

IN THE MATTER OF
THE LEBLANC CORP. ET AL.

Docket 5925. Amended complaint, Feb. 8, 1952—Decision, June 24, 1954

Charge: Advertising falsely therapeutic qualities, composition, testimonials, etc.; in connection with sale of "Hadacol" drug preparation.

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

Mr. Joseph Callaway for the Commission.

Cahill, Gordon, Reindel & Ohl, of New York City, and *Cahill, Gordon, Zachry & Reindel*, of Washington, D. C., for The LeBlanc Corp.

Voorhies & Labbe, of Lafayette, La., and *Mr. Robert E. Freer*, of Washington, D. C., for Dudley J. LeBlanc.

DECISION OF THE COMMISSION

This matter coming on to be heard by the Commission upon its review of the hearing examiner's initial decision dismissing the complaint herein; and

The Commission having considered the entire record and being of the opinion that said initial decision is appropriate to dispose of the proceeding:

It is ordered, That the hearing examiner's initial decision, a copy of which is attached, shall, on the 24th day of June 1954, become the decision of the Commission.

Commissioner Mead not participating.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On February 8, 1954, counsel for the Trustee of the Estate of the LeBlanc Corporation submitted his thirteenth motion for a further extension of time within which to answer the complaint herein, and counsel supporting the complaint responded thereto by submitting a motion to dismiss the complaint without prejudice. To this motion respondents have offered no opposition.

The original complaint herein was issued on September 28, 1951, and an amended complaint on February 8, 1952. These documents allege that respondent corporation and Dudley J. LeBlanc, individually and as President and Sales Manager of the LeBlanc Corporation, have violated Sections 5 and 12 of the Federal Trade Commission Act by the dissemination of false advertisements of a preparation designated "Hadacol." All alleged violations are asserted to have occurred

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during the period during which the respondent corporation was under the control and management of the individual respondent, Dudley J. LeBlanc.

Counsel supporting the complaint avers that shortly after the issuance of the original complaint, and before the time for filing answer thereto had expired, the corporate respondent went into bankruptcy under the jurisdiction of the United States District Court for the Southern District of New York. Subsequently the corporate respondent has been under the control of the trustee appointed by the Court, who has given repeated assurances that the corporate respondent would not violate the provisions of the Federal Trade Commission Act. As a result, repeated motions of counsel for the Trustee for the Estate of the LeBlanc Corporation, requesting extensions of time for the filing of an answer to the complaint herein, pending decisions to liquidate or to reorganize that corporation, have been granted.

Counsel supporting the complaint states that it is believed that respondent Dudley J. LeBlanc now has no voice in the management and control of the business of the corporate respondent. Counsel further states that it is believed that no advertising disseminated since the issuance of the original complaint contains any violations alleged therein or in the amended complaint. Furthermore, counsel assert that they expect the corporate respondent to be reorganized with new capital, new management, and new ownership and control.

Counsel supporting the complaint concludes, firstly, that if the plan for reorganization does not succeed, the affairs of the corporate respondent will be terminated by the Bankruptcy Court, in which event there will be no point in a continuation of this proceeding. Secondly, he concludes, presumptively, that if the plan for reorganization does succeed, the corporate respondent will operate thereafter under new management, which will have had no connection with the management which was in control at the time of the alleged violations of law set forth in the original and amended complaints. Thirdly, he concludes that if the newly-reorganized corporate respondent should disseminate false advertising of the preparation now known as "Hadacol," a new complaint should issue, based upon those violations rather than upon violations alleged to have occurred more than two years ago.

Since the factual statements and conclusions presented by counsel supporting the complaint are unquestioned, and since it appears that his conclusions are reasonable in the light of the circumstances shown, it is believed that his motion should be granted. Accordingly,

It is ordered, That the complaint and amended complaint herein be, and the same hereby are, dismissed without prejudice to the right of the Commission to take such further action as future facts may warrant.

IN THE MATTER OF

EXCEL AUTOMATIC PRODUCTS, INC., ET AL.

