

IN THE MATTER OF
DORIS SAVITCH TRADING AS PERSONAL DRUG CO., AND
LEO SAVITCH

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

Docket 6089. Complaint, Mar. 31, 1953—Decision, Mar. 24, 1954

Where an individual trading as Personal Drug Co., and her manager who directed and controlled the business, engaged in the interstate sale and distribution of medicinal preparations which they designated as "Quick-Kaps" and as "D-Lay Capsules"; in advertising in newspapers of interstate circulation, including the "Afro-American"—

Falsely represented by implication that the use of their preparations would provide relief from delayed menstruation due to pregnancy; and specifically represented that its use would provide relief from said condition due to minor functional disorders and borderline anemia; when said product was of value only in those infrequent cases due to iron-deficiency anemia and then only if taken as directed for at least 30 days:

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

Before *Mr. William L. Pack*, hearing examiner.

Mr. Edward F. Downs for the Commission.

Mr. George Landesman, of New York City, for respondents.

DECISION OF THE COMMISSION

The Federal Trade Commission on March 31, 1953, issued a complaint charging Doris Savitch, an individual trading as Personal Drug Co., and Leo Savitch, individually and as manager of said company, with having violated the Federal Trade Commission Act by disseminating false advertisements of a drug preparation sold by them under the names "Quick-Kaps" and "D-Lay Capsules." Respondents filed an answer denying that their advertisements were false or misleading.

Pursuant to notice, hearings were held in Washington, D. C., on June 25, 1953, and in New York City on September 9, 1953, before William L. Pack, a hearing examiner, designated by the Commission to hear this proceeding. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. The testimony and other evidence were recorded and filed in the office of the Commission.

Filing of proposed findings and conclusions having been waived, the hearing examiner filed his initial decision on October 9, 1953, in

which he concluded that respondents have not advertised their preparation as an abortifacient as alleged but have violated the Federal Trade Commission Act by falsely advertising that their preparation is effective in the treatment of delayed menstruation due to functional troubles other than iron deficiency anemia.

Thereafter, counsel supporting the complaint appealed to the Commission from this initial decision. This appeal was submitted to the Commission upon briefs of the parties, oral argument not having been requested.

Upon consideration of the entire record herein, the Commission, for the reasons stated in the written opinion of the Commission issued herewith, hereby grants the appeal of counsel supporting the complaint insofar as it takes exception to the conclusion in the initial decision that respondents have not falsely advertised their preparation as an abortifacient and insofar as it does not find that respondents falsely advertised that borderline anemia is a cause of delayed menstruation. In lieu of the initial decision the Commission issues its findings of fact, conclusion, and order as follows:

FINDINGS OF FACT

I. Business of the Respondents

Respondent Doris Savitch is an individual trading as Personal Drug Co., with her principal place of business located at 6 Hester Street, New York, New York. Respondent Leo Savitch is the manager of this business and directs and controls its operations. Respondents' business consists of the sale and distribution of a medicinal preparation designated by them as "Quick-Kaps" and as "D-Lay Capsules." Respondents also sell this preparation while trading under the name "New York Drug Co."

Respondents sell this preparation to purchasers located in various States of the United States, other than New York, and during the period of time involved herein have regularly caused this preparation, when sold to be shipped from their place of business in the State of New York to these purchasers, in interstate commerce.

The preparation is compounded by respondents in capsule form and is usually sold in boxes containing 21 capsules. Each capsule contains the following ingredients:

Powdered Extract of Pulsatilla.....	1/10th grain
Powdered Extract of Cimicifuga.....	1/10th grain
Ferrous Sulphate.....	3 grains
Thiamin Hydrochloride.....	1 milligram
Manganese Dioxide.....	1/4th grain
Lactose, quantity sufficient to complete filling of capsule.	

The directions for use of the preparation are as follows: "Average Dose:—Adults One capsule three times a day until relieved. If condition persists, a physician should be consulted."

II. Respondents' Advertisements

Sales of the preparation are solicited by respondents principally through the medium of newspaper advertisements. Certain of these advertisements have been carried in newspapers having interstate circulation. Others have been carried in newspapers circulated within States other than the State of New York for the purpose of inducing and which were likely to induce the purchase of respondents' preparation in interstate commerce. A typical advertisement reads as follows:

PERIOD DELAYED?

(Overdue)

Don't Risk Disaster

Don't Worry

At last—it CAN BE SOLD, a new, extra effective Doctor-approved formula—"Quick-Kaps" capsules may relieve you of your biggest worry—when due to minor functional menstrual delay or borderline anemia. Scientifically prepared by registered Pharmacists "Quick-Kaps" capsules contain only medically recognized drugs, having no harmful after effects—Complete supply—packed in a confidential box only \$5.00. Send no money and we will mail C. O. D. plus small postal and C. O. D. charges or send \$5.00 cash and we will rush AIR MAIL. "Just the thing to have on hand."

For the reasons stated in the written opinion of the Commission issued herewith, the Commission believes that these advertisements, by implication, represent that the use of respondents' preparation will provide relief from delayed menstruation due to pregnancy. In addition, they specifically represent that its use will provide relief from delayed menstruation due to minor functional disorders and borderline anemia.

III. Value of Respondents' Preparation

The greater weight of the evidence is that the only ingredient present in respondents' preparation in a therapeutic dosage is ferrous (iron) sulphate. This ingredient is present in sufficient quantity to constitute a minimum therapeutic dosage in the treatment of iron deficiency anemia if given as directed over a period of at least thirty days.

The very great majority of cases of delayed menstruation are due to pregnancy. One of the infrequent causes may be iron deficiency

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anemia. Borderline anemia is not a cause of delayed menstruation. Respondents' product is of no value in any case of delayed menstruation other than in those infrequent cases due to iron deficiency anemia and then only if taken as directed for at least thirty days.

IV. *General Conclusion*

To the extent that respondents have advertised that their preparation will relieve cases of delayed menstruation due to pregnancy or borderline anemia or any other cause other than iron deficiency anemia, their advertisements are false and misleading in a material respect. Their use of such advertisements has the tendency and capacity to mislead and deceive a substantial portion of the public as to the value of respondents' preparation and to cause them to buy respondents' preparation because of their mistaken belief.

CONCLUSION

The acts and practices of respondents as hereinabove set out are to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Doris Savitch, individually, trading as Personal Drug Co., or trading under any other name, and Leo Savitch, as manager of her said business, their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their medicinal preparation designated "Quick-Kaps" or "D-Lay Capsules" or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same names or under any other name, do forthwith cease and desist from:

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

- (a) That the use of said preparation will terminate pregnancy;
- (b) That said preparation is of any value in cases of delayed menstruation, unless such representations be expressly limited to those cases due to iron deficiency anemia and in which the use of said preparation is continued for a period of time not less than one month;
- (c) That borderline anemia will cause delayed menstruation.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparation, which advertisement contains any representation prohibited in paragraph 1 hereof.

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

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

This matter is before the Commission on the appeal of counsel supporting the complaint from the initial decision of the hearing examiner denying in part the relief demanded in the complaint. Written briefs have been submitted and oral argument was not requested.

The complaint charges that respondents are violating the Federal Trade Commission Act in the sale and distribution of a preparation containing drugs, as "drugs" are defined in the Federal Trade Commission Act, designated by them as "Quick-Kaps" and as "D-Lay Capsules."

The questions presented are:

(1) Have the respondents represented directly or by implication that their preparation is an abortifacient when used as directed?

(2) If so, is said representation true?

(3) Have respondents represented that their preparation will provide affective relief from delayed menstruation when due to minor functional disorders, that borderline anemia will cause delayed menstruation, and that their preparation will provide effective relief therefor?

(4) If so, are these representations true?

Respondent Doris Savitch is an individual trading as Personal Drug Company with her principal place of business in the city of New York. Respondent Leo Savitch is the manager of the business and controls its operations. Respondents are engaged in the sale and distribution of a medicinal preparation designated by them as "Quick-Kaps" and as "D-Lay Capsules" and cause this preparation when sold to be transported from their place of business in New York to purchasers in various other States and in the District of Columbia, and maintain a course of trade in their preparation in commerce among the various States and in the District of Columbia.

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On or about August 2, 1952, respondents caused the following advertisement to be published in a newspaper, to wit, the Afro-American, which advertisement was disseminated in interstate commerce:

PERIOD DELAYED?

(Overdue)

Don't Risk Disaster

Don't Worry

At last—it CAN BE SOLD, a new, extra effective Doctor-approved formula—"Quick-Kaps" capsules may relieve you of your biggest worry—when due to minor functional menstrual delay or borderline anemia. Scientifically prepared by registered Pharmacists "Quick-Kaps" capsules contain only medically recognized drugs, having no harmful after effects—Complete supply—packed in a confidential box only \$5.00. Send no money and we will mail C. O. D. plus small postal and C. O. D. charges or send \$5.00 cash and we will rush AIR MAIL. "Just the thing to have on hand."

The first question is, does the above advertisement represent directly or by implication that Quick-Kaps is an abortifacient when used as directed?

Some of the words and phrases used in the advertisement are significant. For example: "Don't worry"—"Don't Risk Disaster"—"May relieve you of your biggest worry"—"Medically recognized drugs having no harmful after effects"—"complete supply—packed in a confidential box." These are not the words ordinarily used to advertise a preparation whose sole claim is that it will relieve delayed menstruation due to minor functional disorders, or borderline anemia. "At last—it CAN BE SOLD, a new, extra effective Doctor-approved formula." The testimony of the medical experts was to the effect that the drugs making up the preparation were known and had been in use for some time. The above-quoted phrase would seem to imply that either because of a change in the law or recent medical discoveries, a new preparation was now being put on the market, a statement not borne out by the evidence. The advertisement also reads: "Send \$5.00 cash and we will rush AIR MAIL." "Just the thing to have on hand."

The physical makeup of the advertisement is also worthy of consideration. The words "Period Delayed (Overdue) Don't Risk Disaster, Don't Worry" are all at the beginning of the advertisement and in heavy type. The qualifying clause "when due to minor functional menstrual delay or borderline anemia" is in small type as is much of the rest of the advertisement.

In determining the construction that may reasonably be put upon an advertisement, it should, of course, be considered as a whole and

against a background of general experience and knowledge. It is a well-known fact that the selling and distribution of preparations or devices for the producing of an abortion is generally prohibited by law. Persons looking for such a product would not expect to find it advertised with the same clarity and directness as in the case of products not so prohibited. This advertisement seems to invite a reading between the lines. It is reminiscent of the situation existing in bootlegging days when a knowing wink might convey to the prospective purchaser the thought that the liquid being sold as "cold tea" was in fact illegal intoxicating liquor. As pointed out by the court in *Aronberg, trading as Positive Products Company v. F. T. C.*, 132 F. 2d 165:

"The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also all that is reasonably implied."

The medical testimony is to the effect that the most common cause of delayed menstruation is pregnancy. All the medical witnesses testified that when a patient comes to them because of delayed menstruation, the first thing they look for is pregnancy. One of the witnesses for respondent testified that some of his patients in such a situation were worried because they might be pregnant. He also testified that in the early part of a pregnancy, the patient would have no way of knowing whether the delayed menstruation was due to a pregnancy, a minor functional disorder, or anemia, or any other cause.

In view of this medical testimony, it is reasonable to believe that some persons "worry" about delayed menstruation and might think it was due to pregnancy. To such persons desiring for any reason to terminate that condition, respondents' advertisement could well be construed as promising relief. In any event, the mental condition of such person is an element to be considered in arriving at which construction might reasonably be put upon the advertisement.

As to this issue, the hearing examiner found that it is possible that in isolated instances, respondents' advertisement might be interpreted as representing that the product is an abortifacient, but concluded that the advertisement was not reasonably subject to such construction and that it does not have the tendency and capacity to cause any substantial portion of the public to believe that the preparation is offered as an abortifacient.

We disagree with this finding and find the facts to be to the contrary.

Counsel supporting the complaint, after laying the proper foundation, asked his medical witnesses as to their observations of the impressions created by the advertisement on their patients suffering from de-

layed menstruation. This evidence was offered and offer of proof was made on the authority of the following cases: *Benton Announcements, Inc. v. F. T. C.* (July 6, 1942), 130 F. 2d 254; *Charles of the Ritz Distributing Corporation v. F. T. C.* (July 6, 1944), 143 F. 2d 676; *Stanley Laboratories, Inc. v. F. T. C.* (October 20, 1943), 138 F. 2d 388.

Because of the view we take as to the sufficiency of the evidence in the record, we find it unnecessary to pass on the correctness of the ruling of the hearing examiner in refusing to admit this evidence.

On the second question, it is undisputed that the preparation is not an abortifacient.

