust prohibitions. It served only to validate interstate sales of articles under vertical resale price contracts where such contracts are authorized by State law. Like the Miller-Tydings Amendment, which is similar for purposes of this case, the McGuire Act was merely an enabling measure. See 97 Cong. Rec. 13405. Congressman McGuire, the sponsor of the legislation which ultimately was passed as the Federal Fair Trade Act, stated on the floor in support of H. R. 5767 that: "The McGuire bill adds no new powers to the Federal Trade Commission Act. It merely exempts from the Federal Trade Commission Act and the Antitrust Acts, so far as interstate commerce is concerned, that type of resale price maintenance contract which is permitted by the fair trade acts of 45 States." [1]

Section 5 (a) (5) provides that horizontal arrangements are exempted from the immunizing effects of the Act. Such arrangements were and are prohibited by existing law and the processes of the Commission should be directed against them with vigor. But facts sufficient to show a violation of existing law are not alleged in the complaint before us. Compare *U. S.* v. *Frankfort Distillers, Inc.*, *supra; U. S.* v. *Univis Lens Co., Inc., et al.*, 316 U. S. 241, 252.

The fact that respondent functions in a dual capacity—as a manufacturer and as a retailer—has not in the past been considered a violation of law.[2] The practice of manufacturers to market their products through their own outlets, while at the same time selling to independent retail stores, is a widespread marketing practice.[3] Mere competition between some of these outlets and independent retail stores having resale price contracts with the manufacturer is certainly not determinative of illegality. If the contracts are truly vertical, no violation of the Federal Trade Commission Act is present. Neither the Miller-Tydings Amendment nor the McGuire Act were intended by the Congress to discriminate between integrated and nonintegrated manufacturing concerns in securing the benefits of resale price maintenance for themselves or their customers.[4]

"There is no indication in the Miller-Tydings Act itself [or the McGuire Act] or in its legislative history that Congress intended to

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[1] 98 Cong. Rec. 4900–4901. To this same effect, see *U. S.* v. *Frankfort Distillers, Inc.*, 324 U. S. 293, 296.

[2] See my opinion on Count III in Docket No. 5897, In the Matter of *Doubleday and Co., Inc.*, decided September 25, 1953.

[3] See Phillips, Marketing by Manufacturers (1946), p. 144 *et seq.*

[4] Senator Humphrey, a leading proponent of the McGuire Act, explained on the floor of the Senate that the test of:

> "whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.
>
> "It is important to keep this distinction in mind, because many producers of trade-marked items sell them to customers, retailers, and wholesalers alike.
>
> "Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trademarked or branded commodity, rather than as whole-

* * * alter established systems of distribution in order [for a manufacturer] to avail himself of the benefits of the act." [5]

The complaint in this case does violence to the fundamental principle that legislation should be construed in the light of its basic purpose. The Congress has validated vertical resale price contracts and it is not the Commission's function to invalidate the use of such contracts by a large segment of the economy.

If it were alleged, for example, with sufficient particularity, that a bona fide relationship of buyer and seller did not exist between respondent and its retail store customers, or that the transactions between them involved something more than customary marketing transactions affecting successive stages of the marketing process, or that the contracts were not between parties at different levels of the distribution system, or that there was a purpose to suppress and restrain competition through an unlawful horizontal arrangement, then a cause of action might be stated.

As it stands, however, the complaint represents another one of those peripheral "test" cases of strained statutory interpretation, doubtful validity and unfortunate economic consequence.

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salers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers." 98 Cong. Rec. 8870.

See colloquy between Congressman Patman and Hale, Hearings on Minimum Resale Prices before a Subcommittee on the House Committee on Interstate Commerce, 82d Cong., 2d Sess., p. 13. A commentator has said: "All of the legislation is expressly made inapplicable to horizontal price-fixing contracts, but this provision has not been deemed to prohibit contracts between a retailer and a manufacturer with a retail outlet, or between a manufacturer and a manufacturing retailer." Williams, *Resale Price Maintenance and Minimum Price Legislation* (1950), Institute on Antitrust Laws and Price Regulations, p. 141. See also Callman, *Unfair Competition and Trademarks,* Vol. 1, p. 377. Cf. Statement of Thurmond Arnold in *Final Report and Recommendations of the TNEC* (1941), p. 238.