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

Docket 6063. Complaint, Nov. 21, 1952—Decision, June 25, 1954

Where a corporation and its two responsible officers, engaged in the manufacture and competitive interstate sale and distribution of their "Taylor-Made Dry Shaver"—

- (a) Falsely represented in printed booklets and pamphlets distributed to prospective purchasers that their said product soothed the skin as it shaved;
- (b) Falsely represented, as aforesaid, that its cutting parts were precision ground, were made of the highest grade surgical steel, were properly tempered, and were self-sharpening;
- (c) Represented, as aforesaid, that it was fully and unconditionally guaranteed against defective workmanship and materials and that necessary repairs and replacement of defective parts would be made without charge; when in fact they exacted a handling charge of 50¢ for each shaver returned for such repairs or replacement; and
- (d) Represented that the usual and customary retail price of their said product was \$19.50 in the United States through attaching thereto, before shipment to purchasers, a tag so stating; when in fact said price was fictitious and greatly in excess of the amount at which said product was ever sold:

Held, That such acts and practices were all to the prejudice and injury of the public and of their competitors and constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. John Lewis*, hearing examiner.

Mr. Andrew S. Scott, Jr. and *Mr. William J. Tompkins* for the Commission.

Mr. Joseph Bohrer, of Newark, N. J., for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated June 25, 1954, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on November 21, 1952, charging them with the use of unfair and deceptive acts and practices and unfair methods

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of competition in commerce in violation of the Federal Trade Commission Act. Said respondents, after being duly served with the complaint herein, filed their answer, in which they admitted the jurisdictional allegations of the complaint, but denied having engaged in any illegal practices as alleged in the complaint.

Pursuant to notice, hearings were held before the undersigned hearing examiner, theretofore duly designated by the Commission to hear this proceeding, on the dates and at the places following: On February 16, 1953, in New York, New York; on February 27, 1953, in Washington, D. C.; on April 13, 1953, May 27, 1953, and August 7, 1953, in New York, New York.

At said hearings testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. Counsel supporting the complaint and counsel for respondents both waived opportunity to argue orally before the hearing examiner. However, they availed themselves of the opportunity for filing proposed findings and conclusions, together with the reasons therefor, which have been carefully considered by the examiner.

Upon consideration of the entire record herein, and from his observation of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACT

I. The business of respondents

Respondent Excel Automatic Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 57-59 Twelfth Avenue, Newark, New Jersey. Respondents Stephen J. Gwoosh and Clarence E. Taylor are president and vice president, respectively, of the corporate respondent and formulate, direct and control the policies, acts and practices of said respondent, including the acts and practices hereinafter found. Their address is the same as that of the corporate respondent. Said respondents are now, and for more than two years last past have been, engaged in the manufacture, sale and distribution of a product designated as Taylor-Made Dry Shaver.

Respondents cause their product, when sold, to be transported from their place of business in the State of New Jersey to purchasers thereof

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located in various other states of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce among and between the various states of the United States and in the District of Columbia. Their volume of trade in said product has been, and is, substantial.

II. The unfair and deceptive practices

A. *Background and issues*

The complaint charges respondents with having made certain false, misleading and deceptive statements with respect to the quality, value and price of their product in printed booklets and pamphlets distributed to prospective purchasers and on price tags attached to said product. In their answer, as filed, respondents admitted having made certain of the statements and representations attributed to them, but denied that any of such statements or representations were false, misleading and deceptive. However, at the initial hearing held herein, counsel for respondents and counsel supporting the complaint entered into a stipulation modifying the original answer filed by respondents, as a result of which stipulation it was agreed that respondents admitted having made all of the statements and representations set forth in the complaint, and admitted further that said statements and representations were false, misleading and deceptive, with the exception of the representation that respondents' product "will render effective and satisfactory service as a dry shaver." With respect to the last-mentioned representation, respondents denied the falsity thereof. Respondents having admitted all of the allegations of the complaint, except that concerning whether their shaver will render effective and satisfactory service as a dry shaver, no proof was offered in support of or in opposition to the other allegations of the complaint, and all of the testimony and other evidence adduced at the hearing was with respect to this single issue.

