

Syllabus

IN THE MATTER OF
DICTOGRAPH PRODUCTS, INC.

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

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

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

- (a) Consistently followed, since 1937, a policy of making sales and contracts for sales of its products on the condition, agreement, and understanding that the purchasers thereof should not use or deal in hearing aid instruments or parts or accessories therefor sold and distributed by competitors;
- (b) Required also that all its distributors refrain from selling any used hearing aids or any which had been traded in as part payment for a new hearing aid;
- (c) Provided in its said contracts for the appointment of sub-distributors by its distributors in the territory allotted to them, on contract forms supplied by it and subject to the same restrictive exclusive-dealing provisions contained in the contract between it and the distributors;
- (d) Provided in its said contracts that they might be cancelled at any time, with or without cause, and that in said event the distributor would cancel the franchises of all its dealers and would not for a year engage in any hearing aid business in the territory concerned;
- (e) Required its distributors to sign supplements to such agreements by which they agreed that, upon termination of the contracts, they would surrender their telephone directory listing and authorize that any mail upon which appeared the name "Acousticon" or any variation of the word "Acoustic," be forwarded to its home office, said latter agreement being in such form as to constitute a directive to the Postal Department to forward all mail so addressed direct to it;
- (f) Brought to the attention of each distributor at the time of the execution of the written contract that such distributor must handle only its products; and through its exclusive-dealing clause in conjunction with the right of cancellation and the prohibitions against continuing in business for a year after cancellation, intimidated and coerced distributors and compelled them to purchase products concerned solely from it; and
- (g) Instructed its field representatives to check the stock of products carried by its dealers and distributors to determine whether any competitive products were being carried, and threatened those whom it discovered to be carrying such products with immediate discontinuance of the distributor's franchise pursuant to the cancellation provisions contained therein, and in the event of any such distributor's persistence in carrying such products, immediately discontinued him;

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- Held*, (a) That such acts and practices, under the circumstances set forth, constituted unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act; and
- (b) That the acts and practices of respondent in selling and making contracts for sale of hearing aids and parts and accessories therefor on the condition, agreement, or understanding that the purchasers thereof should not sell or deal in similar products of a competitor constituted a violation of Sec. 3 of the Clayton Act.

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

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

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

ORDERS AND DECISION OF THE COMMISSION

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

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

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

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

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

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

It is further ordered, that respondent Dictograph Products, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner

and form in which it has complied with the order to cease and desist contained in said initial decision * * *.

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

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

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

FINDINGS AS TO THE FACTS

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

PAR. 2. Since its incorporation in 1938 or 1939 and prior thereto, as a Delaware corporation, the respondent has been engaged in the manufacture and the sale and distribution of hearing aid instruments under the trade name "Acousticon" and of parts and accessories therefor. Respondent is one of the largest manufacturers of hearing aids and parts and accessories therefor located in the United States. Respondent causes said products when sold to be transported from its

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place of business and factory located in the State of New York to purchasers thereof located in the various other States of the United States and in the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

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

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

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

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

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

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

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

(Description of territory allotted)

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

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

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

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

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

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

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

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

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

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

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

PAR. 9. In addition to respondent requiring its distributors to enter into formal written contracts with it containing the provisions hereinbefore described, the respondent at the same time required its distributors to sign supplements to such agreements by which they agreed that, upon termination of said contracts, they would surrender their

telephone directory listing and authorize that any mail upon which appears the name "Acousticon" or any variation of the word "Acoustic" be forwarded to the home office of respondent. This latter agreement was in such form as to constitute a directive to the Postal Department to forward all mail so addressed direct to the respondent.

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

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

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

PAR. 13. As a part of its defense the respondent called representatives of nine competing manufacturers of hearing aids in an attempt to

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

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

PAR. 15. The relative merits of respondent's hearing aids or its fitting techniques does not constitute a defense to this proceeding. No matter how compelling the advantage of handling the respondent's products might be either to the distributor or his customer this does

not justify the evasion or violation of the statutory provisions dealing with exclusive dealing contracts. While the distributor is engaged in an entirely private business and has a right to freely exercise his own independent discretion as to parties with whom he will deal or stop dealing for reasons sufficient unto himself, this right should be left to the dealer free of any contractual requirement to deal only in respondent's products.