[5] *Sunbeam Corp.* v. *Payless Drug Stores,* 113 F. Supp. 31 (N. D. Calif. 1953).

IN THE MATTER OF

SCIENTIFIC LIVING, INC., ET AL.

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

Docket 6099. Complaint, May 21, 1953—Decision, Oct. 1, 1953

Where a corporation and its three officers, engaged in the interstate sale and distribution of certain food and drug preparations and a stainless steel cooking utensil designed for cooking food in steam or vapor below the boiling point; in advertising their said food and drug preparations through their own magazine and otherwise; directly and by implication—

(a) Falsely represented that their "Adolphus Imported Peppermint Tea" sweetened the entire intestinal tract; that their "El Rancho Adolphus Clover Honey" was a cure for coughs and colds, and that their "El Rancho Adolphus Pure Apple Juice Concentrate" eliminated mucus and toxins present in the body;

(b) Falsely and misleadingly represented not only that certain symptoms and conditions (such as nervousness, neuritis, fatigue, insomnia, constipation, dizziness, and vague aches and pains) for which they offered their "Adolplus B-Complex Tablets" as beneficial, might be due to certain vitamin deficiencies, but that there was a reasonable probability that they were due thereto and that the preparation would cure or relieve them, through such statements as that the tablets could benefit the person if such symptoms resulted from a deficiency of one or more of the B-complex vitamins they contained, coupled with the statement that such symptoms could occur in the event of a prolonged deficiency of Vitamin B_1, Vitamin B_2, and Niacin in amounts under the minimum daily requirements; and

Where said corporation's officers, for the purpose for inducing the sale of their said "Adolphus Tenderizer" cooking utensil, in statements in lectures on health and nutrition given in various localities by one of them, and in pamphlets, booklets, and other written material, including certain books, distributed or sold to members of the audience—

(a) Represented falsely that the cooking of foods in utensils other than said "Tenderizer" resulted in damage, destruction, or loss of minerals and vitamins to the extent that the consumer of the food would not receive the minimum daily requirements thereof;

(b) Falsely represented that their "Tenderizer" would retain minerals and vitamins of food cooked therein to a greater extent than utensils sold by any competitor;

(c) Falsely represented that food cooked in their "Tenderizer" was more beneficial than that cooked in other utensils in that it provided more and better blood, more energy, better health, greater immunity to fatigue and disease, increased vitality, longevity, and virility; and was more beneficial to sufferers from constipation;

(d) Falsely represented that the use of their "Tenderizer" in the preparation of food was of value in the treatment of cancer and tuberculosis; would prevent and cure neuralgia, neuritis, melancholia, gastric cancer, rheumatism, arthritis, and other ailments and would have more influence on the acidity or alkalinity of the body than other methods of cooking;

(e) Falsely represented that yams and sweet potatoes contain Vitamin A, which is destroyed if they are fried, baked, or boiled; the facts being that said vegetables do not contain Vitamin A, but contain carotene, or pro-vitamin A, which has Vitamin A activity in the body and is not destroyed by baking, boiling, or frying;

(f) Falsely represented that food cooked in aluminum cooking utensils causes diabetes and liver damage, and that cooked in copper utensils is harmful to the body, that bread baked in said "Tenderizer" is more nutritious than ovenbaked bread, and that the nutritional value of food is destroyed by cooking in pressure cookers; and

(g) Represented through such statements on certain pamphlets and in aforesaid lectures, in connection with their "Tenderizer," as "Manufactured by Scientific Living, Inc.," that they owned, operated, and controlled the factory wherein said "Tenderizers" were manufactured and that they were the manufacturers thereof, when, in fact, they purchased said devices from a separate source of supply:

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

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

Mr. William L. Pencke and *Mr. George M. Martin* for the Commission.