As to the third question, we find that the advertisement does represent that the preparation will provide effective relief from delayed menstruation when due to minor functional disorders, that borderline anemia will cause delayed menstruation, and that the preparation will provide effective relief therefor. The remaining question, therefore, is as to the truth of these representations.

Although there is some difference of opinion among the medical witnesses, we believe that counsel supporting the complaint has sustained the burden of proving that borderline anemia, as defined by the doctors, will not cause delayed menstruation. The evidence indicates that there are various causes for delayed menstruation and that, with the exception of iron deficiency anemia, the various ingredients of respondents' preparation in the amounts indicated would have no therapeutic effect in correcting such causes.

The testimony does indicate (as found by the hearing examiner) that the ferrous sulfate (iron) in the preparation would be of therapeutic benefit in the treatment of delayed menstruation when the condition was due to that type of anemia known as iron deficiency anemia provided the preparation was taken over an extended period of time of not less than one month. We do not regard this as particularly material because neither in the complaint nor in respondents' advertisement was any such issue presented. So far as anemia is concerned, the respondents claim that borderline anemia will cause delayed menstruation and that their preparation will remedy the conditions. The proof is that anemia in the degree known as borderline will not cause delayed menstruation and also that anemia may be caused by other causes than iron deficiency. It is only for anemia due to iron deficiency that ferrous sulfate is indicated as having therapeutic value.

In addition to the jurisdictional facts before referred to, we find that respondents falsely represented directly or by implication:

- (1) That their preparation is an abortifacient;

(2) That their preparation has therapeutic value in cases of delayed menstruation caused by minor functional disorders;

(3) That borderline anemia will cause delayed menstruation and that their preparation will relieve delayed menstruation when caused by borderline anemia.

We further find that the acts and practices of respondents as hereinabove set out are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

It is directed that an order issue in accordance with this opinion

Order

IN THE MATTER OF
DENVER CHEMICAL MANUFACTURING CO.

Docket 5755. Complaint, Mar. 22, 1950—Order, Mar. 25, 1954

Charge: Advertising falsely "Antiphlogistine" drug preparation.

Mr. Joseph Callaway for the Commission.

Davies, Richberg, Beebe, Landa & Richardson, of Washington, D. C., for respondent.

ORDER DISMISSING COMPLAINT

This matter came before the Commission for consideration of the motion of counsel supporting the complaint to dismiss this proceeding without prejudice and respondent's answer stating that it has no objection to the motion.

The complaint herein alleges that respondent has disseminated false advertisements of its drug product "Antiphlogistine," which it recommends for use as a medicated poultice or dressing. Respondent's answer denies that its advertisements were false or misleading. Proceedings in this matter were held in abeyance because respondent changed its formula, directions for use, and advertising claims. In an affidavit dated February 26, 1954, respondent set out its advertising claims made since the issuance of the complaint herein and stated that it did not intend to make any additional claims which would run contrary to the allegations of the complaint.

Counsel supporting the complaint thereupon filed his motion, now under consideration, stating that respondent's present advertising claims do not justify further proceedings in this matter and moving that the Commission dismiss the allegations of the complaint without prejudice. Respondent filed its answer consenting to this motion being granted.

Upon consideration of this entire matter including respondent's affidavit, the Commission is of the opinion that there is no public interest in further proceedings in this matter at this time.

It is ordered, therefore, that the motion of counsel supporting the complaint is hereby granted, and that the allegations of the complaint are hereby dismissed without prejudice to the right of the Commission to issue a new complaint as to the alleged practices or to take such other action in regard thereto as future circumstances may require.

IN THE MATTER OF
PHILO BURT MANUFACTURING COMPANY

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

Docket 6079. Complaint, Feb. 4, 1953—Decision, Mar. 30, 1954

Where a corporation engaged in the manufacture and interstate sale and distribution of certain devices designated "Philo Burt Appliances," which were made by it for each customer in accordance with measurements made by him and inserted in a form supplied by the respondent; in advertising in newspapers, periodicals, circulars, and pamphlets in which were included references to and reproductions of various testimonials, and in which advertisements its primary emphasis was on ailments of the back and the spine—

- (a) Represented falsely that the use of said appliances would cure or constitute a competent and effective treatment for asthma, extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps of the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry, indigestion, loss of appetite, outbursts of temper, forgetfulness, and distaste for either work or society:

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

Before *Mr. John Lewis*, hearing examiner.

Mr. B. G. Wilson and *Mr. John J. McNally* for the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 4, 1953, issued and subsequently served its complaint in this proceeding upon respondent, Philo Burt Manufacturing Company, a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Said respondent filed an answer and a supplemental answer to the complaint herein but failed to appear at the time and place fixed for hearing. At said hearing, testimony and other evidence in support of 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. The respondent was thereafter advised that, despite its failure to appear at the aforesaid hearing, a further hearing could be held

for the purpose of enabling it to offer testimony and other evidence in opposition to the allegations of the complaint. After first requesting such a hearing, which hearing was scheduled for June 15, 1953, in Jamestown, New York, respondent later requested that said hearing be cancelled and said hearing was accordingly cancelled. No testimony or other evidence in opposition to the allegations of the complaint was offered by respondent, except an affidavit as to the discontinuance of certain practices, which affidavit was made a part of the record in this proceeding by agreement of counsel in support of the complaint. Thereafter, the proceeding regularly came on for final consideration by said Hearing Examiner on the complaint, the answer and the supplemental answer thereto, testimony and other evidence, and the aforesaid affidavit of respondent, no proposed findings as to the facts and conclusions having been submitted by the attorney in support of the complaint or respondent and oral argument not having been requested; and said Hearing Examiner having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Philo Burt Manufacturing Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at Jamestown, New York. The respondent is now and for some time last past has been engaged in the business of manufacturing, selling, and distributing certain devices, as "device" is defined in the Federal Trade Commission Act, designated "Philo Burt Appliances." The devices are manufactured by respondent for each customer in accordance with measurements made by the customer and inserted by the customer in a form supplied by the respondent.

PAR. 2. In the course and conduct of its aforesaid business, the respondent causes its devices, when thus manufactured and sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. At all times mentioned herein respondent has maintained a course of trade in said devices in commerce between and among the various States of the United States and in the District of Columbia. The volume of business in said commerce has been and is substantial.

PAR. 3. In the course and conduct of its aforesaid business, respondent has disseminated and has caused the dissemination of advertise-

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ments concerning its said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said devices, including, but not limited to, advertising matter inserted in newspapers and periodicals and by means of circulars and pamphlets; and respondent has also disseminated and has caused the dissemination of advertisements concerning its said devices by various means, including, but not limited to, the aforesaid advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said devices in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Through the use of the said advertisements, respondent has represented, directly and by implication, that the use of "Philo Burt Appliances" will cure or constitute a competent and effective treatment for asthma, extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps of the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry, indigestion, loss of appetite, outbursts of temper, forgetfulness, distaste for either work or society, backache, contraction of the muscles, weariness, fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury and deformity of the spine, arthritis of the spine, lordosis and spinal curvature.

While respondent admits having represented that its product is of significant value and benefit in the relief and treatment of most of the conditions above mentioned, it denies (1) that it has ever represented its product to be a "cure" or (2) that it has ever made any claim for the efficacy of its product in the case of "asthma." The evidence in the record requires a finding contrary to the contention of respondent on both of these matters. With respect to whether respondent has represented its product to be a "cure," a review of respondent's advertising literature discloses that, both expressly and by clear implication, respondent has represented its product as having permanent curative effects. Thus, in a 16-page booklet entitled: "An Aid in Spinal Ailments," where most of the above symptoms and conditions are referred to, there appears the following language descriptive of the subject matter of the publication:

The causes and the symptoms in spinal troubles and how they may be relieved, benefited or *overcome*¹ by means of proper Anatomical Support.

¹ All emphasis in quotations appearing in this paragraph have been supplied by the undersigned.

Other statements appearing in the same booklet are as follows:

Tonics, patent foods, various forms of treatment and fancy baths, merely serve to *temporarily relieve* the symptoms. Elongation of the spine to separate the vertebrae and hold the spine in normal alignment is considered proper procedure in bringing *permanent relief*. The Philo Burt Appliance gives an extension or lifting support to remove the pressure and thus aid in overcoming the cause.

* * * * *

No matter how severe your condition or how discouraged you may become, we urge the importance of making every effort toward *a cure or complete recovery*. This appliance has been *successfully used* in over eighty thousand cases.

The same booklet also contains excerpts from testimonial letters by alleged users of the device which are characterized by respondent as follows: "These Letters Give Proof of Relief, Benefit and *Recovery*, in Many Cases of Spinal Trouble." One of the excerpts states that the appliance brought about "complete recovery" from a curvature of the spine despite a previously unsuccessful spinal operation. Another testimonial refers to a person who had a "tubercular condition of the spine which left her with a weakened and curved back" and who, as a result of wearing respondent's device, had "no signs of her ever being afflicted with a curvature of any kind." Another testimonial refers to a person who was unsuccessfully treated by three doctors for a back injury but who, after wearing respondent's device for less than two months, had no sign of his former trouble and no longer required the device.

Similar references to testimonials appear in other advertising literature used by respondent as follows:

A woman, aided by Philo Burt support, writes: "Now, I can walk, run, dance, ride without aches and pains." A man, invalided by a bad fall, was enabled to walk, ride horseback and play tennis. A child paralyzed from a spinal deformity was playing around the house within four weeks. In our Free Book, many users tell of relief, improved appearance, *even permanent correction*.

* * * * *

Thousands of letters from Physicians and Patients tell of relief, benefit and *recovery*. These constitute indisputable evidence of the effective, anatomical support provided by our Appliances.

The testimonials are also separately printed by respondent and when it receives an inquiry from some person concerning its appliance, it frequently sends such persons copies of testimonials purporting to be from others who have had a similar condition. In a number of these testimonials there appear references to "permanent" results, to "recovery," to the fact that the wearer no longer has any "trouble" and is able to get along without the support, and to the wearer's "trouble" having been "overcome." Respondent has given the testimonials such headings as "Permanent Results," "A Cured Case!", and "A Complete Recovery."

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From respondent's advertising literature as a whole, including the excerpts above referred to, it seems clear, and it is so found, that respondent has represented that its product can be expected in many cases to achieve permanent results and to effect a complete cure or recovery. Respondent's contention to the contrary appears to be based on the claim that it has not specifically used the word "cure" in describing the effectiveness of its product. The record discloses that this word or words of similar import have been used by it. Moreover, irrespective of whether the word "cure" was used, it is clear from the context of its advertising literature that it has held out the hope of permanent curative effects to the wearers of its product and that, in any event, it has reasonably implied that if its product will not effect a complete cure in all cases it may be expected to at least substantially aid in the removal of the cause of failure of normal functions.² Respondent also relies on the fact that many of the claims made for its product are based on reports received from users of the device. However, without considering at this point the truth or falsity of these reports, it seems clear that to the extent respondent has caused such testimonials to be printed and to be distributed to prospective customers, it has thereby represented to such persons that they may expect similar results in their own cases.

With respect to the making of any claim of effectiveness in the case of "asthma," the record discloses that respondent distributed a testimonial in which the purported writer referred to the fact that respondent's device, in addition to helping her young son's spinal cord, also "cured [him] of the asthma." In an affidavit submitted by its president, respondent admits having published this testimonial but claims that it was printed in 1929, was given "limited circulation," and is no longer in print. However, on the issue of whether respondent did represent its device as a cure or effective treatment for asthma, it cannot be denied that the allegation of the complaint in this respect has been sustained.

PAR. 5. The aforesaid advertisements are misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act, for the following reasons:

(a) It is clear from the record that respondent's devices will not cure nor will they be of any significant value in the treatment of asthma, extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps in the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry,

² See *Aronberg v. F. T. C.*, 132 F. 2d 165 (C. A. 7).

indigestion, loss of appetite, outbursts of temper, forgetfulness, or distaste for either work or society. While respondent's primary emphasis in its advertisements is on ailments of the back and spine, it does refer to most of the above as symptoms arising from "spinal ailments," and claims that the wearing of one of its devices will help bring "permanent relief" from these conditions by "[e]longation of the spine to separate the vertebrae and hold the spine in normal alignment." However, according to the uncontradicted medical testimony in the record, the above-mentioned symptoms or conditions generally have their origin in parts of the body remote from the area treated by a support, and the wearing of a support such as respondent's would therefore not be of any significant value in their cure or treatment.³

(b) The use of respondent's devices will not cure backache, contraction of muscles, weariness or fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury or deformity of the spine, arthritis of the spine, lordosis or spinal curvature; nor are said devices of any significant benefit in the treatment of said conditions or symptoms except under certain limited circumstances which are not present under respondent's method of sale and distribution of its products. Some of the conditions or symptoms above referred to are of a rather vague and general nature, being more in the nature of subjective complaints of patients than of specific ailments of the spine or back. In order to determine the cause of such symptoms or conditions, or to verify the existence of and determine the cause of specific ailments such as spinal tuberculosis, arthritis of the spine, lordosis or spinal curvature, a proper examination must be made by a competent physician. Such examination ordinarily includes the taking of a case history and a thorough physical examination of the patient, and frequently involves the making of laboratory tests and the taking of X-rays. Only after such an examination can the exact nature of the ailment be ascertained with any reasonable degree of accuracy and a proper course of treatment prescribed. The course of treatment may or may not involve the wearing of a support, depending on the

³ The only competent evidence in the record concerning the effectiveness of the devices is the testimony of two doctors called by the attorney in support of the complaint. One is an orthopedic specialist and the other a specialist in physical medicine and rehabilitation. Since both of these men appeared to be amply qualified as experts in the subject matter of this proceeding, and their testimony was reasonably plausible and credible on its face, and since no competent contradictory evidence was offered by respondent, their testimony has been accepted by the undersigned as the basis for many of the findings made herein with respect to the therapeutic value of respondent's device. The record does contain a number of respondent's testimonials and case records, which were offered in evidence by the attorney in support of the complaint. While such exhibits are admissible to show the type of representations made by respondent and as reflecting its general mode of operation, they are not competent to establish the truth of the statements therein made concerning the effectiveness of respondent's product since the persons purporting to have made such statements were not available for cross-examination.

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diagnosis of the physician. For example, in some cases of arthritis of the spine, it may be advisable to have the patient exercise and keep his spine mobile, rather than immobilized by a support. In some types of lordosis it may be harmful to wear a support which would restrict the normal functions of supporting muscles. While the wearing of a support may be indicated in some cases, it will not cure the condition but is merely an adjunct to more basic treatment measures, such as medical treatment, immobilization, exercise, and even surgery. For example, in the case of inflamed or infected spine, or spinal tuberculosis it would be gross error to confine treatment to the wearing of a support, since medical measures such as the use of antibiotics and possibly the use of surgery may be necessary to save the life of the patient and return him to normal health.

Even in those cases where the course of treatment properly involves the wearing of some form of support, the precise nature of the support should be prescribed by a competent physician. In some cases the support required may be of a more rigid nature than those of respondent, such as a plaster cast or a steel brace. Even where a support similar to respondent's is called for, the measurements should be taken by the manufacturer of the device or by a physician or some similar person familiar with the proper anatomical landmarks.

Under respondent's method of sale and distribution there is no reasonable assurance that the appliance will be of any benefit in the relief or treatment of any of the above conditions. Any benefit which does occur would be purely accidental. While some of the users of respondent's devices have been referred by physicians, and respondent mentions in some of its advertisements its desire to cooperate with physicians, the proper examination of the user and diagnosis by competent medical authority is not a prerequisite to the sale and distribution of the devices. Many of the users are persons who have seen respondent's devices advertised and who have written to respondent describing their symptoms or complaints. In such instances respondent has attempted by mail, and without proper physical examination, to prescribe a support suitable for the condition described, despite the fact that some of the conditions described are of a rather vague and general nature and may be due to a variety of causes which may or may not require a support. In some instances, a support has been sold despite the fact that the user's physician advised other treatment measures or other types of support. Moreover, the users and prospective users are given the impression, from respondent's advertising literature, that the wearing of the support is alone sufficient, or is a major factor, in curing, treating, or bringing relief from various ailments of the back and spine, thus causing them to overlook or neglect

more basic and effective methods of treatment. While the measurements for one of respondent's supports are sometimes prepared by the customer's physician, they are frequently made by the customer himself or some other untrained persons on a form supplied by respondent and there is therefore no assurance that a proper fit will be obtained.

It is therefore found that respondent's representations concerning the effectiveness of its devices in the cure and treatment of the above conditions or symptoms are false and misleading, since:

(1) The devices will not cure any of the above conditions or symptoms;

(2) The wearing of a support will not be of any benefit in the treatment of any of the above symptoms or conditions except as an adjunct to more basic treatment measures;

(3) When the wearing of a support is desirable as part of a course of treatment, the proper type of support should be prescribed by competent medical authority, after proper examination, and the measurements made by a properly trained person; prescribing by mail, on the basis of symptoms and measurements submitted by lay persons, is not calculated to assure that the user will receive a support best suited to his needs and one which will properly fit, nor will it assure that other necessary treatment measures, to which such support is merely an adjunct, will be undertaken.

PAR. 6. The use by respondent of the foregoing false and misleading statements contained in its advertisements, disseminated as aforesaid, has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of such statements are and were true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase its said devices.

CONCLUSION

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

In determining the nature of the order to be issued herein, the undersigned has considered whether it should include a prohibition with respect to any claim of effectiveness for respondent's devices in the case of asthma. In view of the fact that this claim was not made in respondent's main booklet, but only in a single testimonial which was published in 1929 and given only limited circulation, and in view of the fact that respondent presently makes no claim of effectiveness for

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its devices in the case of asthma and has no intention of making such claim, the remedial purposes of the Act will, in the opinion of the undersigned, be satisfied if a specific reference to asthma is not included in the order to be issued herein.

ORDER

It is ordered, That the respondent, Philo Burt Manufacturing Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its devices designated as Philo Burt Appliances, or designated by any other name, or any other product of substantially similar design or construction, do forthwith cease and desist from:

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

(a) That the use of respondent's said devices will cure or will be of any significant value in the treatment of extreme sensitiveness of the skin, sensations of uneasiness, tingling, girdle pains, itching, headache, sleeplessness or loss of sleep, melancholy, spine sensitive to pressure, feeling of irritation, muscular weakness, fidgets, sudden starts, cramps in the legs or abdomen, sensations of heat and cold, skin flushed and hot, clammy sweats, worry, indigestion, loss of appetite, outbursts of temper, forgetfulness, or distaste for either work or society;

(b) That the use of respondent's devices will cure backache, contraction of the muscles, weariness or fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury to or deformity of the spine, arthritis of the spine, lordosis or spinal curvature;

(c) That the use of respondent's devices is a competent or effective treatment for backache, contraction of the muscles, weariness or fatigue, spinal tuberculosis, spinal irritation, spinal weakness, inflamed spine, injury to or deformity of the spine, arthritis of the spine, lordosis or spinal curvature, unless such representation is limited to cases where:

(1) the particular condition or symptom has been diagnosed by a competent physician as one requiring the wearing of a support,

(2) the type of support sold by respondent is recommended by the physician,

(3) the proper measurements have been made by respondent, the physician, or other properly qualified person, and

(4) the support is used in conjunction with other necessary treatment measures, as prescribed by the physician.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondent's said devices, which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

DECISION OF THE COMMISSION

The complaint in this case charges respondent, the Philo Burt Manufacturing Company, of Jamestown, New York, with falsely advertising its corset type of back supporters and braces which it sells as the "Philo Burt Appliance" or "Spinal Appliance." Respondent, which is not represented by counsel, denied that it had falsely advertised its products, in an answer filed for it by its President, Mr. R. J. Barrows.

A hearing was held on March 30, 1953, in New York City at which respondent's advertising was placed in the record and two expert medical witnesses testified as to the value of using respondent's devices for those conditions for which its use was recommended in its advertising. Full opportunity to present evidence and to examine and cross-examine witnesses was given to respondent, but it was not represented at the hearing. Respondent, however, did file an affidavit of its President stating that respondent's representations as to asthma were given limited circulation years ago, are now out of print and will not be reprinted. Opportunity to present proposed findings was given both parties but none were filed.

On June 29, 1953, the hearing examiner filed his initial decision in which he describes respondent's representations, fully discusses the effect of using respondent's devices on the symptoms, disorders and ailments for which its use is recommended, as shown by the testimony of the medical experts, and concludes that respondent has falsely advertised that the use of its devices will cure any of these conditions, are of no significant value in treating certain of these conditions and as to the other named conditions said devices are only of value as an adjunct to more basic medical treatment and only if properly fitted. The hearing examiner also found that those conditions for which respondent's device is beneficial can only be determined by a physician, and that the measurements used in making the device should be taken by the manufacturer, a physician or some other properly trained person. He concluded that, inasmuch as respondent's claims as to asthma had long been discontinued, no remedial action was necessary as to them.

Based on this record the hearing examiner in his initial decision prohibited respondent from disseminating advertisements which claim the use of its device will cure any of the named conditions (other than asthma), that it is of any significant value in the treatment for those conditions for which it had been found to be valueless (other than asthma) and that it is a competent or effective treatment for any of the other conditions named unless the claim is limited to cases where:

- (1) the particular condition or symptom has been diagnosed by a competent physician as one requiring the wearing of a support,
- (2) the type of support sold by respondent is recommended by the physician,
- (3) the proper measurements have been made by respondent, the physician, or other properly qualified person, and
- (4) the support is used in conjunction with other necessary treatment measures, as prescribed by the physician.

From this initial decision respondent appealed to the Commission.

Respondent has taken general exception to the entire decision and has specifically excepted to the findings that its business is substantial, that its acts and practices are unfair and deceptive, that respondent's method of selling does not assure that its device will fit and that it has sold its spinal support where the user's physician advised other treatment. Exception has also been specifically taken to paragraph 1 (c) of the order and to the findings on which it is based.

The business of the respondent is small. Its gross annual business amounts to approximately \$30,000. However, in cases of this type the extent of public interest is not controlled entirely by the total sales of the company involved. This respondent has made claims for permanent relief of serious back diseases and disorders by the use of a device which, if used without proper diagnosis, fitting and other more basic treatment measures, could make the condition worse. The public interest in such matters is great even though the gross sales are comparatively small.

Respondent also states that at the end of May, two months after the hearing herein, it discontinued all advertising in lay publications. It has requested an opportunity to enter into informal discussions for the purpose of agreeing on necessary revisions in its advertising material. The record shows, however, that in 1937 respondent entered into an agreement with the Commission to cease and desist from making many misrepresentations as to its devices. This stipulation has not been complied with. For example, respondent stipulated that it would not represent or circulate testimonials claiming that its spinal appliance is a competent treatment or an effective remedy for spinal disease. Despite this, respondent has recommended its device for "cases of * * *

Tuberculosis or any Disease or Arthritic condition of the Spine.” And it has circulated testimonials claiming complete recovery in cases of “Spinal Tuberculosis,” “Potts Disease” and “Chronic Spinal Arthritis” through the use of its device. Under these circumstances the Commission believes that this formal proceeding is required in the public interest.

Respondent makes each appliance to conform to the measurements submitted with the order on a “Measurement Blank” furnished by it. In its directions on how to order, it states that the measurements needed to make a perfect fit can be taken by any person or physician. The testimony of the medical witnesses in this case is that the average untrained individual is completely unqualified to make the required measurements, that such measurements can only be made by the manufacturer of the appliance, a competent physician or other trained person. Thus, respondent’s exception to the finding that its method of selling does not assure that its device will fit, is rejected.

Several of the testimonials used by respondent as advertisements clearly state that their authors used respondent’s device against the advice of their physicians. By the circulation of such testimonials, respondent minimized the importance of proper medical advice in the treatment of serious spinal diseases and disorders. Its objection to the finding that certain of its users purchased its device contrary to their physicians’ advice is groundless.

Respondent’s contention that paragraph 1 (c) of the order is improper upon this record is also rejected. The medical testimony clearly shows that a layman cannot distinguish between those cases where the use of respondent’s device would be proper and those where it would be injurious. This requires a physician’s diagnosis. Also, it shows that untrained laymen cannot take measurements which would provide a basis for the construction of a proper fitting appliance. It further shows that the services of a physician are required to prescribe the other necessary treatment measures for those conditions.

Paragraph 1 (c) of the order prohibits respondent from advertising its device as providing an effective treatment for those conditions where properly used it would be a part of the indicated treatment, without describing the other requirements needed to provide a proper treatment. Under this order respondent is not restricted to selling its device only to persons under a physician’s care, as respondent apparently fears. But it cannot advertise that its device will provide an effective treatment for the named conditions, as it will not unless the other requirements are complied with. The order permits respondent to describe its product as providing an effective treatment where the circumstances under which it will be effective are set out.

The Commission, therefore, being of the opinion that respondent's appeal from the hearing examiner's initial decision is 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 30th day of March 1954 become the decision of the Commission.

It is further ordered, That the respondent 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, a copy of which is attached hereto.