B. *The representations made*

It has been stipulated, and is so found by the hearing examiner, that respondents, for the purpose of inducing the purchase of their product, Taylor-Made Dry Shaver, have made the following representations, either directly or by implication, in printed booklets and pamphlets distributed to prospective customers or purchasers thereof:

1. That their product will render effective and satisfactory service as a dry shaver;
2. That it soothes the skin as it shaves;

3. That its cutting parts are precision-ground, are made of the highest grade surgical steel, are properly tempered and are self-sharpening;

4. That it is fully and unconditionally guaranteed against defective workmanship and materials;

5. That necessary repairs and replacement of defective parts will be made without charge.

It has been further stipulated, and is so found by the examiner, that before respondents ship their products to purchasers, they attach a tag thereto containing a statement that the price of the shaver in the United States is \$19.50. It is found that by means of the statement appearing on the said tag, respondents represent that the usual and customary retail price of their said product is \$19.50 in the United States.

C. The falsity of the representations

It is admitted by respondents, and is so found by the hearing examiner, that certain of the statements and representations made with respect to their product, as above found, are false, misleading and deceptive in the following respects:

1. Respondents' product does not soothe the skin as it shaves;

2. Its cutting parts are not precision-ground, are not made of the highest grade surgical steel, are not properly tempered, and are not self-sharpening;

3. The said product is not fully or unconditionally guaranteed against defective workmanship or materials;

4. Respondents do not make necessary repairs or replacements of defective parts under the aforesaid guarantee without charge, but exact a handling charge of 50 cents for each shaver returned for repairs or replacement of defective parts;

5. The price of \$19.50, represented as the usual and customary retail price of their product in the United States, is a fictitious price and is greatly in excess of the amount at which said product was ever sold.

The only issue on which there is any dispute is that as to whether respondents' shaver will render effective and satisfactory service as a dry shaver. In support of his contention that respondents' shaver will not perform satisfactorily counsel in support of the complaint relies on the testimony of two individuals who purchased and briefly used the shaver, on the testimony of three employees of the National Bureau of Standards who conducted shaving tests with respondents' shaver, and on the testimony of two representatives of competing electric shaver companies. In support of their position that their

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shaver will render effective and satisfactory service respondents rely on the testimony of three customers who actually used the shavers for periods varying from one month to approximately ten months, and on shaving tests conducted by the New York Testing Laboratories.

1. Evidence in support of the complaint

The two individual customers called by counsel in support of the complaint testified that when they attempted to use respondents' shaver it would not shave, and that they sent it back to respondents under the guarantee. According to one of the individuals, when the shaver was returned to him by respondents it still would not shave. The other individual testified that when the shaver was returned it did cut some hair, but he claimed that it did not give him a "good, clean shave." Both witnesses admitted having strong, tough beards and indicated that they had had no previous experience with electric shavers.

The tests at the National Bureau of Standards were conducted under the supervision of S. H. J. Womack, an electrical engineer. The tests consisted of Womack and two of his associates attempting to shave with several of respondents' shavers and with two other brands of shavers, and then measuring the length of the hairs cut. Womack gave the following account of his experience with the shavers: After acquiring a two-days' growth of beard he attempted to shave with one of respondents' shavers but found, after ten minutes, that it only cut his hair "slightly." He then let his beard grow for another ninety hours and again attempted to shave but found, after five minutes, that it shaved "very poorly." Upon examining the shaver under microscope, Womack found that the upper and lower cutting plates were not in contact for about one third the length of the cutting head. Two days later Womack attempted to shave with another of respondents' shavers and found that although it did cut hairs, the results were poor and not uniform, and that his face was irritated. After using respondents' shaver on one side of his face, Womack attempted to use a Schick shaver on the other side and found that he was able to get a "smooth" shave within five minutes. He measured the length of the cut hairs remaining on his face with an instrument known as a "feeler-gauge," and found that the length of the hair which had been cut by respondent's shaver was 14/1000 of an inch, while the hair cut by the Schick shaver was 8/1000 of an inch. When Womack was asked how much hair on his face was actually cut to any extent by respondent's shavers, he estimated that only about one percent was cut with the first shaver and about three

