

IN THE MATTER OF
BELTONE HEARING AID COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT

Docket 5825. Complaint, Nov. 2, 1950—Decision, Feb. 16, 1956

Order requiring one of the largest manufacturers of hearing aid instruments in the United States—in 1953 having written exclusive-dealing franchise agreements with 167 of its 187 independent distributors and exclusive-dealing understandings with the remainder—to cease selling its hearing aids to dealer distributors on condition that they not handle similar products of its competitors.

Mr. Andrew C. Goodhope for the Commission.
Crowell & Leibman, of Chicago, Ill., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

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

The complaint in this proceeding was issued November 2, 1950, charging respondent Beltone Hearing Aid Company, a corporation, with having violated the provisions of Section 3 of the Clayton Act by reason of respondent's practice of selling its hearing aids to certain of its customers on condition, agreement or understanding that such customers shall not use or deal in hearing aids sold and distributed by competitors of respondent.

The respondent filed its answer to the complaint on November 30, 1950, but later on January 11, 1951, the respondent withdrew said answer by filing an answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts. Subsequent thereto Webster Ballinger, a duly designated Hearing Examiner of the Commission, issued his initial decision in this proceeding. Thereafter, on motion of the respondent, the Commission on February 18, 1954, issued its order setting aside the initial decision of the Hearing Examiner, granting leave to respondent to file an amended and supplemental answer, and remanding this proceeding to the Hearing

Examiner for further proceeding in due course. On March 3, 1954, prior to the taking of any testimony in this proceeding, the Commission issued its order appointing the undersigned, Earl J. Kolb, as Hearing Examiner in the place and stead of Hearing Examiner Webster Ballinger. Thereafter, testimony and other evidence in support of, and in opposition to, the allegations of the complaint were introduced before the undersigned Hearing Examiner and said testimony and other evidence were duly recorded and filed in the office of the Commission.

FINDINGS AS TO THE FACTS.

PARAGRAPH 1. Respondent Beltone Hearing Aid Company is a corporation organized under the laws of the State of Illinois with its principal office and place of business located at 2900 West 36th Street, Chicago, Illinois.

PAR. 2. Since 1941, the respondent has been engaged in the manufacture and in the sale and distribution of hearing aid instruments, under the trade name "Beltone," and parts and accessories therefor, in interstate commerce in competition with other concerns who were also engaged in the sale and distribution of similar products in interstate commerce.

PAR. 3. In 1944, respondent introduced an innovation into the hearing aid industry in the form of a hearing aid which combined the batteries and transmitter into one unit, reducing the bulk and weight of the unit. This hearing aid was sold under the descriptive name of "Beltone Monopac" and was primarily responsible for respondent becoming one of the leading manufacturers of hearing aids in the United States.

PAR. 4. The method of distribution used by respondent is to sell its hearing aids and parts and accessories therefor to independently owned and operated distributors located throughout the United States who are not agents, servants or employees of respondent, 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 sell to dealers for over-the-counter sales and one substantial manufacturer who sells through dealers acting as agents of the company.

PAR. 5. In the course and conduct of its business, respondent has consistently followed a policy of making sales and contracts of sale

of its hearing aid instruments on the condition, agreement or understanding that the purchaser thereof shall not use or deal in hearing aid instruments sold and distributed by competitors of respondent.

PAR. 6. In January 1948, respondent put into use its first formal franchise agreement in contracting to sell hearing aids to its distributors, which provided among other things as follows:

Article 3. DISTRIBUTOR agrees to represent and sell only those hearing aids manufactured and sold by BELTONE, and not to sell any other new hearing aids. (CX 1)

In March 1952, this form of contract was revised for use thereafter in contracting with distributors. The new form of contract provides, among other things, as follows:

Article 4. DISTRIBUTOR agrees to represent and sell only those new hearing aids manufactured and sold by BELTONE, and not to sell any other new hearing aids. (CX 2)

These contracts further provide that each Beltone instrument sold shall be registered by the distributor with Beltone on registration forms supplied by Beltone, giving name and address of purchaser, date of purchase, and serial number of instrument. It was also provided that said contract may be cancelled at any time by either party upon thirty days written notice by registered mail.

PAR. 7. In 1953, the respondent sold its Beltone hearing aids and accessories to 187 independent distributors located in the United States, who in turn maintained approximately 50 subdealer outlets. Of this number, 167 had executed formal written franchise agreements, as hereinabove described. The remaining 20 distributors were not operating under a formal franchise agreement, but had exclusive dealing understandings with respondent, in fact, 8 of these distributors had typed contracts with respondent, one of which, dated April 25, 1947, provided, among other things, as follows:

Article 4. Elbaum [Distributor] agrees to terminate his franchise or distribution rights with any and all other hearing aid companies within thirty days of this agreement, and thereafter will purchase only service supplies and accessories from said firm or firms, but thereafter will not purchase transmitters for resale.

Article 5. Elbaum agrees thereafter to represent and sell only those hearing aids manufactured and sold by BELTONE and not to sell any other hearing aids.