Decision

IN THE MATTER OF
UNITONE CORPORATION AND JOSEPH BARROWS

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

Docket 6019. Complaint, July 29, 1952—Decision, Apr. 8, 1954

Where a corporation and its president engaged in the interstate sale and distribution of a preparation which was designated as "B-Amino Complex" or "BAC"; in advertising in circulars, leaflets, folders, and newspaper advertising which they furnished to dealers, and in the payment for some of which they participated—

- (a) Represented falsely that the use of their said "B-Amino Complex," as directed, would check and cure deafness; and
- (b) Represented falsely that their said preparation constituted a new medical discovery for the treatment of deafness; when it was essentially a vitamin compound:

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

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

Mr. B. G. Wilson and *Mr. William L. Pencke* for the Commission.

Cohen & Bingham, of New York City, for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on July 29, 1952, issued and subsequently served its complaint in the above-entitled proceeding upon respondents Unitone Corporation, a corporation, and Joseph Barrows, individually and as an officer of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the Act. After the issuance of the complaint herein and the filing of respondents' answer thereto, hearings were held, at which testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record by the above-named Hearing Examiner, theretofore duly designated by the Commission, and duly filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the Hearing Examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, and oral argument thereon. The Hearing Examiner, having duly considered the record herein, finds

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that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Unitone Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondent Joseph Barrows is president of the corporate respondent and formulates, directs and controls the policies, acts and practices thereof. The office and principal place of business of both corporate and individual respondents is located at 42 Lispenard Street, New York, New York.

PAR. 2. Respondents are now, and for more than a year have been, engaged in the business of selling and distributing a preparation designated as "B-Amino-Complex," sometimes called "BAC," which is a drug within the meaning of the Federal Trade Commission Act. The formula and directions for use of respondents' preparation "B-Amino-Complex" are as follows:

Formula:

Vitamin B1 (Thiamine Hydrochloride).....	18.0 mg.
Vitamin B2 (Riboflavin).....	27.0 mg.
Niacinamide.....	180.0 mg.
Vitamin B6 (Pyridoxine Hydrochloride).....	3.0 mg.
High Potency Yeast.....	200.0 mg.
Brewer's Type Yeast.....	200.0 mg.
Inositol.....	60.0 mg.
Choline Hydrochloride.....	60.0 mg.
Panthenol (Equal to Cal. Pantothenate 30 mg.).....	26.1 mg.

AMINO ACIDS (Vitagenic Accelerators) as contained in

Yeast Protein Enzymatic Hydrolysate.....	1.0 Gm.
fortified with	
Nucleic Acid.....	100.0 mg.
Glutamic Acid.....	50.0 mg.
Glycine.....	50.0 mg.
Cysteine Hydrochloride.....	25.0 mg.

DI AND TRI-VALENT MINERALS

Iron (Ferric Citro Pyrophosphate Soluble).....	28.8 mg.
Copper (Copper Sulfate).....	2.1 mg.
Magnesium (Magnesium Sulfate).....	5.9 mg.
Zinc (Zinc Sulfate).....	1.4 mg.
Cobalt (Cobalt Sulfate).....	1.3 mg.

Directions for Use:

Directions: Maximum response may generally be initiated through the use of two or more BAC Activator tablets three times daily, most advantageously

taken at meal time. As the benefits of BAC (B-Amino-Complex) therapy becomes manifest, the dosage may be reduced gradually until—eventually as a maintenance dose—a single BAC Activator tablet may suffice. This product is indicated as an aid in the bio-chemical processes involved in cell and tissue intermediary metabolism. It is not intended for treatment of protein deficiencies.

PAR. 3. In the course and conduct of their business, respondents cause their preparation “B-Amino-Complex,” when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various States of the United States, and maintain, and at all times mentioned herein have maintained, a course of trade therein between and among the various States of the United States. Their volume of business in commerce has been and is substantial.

PAR. 4. In the course and conduct of their business, respondents for more than a year have disseminated and caused the dissemination of, and have furnished to dealers and participated in the payment for, certain advertisements concerning their preparation “B-Amino-Complex”, by the United States mails and by various means in commerce, as “commerce” is defined in the Federal Trade Commission Act, including circulars, leaflets, folders, and newspaper advertising, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their preparation; and respondents have disseminated and caused the dissemination of advertisements concerning their preparation, including, but not limited to, the advertising matter referred to above, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their preparation “B-Amino-Complex” in commerce, as “commerce” is defined in the Federal Trade Commission Act. Among and typical of the statements and representations contained in respondents’ advertisements, disseminated as aforesaid, are the following:

NEW HOPE FOR THE HARD OF HEARING!

AMAZING NEW MEDICAL DISCOVERY CHECKS DEAFNESS!

A new revolutionary discovery concerning the cause of and remedy for chronic progressive deafness, has startled the entire medical profession! This discovery was made by a world-famous specialist, head of ear, nose, and throat department of leading New York hospital. These tests were made on 581 hard-of-hearing men, women, and children.

RESULTS ASTOUNDING

In most cases deafness stopped and very satisfactory results in functional hearing and the general clinical picture were obtained.

Extensive tests proved that many people who are hard of hearing have an excess supply of one or two (sometimes both) body chemical substances—pyruvic

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acid and cholesterol. When there is an excess of pyruvic acid, it means your body is not using carbohydrate foods properly. This affects tissues and nerves, and impairs your hearing.

When there is an excess of cholesterol in your blood, fatty crystals may deposit themselves in the small blood vessels of the ear and form a lesion. The lesion cements the tissue and prevents sound waves from entering the ear. The result is gradual loss of hearing. Deafness!

The ear specialist prescribed a course of treatment to correct these conditions. This treatment proved to be a sensational success.

He prescribed a product called BAC (B-Amino-Complex Tablets).

The doctor pointed out that the stopping of further deafness and the improvement in hearing does not come overnight. Results from BAC are gradual and are noticed in 3 to 6 months. But isn't that wonderful—if in 3 to 6 months you notice a definite improvement in your hearing?

It is intended for chronic, progressive deafness in otherwise normal, healthy people.

PAR. 5. In the first line of the above-quoted advertisement, respondents represent that the drug preparation "B-Amino-Complex," sometimes designated "BAC," offers "NEW HOPE FOR THE HARD OF HEARING." Later in the advertisement, respondents appear to particularize the application of their preparation by offering it as an effective treatment to persons having deafness resulting from an excess of pyruvic acid or cholesterol, or both. This particularization, however, does not limit the previous broad representation, which clearly implies that their drug preparation is a cure, remedy, or treatment for defective hearing in all persons so afflicted, regardless of cause or degree of deafness.

In the second line of the above-quoted advertisement, respondents describe their preparation by stating:

AMAZING NEW MEDICAL DISCOVERY CHECKS DEAFNESS!

The only logical conclusion to be drawn from this statement is that respondents' preparation is both amazing and new as a treatment for deafness, and that it will materially benefit or retard the progression of all types of deafness.

In the concluding paragraph of respondents' advertisement appears the statement, with reference to their preparation "B-Amino-Complex," that "it is intended for chronic, progressive deafness in otherwise normal, healthy people."

A logical interpretation of the meaning of the last of the foregoing representations requires an understanding of the general physiological mechanism of hearing; the characteristics, causes and treatment of deafness; and, particularly, the meaning of the phrase "chronic, progressive deafness."

PAR. 6. Hearing in human beings, is accomplished by means of the physiological mechanism consisting of the external and internal ear and the auditory nerve. The external ear, or auricula, is designed to collect and intensify air waves, through which sound is projected, and transmit them through the external ear canal to the drum membrane. There the sound waves are conducted, not only through the air in the middle ear, but through the small chain of bones known as ossicles, located in the middle ear. The Eustachian tube, which leads from the back of the throat to the middle ear, is also a part of the hearing mechanism. From the middle ear, the sound impulses are transmitted to a fluid medium in the inner ear, or cochlea, wherein they produce microscopic miniature waves, which are, in turn, transmitted by the auditory nerve to the brain centers which interpret them as sound.

Deafness is a symptom which indicates a dysfunction of some part of the human mechanism of hearing, and consists of a partial or total loss of the ability to hear.

Deafness may be produced by a variety of diseases, injuries, or malformations affecting any part of the mechanism of hearing. Such causes include enlarged adenoids and tonsils; the contagious diseases of childhood, such as scarlet fever and measles; infectious diseases such as syphilis; diseases involving a disturbance of metabolism, such as diabetes; acute and chronic infections of the middle ear, such as mastoiditis; the common cold; and external interference, such as injury, packed hard wax in the ear, or congenital malformation. There are also the degenerative changes in bone structure known as otosclerosis, which may be incident to the onset of senility, but which also occur in patients of all ages from puberty onward, and arise from a variety of causes, which in turn may be caused by disease, by hereditary factors, or by disturbances in metabolism, endocrine balance, or blood circulation or chemistry. A disturbance in metabolism, particularly in carbohydrate metabolism, may also cause perceptive deafness by interfering with the chemical reaction by which the nerve endings receive the sound waves conducted to them by the mechanism of the middle and inner ear.

The many and various conditions giving rise to the symptom of deafness should be treated as indicated by an exhaustive examination of the individual, and the therapy required to benefit or cure the particular patient may include surgery, medication, mechanical hearing aids, and vitamin and nutritional therapy designed to improve the general health. Failure to determine and institute the proper therapy, or combination of therapies, particularly suited to the individual patient may not only fail to improve the hearing, but may result in progressively increasing deafness.

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The phrase "chronic, progressive deafness" is a general description of the symptom of deafness, or hardness of hearing, when that symptom has existed over a considerable period of time with increasing severity, irrespective of the pathological condition or conditions causing such symptom.

In the light of the foregoing facts, the conclusion is compelled that respondents, through the use of the statements appearing in the above-quoted advertisements, have represented, as alleged in the complaint, that the use of their preparation "B-Amino-Complex", as directed, will check and cure deafness, and that said preparation constitutes a new medical discovery for the treatment of deafness.

PAR. 7. Since deafness is a symptom arising from various, often multiple causes, which causes can only be determined by an individual medical examination of the patient, and the therapy used in the treatment of each patient must accordingly vary widely, no one preparation can constitute an adequate cure, remedy, or treatment for all types of deafness. Therefore respondents' preparation "B-Amino-Complex", by itself, will not check or cure deafness.

Respondents' preparation is essentially a vitamin compound, and, as such is not a new medical discovery for the treatment of deafness.

Although the witnesses in support of the complaint testified that respondents' preparation would have no significant effect in the treatment of deafness, they admitted, in effect, lack of experience in biochemistry and in certain phases of metabolic disturbance which might adversely affect hearing. Their testimony, therefore, did not exclude the possibility that respondents' preparation might, as indicated by the testimony of witnesses for respondents, be of some value in the treatment of perceptive deafness resulting from an excess of pyruvic acid.

Respondents' preparation "B-Amino-Complex" has been prescribed by some physicians, usually in conjunction with other therapy, in the treatment of deafness involving high blood content of pyruvic acid. The record contains, however, no evidence of properly controlled experiments with respondents' preparation, upon which to base a conclusion either that such preparation will be beneficial when so prescribed, or that it will not. It must be concluded, therefore, that the burden of proof of lack of efficacy of respondents' preparation, when so used, has not been sustained.

Accordingly, the possibility has not been excluded that respondents' preparation "B-Amino-Complex" may serve as a useful adjunct to other suitable therapy in the treatment of the restricted percentage of perceptive deafness caused by a disturbance in the carbohydrate

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metabolism, when such disturbance results in a high pyruvic acid content of the blood, causing dysfunction of the auditory nerve.

PAR. 8. Respondents, by supplying to others the advertising matter above referred to, and by participating in the payment of the publication charges therefor, furnish to others the means and instrumentality by and through which to mislead and deceive the public as to the properties and value of their said preparation.

PAR. 9. Respondents' aforesaid representations concerning the drug preparation "B-Amino-Complex", to the extent hereinabove found, are misleading in material respects; have had and now have the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such statements and representations are true, and into the purchase of substantial quantities of said drug preparation as a result thereof; and constitute false advertisements within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

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

ORDER

It is ordered that respondent Unitone Corporation, a corporation, and its officers, and Joseph Barrows, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug product now designated as "B-Amino-Complex" or "BAC", or any other product containing substantially the same ingredients or possessing substantially similar properties, whether sold under the same name or under any other names, do forthwith cease and desist from:

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

- (a) That said product will check or cure deafness or have any significant effect upon deafness, except in cases of perceptive deafness wherein failure of the auditory nerve has resulted from a high blood-

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content of pyruvic acid, caused by disturbance of the carbohydrate metabolism of the body;

(b) That said product is a new medical discovery for the treatment of deafness;

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph 1 hereof.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner :

The complaint charges respondents with false advertising of a drug preparation known as "B-Amino-Complex," sold by them in interstate commerce. A typical newspaper advertisement complained of is the following, which was disseminated in interstate commerce :

"NEW HOPE FOR THE HARD OF HEARING !
AMAZING NEW MEDICAL DISCOVERY CHECKS
DEAFNESS !"

"A new revolutionary discovery concerning the cause of and remedy for chronic progressive deafness, has startled the entire medical profession ! This discovery was made by a world famous specialist, head of ear, nose, and throat department of leading New York hospital. These tests were made on 581 hard-of-hearing men, women, and children."

"RESULTS ASTOUNDING !

"In most cases deafness stopped and very satisfactory results in functional hearing and the general clinical picture were obtained."

"Extensive tests proved that many people who are hard of hearing have an excess supply of one or two (sometimes both) body chemical substances—pyruvic acid and cholesterol. When there is an excess of pyruvic acid, it means your body is not using carbohydrate foods properly. This affects tissues and nerves, and impairs your hearing.

"When there is an excess of cholesterol in your blood, fatty crystals may deposit themselves in the small blood vessels of the ear and form a lesion. The lesion cements the tissue and prevents sound waves from entering the ear. The result is gradual loss of hearing. Deafness !

"The ear specialist prescribed a course of treatment to correct these conditions.

"This treatment proved to be a sensational success.

"He prescribed a product called BAC (B-Amino-Complex Tablets).

"The doctor pointed out that the stopping of further deafness and the improvement in hearing does not come over night. Results from BAC are gradual and are noticed in 3 to 6 months. But isn't that wonderful—if in 3 to 6 months you notice a definite improvement in your hearing."

"It is intended for chronic, progressive deafness in otherwise normal, healthy people."

The hearing examiner found that respondents, through such advertisement, had represented, as alleged in the complaint, that the use of B-Amino-Complex as directed will check and cure deafness and that said preparation constitutes a new medical discovery for the treatment of deafness and that such representations are false.

This finding has ample support in the evidence and is not seriously challenged by either party.

The order requires respondents to cease and desist from advertising that:

(a) Said product will check or cure deafness or have any significant effect upon deafness, except in cases of perceptive deafness wherein failure of the auditory nerve has resulted from a high blood-content of pyruvic acid, caused by disturbance of the carbohydrate metabolism of the body;

(b) Said product is a new medical discovery for the treatment of deafness.

Both counsel supporting the complaint and respondents appeal.

In exceptions 1, 2, 5, 6, and 7, counsel supporting the complaint challenged the sufficiency of the evidence to support the hearing examiner's findings and 1 (a) of the order, and also challenged the propriety of the order even under the findings so made.

Witnesses for counsel supporting the complaint were Dr. Ralph Almour and Dr. Edmund P. Fowler, both experienced practitioners in the field of eye, ear, nose, and throat. They both testified in substance that respondents' product was not a new medical discovery, that it will not check deafness or cure it, or have any significant effect upon it. As pointed out by the hearing examiner "they admitted in effect lack of experience in biochemistry and in certain phases of metabolic disturbances which might adversely affect hearing," a circumstance properly to be considered in weighing their testimony.

Respondents introduced the testimony of Dr. Nachmansohn, a biochemist, Dr. De Graff, a heart specialist, and Dr. Benton. Their testimony sets out the basic theory upon which the claimed value of respondents' product is based. Briefly, that theory is as follows: nerve perception and nerve conduction depends upon the action of a chemical

substance known as acetyl choline which is produced when carbohydrate substances in the blood are metabolized. One of the products also produced is pyruvic acid which, when broken down, gives off certain phosphates which are important in the formation of acetyl choline. Imperfect carbohydrate metabolism is generally indicated by a high pyruvic acid level which indicates that the pyruvic acid is not being properly oxidized. To remedy this condition, certain vitamins are useful. The B-Amino-Complex increases the rate at which carbohydrate metabolism occurs and thus aids eventually the production of acetyl choline.

Respondents also put on the stand Dr. Julius W. Bell, an experienced otolaryngologist. He testified that he was familiar with the experiments and theories of Dr. Kopetzky and that he had prescribed B-Amino-Complex and Betazyme in his practice.

The reasonable conclusion to be drawn from Dr. Bell's testimony is that in certain types of deafness B-Amino-Complex does have value in conjunction with other types of therapy.

After hearing all the testimony, the hearing examiner found as follows:

"The possibility has not been excluded that respondents' preparation 'B-Amino-Complex' may serve as a useful adjunct to other suitable therapy in the treatment of the restricted percentage of perceptive deafness caused by a disturbance in the carbohydrate metabolism, when such disturbance results in a high pyruvic acid content of the blood, causing dysfunction of the auditory nerve."

The above finding is supported by the evidence. However, such finding does not justify 1 (a) of the order. The order should limit the value of the respondents' product to that of a useful adjunct to other suitable therapy.

Exception is also taken to the failure of the hearing examiner to find specifically that the layman is not qualified to diagnose deafness and properly evaluate or interpret the symptoms of deafness or to determine the proper therapy for such conditions. An additional exception is to the failure of the hearing examiner to find specifically that the use of respondents' product by laymen in cases of deafness or impaired hearing may delay competent medical treatment and result in serious injury.

The evidence does establish that the layman is not qualified to diagnose deafness and ordinarily could not determine the proper therapy for such condition. We may also concede that reliance on any advertised product may in some cases delay competent treatment and result in injury. The same result might follow where the afflicted person took no remedy at all or even where he received incompetent

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medical attention. There is no evidence that the preparation is dangerous to the health nor will respondents' advertising (as limited by the order proposed herein) represent expressly or impliedly that diagnosis by competent medical people is unnecessary. As having some bearing on the issue involved here, see *Alberty v. Federal Trade Commission* (1949) 182 F.2d 36.

In their appeal, respondents claim that since the advertisement set out in the complaint does not purport to do more than to accurately restate medical conclusions reached and published by a reputable otolaryngologist, it cannot be said to be false and misleading.

If respondents circulated false and misleading statements, it is no defense that they were merely setting forth the statements and conclusions of someone else. The issue is not whether Dr. Kopetzky actually made certain statements. The issue is: are these statements true? In connection with this issue, respondents offered reprints from medical publications of two articles written by Dr. Kopetzky, an expert in otolaryngology. At the time of the hearing, Dr. Kopetzky was deceased. The authenticity of the articles was conceded. Counsel supporting the complaint admitted that the articles were published but objected to their introduction in evidence as proof of the facts related therein. This objection was sustained by the hearing examiner and exception is taken by respondents.

It does not appear that the articles were recognized and generally accepted as standard authorities on the subject with which they dealt. On the contrary, they were the statements of Dr. Kopetzky concerning a theory which is still a matter of controversy. The ruling of the hearing examiner was correct (see 32 C. J. S. Sec. 718).

The findings of fact made by the hearing examiner are correct and are adopted as the findings of the Commission. It is directed, however, that 1 (a) of the Order be modified as suggested herein.

With that exception, the appeals of both parties are dismissed.

Commissioner CARRETTA did not participate.

ORDER MODIFYING INITIAL DECISION AND ADOPTING SUCH DECISION AS
MODIFIED AND ORDER TO FILE REPORT OF COMPLIANCE

This case having come on for hearing before the Commission upon the appeals filed by the respondents and by counsel supporting the complaint from the initial decision of the hearing examiner; and

The Commission having determined that the appeal of the respondents should be denied and that the appeal of counsel supporting the complaint should be granted in part and denied in part; and

The Commission, for reasons stated in its opinion which is separately issuing herein, having additionally determined that the findings

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as to the facts, conclusion, and order contained in the initial decision are in all respects appropriate, save and except for certain of the provisions contained in Paragraph 1 (a) of the order to cease and desist which the record now requires be modified:

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That the appeal of counsel supporting the complaint be, and it hereby is, granted to the extent that such appeal challenges Paragraph 1 (a) of the order contained in the initial decision as inconsistent with the findings as to the facts appearing in the initial decision and that such appeal be, and it hereby is, denied in all other respects.

It is further ordered, That subparagraph (a) of Paragraph 1 of the order contained in the initial decision be, and it hereby is, modified to read as follows:

That said product will check or cure deafness, or will have any value in the treatment of deafness except that it may serve as a useful adjunct to other suitable therapy in cases of perceptive deafness caused by a disturbance in the carbohydrate metabolism when such disturbance results in a high pyruvic acid content in the blood and causes dysfunction of the auditory nerve.

It is further ordered, That the initial decision as modified herein and by the Commission's opinion be, and it hereby is, adopted as the decision of the Commission.

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

Commissioner CARRETTA not participating.

Syllabus

IN THE MATTER OF
ALASKA SALMON INDUSTRY, INC., ET AL.

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

Docket 6141. Complaint, Nov. 12, 1953—Decision, Apr. 8, 1954

Where some 41 business enterprises, corporate and otherwise, which were engaged in operating canneries in the various fishing areas or districts of Alaska as established by the Department of the Interior for the purpose of controlling salmon fishing; entered into contracts for salmon caught in seven of such fishing areas or districts by the fishermen members of the unions in the fishing areas or districts in which said packers maintained such canneries; operated about 90 of the 110 salmon canneries operating in Alaska in which salmon fishing and canning constituted the Territory's largest industry and its principal source of employment and tax revenue; sold large quantities of salmon, including that caught in the fishing areas or districts concerned and purchased from the fishermen members of the unions involved, to purchasers, after canning; and were in substantial competition in the purchase of fresh or raw salmon from the fishermen who caught the same in such areas or districts, except as restrained or destroyed, as below set forth, with each other and with others likewise—

- (a) For many years past, and especially since 1946, and beginning with the date of their affiliation with their corporate trade organization or association, by means of and through said trade association and its managing director and their individual acts, entered into, maintained, and effectuated an agreement or understanding to pursue, and pursued, a planned, common, and concerted course of action between and among themselves to adopt, fix, and adhere to certain practices and policies which restricted and restrained competition in the offer to purchase and the purchase of fresh or raw salmon in commerce in said Territory; and as a part of and in furtherance of the aforesaid agreement, etc., and among other things—
 - (1) Agreed to and did determine and fix the purchase prices in the various fishing areas or districts of Alaska for the different types of fresh or raw salmon;
 - (2) Agreed to and did restrict price competition between and among themselves in the purchase of said salmon;
 - (3) Agreed to and did maintain uniform minimum prices for the purchase thereof and agreed to and did authorize and empower their said trade organization to negotiate on their behalf contracts or agreements with the said unions to fix and establish the annual minimum prices at which the various types of salmon were to be purchased by said packers and canners, members of their said organization, and were to be sold by the fishermen members of said unions; and

Where for many years past, and especially since 1946, said trade organization, a membership corporation, its said managing director, acting on behalf of its members, said members, from the date of their affiliation with their said trade organization, acting both individually and as members of said trade

organization, and the various unions concerned, acting for and on behalf of their Alaska salmon fishermen members—

- (b) Entered into, maintained, and effectuated an agreement or understanding to pursue, and pursued, a planned, common, and concerted course of action to adhere to certain practices and policies which restricted and restrained competition in the offer for sale, sale, and distribution of fresh or raw salmon in commerce in said Territory; and as a part of and in pursuance to and in furtherance of the aforesaid agreements, etc., among other things—
- (1) Agreed to and did determine and fix minimum prices for the purchase and sale of the various types of fresh or raw salmon caught in the aforesaid fishing areas or districts of Alaska;
- (2) Agreed to and did restrict price competition between and among fishermen members of said unions in the sale of said salmon;
- (3) Agreed to and did adopt and maintain an arrangement whereby each of said unions entered into annual agreements or contracts in one or more of the various fishing districts or areas of Alaska with said trade organization and its said members, whereby the annual minimum fish prices for the purchase and sale of said salmon were fixed;
- (4) Agreed to and did establish and maintain minimum prices for the purchase and sale of said fish;
- (5) Agreed to and did restrict individual salmon fishermen members of said unions from selling any such salmon to canneries of the members of said organization except in accordance with annual agreements or contracts entered into by said organization and its members and the union or unions concerned; and
- (6) Agreed to and did restrict raw or fresh salmon from being sold in any fishing area or district of Alaska until and unless the annual contract fixing and establishing the prices at which the various types of such fish should be purchased and sold had been entered into by or in behalf of said members and the union or unions for the area or district involved:

Held, That such acts and practices, under the circumstances set forth, had a dangerous tendency unduly to prevent price competition between and among respondents in the purchase and sale of raw or fresh salmon in commerce, and were all to the prejudice and injury of the public, and constituted unfair acts and practices in commerce and unfair methods of competition therein.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Fletcher G. Cohn, *Mr. Lewis F. Depro*, *Mr. Paul H. LaRue* and *Mr. Everette MacIntyre* for the Commission.

Mr. W. C. Arnold, of Seattle, Wash., for Alaska Salmon Industry, Inc.

Mr. Thomas M. Green and *Mr. Frank T. Rosenquist*, of the firm of Graham, Green, Howe & Dunn, of Seattle, Wash., for Ellamar Packing Co., Egegik Packing Co., P. E. Harris Co., Inc., Intercoastal Packing Co., Peninsula Packers, San Juan Fishing & Packing Co., Todd Packing Co., Uganik Fisheries, Inc., Calvert Corp., Trans-Pacific Fishing & Packing Co., and Marine Fishing & Packing Co.

Mr. Robert Graham and *Mr. Edward Dobrin* of the firm of Bogle, Bogle & Gates, of Seattle, Wash., for Alaska Pacific Salmon Co.,

Bristol Bay Packing Co., Chignik Fisheries Co., Kadiak Fisheries Co., New England Fish Co., and Seldovia Bay Packing Co.

Medley & Haugland, of Seattle, Wash., for Alaska Year Round Canneries Co., General Fish Co. and Kayler-Dahl Fish Co.

Allen, Hilen, Froude, DeGarmo & Leedy, of Seattle, Wash., for Farwest Wrangell Co. and Nakat Packing Corp.

Kerr, McCord, Greenleaf & Moen, of Seattle, Wash., for Fidalgo Island Packing Co. and Pacific American Fisheries.

Mr. E. H. Taylor, of the firm of Pillsbury, Madison & Sutro, of San Francisco, Calif., for Alaska Packers Ass'n and L. G. Wingard Packing Co.

Mr. Wendell Wyatt, of Astoria, Ore., for Columbia River Packers Ass'n.

Mr. M. A. Marquis of the firm of McMicken, Rupp & Schweppe, of Seattle, Wash., for Copper River Packing Co.

Mr. R. E. Robertson of the firm of Robertson, Monagle & Eastaugh, of Juneau, Alaska, for Icy Straits Salmon Co.

Holman, Mickelwait, Marion, Black & Perkins, of Seattle, Wash., for Libby, McNeill & Libby.

Mr. S. J. King of the firm of Ryan, Askren & Mathewson, of Seattle, Wash., for Whiz Fish Products Co.

Moriarty & Olson, of Seattle, Wash., for Wards Cove Packing Co.

Mr. Walter Walsh, of Juneau, Alaska, for Hood Bay Salmon Co., Annette Islands Canning Co., Keku Canning Co., Klawock Oceanside Packing Co., and Hydaburg Cooperative Ass'n.

Mr. Roy E. Jackson and *Mr. Carl B. Luckerath*, of Seattle, Wash., for Alaska Fishermen's Union.

McCutcheon, Nesbett & Rader, of Anchorage, Alaska, for Cordova District Fisheries Union.

Bassett, Geisness & Vance, of Seattle, Wash., for Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades, Bering Sea Fishermen's Union, United Fishermen of Alaska, and United Fishermen of Cook Inlet.

Walthew, Oseran & Warner, of Seattle, Wash., for Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska, Local No. 3-3, Fishermen & Allied Workers Division, International Longshoremen's & Warehousemen's Union and Local No. 30, Fishermen & Allied Workers Division, International Longshoremen's & Warehousemen's Union.

Mr. Hugh E. Pickel, Jr., of Seattle, Wash., for Stikine Gillnetters Ass'n.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 12, 1953, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them with the use of unfair acts and practices and unfair methods of competition in violation of the provisions of Section 5 of said Act.

The respondents desiring that this proceeding be disposed of by Consent Settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the Consent Settlement hereinafter set forth, and in lieu of the answers to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, are to be withdrawn from the record, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint;
2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law;
3. Agree that this Consent Settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

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

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

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on April 8, 1954, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

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

It appearing to the Commission that Sebastian-Stuart Fish Company, one of the respondents in this proceeding, is no longer engaged in the business of canning salmon in Alaska and that it has no present intention of reentering the business:

It was also ordered, That the complaint herein be dismissed as to said respondent Sebastian-Stuart Fish Company.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Alaska Salmon Industry Inc., is a membership corporation, organized and existing under the laws of the State of Delaware, with its principal office in the State of Delaware located at No. 100 West 10th Street, Wilmington, Delaware, and its principal office for the transaction of business of the corporation located at 200 Colman Building, 811 First Avenue, Seattle 4, Washington. It, its officers, directors and members are here named and made parties respondent to this proceeding. Said respondent, Alaska Salmon Industry Inc., will sometimes hereinafter be referred to as respondent "industry." The members of said respondent Industry will sometimes hereinafter be referred to as respondent "Industry Members."

Except as hereinafter noted, the following corporations, individuals, and partnerships were members of respondent Industry as of June 20, 1952, and each has continued such membership.

Therefore, because of that status and the acts, practices, and policies in which they participated, as hereinafter set forth, each such respondent industry member is also here named and made a party respondent individually. Each such respondent Industry Member is described as follows:

Respondent, Alaska Pacific Salmon Company is a corporation organized under the laws of the State of Nevada, with its principal office and place of business located at the Skinner Building, Seattle, Washington.

Respondent, Alaska Packers Association is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 215 Fremont Street, San Francisco, California.

Respondent, Alaska Year Round Canneries Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 5355 28th Avenue, N. W., Seattle, Washington.

Respondent, Angoon Community Association, operating under the name of the Hood Bay Salmon Company, is a corporation organized and existing under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, having its principal office and place of business located at 625 Colman Building, Seattle 4, Washington.

Respondent, Bristol Bay Packing Company is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located on the Seventh Floor of the Skinner Building, Seattle, Washington.

Respondent, Chignik Fisheries Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1826 Exchange Building, Seattle 4, Washington.

Respondent, Columbia River Packers Association, Inc., is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at Astoria, Oregon.

Respondent, Cook Inlet Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 303 Colman Building, Seattle 4, Washington.

Respondent, Copper River Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2408 Commodore Way, Seattle, Washington.

Respondent, Egegik Packing Company is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle, Washington.

Respondent, Ellamar Packing Company is a sole proprietorship conducted by Milton G. Brown, with its principal office and place of business located at 2408 Commodore Way, Seattle, Washington.

Respondent, Farwest Wrangell Co., Inc., is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 740 Westlake North, Seattle 9, Washington.

Respondent, Fidalgo Island Packing Company, Inc., is a corporation organized and existing under the laws of the State of Maine, with its principal office and place of business located at 2360 Commodore Way, Seattle 99, Washington.

Respondent, General Fish Co., Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 5355 Twenty-Eighth Avenue NW., Seattle, Washington.

Respondent, P. E. Harris Company, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1220 Dexter Horton Building, Seattle 4, Washington.

Respondent, Hydaburg Cooperative Association is a corporation operating under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, with its principal office and place of business located at 916 American Building, Seattle 4, Washington.

Respondent, Icy Straits Salmon Company is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 219 Herald Building, Bellingham, Washington; said respondent was a member of respondent industry until December 31, 1950, since which date it has not held membership in respondent industry.

Respondent, Independent Salmon Canneries Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 66, Bell Street Terminal, Seattle 1, Washington.

Respondent, Intercoastal Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle 14, Washington.

Respondent, Kadiak Fisheries Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1826 Exchange Building, Seattle 4, Washington.

Kayler-Dahl Fish Company, Inc., which was named as a respondent in the complaint, is now dissolved.

Respondent, Keku Canning Company, is a corporation operating under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, with its principal office and place of business located at 4103 Arcade Building, Seattle, Washington.

Respondent, Ketchikan Packing Company is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 625 Colman Building, Seattle, Washington.

Respondent, Klawock Cooperative Association, doing business as Klawock Oceanside Packing Company, is a native charter corporation operating under a charter obtained through the Bureau of Indian Affairs, United States Department of Interior, with its principal office and place of business located at 2700 Westlake North, Seattle 9, Washington.

Respondent, Libby, McNeill & Libby is a corporation organized and existing under the laws of the State of Maine, with its principal place of business being located at Union Stockyards, Chicago, Illinois.

Respondent, Metlakatla Indian Community operating under the trade name of Annette Islands Canning Company, is a Federal corporation chartered under the Act of Congress of June 18, 1934, with its principal office and place of business located at 505 Colman Building, Seattle 4, Washington.

Respondent, The Nakat Packing Corporation is a corporation organized and existing under the laws of the State of New York, with its

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principal office and place of business located at 1355 Dexter Horton Building, Seattle 4, Washington.

Respondent, New England Fish Company is a corporation organized and existing under the laws of the State of Maine, with its principal office and place of business located at 1828 Exchange Building, Seattle 4, Washington.

Respondent, Pacific American Fisheries, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 401 Harris Avenue, Bellingham, Washington.

Nick Bez, William Calvert, Lawrence Calvert and Starr H. Calvert are not engaged in business under the trade name of Peninsula Packers and there is substituted for them as respondents herein Trans-Pacific Fishing & Packing Company and Calvert Corporation, both of which corporations are organized under the laws of the State of Washington; the principal office and place of business of said partners trading under the name of Peninsula Packers in 1220 Dexter Horton Building, Seattle 4, Washington; said partners do acknowledge that full service of process has been effected upon them. Said partnership ceased its membership in respondent industry as of June 30, 1952.

Respondent, Port Ashton Packing Corporation is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 627 Colman Building, Seattle 4, Washington.

Respondent, Pyramid Fisheries Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2003 Exchange Building, Seattle 4, Washington.

Respondent, Superior Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2003 Exchange Building, Seattle 4, Washington.

Respondent, San Juan Fishing & Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle, Washington.

Respondent, Sebastian-Stuart Fish Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Pier 24, Spokane Street Dock, Seattle 4, Washington; said respondent filed no answer to the complaint.

Respondent, Seldovia Bay Packing Company is a corporation organized and existing under the laws of the Territory of Alaska, with

its principal office and place of business located at Central Building, Seattle 4, Washington. Said respondent was a Member of said respondent Industry on June 20, 1952 but has since that date ceased to be a member thereof.

Respondent, Snug Harbor Packing Company is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1805 Smith Tower, Seattle, Washington; said respondent filed no answer to the complaint.

Respondent Todd Packing Company is a partnership composed of San Juan Fishing & Packing Company and Marine Fishing & Packing Company, corporations, both of which are organized and existing under the laws of the State of Washington; the principal office and place of business of said partnership is located at Pier 31, Foot of Stacy Street, Seattle, Washington. Said partners do acknowledge that full service of process has been effected upon them.

Respondent, Uganik Fisheries Inc., is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at Pier 31, Foot of Stacy Street, Seattle, Washington.

Respondent, Wards Cove Packing Company Inc., is a corporation organized and existing under the laws of the Territory of Alaska, with its principal office and place of business located at 303 East Northlake Avenue, Seattle 5, Washington.

Respondent, Whiz Fish Products Company, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 2000 Alaskan Way, Seattle 4, Washington.

Respondents, L. G. Wingard, Mary Lou Wingard, Lester L. Wingard, Lou M. Hill, Charles Coffey, Conney Nelson, Lorraine Nelson and Richard W. Hill are individuals doing business as a partnership under the trade name of L. G. Wingard Packing Co., with their principal office and place of business located at 10457 Maplewood Place, Seattle, Washington.

Win-Ra Fisheries Inc., which was named as a respondent in the complaint herein, has been dissolved.

Respondent, W. C. Arnold has been for several years last past, and is now the Managing Director of respondent, Alaska Salmon Industry, Inc., with its principal office and place of business located at 200 Colman Building, 811 First Avenue, Seattle 4, Washington; he is here also named and made a respondent individually.

Each of the following parties described in this Paragraph 1 entered into agreements with the above-named respondents and participated with them in carrying out the acts and practices hereinafter alleged.

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Therefore, each such party is here named and made a respondent to this proceeding.

Respondent, Alaska Fishermen's Union is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal place of business is located at 84 Union Street, Seattle, Washington.

Respondent, Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal place of business is located at Sitka, Alaska.

Associated Fishermen & Allied Workers, who was named as respondent in the complaint herein could not be served with process. Therefore, the complaint is dismissed as to it.

Respondent, Bering Sea Fishermen's Union is an unincorporated association among whose members are fishermen engaged in catching the various types of raw or fresh salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Dillingham, Alaska.

Respondent, Cordova District Fisheries Union, is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Cordova, Alaska.

Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska, which was named as a respondent in the complaint herein, was not engaged in the acts and practices alleged in the complaint. However, there are named as respondents herein, in lieu of said Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska, Local No. 3-3 of the Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union and Local No. 30, Fishermen & Allied Workers Division of International Longshoremen's and Warehousemen's Union, both unincorporated associations among whose members are fishermen engaged in catching various types of fresh or raw salmon in one or more of the fishing districts of Alaska; the principal office and place of business of said respondent, Local No. 3-3, is 84 Union Street, Seattle, Washington, and that of said respondent Local No. 30, is Ketchikan, Alaska; said respondents do acknowledge that full service of process has been effected upon them.

Petersburg Vessel Owner's Association which was named as a respondent in the complaint herein, was not engaged in any of the acts or practices hereinafter set out.

No service of process was effected upon Southeastern Alaska Salmon Purse Seiners Association, which was named as a respondent in the complaint herein.

Stikine Gillnetters Association, which was named as a respondent in the complaint, is an unincorporated association whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska and selling same through such association in compliance with the provisions of the Fishermen's Marketing Act.

Respondent, United Fishermen of Alaska, is an unincorporated association among whose members are fishermen engaged in catching the various types of fresh or raw salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Kodiak, Alaska.

Respondent, United Fishermen of Cook Inlet, is an unincorporated association among whose members are fishermen engaged in catching the various types of raw or fresh salmon in one or more of the fishing districts of Alaska. Its principal office and place of business is located at Anchorage, Alaska.

PAR. 2. Respondent, Alaska Salmon Industry, Inc., was organized in 1940. It is a trade organization or association composed of corporations, partnerships, firms, and individuals who are engaged in the canning of salmon in Alaska. Its membership constitutes in excess of 50% of the salmon canners or packers operating in Alaska, and they can or pack well in excess of 50% of the total volume of salmon produced in said territory.

Respondent Industry has acted, and is acting for, and in cooperation with, the respondent Members thereof in negotiating and fixing the annual minimum prices to be paid by said respondent Members to fishermen members of respondent Unions for fresh or raw salmon caught by said fishermen in Alaskan waters and sold by them to such Members. In carrying out this function, respondent Industry, in each of the fishing areas or districts of Alaska, which are hereinafter described, fixes and establishes with the respondent Unions, for each of said districts or areas, fish prices for salmon caught in such areas or districts. All of the respondent Members of the respondent Industry having canneries in a particular fishing district or area, authorize and empower respondent Industry to act for them as a group in negotiating and fixing the fish prices for the various types of salmon caught by the fishermen members of the respondent Union or Unions in that particular fishing area or district.

PAR. 3. All of the individuals, partnerships, firms, and corporations hereinbefore described in Paragraph 1 are engaged in the business of

maintaining and operating canneries in one or more of the various fishing areas or districts of Alaska, as hereinbefore described, for the purpose of canning salmon including that caught by the fishermen members of respondent Unions in the fishing areas or districts in which said respondent Industry Members maintain such canneries. Each of said respondents was, or is, a member of respondent Industry, except as otherwise indicated in Paragraph 1, and has authorized, participated in, adopted or confirmed, as a member of respondent Industry, the acts and practices of said Industry hereinafter set forth.

PAR. 4. The respondent Unions are now engaged, and at all times herein mentioned have been engaged, in transacting business on behalf of their fishermen members. Each of said respondent Unions enters into contracts or agreements for one or more of the fishing districts or areas in Alaska with the respondent Industry and/or with respondent Industry Members who have canneries in the areas or districts covered by said contracts or agreements whereby minimum fish prices for the various types of salmon caught and sold in said fishing areas or districts are fixed and established for each annual fishing season.

PAR. 5. As to members of respondent Unions, including fishermen members, who are employees as one or more of respondent Industry Members, said respondent Unions have bargained, and do bargain, with the respondent Industry and/or respondent Industry Members as to wages and working conditions of said employees.

With the exception of the Bristol Bay area, referred to in the second paragraph of Paragraph 11, there is no agreement among respondents as to the status of fishermen members of respondent Unions. No Finding of Fact or Conclusion is made with respect to such status.

As to such status, the Commission is to consider and give full weight to the decisions and actions of the National Labor Relations Board.

PAR. 6. Respondent W. C. Arnold, who is made a respondent herein both individually and in his official capacity as Managing Director of respondent Industry, is the executive officer of said respondent Industry, and as such, acting for and on behalf of respondent Industry, supervises and directs the negotiations and agreements hereinafter described between respondent Industry and the respondent Unions.

PAR. 7. Each of the respondents herein named has directly or indirectly participated in, approved or adopted one or more of the acts and practices hereinafter set forth in Paragraphs 13 and 14.

PAR. 8. It is common knowledge that the Territory of Alaska is an important commercial factor in the economy of this country. Salmon fishing and canning is Alaska's largest industry and its principal

source of employment and tax revenue. The salmon canners are scattered along the shores of Alaska where it will be convenient for boats and fishing gear to intercept the incoming migration.

The law requires that salmon be canned, or otherwise preserved, within forty-eight hours after being caught, and the canneries, including those operated by respondent Industry Members, in order to secure the highest quality product, have adopted the practice of canning or otherwise preserving salmon within twenty-four hours.

The Territory has been divided into separate fishing areas or districts by the Fish and Wildlife Service, Department of Interior, for the purpose of controlling salmon fishing. The respondent Industry Members maintain canneries and enter into contracts for salmon caught in seven of such fishing areas or districts, to wit: Bristol Bay; Peninsula or Westward; Chignik; Kodiak Island; Cook Inlet; Copper River and Prince William Sound; and Southeastern Alaska.

The Secretary of Interior, by Congressional authority, promulgates and issues regulations annually, governing fishing for each year, whereby are controlled the opening and closing dates for salmon fishing in each of the fishing areas or districts. Such seasons vary in the different areas, but generally speaking, any particular area is not open for more than five weeks, and the greater portion of the catch in any such area is made within a fifteen-day period.

Normally there are about 110 salmon canneries operating in Alaska, and the respondent Industry Members operate approximately 90 of them. The capital investment in Alaska salmon fisheries is estimated at approximately \$100,000,000. The industry utilizes approximately 20,000 employees and fishermen, the total fishermen being approximately 14,000. About one-half of this 20,000 are year-round residents of the Territory, and the other 10,000 are transported to the Territory each spring from the continental United States and returned in the fall after the seasons' operations are concluded.

In 1952 the pack was approximately 3,250,000 cases (a case contains 48 one-pound cans), having a wholesale value of approximately \$95,000,000 and being valued to the fishermen at approximately \$33,000,000.

PAR. 9. Respondent Industry Members sell large quantities of salmon, including that caught in the fishing areas or districts of Alaska and purchased from the fishermen members of respondent Unions, to purchasers of said salmon after same has been canned by respondent Industry Members, and which purchasers are located in the various States of the United States, and cause same to be transported for sale from the Territory of Alaska to such purchasers. Said respondent Industry Members, as well as the fishermen members of respondent

Unions, maintain, and at all times herein mentioned, have maintained a regular course or current of trade and commerce in raw or fresh salmon in the Territory of Alaska.

The respondents, Industry, W. C. Arnold, and Unions, have been, and are, media whereby respondent Industry Members and fishermen members of respondent Unions have committed and performed, and are committing and performing, in commerce, the practices and policies hereinafter set forth in Paragraphs 13 and 14. All of the respondents named herein have been, and are now, engaged in commerce in raw or fresh salmon, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 10. Respondent Industry Members in the course and conduct of their business in purchasing fresh or raw salmon from the fishermen who catch same in the fishing areas or districts of Alaska, are in substantial competition, except as such competition has been restrained or destroyed, as hereinafter set forth, with each other and with others who likewise are engaged in purchasing and selling such salmon in commerce.

Respondent Unions, as well as the fishermen members thereof, in the course of negotiating for sale, and in selling the salmon caught by said fishermen in the fishing areas or districts of Alaska, are engaged in substantial competition, except as such competition has been restrained or destroyed, as hereinafter found: (a) the fishermen members of a respondent Union being in competition with each other; (b) all respondent Unions having fishermen members catching salmon in the same fishing area or district being in competition with each other; (c) respondent Unions and the fishermen members thereof being in competition with other unions and their members who are engaged in offering for sale and selling such salmon; and (d) said respondents and their fishermen members being in competition with other fishermen who are not union members, but who are engaged in catching and selling salmon in commerce.

PAR. 11. Fresh or raw salmon, with rare exceptions, is purchased by the respondent Industry Members as the result of, and on the basis of, the negotiations and bargaining carried on for each of the fishing areas or districts, in advance of the fishing seasons for each district, with the respondent Industry acting for, on behalf of, and with the approval of respondent Industry Members, and the respondent Unions acting for, on behalf of, and with the approval of all their fishermen members in the affected district. Such negotiations and bargainings fix and determine the fish prices, which are the prices at which fishermen members of respondent Unions agree to sell and the respondent Industry Members agree to purchase the various types of salmon for

the particular fishing season in the different fishing areas or districts covered by said contracts or agreements.

The greater majority of the fishermen members of respondent Unions who are, and have been for the last several years past, catching salmon within the Bristol Bay area are, and have been, employees of one or more of the respondent Industry Members operating canneries in said area.

PAR. 12. The fish prices fixed and determined in the aforescribed manner are adopted and maintained, at least as the minimum prices, for the various types of salmon in each of the fishing areas or districts covered by such contracts or agreements for the particular season named therein, by the respondent Industry Members and the fishermen members of the respondent Unions covered thereby.

PAR. 13. For many years last past, and especially since 1946, and continuing to the filing of this complaint, respondent Industry Members have, from the date of their affiliation with respondent Industry, by means of and through respondent Industry and respondent Arnold, and also by their individual acts, entered into, maintained and effectuated an agreement or understanding to pursue, and they have pursued, a planned common and concerted course of action between and among themselves to adopt, fix and adhere to certain practices and policies which restrict and restrain competition in the offering to purchase and the purchase of fresh or raw salmon in commerce in the Territory of Alaska.

As part of, pursuant to, and in furtherance of the aforesaid agreement, understanding and planned common and concerted course of action, said respondent Industry Members, among other such practices and policies, have agreed :

1. to determine and fix, and they have determined and fixed, and are still determining and fixing, the purchase prices in the various fishing areas or districts of Alaska for the different types of fresh or raw salmon ;

2. to restrict, and have restricted, and are still restricting, price competition between and among themselves in the purchase of said salmon ;

3. to maintain, and they have maintained, and are still maintaining, uniform minimum prices for the purchase of said salmon ;

4. to authorize and empower, and they have authorized and empowered, and are still authorizing and empowering, respondent Industry to negotiate on their behalf contracts or agreements with respondent Unions to fix and establish the annual minimum prices at which the various types of said salmon are to be purchased by respondent Industry Members and to be sold by the fishermen members of respondent Unions.

Findings

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PAR. 14. For many years last past, and especially since 1946, and continuing to the filing of this complaint, (a) respondent Industry, (b) respondent W. C. Arnold, acting on behalf of respondent Industry Members, (c) respondent Industry Members from the date of their affiliation with respondent Industry, acting both individually and as members of said Industry, and (d) respondent Unions, acting for and on behalf of the Alaska salmon fishermen members of said Unions, have entered into, maintained and effectuated an agreement or understanding to pursue, and they have pursued, a planned common and concerted course of action between and among themselves to adopt, fix, and adhere to certain practices and policies which restrict and restrain competition in the offering for sale, sale and distribution of fresh or raw salmon in commerce in the Territory of Alaska.

As part of, pursuant to, and in furtherance of the aforesaid agreement, understanding, or planned common and concerted course of action, said respondents, among other practices and policies, have agreed

1. to determine and fix, and they have determined and fixed, and are still determining and fixing, minimum prices for the purchase and sale of the various types of fresh or raw salmon caught in the aforesaid fishing areas or districts of Alaska;

2. to restrict, and they have restricted, and are still restricting, price competition between and among fishermen members of respondent Unions in the sale of said salmon;

3. to adopt and maintain, and they have adopted and maintained, and are still adopting and maintaining, an arrangement whereby each of respondent Unions has entered into annual agreements or contracts in one or more of the various fishing districts or areas of Alaska with the respondent Industry and the respondent Industry Members, whereby are fixed the annual minimum fish prices for the purchase and sale of said salmon;

4. to establish and maintain, and they have established and maintained, and are still establishing and maintaining, the minimum prices for the purchase and sale of said salmon;

5. to restrict, and they have restricted, and are still restricting individual salmon fishermen members of respondent Unions from selling any such salmon to canneries of respondent Industry Members except in accordance with annual agreements or contracts entered into by respondent Industry and respondent Industry Members and respondent Union or Unions;

6. to restrict, and they have restricted, and are still restricting, raw or fresh salmon from being sold in any fishing area or district of Alaska until and unless the annual contract or agreement fixing and

establishing the prices at which the various types of such salmon should be purchased and sold, have been entered into by or in behalf of respondent Industry Members and the respondent Union or Unions for said area or district.