Mr. Everett A. Rosser, Mr. David B. Miller and *Mr. William B. Landis,* of Scranton, Pa., 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 October 1, 1953, 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 May 21, 1953, issued and subsequently served its complaint in this proceeding upon the respondents, Scientific Living, Inc., a corporation, and Adolphus Hohensee, Mildred J. Walsh and Viola Heinzerling, individually and as officers of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Pursuant to notice duly served upon all parties, the respondents, through counsel, appeared at the designated time and place for said hearing in the city of Scranton, State of Pennsylvania, on the 28th day of July, 1953, during the course of which proceeding (respondents having failed to file answer to the complaint herein, pursuant to the provisions of Rule VIII of the Commission's Rules of Practice), respondents, through their counsel, announced their intention not to contest the proceeding "in any degree whatsoever," whereupon the provisions of Rule V (b) of the Commission's Rules, prescribing procedure in event of "default", became 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 the 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 Scientific Living, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business located at Scranton, Pennsylvania, and its Post Office address, Box 910, Scranton, Pennsylvania. Respondents Adolphus Hohensee, Mildred J. Walsh and Viola Heinzerling are officers of the aforesaid corporate respondent. These individuals formulate, direct and control the policies, acts and practices of said corporation.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the business of selling and distributing foods and drugs, as the terms "food" and "drug" are defined in the Federal Trade Commission Act. Respondents also sell a cooking utensil designated the Adolphus Tenderizer. The designation used by respondents for certain of their said food and drug products and the formulae and directions for use thereof are as follows:

(1)	Designation:	Adolphus B-Complex Tablets	
	Formula:	One tablet contains:	
		Vitamin B1	6 milligrams
		Vitamin B2	6 milligrams
		Niacin	10 milligrams
	Directions:	One tablet three times daily.	
(2)	Designation:	El Rancho Adolphus Apple Juice Concentrate	
	Formula:	Apple Juice	
	Directions:	Four parts of water to one part concentrate, for this Special Apple Juice Diet.	
	8 a. m.	Drink one 8 oz. glassful of El Rancho Adolphus Apple Juice very slowly.	
	10 a. m.	Two 8 oz. Glasses of El Rancho Adolphus Apple Juice.	
	12 noon.	Two 8 oz. Glasses of El Rancho Adolphus Apple Juice.	

2 p. m.	Two 8 oz. Glasses of El Rancho Adolphus Apple Juice.
4 p. m.	Two 8 oz. Glasses of El Rancho Adolphus Apple Juice.
6 p. m.	Two 8 oz. Glasses of El Rancho Adolphus Apple Juice.
8 p. m.	Two 8 oz. Glasses of El Rancho Adolphus Apple Juice.

Adhere to this fast for a period of three days in a mild cleanse. During this period, if bowels do not move, a ½ teaspoonful of ADOLPHUS HERBAL LAXATIVE may be taken at the end of each day of fasting. (In emergency, a plain, warm water enema may be resorted to.)

Lastly, a plain hot water (no soap) soak in the bathtub to induce excessive perspiration is most desirable and extremely beneficial for eliminating waste products through the largest channel of elimination—the Skin.

In addition to the aforesaid products, respondents sell and distribute the following foods, to wit: Adolphus Imported Peppermint Tea and El Rancho Adolphus Clover Honey.