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percent with the second shaver; but he admitted that he had made no notation of these figures at the time of the experiments and that there was nothing in his report of the tests to substantiate these estimates. Womack also testified that the upper platen (cutting head) on respondents' shaver measured $14/1000$ of an inch, and expressed the opinion that the thickness of the platen affected the cutting ability of the shaver.

The test conducted by the second witness from the Bureau of Standards, Richard W. Armstrong, consisted of shaving the hair on his wrist for a distance of two square inches with one of respondents' shavers and then performing the identical operation with a Philip's shaver. Although respondents' shaver cut all the hair to some extent, Armstrong testified that upon measuring the remaining hair with a feeler-gauge, he found that it measured $14/1000$ of an inch in length, while similar measurements of the hair after being cut with a Philip's shaver revealed the length of the remaining hair as $8/1000$ of an inch. Although Armstrong claimed that he also attempted to use respondents' shaver on his face and could not get satisfactory results, he admitted that he had made no record of this test in his notes of the experiments and that, with respect to this part of the test, he could not "recall precisely enough to testify."

The third witness from the Bureau of Standards, Leon D. Orbach, testified to having used two different shavers of respondents on two different days, after acquiring a beard of several days' growth. On the first occasion he observed that while some of the hair was cut after five minutes of shaving, the largest portion remained uncut. On the second occasion, while more of the hair appeared to be cut, a considerable amount of the beard remained and the shaver seemed to pull his skin. Orbach then used a Schick shaver and claimed that he received a "complete shave" with "no visible beard" in five to eight minutes. No measurements were made by him of the length of hair remaining after any of the shaves.

Counsel in support of the complaint called as rebuttal witnesses representatives from two competing electric shaver companies, the Schick Company and the Remington Rand Company. These representatives testified in substance that the thicker the shear plate, the slower and more unsatisfactory the shave received. The representative of the Schick Company testified that the shear plate of the Schick shaver is between 2 to $3/1000$ of an inch, and that tests made by his company indicated that where the thickness goes beyond $4/1000$ of an inch, the shaver will not produce a satisfactory shave. While the representative of the Remington Rand Company indicated that the thickness of the outer shell or plate on the Remington shaver measures

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from 2.2 to 2.6/1000 of an inch, he indicated that the company also had a thicker plate, measuring 6/1000 of an inch, for use by people having a thin skin which might be irritated by the thinner plate.

2. Respondents' evidence

The three individual users called by respondents had used the shaver for approximately one, three and ten months, respectively. All of them testified that it gave them a satisfactory shave. Although one of the witnesses, Leo Rossi, had not shaved with respondents' shaver since the previous morning, his face at the time of the hearing, despite a one-day's growth of beard, appeared to be fairly clean. Counsel supporting the complaint suggests that these witnesses should not be believed because "for the most part they were shown to be friendly to the respondents." The examiner cannot agree with this observation. Only one of the witnesses was shown to have known any of the respondents prior to the hearing. The testimony discloses that respondent Gwoosh purchases gasoline at the service station of the witness Julius De Falco. However, it also appears that this witness had purchased his shaver prior to the time he had come to know Gwoosh as a customer, and has been using it since. The only other witness as to whom any question was raised was the witness Rossi, who testified that respondents' salesman in Massachusetts had paid his expenses in coming from his home in that state to the place of hearing in New York City. However, this is no reason for disbelieving a witness any more than the fact that Government witnesses receive a witness fee is a ground for not crediting their testimony. So far as appeared from their demeanor and testimony, these three witnesses all appeared to be testifying truthfully.

