

IN THE MATTER OF
ELIZABETH ARDEN, INCORPORATED, ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF
SUB-SECS. (a) AND (e) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15,
1914, AS AMENDED BY AN ACT OF CONGRESS APPROVED JUNE 19, 1936, AND OF
SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3183. Complaint, May 9, 1939,¹—Decision, Oct. 3, 1944

Under the provisions of sub-section (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act—which make it unlawful for any person to discriminate in favor of one purchaser against another, etc., of a commodity bought for resale, etc., by contracting to furnish or furnishing, etc., any services or facilities connected with the processing etc., of such commodity upon terms not accorded to all purchasers on proportionally equal terms—the seller is afforded a free election in the first instance as to the services or facilities, if any, he will provide to purchasers of his products; but, having elected to furnish a particular service or facility to a particular purchaser or purchasers, he thereby assumes the obligation of according similar service to all competing purchasers to the extent required by the statute, and the furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms, the proportionalization of the terms contemplated in the phrase concerned necessarily including the proportionalization of the service or facility, as well, and the statute does not permit a seller so to tailor his terms as to favor a particular customer or group of customers and exclude all the rest.

Where two corporations and an individual—owner, respectively, of ninety percent and all of their outstanding capital stock, and active head of both—engaged in the manufacture and interstate sale and distribution of their “prestige” line of cosmetics and toilet preparations—totaling about one thousand different items—to customers selected with a view to maintaining and enhancing such “prestige,” and including some 725 department stores, 25 specialty shops and 2,250 drug stores;

In furnishing so-called “demonstrators”—i.e., retail sales employees, who, trained to that end, by them, were skilled in presenting to the public the use and advantages of their product in the manner desired by them and in keeping with their “prestige” policy, and whose salary or compensation, in whole or in part, they directly or indirectly bore, or contributed to customers on the basis of individual negotiation by them with each, in which connection they (1) had no definite fixed requirement; but (2) sought assurance as to such various matters as maintenance of a “representative” stock of their products, considering the type of the particular store, its location, etc.; prominently located display counters devoted exclusively to their products; the advertising of their products at least once or twice a month, a portion of the cost of which they bore in varying degrees;

¹ Amended and supplemental complaint.

window displays; and the tying-in of their products with fashion shows given by the store; and (3) made their final determination as to whether or not demonstrator services would be furnished, by deciding whether aggregate "cooperation" which they could secure made the transaction a desirable one from their standpoint—

Discriminated as among competing purchasers of their products by furnishing said demonstrators—a material saving and profitable service to the store concerned—upon terms and conditions which were such that only a few of their customers could comply therewith, by which more than ninety percent who could not comply were excluded from any opportunity to secure such services on a proportional basis or any basis whatever, and which failed to accord such services to customers desiring the same and competing in the resale of their products with those favored; not acting in good faith, in so doing, to meet the action of a competitor, but following a policy intended to beat competition and formulated and executed for the broad purpose of promoting their general interests without special reference to specific demonstrator competition in particular accounts, and as an aggressive rather than defensive one:

Held, That such acts and practices, under the circumstances set forth, constituted a violation of sub-section (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

In considering the question as to whether or not certain sellers of a "prestige" line of cosmetics and toilet preparations violated the provisions of sub-section (e) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act in furnishing demonstrators or trained retail sales employees, expenses of whom they bore in whole or in part, to certain customer-purchasers without making such services available to all on proportionally equal terms, and in considering in said connection (1) sellers' assertion that they were willing to furnish demonstrator service to any customer who requested it and who could and would comply with their requirements, and that this satisfied the section involved, where it appeared that in establishing their requirements they were well aware that more than 90% of their customers could not qualify thereunder for such service; (2) the fact that they withdrew such service from time-to-time from customers who did not supply satisfactory "cooperation"; (3) frankly stated they would refuse it to any customer who could not and did not offer to meet their requirements; and (4) treated the granting or withholding of it in particular cases as a matter to be determined solely in accordance with the best interest of the seller; and when, as aforesaid noted, their terms were not proportionally equal as required by the statute but were such that only a few could comply therewith, their position would not have been helped by the futile gesture of informing their customers of the terms in question.

As respects sellers' defense of their practice of granting demonstrator service to some customers and not to competing customers upon the ground that their competitors furnished similar services and facilities and it was necessary for them to meet such competition: Where it appeared that beginning with about 1930 said sellers had installed demonstrator service in more than twenty accounts prior to any of various competitors involved, maintained such service in thirteen other accounts where none of said competitors had demonstrators and—contrary to their assertion that they did not furnish demonstrator services until 1930, long after their competitors were engaged in the practice—were furnishing permanent demonstrators

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at least as early as 1925 (as an outgrowth of a practice ante-dating 1930 of furnishing forms of selling services of a temporary nature to some of their larger customers) and where such evidence showed they had not pursued a "no-demonstrator" policy from which occasional exceptions were made to meet the action of a competitor, but had actively pursued a demonstrator policy intended to beat competition and formulated and executed to promote their general interest without reference to specific competition in particular accounts, and as an aggressive rather than a defensive policy, and that they made no effort to comply with the provisions of the sub-section concerned after its enactment in 1936, by either discontinuing the service or removing the discrimination by proportionalizing the term, they failed to show that the demonstrator services furnished by them were supplied in good faith to meet the actions of a competitor or competitors.

Before *Mr. John W. Addison* and *Mr. John L. Hornor*, trial examiners.
Mr. Fletcher G. Cohn, *Mr. Frank Hier* and *Mr. P. R. Layton* for the Commission.

Townley, Updike & Carter, of New York City, for respondents.