Respondents cause and have caused said products hereinabove mentioned, when sold, to be shipped from the place of manufacture or storage thereof to purchasers located in various States of the United States other than the States in which said products are manufactured or stored. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in the aforesaid products in commerce between and among the various States of the United States.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated and now cause the dissemination of advertisements concerning their said food and drug products hereinabove named in Paragraph Two, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the magazine entitled "The Life Span," published by respondent, Scientific Living, Inc., and respondents have disseminated and cause the dissemination of advertisements concerning the aforesaid products by various means, including, but not limited to, the magazine referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the said food and drug products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among and typical of the statements contained in said magazine disseminated as aforesaid and the products to which they relate are the following:

(1) Adolphus Imported Peppermint Tea

* * * Sweetens the entire intestinal tract * * *

(2) El Rancho Adolphus Clover Honey

Only a few short years ago my son was besieged by wracking coughs and incessant colds—then a friend told me of the miraculous medical value of El Rancho Adolphus Honey! I began giving Dicky a generous amount of this golden sunshine daily . . . and the results were gratifying—just take a look at my boy and see for yourself! Colds and coughs vanished instantly!

JOIE HARRISON

(3) El Rancho Adolphus Pure Apple Juice Concentrate

Here's a *Sensational* New Health Product! It's Sweeping The Nation! It's Revolutionary! El Rancho Adolphus Pure Apple Juice Concentrate

JUST 3 DAYS and maybe you too, will feel YEARS YOUNGER

After several years of research work with apples we have come to some wonderful conclusions! Many of our guests at the ranch have succeeded in eliminating mucus and toxins from their bodies by simply following our Health-Producing Apple Juice Fast. Pure Apple Juice is proving to be a boon to mankind * * * We use only tree ripened apples * * * maybe that is why we obtain such splendid results! I would like to see all my students who are anxious to dissolve the mucus and toxins from their bodies to try my APPLE JUICE FAST FOR 3 DAYS! Since the cost of shipping the actual juice would be prohibitive, we have proceeded to concentrate our pure apple juice * * * to every quart of concentrate add 4 parts water. It is a known fact, that before you can overcome any of the following diseases, it is necessary first to cleanse our body of accumulated waste substances.

PAR. 5. Through the use of the advertisements containing the statements hereinabove set forth, and others similar thereto, but not specifically set out herein, respondents have represented directly and by implication:

(1) That Adolphus Imported Peppermint Tea sweetens the entire intestinal tract;

(2) That El Rancho Adolphus Clover Honey is a cure for coughs and colds;

(3) That El Rancho Adolphus Pure Apple Juice Concentrate eliminates mucus and toxins present in the body.

The said advertisements relating to El Rancho Adolphus Peppermint Tea, El Rancho Adolphus Clover Honey and El Rancho Adolphus Apple Juice Concentrate are misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act. In truth and in fact:

(1) El Rancho Adolphus Peppermint Tea will not sweeten the intestinal tract;

(2) El Rancho Adolphus Clover Honey will not cure coughs and colds;

(3) El Rancho Adolphus Apple Juice Concentrate will not eliminate mucus and toxins present in the body.

Respondents' advertising relating to the preparation, Adolphus B-Complex Tablets, after first designating a number of symptoms and conditions, i. e., nervousness, neuritis, fatigue, insomnia, constipation, dizziness, and vague aches and pains, contains such language as the following:

Are you Bothered with any of these Symptoms?

* * * * * * *

Adolphus B-Complex Tablets can benefit you if the above-named symptoms resulted from a deficiency of one or more of the B-Complex vitamins contained in Adolphus B-Complex tablets. These above symptoms can occur where a prolonged deficiency of Vitamin B_1, Vitamin B_2 and Niacin in amounts under the minimum daily requirement. If the above symptoms persist, however, it may be a danger signal for serious diseases.