PAR. 15. In addition to the effects, as hereinbefore set forth in Paragraphs 13 and 14, the acts, practices and policies of the respondents likewise have the capacity and tendency to affect the cost of food by their effect on the prices which the public is required to pay for canned salmon.

CONCLUSION

The acts and practices of respondents as hereinbefore found have a dangerous tendency unduly to hinder competition because they have promoted and contributed to the suppression, elimination and prevention of price competition between and among respondents in the purchase and sale of raw or fresh salmon in commerce, as "commerce" is defined in the Federal Trade Commission Act, and such acts and practices, all and singularly, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondents, Alaska Salmon Industry Inc., a corporation, its officers, directors and members, and Alaska Pacific Salmon Company, Alaska Packers Association, Alaska Year Round Canneries Company, Angoon Community Association trading as Hood Bay Salmon Company, Bristol Bay Packing Company, Chignik Fisheries Company, Columbia River Packers Association, Inc., Cook Inlet Packing Company, Copper River Packing Company, Egegik Packing Company, Ellamar Packing Company, Farwest Wrangell Co., Inc., Fidalgo Island Packing Company, Inc., General Fish Co., Inc., P. E. Harris Company Inc., Hydaburg Cooperative Association, Icy Straits Salmon Company, Independent Salmon Canneries, Inc., Intercoastal Packing Company, Kadiak Fisheries Company, Keku Canning Company, Ketchikan Packing Company, Klawock Cooperative Association doing business as Klawock Oceanside Packing Company, Libby, McNeill & Libby, Metlakatla Indian Community operating under the trade name of Annette Islands Canning Company, The Nakat Packing Corporation, New England Fish Company, Pacific American Fisheries, Inc., Trans-Pacific Fishing & Packing Company and the Calvert Corporation, both corporations doing business under the trade name

of Peninsula Packers, Port Ashton Packing Corporation, Pyramid Fisheries, Inc., Superior Packing Company, San Juan Fishing & Packing Company, Sebastian-Stuart Fish Company, Seldovia Bay Packing Company, Snug Harbor Packing Company, San Juan Fishing & Packing Company and Marine Fishing & Packing Company, corporations, doing business as Todd Packing Company, Uganik Fisheries, Inc., Wards Cove Packing Company, Inc., Whiz Fish Products Company, Inc., L. G. Wingard, Mary Lou Wingard, Lester L. Wingard, Lou M. Hill, Charles Coffey, Conney Nelson, Lorraine Nelson and Richard W. Hill, doing business as a partnership under the trade name of L. G. Wingard Packing Co., and W. C. Arnold, individually and as Managing Director of Alaska Salmon Industry Inc., and Alaska Fishermens Union, Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades, Bering Sea Fishermen's Union, Cordova District Fisheries Union, Local 3-3 of the Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union and Local No. 30, Fishermen & Allied Workers Division of International Longshoremen's and Warehousemen's Union, United Fishermen of Alaska and United Fishermen of Cook Inlet, and respondents' members, who shall be deemed herein to be parties respondent, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of raw or fresh salmon caught in the fishing areas or districts of Alaska, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common and concerted course of action, understanding or agreement between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts:

1. Fixing, establishing, maintaining or adhering to, in any manner or by any method whatever, the price or prices at which any type of raw or fresh salmon caught in the fishing areas or districts of Alaska are to be, or are, purchased or sold;
2. Fixing, establishing, maintaining or adhering to or attempting to fix, establish, maintain or cause adherence to, by any means or method, uniform or minimum prices for the purchase or sale of said salmon;
3. Jointly or collectively negotiating, bargaining or agreeing by any means or method as to the price or prices at which said salmon is proposed to be, or is, purchased or sold;
4. Authorizing or empowering any association, group, corporation or union to negotiate, bargain or agree as to the prices to be paid or received in the purchase or sale of any such salmon.

Provided, however, That nothing herein contained shall prevent any association of bona fide salmon fishermen, acting pursuant to and in accordance with, the provisions of the Fisheries Cooperative Marketing Act (15 U. S. C. A., Paragraphs 521, 522) from performing any of the acts and practices permitted by said Act;

Provided further, That nothing herein contained shall be deemed to prohibit one or more respondents from entering into or continuing a bona fide partnership, joint operation or venture, or consolidation, for the purpose of operating one or more canneries, and in which the prices paid for raw or fresh salmon are determined by said partnership, joint operation or venture, or consolidation, and where such determination is, under the contract establishing such partnership, joint operation or venture, or consolidation, binding upon all members thereof; This proviso shall not be construed as either an approval or a disapproval of any specific partnership, joint operation or venture, or consolidation, nor as permitting any such partnership, joint operation or venture, or consolidation, to be continued or formed for the purpose or with the effect directly or indirectly of rendering ineffective or unenforceable the inhibitions of this order and the purposes thereof.

Provided further, That nothing herein contained shall prevent collective bargaining between any respondent Union and respondent Industry and/or any employer respondent with respect to wages and working conditions of employee members of said Union within those fishing districts wherein they may be.

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

The complaint herein is dismissed as to the following who were named as parties respondent in the Complaint:

Kayler-Dahl Fish Company, Inc.; Nick Bez, William Calvert, Lawrence Calvert and Starr H. Calvert; Win-Ra Fisheries, Inc.; Associated Fishermen & Allied Workers; Fisheries Division, International Longshoremen's and Warehousemen's Union, Northwest and Alaska; Petersburg Vessel Owners' Association; Southeastern Alaska Salmon Purse Seiners Association and Stikine Gillnetters Association.

Seattle, Washington

23 January 1954

Amended 10 March 1954.

Order

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The following attorneys of record for the respondents named in the aforesaid Order to Cease and Desist do herewith attach their signatures to this Consent Settlement on the behalf of and for the respondents.

Sgd. W. C. Arnold,
Attorney for Alaska Salmon Industry, Inc.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Alaska Pacific Salmon Company.

Sgd. W. C. Arnold,
Attorney for Alaska Packers Association.

Sgd. Medley & Haugland,
Attorney for Alaska Year Round Canneries Company.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Bristol Bay Packing Company.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Chignik Fisheries Company.

Sgd. W. C. Arnold,
Attorney for Columbia River Packers Association, Inc.

Sgd. Margaret Mason, Secty.-Treas.,
Cook Inlet Packing Company.

Sgd. Donald D. MacLean,
Attorney for Copper River Packing Company.

Sgd. Thomas M. Green, Jr.,
Attorney for Egegik Packing Company.

Sgd. Thomas M. Green, Jr.,
Attorney for Ellamar Packing Company.

Sgd. Allen, Hilen, Froude, DeGarmo & Leedy,
by Seth W. Morrison,
Attorney for Farwest Wrangell Co., Inc.

Sgd. R. A. Moen,
Attorney for Fidalgo Island Packing Company, Inc.

Sgd. Medley & Haugland,
Attorney for General Fish Co., Inc.

Sgd. Thomas M. Green, Jr.,
Attorney for P. E. Harris Company, Inc.

Sgd. Medley & Haugland,
Attorney for Icy Straits Salmon Company.

Sgd. G. K. Davis,
Secretary for Independent Salmon Canneries, Inc.

Sgd. Thomas M. Green, Jr.,
Attorney for Intercoastal Packing Company.

Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Kadiak Fisheries Company.

Sgd. E. Dobszinsky,
President for Ketchikan Packing Company.

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- Sgd. Wendell W. Black—Francis E. Holman,
Attorneys for Libby, McNeill & Libby.
- Sgd. Allen, Hilen, Froude, DeGarmo & Leedy,
by Seth W. Morrison,
Attorney for The Nakat Packing Corporation.
- Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for New England Fish Company.
- Sgd. R. A. Moen,
Attorney for Pacific American Fisheries, Inc.
- Sgd. Thomas M. Green, Jr.,
Attorney for Trans-Pacific Fishing & Packing Company
and Calvert Corporation d/b/a Peninsula Packers.
- Sgd. C. F. Johnson,
Vice Pres., Port Ashton Packing Corporation.
- Sgd. Frank Wright, Jr.,
President, Pyramid Fisheries, Inc.
- Sgd. John T. Tenneson, Jr.,
Vice Pres. for Superior Packing Company.
- Sgd. Thomas M. Green, Jr.,
Attorney for San Juan Fishing & Packing Company.
- Sgd. Bogle, Bogle & Gates and R. W. Graham,
Attorney for Seldovia Bay Packing Company.
- Sgd. Thomas M. Green, Jr.,
Attorney for San Juan Fishing & Packing Company and
Marine Fishing & Packing Company, d/b/a Todd
Packing Company.
- Sgd. Thomas M. Green, Jr.,
Attorney for Uganik Fisheries, Inc.
- Sgd. Moriarty, Olson & Campbell,
by Richard T. Olson,
Attorney for Wards Cove Packing Company, Inc.
- Sgd. Snyder J. King,
Attorney for Whiz Fish Products Company, Inc.
- Sgd. W. C. Arnold,
Attorney for L. G. Wingard, Mary Lou Wingard, Lester
L. Wingard, Lou M. Hill, Charles Coffey, Conney Nel-
son, Lorraine Nelson, and Richard W. Hill, d/b/a L. G.
Wingard Packing Co.
- Sgd. W. C. Arnold,
Attorney for W. C. Arnold, individually and as Managing
Director of Alaska Salmon Industry, Inc.
- Sgd. Roy E. Jackson,
Attorney for Alaska Fishermen's Union.

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- Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for Alaska Marine District Union of Fishermen, Cannery Workers and Allied Trades.
- Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for Bering Sea Fishermen's Union.
- Sgd. Roy E. Jackson,
Attorney for Cordova District Fisheries Union.
- Sgd. Walthew, Oseran, Warner—John F. Walthew,
Attorney for Local No. 3-3, Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union.
- Sgd. Walthew, Oseran, Warner—John F. Walthew,
Attorney for Local No. 30, Fishermen & Allied Workers Division, International Longshoremen's and Warehousemen's Union.
- Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for United Fishermen of Alaska.
- Sgd. Bassett, Geisness & Vance—J. Duane Vance,
Attorney for United Fishermen of Cook Inlet.
- Sgd. ————,
Attorney for Sebastian-Stuart Fish Company.
- Sgd. Joseph R. Fribrock,
Pres. for Snug Harbor Packing Company.
- Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Angoon Community Association, trading as Hood Bay Salmon Company.
- Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Hydaburg Cooperative Association.
- Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Keku Canning Company.
- Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Klawock Cooperative Association, doing business as Klawock Oceanside Packing Company.
- Sgd. Harry A. Sellery, Jr., Chief Counsel,
Bureau of Indian Affairs,
Attorney for Metlakatla Indian Community operating under the trade name of Annette Islands Canning Company.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 8th day of April 1954.

Opinion

IN THE MATTER OF
GENERAL FOODS CORPORATION

Docket 5675. Complaint, July 7, 1949—Decision, opinion, and dissenting opinion, Apr. 13, 1954

Charge: Discriminating in price in the sale of "Certo" and "Sure-Jell" pectin products in violation of Section 2 (a) of the Clayton Act, as amended.

Before *Mr. Abner E. Lipscomb* and *Mr. William L. Pack*, hearing examiners.

Mr. Eldon P. Schrup for the Commission.

Mr. Lester E. Waterbury, of White Plains, N. Y., for respondent.

DECISION OF THE COMMISSION DENYING APPEAL AND DISMISSING
COMPLAINT

This matter came before the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint.

The Commission has considered the entire record herein including the exceptions to the initial decision and, for the reasons stated in the written opinion of the Commission which is issued herewith, is of the opinion that the rulings of the hearing examiner are free from prejudicial error and that the allegations of the complaint should be dismissed.

It is ordered, therefore, That the appeal of counsel supporting the complaint from the initial decision is hereby denied and that the allegations of the complaint are hereby dismissed.

Commissioner MEAD dissenting and Commissioner CARRETTA not participating.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The complaint charges respondent with territorial price discrimination in violation of Section 2 (a) of the Clayton Act, as amended. At the conclusion of the evidence of counsel supporting the complaint, respondent moved for dismissal on the ground that the evidence failed to prove:

- (a) That the goods involved were of like grade and quality;
- (b) That there was any price discrimination; and
- (c) That the alleged practices tended substantially to lessen competition, or to create a monopoly, or to injure, destroy, or prevent