The tests conducted for respondents by the New York Testing Laboratories consisted of five different individuals (three employees of the testing company and the two individual respondents) shaving with respondents' shaver and with three other well-known brands of shavers on three different days. Each of the participants appeared at the laboratory on Monday, March 23, 1953, with a two-days' growth of beard and then shaved one side of his face with one of respondents' shavers and the other side of his face with a Remington, Sunbeam or Schick shaver. This test was repeated on Wednesday, March 25, 1953, with each participant using a different one of respondents' shavers and a different one of the well-known brands above mentioned. On Friday, March 27, 1953, the test was again repeated. On the first day of the tests photographs of both sides of the face of each of the five individuals participating in the tests were taken, before and after

shaving with one of respondents' shavers and with one of the other brands. Photographs were again taken on the second and third days of the tests, showing both sides of each individual's face after shaving with another of respondents' shavers and another of the known brands. These photographs, which were received in evidence, reveal that while the shaving results of the first day's test were for the most part only fair, both with respondents' shaver and the other shavers, as the tests proceeded most of the participants received progressively better shaves. By the last day, and in some cases on the second day, most of the participants received what appeared to be a fairly clean shave with respondents' shavers. Several of the participants testified that as they became more accustomed to using the shavers and as their faces became adjusted to them, they were able to get a better shave. The evidence does reveal that the length of time required to get a clean shave with respondents' shavers was somewhat longer than with the other brands, but not inordinately so. The shaves received with the other brands also appear from the photographs to be somewhat closer in most instances than those received with respondents', but not excessively so.

After the tests described above, the New York Testing Laboratories conducted an additional test for the purpose of measuring the length of the hairs remaining after shaving with one of respondents' shavers and then after shaving with a Sunbeam shaver. Under this test, one of the laboratory's employees who had participated in the shaving tests returned on the Monday following the first group of tests, with a two-days' growth of beard, and shaved an area of about three-quarters of an inch on one side of his face with one of respondents' shavers and a similar area on the other side with a Sunbeam. The hair remaining on his face in the area where the shavers had been used was then measured with a calibrated optical microscope to ascertain its length. The side of the face which had been shaved with respondents' shaver was found to be level with the skin for 73 percent of the area, while the side that was shaved with a Sunbeam shaver was revealed to be level with the skin for about 65 percent of the area. However, most of the remaining hair, which had not been cut level with the skin, was found to have been left longer on the side where respondents' shaver had been used than on the side where the Sunbeam had been used.¹

The employee at the New York Testing Laboratories who set up and supervised the test, Isaac Stewart, a licensed professional engineer,

¹ Of the remaining hair on the side where respondents' shaver was used, 7.7% measured 1.5/1000 of an inch, 11.5% was 3/1000 of an inch, 3.85% was 6/1000 of an inch and 3.85% was 9/1000 of an inch. On the side where the Sunbeam was used, all the remaining hair (34.8%) measured 1.5/1000 of an inch.

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testified that all the measurements had been made with a calibrated optical microscope because that was the most accurate way that he knew of to take measurements of the fineness involved in measuring the length of hairs. The witness testified that a similar measuring device had been used in making tests on the sharpness of blades for a razor company. According to Stewart he attempted, at the request of the respondent Gwoosh, to use a feeler-gauge in the measurement of the hair, but found it unsatisfactory because the interference of adjacent hairs, the flexibility of the skin and the angular growth of the beard hairs made it impossible to measure the length of the hair accurately with this instrument.