CONCLUSIONS

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

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

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

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

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

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

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

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

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

9. The acts and practices of the respondent, as herein found, constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act; and the acts and practices of the respondent in selling and making contracts for the sale of hearing aids and parts and accessories therefor on the conditions, agreement or understanding that the purchasers thereof shall not sell or deal in similar products of a competitor constitute a violation of section 3 of that Act of Congress entitled "An Act To supplement existing laws against unlawful restraints and monopolies and for other purposes" approved October 15, 1914 (the Clayton Act).

ORDER

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

merce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, or deal in, or sell hearing aids or parts and accessories therefor or other similar correlated products supplied by any competitor or competitors of respondent;

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

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

1. Selling or making any contract for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, or deal in, or sell the goods, wares or merchandise of a competitor or competitors of respondent;

2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing sales contract, which condition, agreement or understanding is to the effect that the purchaser of said products shall not use or deal in the goods, wares or merchandise of a competitor or competitors of respondent;

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

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

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

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

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

ORDER TO FILE REPORT OF COMPLIANCE

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

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

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

dealing provisions is in violation of Section 3 of the Clayton Act and that respondent's practice of entering into and enforcing them is in violation of Section 5 of the Federal Trade Commission Act.

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

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

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

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this Act has determined that the public interest requires that the advantage of requiring its distributors to agree to deal exclusively in its products must be denied a seller where the effect of such agreements may be to substantially lessen competition or to tend to create a monopoly.

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

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

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

During this period of expansion, hearing aid manufacturers trying to break into this field found that they were foreclosed from selling to respondent's distributors by the exclusive dealing requirement in respondent's contract with its distributors. These newcomers in the

field were forced to turn to other nonexclusive distributors and to less desirable outlets, such as optical, drug, and department stores. Certain of them, notably Zenith Radio Corporation, which is now first in volume of sales in the industry, were able to successfully enter this field despite this handicap. They are now in the process of locating and establishing other independently owned purchasers for their products who will specialize in the sale of hearing aids.

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

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

Similarly, it is believed that the hearing examiner correctly held in his initial decision that respondent's practices of entering into contracts containing exclusive dealing provisions with its distributors and

of intimidating and coercing them into complying with these provisions were unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

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

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

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

The record contains an estimate by Mr. Charles Leyman, who has been very active in this field for over thirty years, that there are approximately 1,000 responsible dealers specializing in the sale of hearing aids in the United States. This estimate excluded accounts

selling other products and subdealer accounts. These are the approximately 1,000 distributor accounts referred to in the finding excepted to by respondent. This estimate is not in conflict with the testimony of representatives of respondent's competitors stating the number of their sales outlets, as the record does not show how many of those outlets, so referred to, can properly be defined as responsible distributors specializing in the sale of hearing aids only. It is clear from the record that certain of those accounts do not fit into this category.

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

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

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

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

Respondent's contention that the hearing examiner committed prejudicial error by certain of his procedural rulings is also rejected. His refusal to compel counsel supporting the complaint to furnish respondent with a list of witnesses prior to the hearings does not constitute a violation of due process as full opportunity to cross-examine each witness called was available to it. If later investigation

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had revealed the existence of documents or other material which would have enabled respondent to impeach or otherwise materially affect previously given testimony, that witness could have been recalled for further cross-examination on respondent's motion.

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

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

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

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

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IN THE MATTER OF
CHARLES F. HARAD AND SARA E. HARAD TRADING AS
INDUSTRIAL ENGINEERING ASSOCIATES

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

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

Before *Mr. John Lewis*, hearing examiner.

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

Mr. Charles F. Harad, of Mooresville, Ind., for respondents.