AMENDED AND SUPPLEMENTAL COMPLAINT ¹

COUNT I

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particu-

¹ By order dated June 5, 1942 the Commission dismissed Count III of the amended and supplemental complaint herewith, and Count II of the amended complaint, as follows:

This matter coming on to be heard by the Commission upon the request of counsel for the Commission for dismissal of those charges contained in the amended and the amended and supplemental complaints herein which refer to violation of Section 5 of the Federal Trade Commission Act, and the Commission having considered said request and the record herein and being now fully advised in the premises.

It is ordered, That Count II of the amended complaint and Count III of the amended and supplemental complaint herein, both of which counts charge violation of Section 5 of the Federal Trade Commission Act by the respondent herein, be, and the same hereby are, dismissed.

Count II of the amended complaint, above referred to, reads as follows:

PARAGRAPH 1. Paragraphs 1 and 2 of Count I hereof are hereby adopted and made a part of this Count as fully as if set out herein verbatim.

[Said paragraphs 1 and 2 follows:]

[Paragraph 1. Respondent, *Elizabeth Arden, Inc.*, is a corporation, organized and existing under the laws of the State of New York, and respondent, *Elizabeth Arden Sales Corporation*, is a corporation, organized and existing under the laws of the State of Delaware.

[Respondent, *Florence N. Louis*, owns and controls ninety percent of the issued, outstanding capital stock of respondent corporation, *Elizabeth Arden, Inc.*, and all of the issued, outstanding capital stock of respondent corporation, *Elizabeth Arden Sales Corporation*, and is now, and has been during all material times hereinafter mentioned, in active direction and control of the business and business methods and policies of respondent corporations; and in all things hereinafter alleged has been and now is acting with and through respondent corporations. All respondents have their principal place of business at 681 Fifth Avenue, New York, N. Y.

[Par. 2. For more than one year last past, respondents, *Florence N. Louis* and *Elizabeth Arden, Inc.*, have been and now are engaged in the manufacture of cosmetics and other toilet articles; and said respondents, *Florence N. Louis* and *Elizabeth Arden Sales Corporation*, have been and are engaged in the sale of said products in interstate commerce to their customers located in the several states of the United States, causing said products, when sold, to be shipped from their said place of business in the State of New York to said customers.]

PAR. 2. In the course and conduct of their business as aforesaid, respondents furnish to certain of their customers engaged in the resale of their products the services of sales persons or clerks, generally known as demonstrators, who are assigned to the stores of such customers for the purpose of displaying, demonstrating and selling the said products manufactured by respondents to the customers and prospective cus-

larly designated and described, have violated the provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, Sec. 13), hereby issues its amended and supplemental complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Elizabeth Arden, Inc., is a corporation, organized under the laws of the State of New York with its office and principal place of business located at 681 Fifth Avenue in the city of New York, State of New York.

Respondent, Elizabeth Arden Sales Corporation, is a corporation, organized under the laws of the State of New York with its office and principal place of business also located at 681 Fifth Avenue in the city of New York, State of New York. Said respondent is the sole distributor for the commodities manufactured by respondent, Elizabeth Arden, Inc.

Respondent, Florence N. Lewis, owns and controls 90 percent of the issued outstanding capital stock of said respondent, Elizabeth Arden, Inc., and all of the issued outstanding capital stock of said respondent, Elizabeth Arden Sales Corporation, and is now and has been during all times herein mentioned in active direction and control of the business, business methods and business policies of the aforesaid respondent corporations, and in all things herein alleged, has been and now is acting with and through said respondent corporations. Said respondent, Florence N. Lewis', office and principal place of business is likewise located at 681 Fifth Avenue in the city of New York, State of New York.

Respondents, Elizabeth Arden, Inc., Elizabeth Arden Sales Corporation and Florence N. Lewis, are engaged in the manufacture, sale and distribution of cosmetics and toilet preparations as herein described. Respondents cause said commodities when sold to be transported from their place of business in the State of New York to the purchasers thereof located in the various States of the United States and in the District of Columbia.

tomers of such retail stores. Such demonstrators appear to the public to be employees of, and to be acting solely for, the dealer in whose store they are placed, and the public is not informed that they are in fact employees of, and acting in the interest of, respondents.

PAR. 3. The foregoing acts and practices of respondents, as described in paragraph 2 hereof, constitute unfair methods of competition in that said acts and practices deceive the public, have a tendency to, and do, place a restraint not only upon competition between respondents and other manufacturers, but also upon competition between favored retail customers of respondents and those retail customers of respondents and of other manufacturers who do not receive the benefits of said described unfair methods of competition. The said methods cast upon competitors of the respondents the burden of the loss of business unless they engage in similar acts and practices.

PAR. 4. There are among respondents' competitors many manufacturers and distributors of cosmetic products who do not employ demonstrators. As a result of the practices of respondents, there has been, and does exist, a tendency to suppress and stifle competition in the sale of cosmetics and other toilet articles in interstate commerce and in the retail sale of said products, and trade has been unfairly diverted to the respondents from their said competitors, as well as from those retail customers of respondents and of other manufacturers who do not receive the benefits of such practices to such of respondents' customers who do receive the benefit of said practices; and the ability of said manufacturers to compete successfully with respondents, and of said retail customers to compete with said favored customers, has been and is lessened and injured by the methods of respondents hereinabove set forth.

PAR. 5. The acts and things, hereinabove alleged, to have been done by the respondents are to the prejudice of the public and the competitors of respondents, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said cosmetics and toilet preparations sold and distributed by them in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 2. Respondents in the course and conduct of their business as aforesaid, are in actual and substantial competition with other corporations and partnerships, firms and individuals engaged in the sale and distribution of cosmetics and toilet preparations in commerce among and between the various States of the United States and in the District of Columbia. Respondents in such course and conduct of their business in commerce as aforesaid, are in competition with other corporations and with partnerships, firms and individuals engaged in the sale and distribution of cosmetics and toilet preparations, and many purchasers of respondents' aforesaid commodities and other sellers and distributors of like commodities, are competitively engaged in the resale and distribution of such commodities.