3. Concluding findings

Counsel supporting the complaint contends that a satisfactory shave is one which is an "optimum" combination of closeness, speed and comfort. In the opinion of the examiner this is not an appropriate test, since the issue is not whether respondent's shaver will produce the best possible shave, but whether it shaves in a sufficiently satisfactory or effective manner to entitle it to be called a dry shaver. This does not, of course, mean that because a device cuts some hair, to some extent, and within some unspecified time, there is justification for designating it a dry shaver. A shaver can be said to be satisfactory and effective, in the opinion of the examiner, if the average individual, under ordinary conditions of use, can receive a shave which is reasonably close, within a reasonable length of time, and without undue irritation or discomfort. What is reasonable depends on a number of pertinent factors. For example, the testimony of a number of the witnesses, both from the Bureau of Standards and the New York Testing Laboratories, who had at one time used various dry shavers for personal use, suggests the existence of certain limitations on the closeness of the shave received with such devices as compared with conventional wet-shaving methods. Yet it cannot be said that such shavers are not satisfactory or effective by reason of this fact. The standard of comparison must be the performance of dry shavers as a class and not the type of shave received with conventional shaving methods. It must also be recognized that there are degrees of satisfaction and effectiveness among dry shavers, and that one shaver may be satisfactory and effective even though another shaver may give a closer shave within a somewhat shorter period of time. Consideration must also be given to the matter of price. The same type of performance cannot be expected from a shaver retailing at \$4-\$5 as from one selling at \$15-\$20, any more than the same performance

can be expected from a Chevrolet and a Cadillac, albeit in both instances the lower-priced article must meet certain minimum standards of performance to fall within the category of satisfactoriness and effectiveness.

With these considerations in mind, the examiner turns to an evaluation of the evidence introduced in this proceeding. It may be noted at the outset that there was no notable indication that any of the witnesses was attempting to give an untruthful or biased account of his experiences with respondents' shaver. There were, however, differences in the substantiality of their experiences and the reliability of their observations. It must also be borne in mind that it was not incumbent on respondents to establish that their shaver was satisfactory and effective, but that counsel in support of the complaint, as the proponent of the issue, had the burden of establishing to the contrary.

The two lay witnesses called in support of the complaint gave respondents' shaver a very brief try (not more than two or three times) and then concluded that it was not satisfactory. There were even differences between them with regard to the effectiveness of the shaver. One witness conceded that the shaver did cut somewhat after it had been adjusted by respondents, while the other claimed it didn't cut any hair even after adjustment. Both had stiff, tough beards, had had no previous experience with dry shavers, and appeared to expect a degree of performance similar to that received from the wet-shaving methods to which they were accustomed. Compared to these two witnesses, there is the testimony of the three lay witnesses called by respondents who had been using the shaver for a longer period of time and appeared to be getting satisfactory results.

With respect to the tests which were conducted by both the Bureau of Standards and the New York Testing Laboratories, it should be noted that there is no standard, recognized scientific test for the cutting ability of electric shavers. The so-called tests merely consisted in the participants going through the same procedure as any lay witness, namely, using the instrument in shaving. In the absence of a standard, scientific test it was deemed advisable to test other brands of shavers, as well as respondents', so as to give some idea, on a comparative basis, as to the degree of effectiveness of respondents' product.

In considering the reliability of the two groups of tests made, there are a number of factors which favor those conducted by the New York Testing Laboratories as against those conducted by the Bureau of Standards. First there is evidence indicating that one of the shavers used by the Bureau was out of alignment, since the upper and lower cutters were admittedly not in contact for a distance of about one-third

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of the length of the head. This would hardly give a representative picture of the performance of respondents' shaver. The other shaver used by the witnesses Womack and Orbach appears to have had better cutting ability, although they claimed that this too did not give them a satisfactory shave. Orbach made no measurements of the cutting ability of the shaver. While Womack did measure the hair with a feeler-gauge, this instrument was described by respondents' witnesses as an unsatisfactory measuring device. The calibrated optical microscope used by the New York Testing Laboratories had been used by them previously in tests conducted for a razor blade company. Significantly, the witness from the Schick Company, who testified in support of the complaint, used an optical instrument, called a jewelers' loupe, in making examinations of respondents' shaver at the hearing.