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

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

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

One of the allegations of the complaint is that respondents have represented in their advertising that their truss will retain all reducible hernias, it being further charged in such connection that some reducible hernias will not be retained by respondents' device. The hearing examiner concluded that the over-all import of respondents' advertising statements have constituted representations only that

retention will be afforded for reducible hernias of the inguinal variety and that the likelihood of purchase of respondents' product by a member of the public under the impression that it would be effective for all types of hernia is remote. Counsel supporting the complaint, in excepting to this conclusion, points out that at least two of the advertisements received into the record do not mention inguinal hernia but offer the device for reducible hernias, and it is further contended by counsel that other advertising matter furnished by respondents for stores' display in which the device is offered to those who are "ruptured" also implies that the truss will retain all hernias.

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

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

Under his second exception, counsel supporting the complaint states that he objects to the hearing examiner's finding that all reducible hernias will be retained by respondents' truss, under his third exception he asserts that he is interposing objection to the hearing examiner's finding that the device will not slip, and his fourth exception interposes objection to the conclusions reached by the hearing examiner as to the extent to which hernias will be retained under abnormal conditions of strain. With respect to the first of these, the hearing examiner concluded instead, however, that the greater weight of the evidence

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

Reverting to counsel's third and fourth exceptions, the hearing examiner found that counsel supporting the complaint had failed to establish by substantial evidence that respondents have engaged in misrepresentation through statements in their advertising to the effect that their truss will not slip and will hold hernias under conditions of unusual stress and strain, including those associated with sports. The hearing examiner manifestly has accorded weight to the fact that one of the medical witnesses testifying in support of the complaint, at one point in his testimony, appeared merely to express doubt as to the ability of respondents' truss to hold a hernia under conditions of abnormal strain and stress instead of stating with certainty that

failures of retention would result and the hearing examiner has noted still another statement by one of the witnesses called by counsel supporting the complaint, made after a visual demonstration of the truss in use, which is to the effect that it would be difficult for the truss to slip when worn in the manner adopted in the demonstration. The evidentiary matters to which counsel supporting the complaint directs attention in connection with these exceptions have been considered, but, in the light of the evidence including that introduced by respondents and the fact that evidence in rebuttal thereof was not offered, the Commission is of the view that these charges of the complaint are not supported by the greater weight of the evidence received into the record. Counsel's second, third and fourth exceptions, accordingly, are denied.

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

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

be ineffective. The Commission has determined that the allegations of the complaint here pertinent are not sustained by the greater weight of the evidence and counsel's exception is not being granted.

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

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

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

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

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

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

order that the complaint issued herein be dismissed. The reasons and basis for such dismissal are hereafter discussed in connection with the various allegations of the complaint, which are summarized below under separate headings for convenience of discussion.

1. *The Retention of All Reducible Hernias*

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

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

The record discloses that in advertising their product in a number of newspapers respondents have used the phrases: "For All Reducible Hernias." However, in all but one instance there appears in the body of the same advertisement the language: "Provides maximum retention for all reducible *inguinal* hernias." Moreover, in each advertisement there appear several drawings of a male in a state of undress, wearing a truss in the inguinal region, and there is attached a form for ordering the truss which requires the prospective purchaser to check the appropriate box to indicate whether his hernia is on the "Right side," "Left side," or "Both sides," and to give his "waist" measurement. The record also contains other advertising matter distributed by respondents to druggists for use in advertising the truss, which refers to the product as providing protection "For All Reducible Inguinal Hernias." The box in which respondents' product is sold contains on the outer cover thereof, in letters of clearly legible size, the words: "For All Reducible Inguinal Hernias." The booklet of instructions which is enclosed in the box with each truss sold likewise contains on the outer cover thereof the words: "For All Reducible Inguinal Hernias," as well as a picture of a man wearing

a truss in the inguinal region. The inner portion of the booklet contains detailed instructions and diagrams regarding the fitting of the truss, which leave no doubt that it is intended to give relief for inguinal hernias only.