PAR. 3. In the course and conduct of their business as aforesaid, respondents are selling and distributing their cosmetics and toilet preparations to different purchasers engaged in reselling and distributing the same within the United States and the District of Columbia.

In the course of such sale and distribution of their cosmetics and toilet preparations, respondents are differentiating in price between such different purchasers of their said commodities of like grade and quality sold to such purchasers for resale as aforesaid, by giving and allowing to certain of such purchasers varied price discounts more favorable than given or allowed to other of such purchasers, in manner and method among others as follows:

(a) By giving and allowing a price discount of 25% from the retail or list prices of their cosmetic and toilet preparations of like grade and quality to such purchasers as aforesaid whose total annual purchases valued at retail or list prices amount to less than \$200.00, and by giving and allowing a price discount of $33\frac{1}{3}\%$ from the retail or list prices of their cosmetic and toilet preparations of like grade and quality to other of such purchasers as aforesaid whose total annual purchases valued at retail or list prices amount to \$200.00 or more but less than \$3,000.00 and further

(b) By giving and allowing a price discount of $33\frac{1}{3}\%$ plus 5% from the retail or list prices of their cosmetic and toilet preparations of like grade and quality to other of such purchasers whose total annual purchases valued at retail or list prices amount to \$3,000.00 or more but less than \$7,500.00, and by giving and allowing a price discount of 40% from the retail or list prices of their cosmetic and toilet preparations of like grade and quality to other of such purchasers whose total annual purchases valued at retail or list prices amount to the sum total of \$7,500.00 or more.

PAR. 4. Respondents' variant price discounts as given and allowed in manner and method as hereinbefore set out, constitute discriminations in price between different purchasers of respondents' commodities of like grade and quality sold and distributed to such purchasers for resale, the effect of which may be substantially to lessen competition in such purchasers line of commerce and to injure, destroy and prevent competition with such customers of respondents as receive the benefits of said discriminatory price discounts by such other competing customers of respondents as do not receive the benefits of such greater discounts.

PAR. 5. The aforesaid methods, acts and practices of the respondents, Elizabeth Arden, Inc., Elizabeth Arden Sales Corporation and Florence N. Lewis, as herein alleged, are in violation of Paragraph (a) of Section 2 of the Clayton Act as amended (U. S. C., Title 15, Sec. 13).

COUNT II

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and herein more particularly designated and described, have violated the provisions of Section 2 of the Clayton Act as amended by the Robinson-Patman Anti-Discrimination Act, approved June 19, 1936 (U. S. C., Title 15, Sec. 13), in this its amended and supplemental complaint, herewith further states its charges with respect thereto as follows:

PARAGRAPH 1. Paragraph 1 of Count I is hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 2. In the sale and distribution of cosmetics and toilet preparations and in the course of trade as aforesaid, respondents are selling and distributing their cosmetics and toilet preparations directly to purchasers engaged in reselling and distributing the same directly to the purchasing and consuming public. In the furtherance of such sale and distribution and such resale and distribution of their cosmetics and toilet preparations as aforesaid, respondents are also contracting to furnish, are furnishing and are contributing to the furnishing to some but not all of such foregoing purchasers the services and facilities of special personnel known and described in the cosmetic and toilet preparations industry and trade as demonstrators.

Such demonstrators so furnished by respondents, in manner and method aforesaid, are installed in the places of business of certain of such foregoing purchasers of respondents' commodities to display, demonstrate, offer for sale and sell cosmetics and toilet preparations and as so furnished, installed and used, constitute substantially valuable services and facilities in connection with such purchasers' resale and distribution of the aforementioned commodities.

PAR. 3. Many of the foregoing purchasers of respondents' cosmetics and toilet preparations bought for resale are in competition with each other in the resale and distribution of said commodities, and respondents are discriminating in favor of such of said competitive purchasers who are furnished and accorded on terms the aforescribed services and facilities in manner and method as hereinbefore set out, against all of such competitive purchasers of respondents' commodities who are not accorded the same on proportionally equal terms.

PAR. 4. The aforesaid methods, acts and practices of the respondents, Elizabeth Arden, Inc., Elizabeth Arden Sales Corporation and Florence N. Lewis, as herein alleged, are in violation of Paragraph (e) of Section 2 of the Clayton Act, as amended (U. S. C., Title 15, Sec. 13).

COUNT III

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 Elizabeth Arden, Inc., as corporation, Elizabeth Arden Sales Corporation, a corporation, and Florence N. Lewis, an individual, hereinafter referred to as respondents, have violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, in this its amended and supplemental complaint now states its charges in respect thereto as follows:

PARAGRAPH 1. Paragraphs 1 and 2 of Count I and paragraph 2 of Count II are hereby adopted and made a part of this Count as fully as if herein set out verbatim.

PAR. 2. The confidence of the purchasing and consuming public in the merit of the merchandise carried by, and in the integrity of the personnel and the reputation for the business practices of, many of the retail stores purchasing respondents' said commodities for resale, is conducive to the ready sale by such retail stores of said commodities, and prospective purchasers and purchasers, in the selection, purchase and use of commodities as are herein described, have become accustomed to seek and accept as expert aid and advice the help and suggestions of such retail store personnel as are engaged in the sale of such commodities. Prospective purchasers and purchasers are guided largely by the aid and advice of such personnel in the selection and purchase of said commodities.

Such personnel as employed and furnished by respondents and installed in certain recipient purchasers' places of business as aforesaid, directly or impliedly are held out and appear to the prospective purchasing, the purchasing and consuming public as store sales personnel solely interested in such store sales as a whole, and the aforesaid public is not aware or informed of the true status of such personnel or of the fact that they are working directly in the interest of respondents.