PAR. 8. In the general course and conduct of respondent's business relationships with its distributors, respondent has required strict

compliance with, and its distributors have strictly adhered to, the exclusive dealing requirements of its contracts. While there is some vague testimony by competitors of respondent that they were able to sell some of respondent's dealers, closer inspection of this testimony shows that for the most part sales were made to former Beltone dealers or dealers who were in the process of giving up Beltone. While various manufacturers solicited all dealers, including those having exclusive dealing contracts with Beltone, they were not successful in inducing such dealers to handle their hearing aids in conjunction with Beltone. Not one Beltone dealer called as a witness admitted to selling any competitive hearing aid, and, in fact, the record shows that in those instances where a competitive aid had been handled by a dealer it was for the purpose of having the customer switch to Beltone. For example, in a letter dated April 1, 1948, to Mrs. Elsie S. Floren of Northwest Hearing Aid Company, David H. Barnow, General Manager of Sales Department of respondent stated:

You stated that somebody was in your office who covered the entire country and states that many Beltone distributors are carrying more than one line. If this is so, they have certainly been successful in keeping it under cover because not only have we been assured by practically every one in the company that they are handling Beltone exclusively (there are only about 5% who are not), but Pete gets around the country and certainly could smell out any situation that wasn't 100% Beltone. There are a few cases, of course, who were formerly Western or Acousticon or Telex, etc., who are not selling those products but are still servicing the users in order to continue the traffic with a view towards ultimately selling them a Beltone. (CX 11-F)

PAR. 9. The provisions of the contract permitting cancellation on thirty day notice and the requirement that names and addresses of all purchasers be forwarded to respondent further enhanced respondent's ability to enforce the exclusive dealing features of its contract. A distributor knew full well that if the cancellation clause were exercised he would be immediately out of business, and that respondent would immediately notify all his customers of his discontinuance and advise such customers that they should contact the new dealer for service and genuine parts. That the respondent did, in fact, require strict compliance with the exclusive dealing features of its contracts is shown by the following:

1. On January 7, 1947, David H. Barnow, Vice President, of respondent wrote A. G. Hoffman, Houston, Texas, in part as follows:

You will recall on my visit to Houston early last year, we made quite a point of the fact that we were interested in *exclusive* representation. At that

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time it was our understanding that you were going to devote your full time to BELTONE distribution. I find, however, that in the December, 1946 Houston telephone directory that you are still listing Western Electric, DeForest, and almost any other hearing aid the prospect may desire.

We are now laying our plans for 1947 and would like to have an expression from you as to your intentions regarding BELTONE distribution. (CX 24)

2. On March 7, 1947, David H. Barnow wrote Roy Carpenter, Beaumont, Texas, in part as follows:

I think we've reached the point, Roy, where you should be able to give us a clear cut decision on whether or not you want to continue with BELTONE on the following terms:

1. Handle BELTONE exclusively to the exclusion of all other hearing aids. (CX 28-A-B)

3. On November 2, 1948, David H. Barnow wrote Mrs. Ida M. Penn, Chattanooga, Tennessee, in part as follows:

Ida, I've always been personally fond of you. You know I've always gone out of my way to do little extras for my "Mammy". More than that I've always been proud of our association, and of having you in our organization. During that association I've never waivered in my loyalty to you. I can, however, remember one period when you came close to waivering when you were flirting with the idea of adding Western Electric to the Beltone line. I resisted it then. I think you're now in a mental frame of mind to waiver again. I think that would be a serious mistake for you. Not only would it pain me personally, but I would consider it an expression that you're no longer interested in your Beltone franchise. (CX 12-A)

4. On February 9, 1949, David H. Barnow again wrote Mrs. Ida M. Penn of Chattanooga, Tennessee, in part as follows:

You ask for a two month trial with Microtone. I'm sorry but we just cannot grant any exception to our basic policy of exclusive representation. We think we've earned it and we know that it can't work out satisfactorily for the distributor or the company any other way. If at the end of this week, you call me and tell me that you have decided to take on Microtone, we'll have no alternative but to assume that you have in effect decided to cancel Beltone and we shall forthwith issue our cancellation of your existing franchise. (CX 19-A-D)

5. On September 30, 1948, David H. Barnow wrote Mrs. Elsie Floren of Minneapolis, Minnesota, in part as follows:

* * * We are committed to a program of exclusive representation wherever we can get it. We're not kidding ourselves into thinking that we have 100% exclusive representation everywhere, but we have reached about the 95% mark now. We intend to continue until we get it 100% if at all possible. Wherever we don't have exclusive representation we'll keep seeking until we find the individual or firm who is willing to give it to us. (CX 8-F)

PAR. 10. 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. Such distributors also serve as the best markets 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 other parts or batteries or for any repairs or replacement parts in the hearing aid instrument. The hard-of-hearing person generally tries to hide his deafness and does not want to buy a hearing aid; consequently, the dealer, in order to make a sale, has to overcome this reluctance and by continued effort create a personal relationship between himself and the prospect. The value of the independent hearing aid dealer, as compared with the drug store type of outlet, is shown by the testimony of Robert Lubin that at the time that he had 15 dealers and 500 drug store and similar outlets that the sales of the 15 dealers accounted for 50 percent of the gross sales of Cleartone hearing aids.

PAR. 11. The total volume of business done by respondent with its distributors has been substantial. During the years 1948 through 1953, inclusive, sales of hearing aids and parts and accessories therefor by respondent to its distributors were as follows:

Fiscal period	Gross sales to franchise dealers	Total sales new hearing aids to dealers
11/1/47 to 10/31/48	3,010,262.54	1,982,715.00
11/1/48 to 10/31/49	3,850,145.78	2,403,897.00
11/1/49 to 10/31/50	3,621,236.90	2,090,983.00
11/1/50 to 10/31/51	3,635,046.67	2,178,822.00
11/1/51 to 10/31/52	3,491,502.07	2,177,250.00
11/1/52 to 10/31/53	3,433,252.80	2,164,581.00

The total industry figures are shown by the report of the Bureau of Census for sales of hearing aid instruments are as follows:

1947	\$16,868,000
1950	23,073,000
1951	22,316,000
1952	22,103,000

PAR. 12. There are approximately a total of 35 manufacturers of wearable hearing aids in the United States. Respondent is one of the largest of such manufacturers, its total volume of sales of hearing aids ranking fourth in total dollar volume of hearing aids sold in 1951, with its total sales remaining substantially the same in subsequent years. The five largest of these manufacturers are Sonotone, Zenith, Dictograph, Beltone, and Maico. Sonotone sells through employees direct to the user and does not sell to independent distributors. Zenith sells to drug stores, optical stores and similar outlets as distinguished from the independent distributor. Dictograph, Maico, and respondent employ exclusive dealing arrangements with their distributors and together control approximately 600 independent dealers. The total

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sales of hearing aids of these five companies in 1951 amounted to \$16,248,764.00, which is 72.81 percent of the total industry sale of hearing aids in that year. The sales volume for these five hearing aid companies as shown by the record are as follows:

	Beltone	Dictograph	Maico	Zenith ¹
1950.....	\$2,090,938	\$3,561,234	\$1,139,362	\$1,980,297
1951.....	2,178,822	2,974,388	1,162,941	2,786,273
1952.....	2,177,250	3,126,282	1,165,463	3,535,426
1953.....	2,164,581	3,035,670	1,275,152	3,708,098

Sonotone sales of hearing aids for the year 1951 were \$7,146,343.00.¹

PAR. 13. On a percentage basis, the percentage of sales of hearing aids by the various leading companies, as reflected by comparison of the individual company sales to the Bureau of Census figures, are as follows:

	Sonotone	Zenith	Dictograph	Beltone	Maico
1950.....		8.58	15.43	9.06	4.93
1951.....	¹ 16.01	12.48	13.32	9.76	5.21
1952.....		13.32	14.8	10.3	5.52

¹ Sonotone figures represent sales by means of its employees direct to the user. The figures for the other companies are total sales to distributors for resale to users. For purposes of comparison, the Sonotone figures should be reduced by 50 percent to make them comparable with the sale price to distributors shown for the other companies. Zenith figures are taken from Respondent's Exhibits 17 and 18.

The companies listed above, who make use of exclusive dealing contracts with their distributors; namely, Dictograph, Beltone and Maico, represent approximately 30 percent of the entire sales of the whole industry.

PAR. 14. The exact number of independent hearing aid dealers in the United States is rather confused in this record. Witness Grover Cleveland Coil, estimated that there would be 2,000 to 3,000 qualified dealers. As this witness testified that a drug store with a hearing aid department would be a qualified dealer, it is impossible from his testimony to determine the number of independent hearing aid dealers as distinguished from drug stores, optical shops and department stores. Witness David H. Barnow, General Sales Manager and Vice President of respondent, testified that there were approximately 3,000 hearing aid dealers, exclusive of outlets such as drug stores, optical shops, etc. Although the record shows that Sonotone, Beltone, Dictograph and Maico sold to approximately 1,000 dealers, Barnow testified that these four companies would account for approximately 1,150 of the estimated dealers, leaving a balance of approximately 1,900 dealers distributed

among the remaining 30 manufacturers of hearing aids. As he arrived at this latter figure by estimating the number of dealers sold by these 30 hearing aid companies, which for the most part were multiple line dealers, this would result in a considerable amount of duplication, and would prohibit an exact estimate being made because of such duplication. If consideration is given to the fact that Beltone, Dictograph, Maico, Sonotone and Zenith do 72.81 percent of total industry sales and that the remaining manufacturers of hearing aids sell principally to drug stores, optical shops and similar outlets, it readily becomes apparent that the estimate of 1,900 dealers is greatly exaggerated and would serve no basis for a finding as to the number of dealers.

PAR. 15. Considering the record as a whole, including the percentage of industry sales made by respondent and its three competitors—Sonotone, Dictograph and Maico—which, together, comprised 60 percent of the total industry sales in 1951, the Hearing Examiner is of the opinion, and so finds, that respondent's distributors constitute a substantial segment of the outlets for the 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 the result of 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 drug stores, optical stores and similar outlets. Furthermore, the tendency and capacity of these practices to create a monopoly in the respondent and a limited number of its competitors is demonstrated by the following chart showing the hearing aid outlets in 74 cities throughout the United States, in each one of which there is located a Beltone distributor.

City	Popula- tion	Total outlets	Exclusive dealers	Other dealers	Other outlets
Abilene, Tex.	45,570	3	2	-----	1
Albany, N. Y.	134,995	8	4	2	2
Albuquerque, N. Mex.	96,815	5	3	2	-----
Allentown, Pa.	106,756	8	4	4	-----
Altoona, Pa.	77,177	7	4	3	-----
Amarillo, Tex.	74,246	5	3	1	1
Anderson, Ind.	46,820	3	2	1	-----
Annapolis, Md.	10,047	1	1	-----	-----
Asheville, N. C.	53,000	5	2	2	1
Atlanta, Ga.	331,314	8	4	4	-----
Augusta, Ga.	71,508	4	3	1	-----
Austin, Tex.	132,459	7	4	3	-----
Beaumont, Tex.	94,014	6	4	1	1
Billings, Mont.	31,834	4	3	1	-----