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

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

Construing respondents' claims as being limited to inguinal hernias, the next question is whether their truss will, in fact, retain all reducible inguinal hernias. By way of definition of terms, it should be noted that a truss is said to "retain" a hernia when it is able, by the application of pressure to the opening in the abdominal wall, to keep the contents from protruding through the wall after the mass has been pushed back by manual or other means. There is no claim by respondents that this will accomplish a permanent cure or that the truss will be effective other than during the time it is being worn. In this connection it may be noted that the position of the doctors who testified in support of the complaint was that, in general, the only permanently effective method of treating a hernia is by way

of surgery. They regarded a truss as a palliative to be used only by persons whose state of health was such that they could not withstand surgery. However, the merits of the surgical versus the support method in the treatment of hernias is not one which concerns this examiner. The question for disposition here is whether respondents' truss will retain a hernia during the period of its use, not whether other methods are medically more effective or desirable. It is the God-given right of every individual to put up with what may be regarded by some as a lifetime of inconvenience in wearing a support which will give relief only during the period of its use, rather than submit his body to the surgeon's knife in the hope of obtaining a quick, permanently effective cure of his hernia.

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

Considering the fact that respondents' device is basically effective in retaining reducible inguinal hernias in the average person under nor-

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

2. The Retention of Hernias Under Conditions of Physical Strain

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

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

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

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

In evaluating the doctor's testimony it should be noted that, according to his own admission, it was based in large measure on his own brief test of the device which was submitted to him for inspection by

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

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

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

Even on the basis of the testimony of his witnesses, considering the marked change in their attitude after actually observing the truss on Harad's body, the evidently favorable impression which it made on them, and the modifications made in their direct testimony, it is doubtful whether it can be said that the attorney in support of the

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

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

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

3. Comfort of Truss and Conformance with Natural Body Structure

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

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

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

With respect to the alleged falsity of the companion allegation that the truss will be comfortable at all times, the attorney in support of the

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

4. Self-fitting and Correct Wearability

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

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ever, this reference is immediately followed by the cautionary statement:

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

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

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

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

The undersigned is not convinced, on the present state of the record, that it has been established that respondents' truss is not self-fitting or that the wearer cannot reasonably be assured of a correct fit if he

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

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

5. Effectiveness Where Other Trusses Fail

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

A review of respondents' advertising discloses that they have used the word "most," not "all," in comparing the effectiveness of their device to other trusses. Insofar as the truthfulness of their representations is concerned, the record discloses that the most common type of truss is the so-called "spring-type" truss consisting of a steel frame with a leather pad or ball on the end, which is applied to the inguinal region. In view of the concessions made by the experts testifying in support of the complaint as to the effectiveness of respondents' device in holding a hernia, after observing it on Harad's body and after having previously testified to the limitations of most other types of trusses

which they had seen in their practice, it is the opinion of the undersigned that the attorney in support of the complaint has failed to sustain the burden of proof on this issue. It is therefore unnecessary to discuss the testimony of respondents' two expert witnesses regarding the effectiveness of respondents' truss as contrasted to the conventional spring-type truss or to consider their qualifications as experts in the field of herniology as compared to the qualifications of the Commission's experts.

6. Use Following Surgery or Treatment by Injection

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

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

The undersigned finds it unnecessary to resolve this difference of opinion. It seems clear that when a patient is undergoing treatment by the injection method or has had an operation performed, the form of support to be used, if any, is generally prescribed by his physician. It does not appear, therefore, that any statement made by respondents in this regard can have any significant influence on these patients. In any event, since the representation made with respect to the post-operative or post-injection use of the device was concededly made in a publication intended for circulation among physicians only, who, it can be assumed, will not be misled by anything respondents might say regarding their product, and since there is no substantial evidence that the general consuming public would be misled thereby, it is the

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opinion of the undersigned that the public interest does not require the taking of any corrective action based on the alleged falsity of any representation that respondents' device may be used post-operation or post-injection (cf. *Irwin, et al. vs. F. T. C.*, 143 F. 2d 316)

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

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

Interlocutory Order

IN THE MATTER OF
EASTMAN KODAK COMPANY*Docket 6040. Order and opinion, Sept. 25, 1953*

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

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

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

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

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

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

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

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