The advertising relating to the Adolphus B-Complex Tablets is misleading in a material respect, and therefore false and deceptive, by reason of the suggestions contained therein. In advertising their preparation as a cure or remedy for the designated symptoms when due to Vitamin B_1, B_2 or Niacin deficiencies, respondents represent not only that the symptoms specifically mentioned may be due to Vitamin B_1, B_2 or Niacin deficiencies for which the preparation may be beneficial, but also that there is a reasonable probability that such symptoms are in fact due to such causes and that the preparation will cure or relieve them. In truth and in fact, the instances in which any of such symptoms are caused by Vitamin B_1, B_2 and Niacin deficiencies are rare. Each of said symptoms results much more frequently from a number of causes having no relation to Vitamin B_1, B_2 and Niacin deficiencies, including tuberculosis, syphilis, arthritis, rheumatism, heart disease, kidney disease, arteriosclerosis, diseases of the female organs, liver disease, gall bladder disease, peptic ulcer, prostate disease, and numerous other serious ailments, and when said symptoms are so caused, respondents' preparation will have no therapeutic value whatever in the treatment thereof. Thus, there is no reasonable probability that the symptoms mentioned in respondents' advertising are caused by Vitamin B_1, B_2 and Niacin deficiencies for which said preparation may be beneficial, and respondents' representations to the contrary, although made by suggestion instead of categorically, are false.

PAR. 6. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their Adolphus Tenderizers in commerce, respondents have employed and are now employing the following plan or procedure. Respondent Adolphus Hohensee visits a particular locality, town or city and lectures on health and nutrition. The first one or two lectures are free. These preliminary lectures are for the purpose of inducing members of the audience to enroll in the course on nutrition covered by the later lectures, for which a charge is made. During the course of the lectures, respondent Adolpus Hohensee makes numerous oral statements concerning nutrition and health and the therapeutic effects claimed to be secured from food prepared in respondents' tenderizers which are made of stainless steel and are designed for cooking food in steam or vapor below the boiling point and also demonstrates the use of the Adolphus Tenderizer by cooking food therein. Also, during the lectures, a number of pamphlets, booklets and other written material are distributed to the audience. In some instances, certain books, among them the Adolphus Cook Book of Balanced Meals, are sold to members of the audience. Said books contain statements concerning the need for and value of the tenderizer in maintaining and insuring good health. The aforesaid oral statements and statements appearing in the written material are made for the purpose of inducing the purchase of said tenderizers.

PAR. 7. Through the use of statements made during the course of the lectures and in the booklets, pamphlets and other written material, distributed as hereinabove set forth, respondents have represented, directly or by implication, that:

(1) The cooking of food in utensils other than the Adolphus Tenderizer results in the damage, destruction, or loss of minerals and vitamins to the extent that the consumer of the food will not receive his minimum daily requirements thereof.

(2) The Adolphus Tenderizer will retain the minerals and vitamins of food cooked therein to a greater extent than will the utensils sold by any competitor.

(3) Food cooked in the Adolphus Tenderizer is more beneficial than food cooked in other utensils in that it—(a) Provides more and better blood; (b) Provides more energy; (c) Provides better health; (d) Provides greater immunity to fatigue and disease; (e) Increases vitality; (f) Increases longevity; and (g) Increases virility.

(4) The use of the Adolpus Tenderizer in the preparation of food is of value in the treatment of cancer.

(5) The use of the Adolpus Tenderizer in the preparation of food is of value in the treatment of tuberculosis.

(6) That food cooked in the Adolphus Tenderizer is more beneficial to sufferers from constipation than the same food cooked in other utensils.

(7) The use of the Adolphus Tenderizer in the preparation of food will result in and maintain good health, strength, vigor, youthfulness, efficiency, and increased resistance to disease, will prevent or cure disease including neuralgia, neuritis, melancholia, insanity, gastric cancer, aching joints, rheumatism, arthritis, decomposition of the kidneys, piles, gall stones, liver tumors, and will have more influence on the acidity or alkalinity of the body than will the ingestion of foods cooked by other methods.

(8) That yams and sweet potatoes contain Vitamin A which is destroyed if said food products are fried, baked, or boiled.

(9) Food cooked in aluminum cooking utensils causes diabetes and liver damage.

(10) Food cooked in copper utensils is harmful to the body.

11) Bread baked in the Adolpus Tenderizer is more nutritious than oven-baked bread.

(12) The nutritional value of food is destroyed by cooking in pressure cookers.