Prospective purchasers and purchasers in the selection and purchase of cosmetics and toilet preparations as above, are misled and deceived into so relying upon such personnel as furnished by respondents and installed as aforesaid, under the erroneous impression and belief that such personnel is store sales personnel working solely and only in the interests of and under the instructions and control of the respective stores concerned. Such deception of the prospective purchasing, the purchasing and the consuming public is further enhanced by the active participation of said personnel in such functions and duties as are usually expected of and performed by the sales personnel of said stores.

PAR. 3. Personnel furnished to certain purchasers by respondents, in the manner and method, as hereinbefore set out, for the most part are skilled in displaying, demonstrating, offering for sale and selling cosmetics, and toilet preparations and in the giving of advice, suggestions and information designed to increase and further the sales and use of said commodities.

Such personnel, when furnished said purchasers and installed in their places of business, as aforesaid, are particularly able to push and stress the merits, sales and use of respondents' commodities over and above and in opposition to the like and similar commodities of respondents' competitors.

Personnel employed by respondents and furnished to said certain purchasers and installed as aforesaid, depend solely and only for continuance in such employment upon adequate sales of respondents' commodities. In addition to the foregoing incentive toward continuing in such employment through the meeting of respondents' sales requirements, such personnel, as a further spur toward sales of respondents' commodities, are also awarded such bonuses and commissions in these connections as their services and sales records warrant in the sole determination of respondents.

Respondents' aforesaid personnel plan as used in the manner and method as hereinbefore set out is deceptive to a substantial number of the prospective purchasing, the purchasing and the consuming public in their selection of cosmetics and toilet preparations for purchase and use, and additionally has the capacity and tendency to lend itself to misrepresentation of competitors' commodities and the substitution of respondents' therefor at the point of the retail sale of such commodities. Such plan further has the capacity and tendency to deprive and prevent a substantial number of the aforesaid public in their selection of cosmetics and toilet preparations for purchase and use, of the complete exercise of their right to full access to and free choice of said commodities or such of said commodities as may be most suitable or adaptable to their particular needs and requirements.

PAR. 4. There are among respondents' competitors in commerce and other competitive sellers and distributors of cosmetics and toilet preparations, many who do not contract to furnish and who do not furnish or contribute to furnishing of sales personnel as hereinbefore described, and there are among the customers of respondents and respondents' competitors in said commerce and other competitive sellers and distributors of cosmetics and toilet preparations many engaged in the resale and distribution of said commodities who are not furnished and who do not avail themselves of such sales personnel as aforementioned.

PAR. 5. The foregoing methods, acts and practices of respondents constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in that said methods, acts and practices have the capacity and tendency to, and do, mislead and deceive a substantial portion of the prospective purchasing, the purchasing and the consuming public in the selection, purchase and use of cosmetics and toilet preparations and cause them to purchase respondents' said commodities and further place in the hands of unscrupulous dealers an instrumentality whereby fraud and deception therein may be practiced on said public. Said methods, acts and practices of respondents further have the capacity and tendency to, and do, place a restraint upon, stifle and substantially lessen competition between respondents and respondents' competitors in commerce and other sellers and distributors of cosmetics and toilet preparations, and between those customers of respondents and respondents' competitors and other sellers and distributors engaged in reselling and distributing cosmetics and toilet preparations who do not adopt, engage in or receive the benefits of the above described methods, acts and practices of respondents.

Respondents' said methods, acts and practices, as above described, place an uneconomical, unethical and unfair burden on present and poten-

tial competitors of respondents and certain of respondents' customers who are morally unwilling to engage in, adopt or enter the market and compete with the respondents and certain of respondents' customers on such basis and the burden of choice between loss of business and adoption and use of methods, acts and practices similar or equivalent to those engaged in and practiced by respondents and certain of their customers, as aforesaid, is thus unfairly cast by respondents upon the aforesaid competitors. Such methods, acts and practices as aforesaid unduly enhance the prices of cosmetics and toilet preparations to the purchasing public without any corresponding benefit to said public in exchange. All of said methods, acts and practices of respondents as hereinabove described are deceptive to the public, opposed to good morals in trade, and contrary to public policy.

As a result of the above described methods, acts and practices of the respondents, the public has been deceived and substantial injury has been done and is now being done by the said respondents to the public and to competition in the sale and distribution and the resale and distribution of cosmetics and toilet preparations in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 6. The aforesaid methods, acts and practices of the respondents, Elizabeth Arden, Inc., Elizabeth Arden Sales Corporation and Florence N. Lewis, as herein alleged, are all to the prejudice of the public, and of respondents' competitors and other sellers and distributors of cosmetics and toilet preparations engaged in the sale and distribution and the resale and distribution of the same as aforesaid and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

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 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on May 15, 1937, issued and subsequently served its complaint upon respondents, Elizabeth Arden, Inc., and Elizabeth Arden Sales Corporation, charging them with violation of the provisions of subsections (a), (d), and (e) of Section 2 of the said Clayton Act as amended. Thereafter, on June 25, 1937, the Commission issued and subsequently served its amended complaint upon the aforesaid respondents and upon respondent Florence N. Lewis, charging them with violation of subsections (a), (d), and (e) of Section 2 of said Clayton Act as amended, and with violation of the provisions of the Federal Trade Commission Act. After the said respondents filed their answers to said amended complaint, the Commission on May 9, 1939, issued and subsequently served upon the corporate respondents and respondent, Florence N. Lewis, its amended and supplemental complaint, charging them with violation of subsections (a) and (e) of Section 2 of said Clayton Act as amended, and with violation of the provisions of the Federal Trade Commission Act in the sale and distribution of cosmetics, perfumes, toilet preparations, and accessories.

After the issuance of said amended and supplemental complaint and the filing of respondent's answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore duly designated by it. Thereafter, this proceeding regularly came on for final hearing before the Commission on Counts I and II of said amended and supplemental complaint (Count III having been dismissed by order of June 5, 1942), the answers thereto, testimony and other evidence (report by the trial examiner having been waived), briefs in support of and in opposition to the complaint, and oral arguments of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent, Elizabeth Arden, 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 at 681 Fifth Avenue, New York, N. Y.

(b) Respondent, Elizabeth Arden Sales Corporation, is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 681 Fifth Avenue, New York, N. Y.

(c) Respondent, Florence N. Lewis, is an individual, with her office and principal place of business at 681 Fifth Avenue, New York, N. Y.

(d) Respondent, Florence N. Lewis, owns 90 percent of the outstanding capital stock of respondent, Elizabeth Arden, Inc., and all of the outstanding capital stock of Elizabeth Arden Sales Corporation. Respondent, Florence N. Lewis, generally known as Elizabeth Arden, controls, directs, and is the active head of both of the corporate respondents. The corporate respondents are mere instrumentalities through which she conducts the business of producing and selling cosmetics and toilet preparations, her manufacturing operations being carried on through respondent, Elizabeth Arden, Inc., and the sale and distribution of her products being handled through Elizabeth Arden Sales corporation. For all practical purposes the three respondents form a business entity, and except as otherwise specifically stated they are hereafter referred to as a unit without differentiation as among them.

PAR. 2. In the course and conduct of their aforesaid business of manufacturing, selling, and distributing various cosmetic and toilet preparations, respondents transport their said products, or cause them to be transported, from their place of business in New York to purchasers at their various points of location in States other than the State of New York, and maintain, and have maintained, a course of trade in said products in commerce among and between the several States of the United States and in the District of Columbia.

PAR. 3. Respondents' products, known as the Elizabeth Arden line, consist of creams, lotions and oils, powder foundations, powders, rouge, lipsticks, eye make-up, hair preparations, deodorants and depilatories,

hand preparations, bath accessories, perfumes, and various other beauty preparations, appliances, and accessories. According to respondents' price list these products, including various sizes, shades, and odors, total approximately 1,000 different items. The Elizabeth Arden products, a "prestige" line, are said to stand at or near the top of the competitive field in their appeal to those who wish to purchase products having an aura of "exclusiveness" or representing "high fashion." Respondents sell their products to some 725 department stores, some 25 specialty shops, and about 2,250 drug stores. Their customers are selected with a view to enhancing and maintaining the "prestige" of the Elizabeth Arden line.

PAR. 4. (a) For a long period of years respondents, at their own expense, have furnished to a few of their customers salesgirls who act as clerks in such customers' stores to promote the sale of and sell Elizabeth Arden products to members of the public. Various terms have been used to designate the salesgirls thus furnished to retailers by respondents and other cosmetic manufacturers, but they are most frequently referred to as "demonstrators." This term is a misnomer in that a "demonstrator" is merely a retail sales employee, but because of its general use in the trade the term will be used hereafter to designate retail sales employees paid in whole or in part by manufacturers and furnished to their customers. The origin of the practice of cosmetic manufacturers supplying demonstrators to retail stores is unknown, but it is shown by the record to have existed for at least 50 years, and probably longer. Many of the cosmetic manufacturers who supplied demonstrators to their customers 20 or more years ago are now out of business and it is impracticable, if not impossible, to determine the originators of this practice in the cosmetic industry.

(b) Respondents sometimes send a demonstrator to the store where she is to be stationed and sometimes select and train a girl who is already a sales employee of the store in question, but in either instance such girls are skilled in presenting to the public the uses and advantages of respondents' products in the manner desired by respondents and which, in their view, is in keeping with their "prestige" policy. These demonstrators are actually under the immediate direction of the store where they work, but their duties are primarily, though not exclusively, the sale of Elizabeth Arden products. If a customer asks specifically for the product of another manufacturer, the demonstrator will sell it, and she will also make herself generally useful in the cosmetic department of the store insofar as she can do so without neglecting her principal business of promoting the sale of and selling Elizabeth Arden products.

(c) Respondents sometimes make salary payments directly to their demonstrators, but more frequently the store in which they work pays their weekly salaries and is reimbursed from time to time by respondents for these payments. Sometimes the payments to the stores are made by check and sometimes by credit memoranda pursuant to which the stores deduct the amount of such memoranda from their payments for merchandise purchased from respondents. To some of their customers respondents pay the full salary of the Arden demonstrators; to some they furnish more than one fully paid demonstrator; and to some they pay only part, usually one-half of the demonstrator's salary. In some instances a commission based upon a specified percentage of the invoice value of the Arden products purchased is paid to the store with the intention and understand-

ing that it be applied toward the payment of the salesgirl who devotes her time principally to the sale of Elizabeth Arden products. Occasionally, the store where a fully paid demonstrator is supplied may add a small sum to the weekly salary authorized and paid by respondents. In cases where they think it desirable, respondents pay a small commission to their demonstrators on sales made in excess of some fixed weekly sales quota. Regardless of the exact procedure followed in paying the salary of demonstrators, the purpose and effect is to furnish or contribute to the furnishing to selected retail stores of skilled sales employees to resell to the purchasing public the Elizabeth Arden products purchased from respondents by such stores.

PAR. 5. (a) Respondents contend that they have certain specific terms upon compliance with which by a customer they will furnish a demonstrator. This is not true, however, except in the broad general sense that respondents will furnish a demonstrator to a customer where in their own judgment the advantages received compensate them for the cost of the demonstrator and make it advantageous to them from a business standpoint to furnish a demonstrator.

(b) Where a demonstrator is furnished, respondents expect the customer to maintain what they term a "representative" stock of their products. This means a stock which includes all items for which there is likely to be any public demand, taking into consideration the type of the particular store, its location, the economic level of its customers, the display facilities available, the season of the year, and other factors. What constitutes a "representative" stock varies according to respondents' views in the particular instance. One of the duties of the demonstrator is to see that the stock of goods is maintained so that she can adequately meet the demands of customers.

(c) Where a demonstrator is furnished, respondents expect that the customer will make available adequate display counters in a prominent location in the store to be devoted exclusively to the display and sale of Elizabeth Arden products. The exact location and size of the space devoted to this purpose are flexible factors. Respondents seek the location they think most desirable and negotiate for a display as large and as elaborate as they can get. In some instances respondents have furnished counters and other store fixtures to customers. It is also their purpose to assure the display of all the Elizabeth Arden line in one place and not have it mixed with the goods of other cosmetic manufacturers. When demonstrator service is not furnished, the stores usually display the powders of a number of manufacturers in a group, lipsticks of a number of manufacturers in another group, and so on. One of the duties of the demonstrator is to maintain the segregated display of respondents' products in attractive form and condition.

(d) Where a demonstrator is furnished, respondents seek assurance that the customer will advertise Elizabeth Arden products at least once or twice a month. Respondents contribute to such advertising by defraying a portion of the cost, not to exceed a specified percentage of the value of the products purchased by the customer. In some cases respondents pay half the advertising cost; in other cases, pay two-thirds of the cost; and in rare instances, pay the full cost. This is a flexible factor and performance varies widely among the customers.

(e) Where a demonstrator is furnished, respondents seek to secure show window displays of their products. There is no specific requirement as to the number, duration, or type of such displays, but an effort is made to secure what respondents consider a reasonable number during the course of a year. Actual performance varies widely among customers.

(f) Where a demonstrator is furnished, respondents expect that if the store gives fashion shows for its customers Elizabeth Arden products will be "tied in" with the show and "mentioned" during it. They furnish cosmetics used by the models in such instances, and frequently their demonstrator or other employee applies the cosmetics to the models. This is a flexible factor and, of course, can be secured only from customers who stage fashion shows.

(g) Where a demonstrator is furnished, respondents seek to limit the cost of the demonstration service to themselves to not more than 10 per cent of the wholesale price of the Elizabeth Arden products purchased by the customer. This, however, is also a flexible factor in that the record shows costs of demonstrator services furnished to particular customers varying from about $7\frac{1}{2}$ per cent to about $11\frac{1}{2}$ per cent of the wholesale cost of goods purchased.

(h) As indicated in the preceding subparagraphs, respondents have no definite, fixed requirements and the things which they demand in return for demonstration service have not been reduced to a written schedule. Each agreement made with a customer for demonstrator service is negotiated upon an individual basis, with the respondents seeking as much as they can secure and making the final determination as to whether or not demonstrator service will be furnished by deciding whether the aggregate of the "cooperation" which they can secure makes it a desirable transaction from their standpoint. Actual performance among customers varies widely—some furnish little or none of one form of "cooperation" and perhaps more of another. In some instances customers who receive demonstrators are not aware of any requirements placed upon them, and apparently respondents believed from their information concerning such stores that sufficient "cooperation" in some form would be forthcoming to satisfy them.

PAR. 6. (a) Respondents actually furnish about 125 fully paid demonstrators to customers, but this does not mean that 125 customers receive that service. At least 22 customers have two or three demonstrators in one store, and other customers have demonstrators in more than one store. Respondents also furnish about 80 partially paid demonstrators to customers, and pay commissions to about 82 stores as a contribution to the compensation of girls selling Elizabeth Arden products. As stated in paragraph 3, respondents sell their products to some 725 department stores, 25 specialty shops, and 2,250 drug stores. It is plain, therefore, that only a few of respondents' customers are furnished with demonstrators to handle the sale of Elizabeth Arden products in their stores.

(b) Furnishing a demonstrator or contributing to the furnishing of a demonstrator constitutes a material service to a retail store purchasing respondents' products. It relieves the customer of all or part of the salary of the sales person needed to sell Elizabeth Arden products to the public. For example, respondents supply two demonstrators to Saks-Fifth Avenue store in New York City, and that store has about 40 salesgirls in its cos-

metic department, all paid by various manufacturers and not by the store; respondents furnish two demonstrators to Abraham & Strauss, and this customer has 33 salesgirls in its cosmetic department, only who of whom are paid by the store; respondents furnish one demonstrator to John Wanamaker, and this customer has about 26 salesgirls in its cosmetic department, only 10 of whom are paid by the store. It is not unusual for a large store to have from one-third to all of the clerk hire of its cosmetic department paid by cosmetic manufacturers. Respondents' demonstrator service also furnishes the store with a sales person particularly competent to sell Elizabeth Arden products to the public, and one whom respondents have, by intensive schooling, trained to that end. This skill reflects itself in increased sales of Elizabeth Arden products. For example, an instance appears in the record where the installation of an Arden demonstrator in a store tripled the store sales of Elizabeth Arden products over the sales for the preceding year, when no demonstrator was furnished.

(c) Respondents have customers who desire demonstrator services, but to whom such services are not accorded upon any basis. Respondent's terms and conditions are such that but few of their customers can comply, and their smaller customers are excluded from any opportunity to secure such services on a proportional basis or in any degree whatever.

PAR. 7. The record contains a list of all the stores to which respondents furnish demonstrators—whether fully paid, partly paid, or commission arrangements—together with the names of all other purchasers of respondents' products located in the same cities as the customers who receive demonstrator service. For example, in Philadelphia, Pa., respondents furnish fully paid demonstrators to the Blum Store, Bonwit Teller, B. F. Dewees, and Strawbridge & Clothier. They furnish partly paid demonstrators to Gimbel Brothers and N. Snellenberg & Company. They sell their products to 13 other purchasers in Philadelphia to whom no demonstrator service whatever is furnished. Witnesses representing several of these non-demonstrator accounts testified that they are in competition with other stores in Philadelphia who receive demonstrator services in the sale of Elizabeth Arden products to members of the purchasing public in Philadelphia. In some of the cities appearing in said list respondents have but one customer or, if more than one, all receive or none receive demonstrator service. In many of the cities so listed, however, respondents have customers some of whom receive and some of whom do not receive demonstrator services. In such instances the Commission infers from the location of such retail stores in the same city and from the general nature of the retail selling practices of department stores, specialty shops, and drug stores as shown in the record, and therefore finds, that the customers who offer respondents' products for sale to the purchasing public in the same city compete with each other for the patronage of members of that purchasing public.

PAR. 8. (a) Respondents assert that they are willing to furnish demonstrator service to any customer who requests it and who can and will comply with their requirements, and that this satisfies subsection (e) of Section 2 of the statute. In establishing the requirements which they did, respondents were well aware that more than 90 per cent of their customers could not qualify thereunder to receive demonstrator service. Respondents have not informed their customers generally of the demonstrator service which

they furnish or the terms upon which it will be furnished. Respondents have from time to time withdrawn demonstrator service from a customer who did not supply "cooperation" which satisfied them. They have frankly stated that they would refuse demonstrator service to any customer who could not and did not offer to meet their requirements. Respondents have treated the granting to or withholding of demonstrator service to particular customers as a matter to be determined solely according to the best interests of the seller. In other circumstances, the failure to inform their customers of the terms upon which demonstrator service would be furnished might be important, but respondents' position would have been no better in the present case if they had informed their customers of their terms. Where, as here, the only terms upon which the service or facility is granted are such that only a few customers could comply, the futile gesture of informing their customers generally of such terms would not satisfy the statute, because they would not be terms accorded to all purchasers on proportionally equal terms.

(b) The Commission is of the opinion that the statute affords the seller a free election in the first instance as to what services or facilities, if any, he will provide to purchasers of his products; but having elected to furnish a particular service or facility to a particular purchaser or purchasers, he thereby assumes the obligation of according similar services to all competing purchasers to the extent required by the statute. The furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms. The phrase "upon terms not accorded to all purchasers on proportionally equal terms" contemplates the proportionalization of the terms, and this necessarily includes the proportionalization of the service or facility as well. The statute does not permit a seller to so tailor his terms as to favor a particular customer or group of customers and automatically exclude all the rest of his customers. This is what respondents have done.

PAR. 9. (c) Respondents defend their granting of demonstrator services to some customers and not to competing customers upon the ground that their competitors furnished similar services and facilities and it was necessary for them to meet this competition. Respondents contend that they did not furnish demonstrator service until 1930, long after their competitors were engaged in the practice. In support of this contention respondents supplied a list said to show all their accounts where demonstrator service is maintained and the date of the installation of such service in each such account. With the exception of one account showing a date late in 1929, all other installation dates shown of this list are in 1930 or subsequent years. Respondents secured from their principal competitors—Helena Rubinstein, Dorothy Gray, Denny & Denny, Kathleen Mary Quinlan, Richard Hudnut, Harriet Hubbard Ayer, Coty, Charles of the Ritz, and Bourjois—data showing whether these companies installed demonstrators in each of the accounts where respondents furnished demonstrator service, if they did, either before or after the dates named by respondents. A comparison of these lists shows that respondents installed demonstrator service

in 20 accounts prior to any of their said competitors, and, in addition, maintained demonstrator service in 13 other accounts where none of the competitors named has demonstrators.

(b) It is clear from the record that respondents' contention that they did not commence furnishing demonstrators until 1930 is not true. Respondents reported that they first installed a demonstrator in the H. S. Pogue store in Cincinnati, Ohio, on September 1, 1930, but the fact is they commenced supplying demonstrator service to this customer in May or June 1925. Respondents reported that they first installed a demonstrator in Younker Brothers store in Des Moines, Iowa, on January 26, 1931, but the fact is that demonstrator service to this customer was commenced in April or May 1927. Respondents reported that they commenced supplying demonstrator service to L. Bamberger, Newark, N. J., on June 19, 1938, but the fact is they installed a demonstrator in this store in September 1927. In the last instance the service may have been discontinued at some time after 1929 and reinstated in 1938. Respondents reported that they commenced furnishing demonstrator service to Kerr Dry Goods Company of Oklahoma City, Okla., on October 13, 1930, but the fact is that they installed a demonstrator in this account in October or November 1925. Respondents reported that demonstrator service was installed in the J. L. Brandeis store in Omaha, Nebr., on February 2, 1931, but in fact demonstrator service to this customer was commenced in April 1927. Respondents supplied demonstrator service to other of their accounts for varying numbers of years prior to 1930, including Joseph Horne Company, Pittsburgh, Pa.; L. S. Ayres, Indianapolis, Ind.; Neiman-Marcus, Dallas, Tex.; Rike-Kumler, Dayton, Ohio; I. Magnin, San Francisco, Calif.; T. A. Chapman Company, Milwaukee, Wis.; Gimbel Brothers, Milwaukee, Wis.; Carson-Pirie-Scott, Chicago, Ill.; and L. S. Donaldson, Minneapolis, Minn. Had respondents furnished the actual dates on which demonstration services were commenced, the number of accounts in which they antedated their competitors would have been larger than that shown in the preceding subparagraph.

(c) In considering respondents' defense of meeting competition, attention must be given to the history of their use of demonstrators and the purpose and manner in which their policy has been executed. The development of respondents' present demonstrator policy has covered a long period of years. Prior to 1920 respondents furnished a selling service to some of their large customers by sending a representative to the customer's store for a limited period of time, usually not more than two weeks in a year and frequently less. These representatives served as consultants and advisers to members of the public who visited the store, and their business was the promotion of the sale of and, to a limited extent, the actual sale of Elizabeth Arden products for benefit of respondents' customers. Not later than the early 1920's customers in some instances furnished special rooms where respondents' representatives displayed, sold, and promoted the sale of Elizabeth Arden products. Originally these special rooms were staffed by respondents' representatives for only a limited period of time. At some point these services became permanent in the case of some of respondents' customers and changed in form to the usual demonstrator service heretofore described. Permanent demonstrators were furnished by respondents at least as early as 1925, and by the end of 1929 respondents were furnish-

ing demonstrators to a considerable number of their more important customers. Gradually, the permanent demonstrator practice tended to succeed and supplant the other forms of sales services previously furnished by respondents. According to the data furnished by respondents, which is erroneous to the degree already pointed out, they installed demonstrators in the number of accounts shown in each of the years listed below:

<i>Year</i>	<i>Accounts</i>	<i>Year</i>	<i>Accounts</i>
1929	1	1936	18
1930	23	1937	3
1931	37	1938	10
1932	16	1939	8
1933	19	1940	17
1934	18	1941	1
1935	8		

At least five of the demonstrators said to have been installed in 1930 and seven of those said to have been installed in 1931, and probably more in each of these years, were in fact installed in years prior to 1930.

(d) It is plain from the record that respondents have not pursued a "no-demonstrator" policy from which occasional exceptions were made to meet the action of a competitor; but, on the contrary, they have actively pursued a "demonstrator" policy intended to beat competition where possible, and formulated and executed for the broad purpose of promoting their general interests without special reference to specific demonstrator competition in particular accounts. This policy has been aggressive rather than defensive. When subsection (e) of Section 2 was enacted in 1936, respondents made no effort to comply with its provisions by either discontinuing their discriminatory demonstrator services or removing the discrimination by proportionalizing their terms. In view of the circumstances, the Commission concludes that respondents have not shown that the demonstrator services furnished by them were supplied in good faith to meet the actions of a competitor or competitors.

PAR. 10. The Commission concludes, and therefore finds, that respondents have, in the course of commerce, discriminated as among purchasers of their products by furnishing or contributing to the furnishing of services or facilities to some of their customers of material value in the handling, sale, or offering for sale of products purchased from the respondents, and concurrently failed to accord to competing purchasers of their products such services or facilities on proportionally equal terms or upon any terms whatever.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, constitute violations of subsection (e) of Section 2 of "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended and supplemental complaint of the Commission, the answers of respondents, testimony and other evidence in support of the allegations of said complaint and in opposition thereto taken before an examiner of the Commission theretofore duly designated by it, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that respondents have violated the provisions of subsection (e) of Section 2 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 (Clayton Act), as amended by Act approved June 19, 1936 (Robinson-Patman Act).

It is ordered, That respondents, Elizabeth Arden, Inc., a corporation, and Elizabeth Arden Sales Corporation, a corporation, their respective officers, representatives, agents, and employees, and respondent, Florence N. Lewis, an individual, her representatives, agents, and employees, either jointly or severally, directly or through any corporate or other device, in or in connection with the sale of cosmetics, perfumes, toilet preparations, or accessories in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, among competing purchasers of such products:

1. By furnishing or contributing to the furnishing of demonstrator services to any retailer purchasing their products when such services are not accorded on proportionally equal terms to other retailer purchasers located in the same city, or other retailer purchasers who in fact resell such products in competition with retailers who receive such services.

2. By furnishing or contributing to the furnishing of any services or facilities connected with the handling, sale, or offering for sale of products purchased from respondents to any retailer upon terms not accorded to competing retailers on proportionally equal terms.

It is further ordered, That the charge of unlawful discrimination in price contained in Count I of the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to institute further proceedings should future facts so warrant.¹

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

¹ Charge of violation of Section 5 of the Federal Trade Commission Act, as alleged in Count III of the complaint was dismissed by order dated June 5, 1942. See footnote to complaint on p. 290.

Order

39 F. T. C.

IN THE MATTER OF
AVERBACH COMPANY, INC. ET AL.

MODIFIED CEASE AND DESIST ORDER

Docket 3342. Order, October 4, 1944

Modified order in proceeding in question, in which original order issued on September 11, 1939, 29 F. T. C. 879, requiring respondents, their officers, etc., in connection with the offering for sale, etc., of flavoring compounds, foodstuffs, toilet articles and novelties in interstate commerce or in the District of Columbia, to cease and desist from misrepresenting their business status, methods, operation and size, prices, special offers, terms and conditions, agents' opportunities or earnings, value of their products, free goods, and composition and nature of their said products, as in said order in detail below set out.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answers of respondents in which answers respondents admit all the material allegations of fact set forth in said complaint and state that they waive all intervening procedure and further hearing as to said facts, and the Commission having duly made and issued its findings as to the facts, conclusion and order to cease and desist dated September 11, 1939; and the Commission having further considered said order to cease and desist and having given due notice to the respondents to show cause why the proceeding should not be reopened for the purpose of modifying said order in the respects and to the extent set out in said notice, and no appearance having been entered by any of the respondents; and the Commission having considered the matter and the record herein, and having concluded that the public interest requires the modification of said order in the respects and to the extent set out in said notice.

It is ordered, That the respondents, Averbach Co., Inc., a corporation, and Maid-O-Best, Inc., a corporation, their officers, agents, servants and employees, G. M. Moses, individually, and his agents, servants and employees, and Esther Averbach, Morris Averbach, and Jerome Averbach, individually, and trading variously under the names The Muriel Co. and American Chemical Co., and their agents, servants and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of flavoring compounds, foodstuffs, toilet articles and novelties in interstate commerce or in the District of Columbia, do forthwith cease and desist from:

1. Representing by photographs or in any other way that J. M. Gebbart, a fictitious person, or any other fictitious person, is a Director of Sales of Maid-O-Best, Inc.
2. Representing that Maid-O-Best, Inc., has a national sales organization until and unless said Maid-O-Best, Inc., actually has and maintains a