Certain of the important observations alleged to have been made by the Bureau witnesses were not recorded in their notes, and they relied on their recollections of an experiment conducted more than a year prior to the hearing. Thus the witness Womack conceded that there was nothing in his notes to bear out his estimates of one percent and three percent as the amount of hair cut with respondents' shavers. The witness Armstrong likewise made no record of the fact that he had endeavored to use one of respondents' shavers on his face as well as on his wrist.

Certain of the comparisons made between respondents' shaver and other shavers are open to question. Thus the witness Orbach claimed that within five to eight minutes he was able to get a satisfactory shave with a Schick shaver, after getting only partial results with one of respondents' shavers. Yet the Schick shaver had a triple head which could cut a much greater area than respondents' single-headed shaver. The witness Armstrong, although conceding that respondents' shaver cut all the hair on his wrist, claimed that it left hairs of $14/1000$ of an inch. Aside from the question of the accuracy of the measurements with the feeler-gauge which he used, there is no evidence that shaving conditions on the face and wrist are comparable. In fact, respondents' advertising literature shows that they sell another type of shaver for cutting longer hair on other parts of the body. Moreover, even the Schick shaver did not shave the hair flush with the skin, but left it $8/1000$ of an inch.

In evaluating the tests of the New York Testing Laboratories, the examiner is not confined to consideration of the subjective reactions of witnesses and their present recollections of prior experiences. The photographs taken during the tests are concrete evidence of the results achieved. While these photographs indicate that most of the subjects only received fair results on the first day of the tests, this

was true of the other shavers as well as respondents'. Further, as the tests progressed, most of the subjects received progressively better shaves with both groups of shavers, thus corroborating the testimony that a certain period of adjustment is necessary to get the best results from an electric shaver. While for the most part the shaves with respondents' shavers were not quite as close as those obtained from the more expensive shavers, and were accomplished somewhat more slowly than those received from the latter, the length of time consumed does not appear to be unreasonable, and the results achieved appear to be within the realm of being satisfactory and effective. As indicated previously, the issue is not whether respondents' shaver is as good as or better than other shavers on the market, but whether it falls within the category of being a satisfactory and effective shaver. The photographs taken of the results of the tests conducted by the New York Testing Laboratories, and the measurements made by that organization, would appear to indicate that the shaver does render satisfactory and effective service.

No reason has been suggested why the photographs and measurements made by the New York Testing Laboratories should not be considered reliable. At the hearing counsel supporting the complaint seemed to suggest by some of his questions that the laboratory was not objective because it was being paid for the tests. However, the examiner sees no reason to question the objectivity of this organization or its reliability, simply by reason of the fact that it is in business for the purpose of conducting tests on commercial products. The record shows that the company has been in business for many years, that it has conducted tests for a number of well-known commercial and industrial enterprises, for contractors under Government contract, and for Government agencies themselves, and that an inspector of one of the Government agencies is stationed on its premises. The fact that the first photographs of the tests made by it indicate only fair results, and that these photographs were, nevertheless, introduced in evidence, would tend to indicate the objectivity and reliability of the organization.

Counsel supporting the complaint also places considerable emphasis on the opinion expressed by a representative of the Schick Company that any shaver with a shearing head thicker than $4/1000$ of an inch will not produce a satisfactory shave. It may be noted, in this connection, that the head of the Sunbeam shaver was found to measure $5.4/1000$ of an inch and that the Remington Rand Company produces a shaver with a head of a thickness measuring as much as $6/1000$ of an inch. In any event, whatever may be the validity of such theoretical claims, on the basis of comparative satisfactoriness and effective-

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ness, the tests actually conducted by the New York Testing Laboratories would indicate that a shaving head having a greater thickness can produce a shave which can be called satisfactory.

Considering the record as a whole, it is the opinion of the examiner, and is so found, that counsel supporting the complaint has failed to establish, by a preponderance of the reliable, probative, and substantial evidence, that respondents' shaver is not a satisfactory and effective shaver. The allegation of the complaint making this charge will, accordingly, be dismissed.