PAR. 8. The foregoing representations are false, misleading and deceptive. In truth and in fact:

(1) Minerals are not appreciably damaged or destroyed by the heat used in any method of cooking. Vitamin C and some elements of the Vitamin B-Complex are destroyed by prolonged high cooking temperatures; other vitamins are not. Depending upon the solubility of the compounds in which they occur in foods, minerals and some vitamins are leached out in boiling water. If the water is not consumed, there is loss of these food elements, consequently if the cooking water is discarded, the least loss of soluble minerals and vitamins takes place with these methods of cooking using the least water. The possible loss of vitamins and minerals through discarding the cooking water depends on the amount in the food before cooking, which in turn depends on the soil in which grown, the varieties of fruits and vegetables, the manner of harvesting and storage and the exposure to light and air between maturity and preparation. Except for persons already deficient in these food elements or on the borderline of these restricted diets, the maximum loss from any method of cooking in general use would be insignificant from a nutritional standpoint and ordinary cooking methods and utensils other than the Adolphus Tenderizer will not result in destruction or loss of minerals and vitamins so as to prevent the consumer from receiving his minimum daily requirements thereof.

(2) There are similar methods of cooking and other cooking utensils which will retain the minerals and vitamins cooked therein to the same extent as retained by cooking in the Adolphus Tenderizer.

(3) Food cooked in the Adolphus Tenderizer is not more beneficial than food cooked in other utensils in—(a) Providing more and better blood; (b) Providing more energy; (c) Providing better health; (d) Providing greater immunity to fatigue and disease; (e) Increasing vitality; (f) Increasing longevity; and (g) Increasing virility.

(4) It is not known that the manner of cooking food has any value in treating cancer.

(5) Tuberculosis, in certain stages, can be arrested and even cured through such physical methods as rest and diet. However, food cooked in the Adolphus Tenderizer does not have any greater value in the treatment of tuberculosis than the same food cooked in other utensils.

(6) The method of cooking food has no connection with its value to sufferers from constipation.

(7) The use of the Adolphus Tenderizer in the preparation of food will not result in and maintain good health, strength, vigor, youthfulness, efficiency and increased resistance to disease, and will not prevent, or cure, and has no value in the treatment of neuralgia, neuritis, melancholia, insanity, gastric cancer or other forms of cancer, aching joints, rheumatism, arthritis, decomposition of the kidneys, piles, gallstones and liver or other tumors. The ingestion of foods cooked in the Adolphus Tenderizer does not have more influence on the acidity or alkalinity of the body than does the ingestion of the same foods cooked by other methods.

(8) Sweet potatoes and yams do not contain Vitamin A, but do contain carotene, or pro-vitamin A, which has Vitamin A activity in the body. This ingredient is not destroyed by baking, boiling, or frying.

(9) Food cooked in aluminum cooking utensils does not cause diabetes and liver damage.

(10) Food cooked in copper cooking utensils is not harmful to the body.

(11) Bread baked in the Adolphus Tenderizer is not more nutritious than oven-baked bread. The type of container used for baking does not influence the value of the bread baked therein.

(12) The nutritional value of food is not destroyed by pressure cookers.

PAR. 9. Respondents, also, by the use of such statements as "The Adolphus Tenderizer Manufactured by Scientific Living, Inc." appearing on certain pamphlets, distributed during the course of the lectures, hereinbefore referred to, and by oral statements of similar import made by respondent, Adolphus Hohensee, in the course of the lectures aforesaid, have represented and now represent that they own, operate and control a factory wherein said tenderizers are manufactured and that they are and have been for several years last past the manufacturers of said tenderizers. In truth and in fact, respondents neither own, operate or control a factory wherein their said tenderizers are manufactured, but purchase the tenderizers from a distinct and separate source of supply.

PAR. 10. The use by the respondents of the foregoing representations designated as aforesaid, has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations are true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase respondents' aforesaid products.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found are all to the prejudice and injury 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 respondents, Scientific Living, Inc., a corporation, and its officers, and Adolphus Hohensee, Mildred J. Walsh and Viola Heinzerling, individually and as officers of the respondent corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their various drugs and food, or any other preparation or product of substantially similar composition, or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from directly or indirectly:

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

(a) That the Adolphus B-Complex Tablets possess any value in the treatment of nervousness, neuritis, fatigue, insomnia, constipation, dizziness or vague aches and pains, or any other symptoms resulting from Vitamin B_1, B_2 or Niacin deficiencies, unless such representation be expressly limited to symptoms due to Vitamin B_1, B_2 or Niacin deficiencies.

(b) That Adolphus Imported Peppermint Tea sweetens the intestinal tract;

(c) That El Rancho Adolphus Clover Honey is a cure for coughs and colds;

(d) That El Rancho Adolphus Pure Apple Juice Concentrate eliminates mucus and toxins.

2. Disseminating or causing to be disseminated by any means for the purpose of inducing or which is likely to induce, directly or in-

directly, the purchase of respondents' foods, drugs or devices in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in paragraph 1 hereof.

It is further ordered, That the respondents, Scientific Living, Inc., a corporation, and its officers, and Adolphus Hohensee, Mildred J. Walsh and Viola Heinzerling, individually and as officers of respondent corporation, and respondents' 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 their tenderizers, or any other product of substantially similar composition, design, construction or purpose, do forthwith cease and desist from representing, directly or by implication.

(a) That the cooking of food in utensils other than the Adolphus Tenderizer damages, destroys, or results in the loss of minerals and vitamins to the extent that the consumer of the food will not receive his minimum requirements thereof;

(b) That the use of the Adolphus Tenderizer will retain the minerals and vitamins cooked therein to a greater extent than will competitive cooking utensils utilizing similar methods of cooking;

(c) That food cooked in the Adolphus Tenderizer is more beneficial than food cooked in other utensils in that it provides more or better blood, more energy, better health, greater immunity to fatigue or disease, or increases vitality, longevity or virility;

(d) That the use of the Adolphus Tenderizer in the preparation of food is of any value in the treatment of cancer;

(e) That the use of the Adolphus Tenderizer in the preparation of food is of any value in the treatment of tuberculosis;

(f) That the food cooked in respondents' Tenderizer is more beneficial to sufferers from constipation than food cooked by other methods;

(g) That the use of the Adolphus Tenderizer in the preparation of food will result in or maintain good health, efficiency, youthfulness, strength, vigor, or increased resistance to disease; or will prevent or cure or be of value in the treatment of neuralgia, neutritis, melancholia, insanity, cancer, aching joints, rheumatism, arthritis, decomposition of the kidneys, piles, gall stones, or tumors;

(h) That the ingestion of food cooked in the Adolphus Tenderizer will have more influence on the acidity or alkalinity of the body than the ingestion of food cooked by any other method;

(i) That yams or sweet potatoes contain Vitamin A or that frying, baking, or boiling said food products destroys the pro-vitamin A or carotene therein;

(j) That food cooked in aluminum cooking utensils causes diabetes and liver damage;

(k) That food cooked in copper utensils is harmful to the body;

(l) That bread baked in the Adolphus Tenderizer is more nutritious than oven-baked bread;

(m) That the nutritional value of food is destroyed by cooking in pressure cookers.

It is further ordered, That the respondent, Scientific Living, Inc., a corporation, and its officers, and Adolphus Hohensee, Mildred J. Walsh and Viola Heinzerling, individually and as officers of respondent corporation, and respondents' 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 their tenderizers, or any other product, do forthwith cease and desist from:

(1) Using the expression "Manufactured by Scientific Living, Inc.," or any other expression of similar import or meaning, to designate, describe or refer to the respondents' tenderizer or any other product not manufactured by them or representing in any other manner that respondents manufacture any product distributed by them, unless and until they own and operate or directly and absolutely control the plant wherein said product is produced.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of October 1, 1953].