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City	Popula- tion	Total outlets	Exclusive dealers	Other dealers	Other outlets
Birmingham, Ala.	326,037	7	3	3	1
Boise, Idaho	34,393	7	3	3	1
Cedar Rapids, Iowa	72,296	6	4	2	
Champaign-Urbana, Ill.	{39,563 22,834}	5	3		2
Charleston, S. C.	70,174	4	2	2	
Charleston, W. Va.	73,501	7	3	1	3
Charlotte, N. C.	134,042	8	4	2	2
Chattanooga, Tenn.	131,041	7	3	3	1
Columbus, Ga.	79,611	2			
Corpus Christi, Tex.	108,287	7	4	2	1
Davenport, Iowa	74,549	8	4	4	
Duluth, Minn.	104,511	8	4	2	2
Easton, Pa.	35,632	5	3	1	1
Eau Claire, Wis.	36,058	6	3	2	1
El Paso, Tex.	130,485	6	3	3	
Erie, Pa.	130,803	7	4	2	1
Everett, Wash.	33,849	6	3	2	1
Flint, Mich.	163,143	6	4	2	
Fresno, Calif.	91,669	9	4	4	1
Grand Rapids, Mich.	176,515	8	4	3	1
Greensboro, N. C.	74,389	4	2		2
Jacksonville, Fla.	204,517	7	4	2	1
Johnstown, Pa.	63,232	6	4	2	
Joplin, Mo.	38,711	6	4	1	1
Knoxville, Tenn.	124,769	7	4	2	1
Lansing, Mich.	92,129	8	4	4	
Little Rock, Ark.	102,213	7	4	3	
Lubbock, Tex.	71,747	5	3	2	
Macon, Ga.	70,252	3	2	1	
Mobile, Ala.	129,009	6	4	2	
Muskegon, Mich.	48,429	2	1	1	
Nashville, Tenn.	174,307	8	3	5	
New London, Conn.	30,551	4	2		2
Norfolk, Va.	213,513	3	4	3	1
Orlando, Fla.	52,367	7	4	3	
Portland, Maine	77,634	5	3	2	
Raleigh, N. C.	65,679	6	4		2
Rapid City, S. Dak.	25,310	3	2	1	
Reading, Pa.	109,320	7	4	3	
Reno, Nev.	32,497	2	1		1
Richmond, Calif.	99,545	4	2		2
Richmond, Va.	230,310	10	4	5	1
Rochester, Minn.	29,855	7	4	3	
Rockford, Ill.	92,927	8	4	4	
Saginaw, Mich.	92,918	4	2	2	
Schenectady, N. Y.	91,785	7	4	2	1
Scranton, Pa.	125,536	5	3	1	1
Shreveport, La.	127,206	8	4	3	1
Sioux City, Iowa	83,991	7	4	2	1
Springfield, Ill.	81,628	7	3	4	
Springfield, Mass.	162,399	9	4	5	
Syracuse, N. Y.	220,583	9	4	4	1
Tampa, Fla.	124,681	6	4	1	1
Tulsa, Okla.	152,740	6	4	2	
Utica, N. Y.	101,531	7	4	2	1
Waco, Tex.	84,706	6	4	1	1
Watertown, N. Y.	34,350	5	3	2	
Wichita, Kans.	168,279	5	3	2	
Wilkes-Barre, Pa.	76,826	8	4	3	1
Winston-Salem, N. C.	87,811	6	3	2	1

The Acousticon dealer in Wichita, Kans., carries one additional make.

The Beltone dealer in Portland, Maine, carries one additional make.

The Maico dealer in Birmingham and Charleston each carries two additional makes, and the Maico dealer in Nashville carries one additional make.

Corpus Christi, Tex., has one exclusive Maico dealer, and one other dealer who carries Maico as one of two makes.

Reference to the above table would indicate that should two other manufacturers follow respondent's example and tie up two additional jobbers in each of these cities by exclusive dealing contracts it would create a monopoly and result in the exclusion of all other hearing aid manufacturers from approximately two-thirds of the cities listed.

PAR. 16. The respondent has based its defense on a number of economic factors and public interest as a justification of the continued use of its exclusive dealing contract—

(1) It was contended that respondent's written franchise agreements had no effect upon respondent's sales. In 1949 unit sales of respondent were the highest in its history, when only 50 percent of respondent's distributors had entered into written franchise agreements. The record shows, however, that respondent claimed as early as 1948 that 95 percent of its dealers were required to deal exclusively in Beltone hearing aids.¹ In view of this, unit sales have no relationship to franchise agreements. Furthermore, while respondent has shown some decrease in unit sales, it has not shown a corresponding decrease in dollar volume, and respondent has continued to maintain its position in the industry and, in fact, during the years 1950 to 1952 has increased its percentage of total industry sales.

(2) It was contended that respondent's exclusive dealing contracts had no effect on competition for the reason that the number of hearing aid manufacturers has increased from approximately 15 in 1943 to approximately 35 in 1953; that competitors were free to train their own distributors; and that respondent's distributors were free to cancel their contracts and take on other hearing aids. Such increase as has taken place has not affected either respondent's position in the market or its share of total industry sales, nor has there been any appreciable exodus of respondent's dealers, and competitors have been forced to sell their hearing aids in less desirable markets, such as drug stores, optical shops, etc. As stated by the Supreme Court in *Standard Oil v. United States*; 337 U.S. 293, pp. 311, 314—

We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition.

* * * * *

It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.

¹ Commission's Exhibits 11-F and 8-F.

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(3) It was further contended that respondent's hearing aids are highly complex electronic devices and that respondent has contributed to new advances and inventions in the electronic field, together with many technological improvements and has spent large sums of money in advertising its hearing aids and has built up a considerable amount of good will, which constitutes a strong business justification for a hearing aid manufacturer to restrict his dealers to handle only its line of hearing aids. 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. This identical defense was discussed by the United States Circuit Court of Appeals for the Second Circuit in *Dictograph Products, Inc., v. Federal Trade Commission* decided December 15, 1954, 217 F. 2d 821.

Preliminarily, it should be noted that potential or even probable adverse effects upon petitioner's business alone is not a sufficient basis for withholding injunctive relief. Were we to hold otherwise, we would quite effectually draw the teeth of Section 3 and of the anti-trust laws generally. It appears self evident that any prohibition upon behavior which stifles competition will necessarily inure to the immediate economic disadvantage of the individual or business organization engaging in that behavior.

(4) It was further contended by the respondent that there was a justification in the use of the exclusive dealing contract as it permitted the rendering of better service to the dealer and a supplying to him of advertising assistance and leads without the necessity of a dealer carrying a large inventory. By so doing, respondent further contended that this enabled the dealer to give better service to the hard-of-hearing public. 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

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 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, 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 refuse 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 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 competing manufacturers and suppliers.

5. The dollar volume of such products annually sold by respondent to its distributors under restrictive conditions, understandings and agreements is 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 acts and practices of respondent as hereinbefore found are all to the injury and prejudice of the respondent's competitors

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and of the public, and have the tendency to, and have, hindered and prevented 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.

7. The effect of the sale and contracts for sale of hearing aids on the condition, agreement or understanding that the purchasers thereof shall not sell or deal in similar products of competitors may be, and has been, to substantially lessen competition and to tend to create a monopoly in respondent in the sale of such hearing aids.

8. The acts and practices of the respondent, as herein found, in selling and making contracts for the sale of hearing aids on the condition, agreement or understanding that the purchasers thereof shall not sell or deal in similar products of a competitor or competitors constitute a violation of Section 3 of the Clayton Act.

ORDER

It is ordered, That respondent Beltone Hearing Aid Company, 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 or 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 other similar or related products supplied by any competitor or competitors of respondent.

2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing contract of sale, which condition, agreement or understanding is to the effect that the purchaser of said products shall not use or deal in hearing aids or other similar or related products supplied by any competitor or competitors of respondent.

ON APPEAL FROM INITIAL DECISION

Per Curiam:

The Commission is of the opinion that the issues raised by this appeal are substantially the same as those decided in *Dictograph Products, Inc. v. Federal Trade Commission*, 217 F. 2d 821 (C.C.A. 2, 1954), certiorari denied, 349 U.S. 940, and in *Anchor Serum Company v. Federal Trade Commission*, 217 F. 2d 867 (C.C.A. 7, 1954).

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Order

Accordingly, upon the basis of our review of the whole record herein, respondent's appeal is denied and the initial decision is adopted as the decision of the Commission.

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

FINAL ORDER

Respondent Beltone Hearing Aid Company filed on May 23, 1955, its appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission:

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

Commissioner Kern not participating.

IN THE MATTER OF
CARL DRATH TRADING AS BROADWAY GIFT COMPANY

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

Docket 6185. Complaint, Feb. 24, 1954—Decision, Feb. 16, 1956

Order requiring an individual in New York City to cease furnishing to members of the public who were prospective representatives and operators, push and pull cards and instructions for the sale of his watches, cameras, novelties, household articles, and other merchandise to the public by means of a lottery scheme.

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

Mr. Horace J. Donnelly, Jr., of Washington, D. C., for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges respondent with violation of the Federal Trade Commission Act through the use of lottery schemes or games of chance in the sale and distribution of his merchandise. After the filing of respondent's answer to the complaint, hearings were held at which testimony and other evidence were offered in support of the complaint (no evidence being offered by respondent), and such testimony and other evidence were duly recorded and filed in the office of the Commission. The matter is now before the hearing examiner for final consideration on the complaint, answer, evidence, oral argument of counsel and proposed findings and conclusions submitted by counsel. Having duly considered the matter, the examiner finds that the proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order.

2. Respondent Carl Drath is an individual trading as Broadway Gift Company, with his office and principal place of business at 121 East 24th Street, New York, New York. He is engaged in the sale and distribution in commerce, as that term is defined in the Federal Trade Commission Act, of numerous and varied items of merchandise including, among others, cameras, watches, jewelry, safety razors, and various household and toilet articles.

3. Most of respondent's sales are made through members of the public. Upon obtaining the names and addresses of individuals, members of the public, who are regarded by him as prospective distributors of his merchandise, respondent mails to such persons

certain advertising and sales material. One of the pieces of material employed by respondent is a circular describing and depicting certain articles of merchandise and containing a device commonly known as a pull card. This card contains a number of partially perforated tabs under each of which is a feminine or masculine name, together with the name of one of the articles described in the circular, and the price of the article. Persons pulling the tabs pay to the individual circulating the pull card the amount specified, and their names are noted on the circular in a place provided for that purpose. The information under the pull tabs is concealed from view, and persons pulling the tabs have no information as to the article they are to receive or the price to be paid therefor until the tab has been pulled or separated from the card.

4. The pull card also contains a master seal which conceals a name corresponding to one of the names beneath the tabs. The person who happens to pull the tab containing this name receives, in addition to the first article, a watch as a special prize.

5. After all of the tabs on the card have been pulled and the respective amounts paid by the several persons pulling the tabs, the individual circulating the card remits the total amount to respondent and receives from him the merchandise, including the watch. The respective articles are distributed by this individual to the persons entitled thereto, the master seal on the pull card is removed to ascertain which of the persons receives the watch, and the watch delivered to such person. For his compensation the individual circulating the pull card receives an article of merchandise selected by him from a designated group.

6. In addition to the circular and pull card just described, respondent has used a device known as a push card. This card contains 36 partially perforated discs, each of which bears a feminine name. Concealed within each disc is a number which is not revealed until the disc has been pushed or separated from the card. Legends on the card read: "No. 1 pays 1¢, No. 9 pays 9¢, No. 28 pays 28¢, all others pay 29¢—None Higher" and "No. 1 and No. 9 receive a handsome fountain pen." Persons pushing the discs pay in accordance with the first of these legends. The card also contains a master seal, concealed beneath which is the name corresponding to one of the names appearing on the discs. The master seal is not broken nor the name beneath it revealed until all of the discs have been pushed. The person who pushes the disc bearing the same name as that under the master seal receives a camera. The other persons pushing discs on the card receive nothing except the persons who push numbers 1 and 9, each of whom receives a

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fountain pen. As in the case of the circular and pull card described above, these push cards are mailed by respondent to members of the public. If a recipient elects to do so, he sells the pushes on the card to other members of the public, collects the money therefor, remits it to respondent, receives the camera and fountain pens and delivers them to the persons who pushed the lucky discs. For his compensation the individual circulating the card also receives a camera.

CONCLUSIONS

It is clear that each of these sales plans contemplates and involves the use of a lottery or game of chance, and that respondent supplies to and places in the hands of others lottery devices for use in the sale of his merchandise. The use by respondent of such sales plans or methods and the sale and distribution of his merchandise to the public through the use thereof is a practice which is violative of an established public policy of the Government of the United States, is to the prejudice of the public, and constitutes unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Carl Drath, individually and trading as Broadway Gift Company, or trading under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any 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 pull cards, push cards or any other devices which are designed or intended to be used in the sale or distribution of respondent's merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme.

OPINION OF THE COMMISSION

By KERN, Commissioner:

This matter is before the Commission on consideration of an appeal from the initial decision of the hearing examiner, who has found that respondent has violated Section 5 of the Federal Trade Commission Act by supplying to others, through the channels of

interstate commerce, lottery devices for use in the sale of his merchandise, and has issued an appropriate order to cease and desist.

Respondent distributes two types of lottery device, "pull cards" and "push cards." Their construction and method of operation is fully described in the initial decision, and it will here suffice to say that each type is designed to be used in the sale of merchandise by paid chance. Commission orders condemning the interstate distribution of such devices have been universally sustained on judicial review. *Seymour Sales Co. v. FTC*, 216 F. 2d 633 (D.C. Cir. 1954) and cases cited, *cert. denied*, 348 U.S. 928 (1955); *Wolf v. FTC*, 135 F. 2d 564 (7th Cir. 1943); *Colon v. FTC*, 193 F. 2d 179 (2d Cir. 1952). It is thus well-settled that the practices in which respondent was found to have engaged violate the Federal Trade Commission Act. *United States v. Halseth*, 342 U.S. 277 (1952), which respondent insists holds that the Commission is without jurisdiction in these premises, arose under the postal statutes and did not purport to construe the Federal Trade Commission Act. This is clear from the decisions of those courts which have considered and rejected this same contention. *Seymour Sales Co. v. FTC*, 216 F. 2d 633, 635, footnote 2 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 928 (1955); *U. S. Printing & Novelty Co., Inc. v. FTC*, 204 F. 2d 737 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 830 (1953); *Halseth v. FTC*, not reported, No. 11022, 7th Cir., Sept. 15, 1954, *cert. denied*, 348 U.S. 928 (1955); *Maltz v. FTC*, not reported, No. 11399, 7th Cir., October 12, 1954. There is thus no basis for respondent's contention that the Commission is without jurisdiction over his practices.

Respondent points to Section 9 of the Federal Trade Commission Act which, *inter alia*, provides that—

no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it * * *.

He argues that since he testified in response to a Commission subpoena concerning the matters which underlie this proceeding, the quoted statute saves him immune from the proposed order.

A Federal Trade Commission order to cease and desist is injunctive only, forbidding future violations of law but imposing no sanctions for past misconduct. Injunctive relief is not a "penalty" or a "forfeiture." *Bowles v. Misle*, 64 F. Supp. 835, 838 (Neb. 1946). Proceedings to collect civil penalties for the disobedience of Commission orders are brought in United States District Courts

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and must be based on independent evidence of misconduct occurring subsequently to issuance of the order to cease and desist. The immunity clause is therefore inapplicable to respondent. *Standard Distributors, Inc. v. FTC*, 211 F. 2d 7, 14 (2d Cir. 1954). *Lee v. CAB*, 225 F. 2d 950 (D.C. Cir. 1955), relied on by respondent in this regard, is not in point.

Upon consideration of the entire record herein we hold that the hearing examiner's findings are supported by substantial evidence and fully warrant the order that he has proposed. Accordingly, respondent's appeal is denied and the initial decision of the hearing examiner is affirmed. Appropriate order will be entered.

Commissioners Mason and Secrest did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying respondent's appeal and affirming the initial decision:

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

Commissioners Mason and Secrest not participating.

Decision

IN THE MATTER OF

WILLIAM E. BROWN ET AL. DOING BUSINESS AS
THE DIOPTRON COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6349. Complaint, May 6, 1955—Decision, Feb. 18, 1956

Order—consented to by respondent distributors—requiring two individual manufacturers located in Milwaukee and the corporate seller which was their exclusive distributor in the New England area, to cease representing falsely in advertising matter of general circulation that their fly trap and baiting fluid designated respectively as “Big Stinky Fly Trap” would eliminate flies, prevent any possibility of disease caused by flies, and prevent polio; and

Dismissing the allegation that respondent manufacturers advertised falsely that the fly trap “was nationally approved for use for the Boy Scouts”, since the representation was substantially true.

Mr. Michael J. Vitale for the Commission.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint against the above-named respondents on May 6, 1955, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act. Said complaint charges that respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company, in Milwaukee, Wisconsin, for several years have been engaged in the manufacture and sale of a fly trap and baiting fluid designated respectively as “Big Stinky Fly Trap” and “Big Stinky Control Fluid” to distributors located throughout the several states, one of such distributors being the respondent Joseph Breck & Sons Corporation which had the exclusive distributorship for said products in the New England area. It is further alleged that in the course and conduct of its business, the respondent Joseph Breck & Sons Corporation made certain statements and claims in advertising matter which were alleged to be false, deceptive and misleading and that respondents William E. Brown and John R. Seeger furnished the material to said Joseph Breck & Sons Corporation which was used by said corporation in

the preparation of the allegedly false and misleading advertisements and participated with said corporation in the payment of the cost of such advertisements. It was further charged that the use by the respondents of the false, misleading and deceptive statements had the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were and are true and to induce a substantial portion of the purchasing public because of such mistaken and erroneous belief to purchase the fly trap and baiting fluid sold by respondents and that, as a result thereof, substantial trade has been unfairly diverted to respondents from their competitors and substantial injury is being done and has been done by respondents to competition in commerce.

Respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company, filed an answer on June 6, 1955, denying that they had furnished advertising material to respondent Joseph Breck & Sons Corporation containing the language appearing in the complaint and denying that they had participated in payment of the cost of the advertisements. They admitted, however, that the use of the statements contained in the complaint would, to a degree, be false, deceptive and misleading.

One of the allegations of the complaint was that the respondents had used in their advertising matter a statement that the "BIG STINKY FLY TRAP is the Fly Trap that was nationally approved for use for the Boy Scouts." With respect to this allegation, these respondents denied the allegation, asserting that the National Supply Service Division of the Boy Scouts of America had approved their product.

On July 29, 1955, there was transmitted to the hearing examiner for his consideration, an agreement for consent order by the attorney in support of the complaint as to all of the respondents except respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company, which agreement was duly executed by respondent Joseph Breck & Sons Corporation and individual respondents Luther A. Breck, Jr., James Shiels and Clarence Wells, individually and as officers of Joseph Breck & Sons Corporation and also signed by Michael J. Vitale, counsel supporting the complaint, and approved by Joseph E. Sheehy, Director of the Bureau of Litigation. In said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. It was also provided in said agreement that the said respondents waived any

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further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. It was further provided by the agreement that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint. It is further provided that an order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents; that, when so entered, it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of said order.

It appearing that the order provided for in said agreement conforms in all respects to the order in the notice portion of the complaint with respect to said respondents and that said agreement provides for an appropriate disposition of that portion of the complaint which involves said respondents signing said agreement and it appearing that, with respect to such issue, this proceeding is in the public interest, the said agreement is hereby accepted and, in accordance therewith, the order contained therein is included in the order hereinafter made. With respect to the remainder of the proceeding, based on the entire record pertaining thereto, and from his observation of the witnesses, the undersigned finds that this proceeding is in the interest of the public and makes the following

FINDINGS OF FACT

I

Respondents William E. Brown and John R. Seeger are co-partners doing business under the name of The Dioptron Company with their office and principal place of business located at 704 West Wisconsin Avenue, Milwaukee, Wisconsin. Said respondents are now and for several years last past have been engaged in the business of manufacturing and selling a fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" and "Big Stinky Control Fluid" to distributors, including wholesalers and retailers, and granted to respondent Joseph Breck & Sons Corporation the exclusive distributorship for said products in the New England

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area from 1951 through 1954. Since 1954 sales of said products have been made to respondent Breck on a non-exclusive basis. Said respondents cause and have caused said products to be transported in substantial quantities from their said place of business in the State of Wisconsin to respondent Joseph Breck & Sons Corporation at its place of business in the State of Massachusetts.

II

In the course and conduct of their business and for the purpose of inducing the purchase of their said products, said respondents William E. Brown and John R. Seeger, co-partners, doing business as The Dioptron Company, represented either directly or through respondent Joseph Breck & Sons Corporation in advertising matter of general circulation (a) that the use of said products will eliminate flies; (b) that the use of said products will prevent any possibility of disease caused by flies; (c) that the use of said products will prevent polio; and (d) that the fly trap manufactured by said respondents was nationally approved for use by the Boy Scouts.

III

In truth and in fact, said products will not (1) eliminate all flies in a given area; (2) prevent the possibility of disease caused by flies; or (3) prevent the spread of polio. Said products, however, will aid in reducing the fly population and, to that extent, will decrease the possibility of disease being caused by flies.

IV

With respect to the representations made by said respondents concerning the approval of respondents' fly trap "for use for the Boy Scouts," it appears that a catalogue of Camp and Waterfront Equipment published by the National Supply Service Division of the Boy Scouts of America in 1953 contains an advertisement of "Big Stinky" as a fly control. It was advertised "for controlling and abating fly problem at camp and other rural installations. Flies are lured by odor, keep regenerating trap. Tested and endorsed by Health and Safety Service." It further appears that the Purchasing Agent of the Boy Scouts, operating under the National Supply Service Division, in a letter dated January 7, 1952, addressed to respondent William E. Brown, stated with respect to the "Big Stinky Fly Trap," "We have decided after a thorough trial and on recommendation of our Health and Safety Committee to list this item in our camp catalogue, which we are working on at the present time." However, an Assistant Director of the

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Conclusion

Supply Service Division of the Boy Scouts of America testified that the statement quoted from the catalogue did not authorize anyone to state that the item had been approved by the Boy Scouts or was endorsed by the Boy Scouts without explicit authorization for such reference in advertising. He further explained that respondents' advertising implied that the fly trap was an official item or product of the Boy Scouts of America which was not the case; that normally such official items would be made according to the Boy Scouts' specifications and would carry the seal of the Boy Scouts of America and that respondents' fly trap had never carried such seal. It was admitted by him that the product had been approved to the extent that it "was approved for use by our local Councils primarily in the conduct of their local Scout Camps." This witness insisted, however, that his organization had not given to the respondents herein authorization to make such reference in advertising and that his organization objected to such advertising as a matter of organization policy.

CONCLUSION

The use by respondents of the foregoing false, misleading and deceptive statements and representations mentioned in Paragraph III hereof has had and now has the tendency and capacity to mislead a substantial portion of the purchasing public and distributors into the erroneous and mistaken belief that such statements were and are true and to induce a substantial portion of the purchasing public and distributors because of such mistaken and erroneous belief to purchase the fly trap and baiting fluid sold by respondents and to unfairly divert substantial trade to respondents from their competitors.

With respect to the representations that the respondents' product was "approved for use for the Boy Scouts," it is believed that this representation is substantially true and, although the Boy Scouts of America may have objection to such representation, the fact that these products were advertised in the Boy Scout catalogue as products "Tested and endorsed by Health and Safety Service" would justify the respondents in advertising that the products had been approved for use for Boy Scouts unless the Boy Scouts of America had specifically notified the respondents that such catalogue listing did not authorize respondents to represent to the public that the products had been approved for use for Boy Scouts. Furthermore, the letter in the record written by the Purchasing Agent of the Boy Scouts of America to respondent Brown advising him that the trap was to be listed in the camp catalogue which was to be

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distributed to local retail dealers and local Council Camps without advising that such action on the part of the Boy Scouts of America did not entitle these respondents to advertise this fact, would also tend to justify the respondents in the statements made as alleged in the complaint. Accordingly, the allegations of the complaint with respect to this representation should be dismissed.

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

ORDER

It is ordered, That respondents William E. Brown and John R. Seeger, copartners, doing business as The Dioptron Company; and Joseph Breck & Sons Corporation, a corporation, and its officers; and Luther A. Breck, Jr., James Shiels and Clarence Wells, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of the fly trap and baiting fluid designated respectively as "Big Stinky Fly Trap" and "Big Stinky Control Fluid," or by any other name or names, do forthwith cease and desist from representing, directly or by implication, that the use of their said products will:

1. Eliminate flies.
2. Prevent the possibility of disease caused by flies.
3. Prevent polio.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the allegation in Paragraph Six thereof.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

The Commission having considered the initial decision of the hearing examiner herein; and

It appearing that the respondent Joseph Breck & Sons Corporation was erroneously designated "John Breck & Sons Corporation" in Paragraph II of the findings of fact; and

It further appearing that the words "and its officers" were erroneously omitted from the order to cease and desist:

It is ordered, That this case be, and it hereby is, placed on the Commission's own docket for review.

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Decision

It is further ordered, That the name "Joseph Breck & Sons Corporation" be, and it hereby is, substituted for the name "John Breck & Sons Corporation" in Paragraph II of the findings of fact contained in the initial decision.

It is further ordered, That the words "and its officers" be, and they hereby are, inserted immediately after the words "Joseph Breck & Sons Corporation, a corporation," in the order to cease and desist contained in said decision.

It is further ordered, That the initial decision as so modified shall, on the 18th day of February 1956, become the decision of the Commission.

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

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IN THE MATTER OF
DAVID CRYSTAL, INC.

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

Docket 6412. Complaint, Sept. 13, 1955—Decision, Feb. 22, 1956

Consent order requiring a manufacturer in New York City to cease representing—through use in advertisements in periodicals and on attached labels the word "London", the word "Limited" or its abbreviation "Ltd.", a pictorial simulation of the British Royal Coat of Arms, and the phrase "By Appointment to H. M. the Late King George VI"—that the men's and women's clothing it manufactured was made in England.

Before *Mr. Everett F. Haycraft*, hearing examiner.
Mr. R. D. Young, Jr. for the Commission.
Mr. Arnold M. Grant, of New York City, for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that David Crystal, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, David Crystal, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 498 Seventh Avenue, New York, New York.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the design, manufacture, sale and distribution of men's and women's wearing apparel.

In the course and conduct of its business, respondent ships its said wearing apparel from the State of New York to the purchasers thereof located in various other States and in the District of Columbia, and maintains, and has maintained, a course of trade in said wearing apparel, in commerce, between and among the various States of the United States and in the District of Columbia.

3. In the course and conduct of its business as aforesaid, and for the purpose of inducing the purchase of its said wearing apparel, in commerce, respondent made and is now making certain

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statements in advertisements inserted in periodicals and on labels attached to said wearing apparel. Among and typical, but not all inclusive, of said statements so made are the following:

(a) By Appt Shirtmakers to H.M. the Late King George VI

A.

IZOD LTD.

J. (Coat of Arms)

of London

Izod of London, New York 18, New York

(b) A.

IZOD LTD. (Coat of Arms)

J.

of London

American Producers—David Crystal, Inc.

(c) A. J. IZOD LTD.

of London

D'Armigene Sleeve Golfer

Pat. #2,668,955

by Vin Draddy

(d) The shirts, walking shorts, and beach trunks,
all designed by Izod of London. * * *

PAR. 4. Through the use of the aforesaid statements, and others of similar import but not specifically set out herein, respondent represented and now represents that its said wearing apparel was and is designed and manufactured in London, England.

PAR. 5. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact, said wearing apparel was not and is not designed or manufactured in London, England, but on the contrary said wearing apparel was and is designed and manufactured in New York, New York, by David Crystal, Inc., respondent herein.

PAR. 6. There is a preference on the part of substantial numbers of the purchasing public for wearing apparel designed or manufactured in London, England.

PAR. 7. In the course and conduct of its business respondent was and is in substantial competition in commerce with other corporations and with firms and individuals engaged in the sale of wearing apparel of the same nature as that sold by respondent.

PAR. 8. The use by respondent of the foregoing false, misleading and deceptive statements and representations had, and now have, the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that such representations and statements were and are true and to cause substantial numbers of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's