D. Effect of the unfair practices

It is admitted, and so found by the examiner, that respondents have been and are now in substantial competition with other corporations and with firms and individuals in the sale and distribution of electric dry shavers in commerce. It is further admitted, and is so found, that respondents' practice of attaching a tag to their product stating that the price is \$19.50 in the United States places in the hands of purchasers for resale a means and instrumentality by and through which they may mislead the public as to the usual and customary price of said product. It is further found that the use by respondents of the false, misleading, and deceptive statements and representations, above found, other than the representation that their product will render satisfactory and effective service as a dry shaver, has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and it may reasonably be inferred that a substantial portion of the purchasing public, because of such erroneous and mistaken belief, has purchased and will purchase substantial quantities of respondents' said product. As a result thereof, substantial trade in commerce has been and may be unfairly diverted to respondents from their competitors, and substantial injury has been and may be done to competition in commerce.

CONCLUSION OF LAW

It is concluded that counsel in support of the complaint has failed to establish by a preponderance of the reliable, probative, and substantial evidence that respondents have engaged in any unfair and deceptive acts and practices or any unfair methods of competition in commerce by representing that their product will render effective or satisfactory service as a dry shaver. However, it is concluded that the other acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and of respondents' competitors,

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Order

and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. It is accordingly concluded that this proceeding is in the interest of the public and that an order to cease and desist should issue against respondents.

ORDER

It is ordered, That the respondent, Excel Automatic Products, Inc., a corporation, and its officers, and Stephen J. Gwoosh and Clarence E. Taylor, individually and as officers of said corporation, and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their product designated as Taylor-Made Dry Shaver, or any product of substantially similar construction, do forthwith cease and desist from :

1. Representing that the said product soothes the skin as it shaves.
2. Representing that the cutting parts of the said products are precision ground, are made of the the highest grade surgical steel, are properly tempered, or are self-sharpening.
3. Representing that the said product is fully or unconditionally guaranteed against defective workmanship or materials, unless respondents do in fact make, without expense to the purchaser or owner, any repairs or replacements of parts which may be necessitated by reason of defective workmanship or materials; provided, however, that nothing contained in this order shall be construed as prohibiting respondents from guaranteeing their product against defective workmanship or materials, even though a charge is imposed by respondents in connection therewith, if the amount of such charge is clearly and conspicuously disclosed in immediate conjunction with such guarantee.
4. Representing as the retail price of said product any price which is in excess of that at which such product is regularly and usually sold at retail.

It is further ordered, That the allegation of the complaint that respondents have violated the Federal Trade Commission Act by representing that their product will render effective and satisfactory service as a dry shaver be, and it hereby is dismissed.

IN THE MATTER OF
HARRISON MILLS, INC., GRANITE FABRICS CORP. ET AL.

Docket 5981. Complaint, April 30, 1952—Order, June 28, 1954

Charge: Neglecting to disclose flammability of brushed rayon fabrics.

Before *Mr. Webster Ballinger*, hearing examiner.

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

Tenzer, Greenblatt, Fallon & Kaplan, of New York City, for respondents.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

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

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons stated in the accompanying opinion of the Commission, that the complaint should be dismissed without prejudice, such disposition of this case rendering it unnecessary to rule specifically on each of the points raised by respondents in their appeal:

It is ordered, That the complaint herein be, and it hereby is, dismissed without prejudice.

Commissioner Mead not participating for the reason that he did not hear oral argument and Commissioner Gwynne not participating for the reason that oral argument was heard prior to his appointment to the Commission.

OPINION OF THE COMMISSION

By MASON, Commissioner:

This matter is before us on respondents' appeal from the hearing examiner's initial decision.

The respondents are charged with having violated the Federal Trade Commission Act by failing to disclose that their rayon fabrics are composed of rayon and by failing to reveal the flammable characteristics of their brushed rayon fabrics. The hearing examiner found the facts to be substantially as alleged in the complaint, except with respect to two of the individual respondents as to whom the complaint is dismissed, and his order directs the remaining respondents to cease and desist from: