

Complaint

IN THE MATTER OF
THE MAICO COMPANY, INC.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 3 OF THE CLAYTON ACT*Docket 5822. Complaint, Oct. 24, 1950—Decision, May 22, 1955*

Consent order requiring a manufacturer of hearing aid instruments and parts and accessories in Minneapolis, Minn., to cease violating sec. 3 of the Clayton Act by entering into such exclusive contracts with distributors as require them to agree to carry its products only, to clear their stocks of competitive products, and not to order any more of such products for resale.

Before *Mr. Webster Ballinger* and *Mr. Frank Hier*, hearing examiners.

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

Dorsey, Colman, Barker, Scott & Barber, of Minneapolis, Minn., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for other purposes," commonly known as the Clayton Act, the Federal Trade Commission having reason to believe that the Maico Company, Inc., a corporation, hereinafter designated and referred to as respondent, has violated the provisions of Section 3 of said Act, the Commission hereby issues its complaint stating its charges in such respects as follows:

PARAGRAPH 1. Respondent, The Maico Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Minnesota, and having its principal office and place of business at 21 North Third Street, Minneapolis, Minnesota.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the manufacture, distribution and sale of hearing aid instruments and parts and accessories; the principal line of products manufactured, distributed and sold by respondent is now, and has been, a line of hearing aid instruments which are advertised and sold under the trade name "Maico." Such products are sold by respondent for resale and use within the United States and the District of Columbia. Respondent's hearing aid instruments are nationally advertised, enjoy wide sales throughout the various States of the United States,

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and respondent is one of the larger manufacturers and distributors of hearing aid instruments in the hearing aid industry.

Respondent's annual sales were approximately two million dollars during the year 1948. Respondent now sells, and for many years last past has been selling, its said products above-described to approximately 155 distributors located throughout the several States of the United States, the Territories thereof, and in the District of Columbia, causing said products when sold to be transported from the place of manufacture to the purchasers thereof located in States other than the place of manufacture, and there is now and has been for many years last past, a constant current of trade and commerce in said products between and among the various States of the United States, the Territories thereof, and in the District of Columbia.

PAR. 3. In the course and conduct of its said business, as herein described, respondent has been for many years last past in substantial competition in the sale of hearing aid instruments and parts and accessories therefor, in commerce between and among the various States of the United States, the Territories thereof, and in the District of Columbia, with other corporations and with persons, firms and partnerships.

PAR. 4. In the course and conduct of its business in commerce respondent has made sales and contracts for sale of its products and is still making sales and contracts for sale of its products or fixing a price charged therefor or discount from or rebate upon such price, on the condition, agreement or understanding that the purchasers thereof shall not use or deal in goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of respondent.

Among such contracts for sale, but not limited thereto, have been and are those which respondent entered into with its distributors. This contract is a form contract prepared by respondent and used by it in contracting with all its distributors. Paragraph Two of the contract now being used by respondent in contracting with its distributors provides as follows:

"2. Distributor agrees to order and purchase exclusively from Company and Company agrees to sell to Distributor, on terms as hereinafter set forth and subject to Company's ability to make delivery, Distributor's requirements of the products described in Paragraph One (1) hereof, and Distributor further agrees to devote his entire time and attention and his best efforts to promote the sale of Company products; to maintain a suitable sales office, or offices, adequately

staffed for local and territorial sales coverage; to render adequate service to users of Company's products; to conform to Company's credit, sales, guarantee and service policies as set forth in Company's Distributor Policy Manual, Franchise Supplement, current bulletins, and in its advertising to the public, and to refrain from selling, marketing, distributing, or otherwise dealing in other brand or second-hand merchandise or indulging in any trade practices or doing anything which may in any way impair or adversely affect the good-will or reputation of the Company."

Among such sales and contracts for sale, but not limited thereto, have been and are those in which respondent, in selling its products to its distributor has required the distributors, either orally or in writing, or both, to agree to carry respondent's products only and to clear their stocks of products other than those sold by respondent and not to order any more of such items for resale by the distributor.

PAR. 5. The effect of said sales and contracts for sale on such conditions, agreements and understandings may be to substantially lessen competition in the line of commerce in which the respondent is engaged and in the line of commerce in which the customers and purchasers of respondent are engaged; and tend to create a monopoly in respondent in the manufacture and sale of hearing aid instruments and parts and accessories therefor and other goods, wares and merchandise in the manufacture and sale of which respondent has been and now is engaged.

PAR. 6. The aforesaid acts of respondent, The Maico Company, Inc., constitute a violation of the provisions of Section 3 of the hereinabove-mentioned act of Congress entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act).

Interlocutory opinion of January 21, 1955, sustaining hearing examiner's overruling of motion to quash subpoenas calling for production at hearing of records, etc., showing total sales of hearing aid batteries to each of respondent's competitors, in proceeding concerned with manufacturer's exclusive-dealing contracts with its distributors.

ORDER DENYING APPEALS FROM RULING DENYING MOTIONS TO QUASH
SUBPOENAS DUCES TECUM

This matter having come before the Commission upon the appeals of General Dry Batteries, Inc., and National Carbon Company, a division of Union Carbide & Carbon Company, from the ruling of the

hearing examiner of June 23, 1954, denying their motions to quash subpoenas duces tecum addressed to them in this proceeding, and upon the motion of P. R. Mallory & Co., Inc., objecting to the hearing examiner's refusal to quash a similar subpoena addressed to it; and

The Commission having determined, for the reasons stated in the accompanying opinion, that the motions to quash were properly denied, and that the offer of compliance with the subpoenas in an alternative manner satisfactory to respondent was improperly rejected by the hearing examiner:

It is ordered, That said appeals and said motion of P. R. Mallory & Co., Inc., are hereby denied.

It is further ordered, That the hearing examiner's ruling, requiring the parties subject to the subpoenas duces tecum to reveal the names of their customers and the dollar value of purchases of each in compliance with these subpoenas despite respondent's willingness to waive this requirement, is hereby reversed.

Commissioner MEAD dissenting.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

Involved here are appeals of General Dry Batteries, Inc., and National Carbon Company from rulings of the hearing examiner denying motions to quash subpoenas duces tecum. P. R. Mallory & Co., Inc., did not file notice of appeal but did file a memorandum with the Commission stating its objections to the hearing examiner's rulings.

The complaint was issued under Section 3 of the Clayton Act and charged respondent Maico Company, Inc., with entering into exclusive dealing contracts with its distributors which had the effect of substantially lessening competition and which "tend to create a monopoly in respondent in the manufacture and sale of hearing aid instruments and parts and accessories therefor and other goods, wares and merchandise in the manufacture and sale of which respondent has been and is now engaged."

The hearing examiner found that the exclusive dealing contracts did have the effect of substantially lessening competition and tending to create a monopoly. Upon appeal the opinion by Mason, Commissioner, states:¹

"The hearing examiner rejected all of respondent's attempts to present evidence for the purpose of showing (1) that there has been an increase in the number of its competitors, (2) that the volume of business of its competitors has increased, (3) that its share of the

¹ 50 F. T. C. 485.

market has been decreasing, (4) that its dealers constitute a small percentage of the total number of hearing aid dealers in the country, and (5) other matters relating to effect on competition.

"These factors, in our opinion, all have a very real bearing on whether there may be, or already has been, a substantial lessening of competition due to respondent's exclusive dealing contracts."

Accordingly, the case was remanded to the hearing examiner for the development of a record sufficient to enable the Commission to determine the actual effect upon competition. After the hearing had been resumed, the respondent secured and served on the proper officials of the three battery companies named in paragraph one hereof subpoenas duces tecum. The subpoenas called for the production at the hearing of the following.

"Books and records of said company showing the total sales of said company, of hearing aid batteries, by types, amounts, and dollar volume to each hearing aid manufacturer or their respective dealers or distributors to whom it sold batteries for each of the years 1949 through 1954, inclusive."

Instead of complying literally with the subpoena, the National Carbon Company, by agreement with the respondent, brought to the hearings a document which for identification purposes was marked Respondent's Exhibit 68. This was a list sworn to have been made from the books and records of the company, showing the relative position of the 15 largest purchasers of hearing aid batteries during the years 1949 to 1953, inclusive, as determined by dollar purchases. The list did not give the dollar volume of purchases nor the names of the customers with the exception of respondent. All others were identified by letters of the alphabet. Counsel for the complaint objected to the introduction as being incompetent to show respondent's position in the hearing aid industry and also because the names of the customers were not included. The objection was overruled with the reservation that counsel might move at the proper time to strike the evidence. On cross-examination the witness declined to reveal the names of customers and the dollar value of purchases and counsel for the complaint then moved that the exhibit be stricken. The hearing examiner indicated that counsel was entitled to have the information sought on cross-examination and gave the witness until the next morning to produce it or to move to quash the subpoenas. On that day the National Carbon Company moved to quash the subpoena on the ground that it is unreasonable in scope since it has to do with confidential business information, that it is irrelevant and immaterial and that compliance therewith would work an undue hardship. This motion was overruled.

The record in regard to General Dry Batteries Company is substantially the same. P. R. Mallory & Co., Inc., appeared by counsel, and stated it was ready and willing to put in the required evidence. However, in view of the stand taken by its two competitors, it also moved to quash the subpoena.

Thus it appears that respondent was not insisting upon literal compliance with its subpoena. An arrangement had been worked out which was satisfactory to both parties. This called for the introduction of certain evidence, which the hearing examiner held was not at that stage in the proceedings subject to the objection of irrelevancy. Upon cross-examination the witness claimed his privilege of not divulging certain information. This he had a right to do. As was said in *Finn v. Winneshiek* District Court 1909 Iowa 123 N. W. 1066, "If question calls for privileged matter the witness may decline to answer, subject to proceedings for contempt." Just why the hearing examiner, considering the state of the record, gave the witness the alternative of complying literally with the subpoena or moving to quash it is not entirely clear.

That there is some privilege in the matter of divulging "trade secrets" is well settled. This privilege extends, not merely to the chemical and physical composition of substances employed and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense and the like. Wigmore on Evidence, 3rd edition Volume 8 Section 2212.

The privilege is not an absolute one. Nor can the "public interest" be automatically held up as an excuse for denying it, although it is always an important consideration. In *E. B. Muller & Company v. F. T. C.*, 1944 142 F. 2d 511, the court ordered Schanzer (repondent's only competitor and the party claiming to be injured) either to produce his books and records or to furnish data therefrom giving petitioners the information to which they were entitled. Schanzer furnished certain information but refused to give the names of his customers. The court affirmed the action of the Commission in not requiring such a disclosure. In *Moore v. Crown*, L. R. 7 Ch. the court said "The court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtain all the discovery which can be of use to him, on the other hand, it is bound to protect the defendant against undue inquisition into his affairs."

It should also be noted that the question arose on the cross-examination of the witness. Respondent elected to waive certain requirements of the subpoena. He offered evidence tending to show only the relative position of 15 customers, including the respondent. In this limited field, opposing counsel had the right of cross-examination, to bring out facts showing how the books and the records were kept, how the list was prepared and any other facts bearing upon the credibility of the witness and the value of the evidence submitted. There is nothing in the record to indicate that inquiry as to matters, ordinarily confidential, was necessary for that purpose.

In the *Robinson v. Phila. R. R. Company*, 1886, 28 Fed. 340, which was an action to compel answers to interrogatories, the court said "Witnesses before an examiner, will be compelled to answer, when it seems probable the testimony will be relevant; but care must be exercised to avoid unnecessary and improper inquiry into private affairs." In *Moxie Nerve-Food Company v. Beach*, 1888, 35 Fed. 465, it was held that where a witness for plaintiff testified on direct, only as to the uses and effects of Moxie Nerve-Food, he cannot on cross-examination be required to disclose particular ingredients of the preparation, that being a trade secret, the disclosure of which would injure plaintiff's business.

Witnesses, like jurors, are often required to put aside their personal affairs and desires to aid in the settlement of disputes between litigants. This is the indispensable requirement for the operation of judicial tribunals and courts in a free society. Consequently, all concerned in the litigation should cooperate in protecting against disclosure of confidential matters, to the fullest extent compatible with the interests of the litigants and of the public. The record here discloses that various procedures along this line are under consideration. In fact, all the parties seem cooperative and we have no reason to doubt that the necessary facts can be adduced without undue injury to anyone.

Under the facts disclosed in the record, we conclude that the witnesses should not be required to disclose the names of their hearing aid battery customers or the dollar amount of sales to each.

Applicants next raise the question that the evidence sought is irrelevant. They point out the following: their records do not distinguish between sales of batteries for new instruments and for replacements; that there is a great difference in the useful life of different batteries depending upon their use, etc.; that many batteries are interchangeable; that the use of a new device known as a transistor in some instruments prolongs the life of the battery; that the necessary information can best be secured from competing hearing aid manufacturers.

If the status of the hearing aid business and the effect of the battery

sales on it were the sole question, there would be considerable force to this argument. However, the complaint covers not only hearing aid instruments but also parts and accessories thereof. Both counsel for the complaint and counsel for the respondent agree that batteries are included thereunder.

Respondent points out that sales of batteries constitute about 20% of its total sales; that under the exclusive dealing contracts, its dealers and distributors buy batteries only from Maico, whereas many dealers of their competitors buy direct from battery manufacturers; consequently, the true picture of the status of respondent in the battery field will not be shown by the books of hearing aid manufacturers alone, the facts can only be shown by the records of the 2400 dealers or by records of the battery manufacturers, which supply the larger share of the batteries used.

We think the evidence sought might have some value in determining respondents status in the battery field and, in conjunction with other proposed testimony, might also bear on the matter of hearing aid instrument sales. We agree that the motion to quash the subpoenas was properly overruled.

It is therefore directed that the appeals be dismissed and that the case be remanded to the hearing examiner for further proceedings in accordance with this opinion.

Commissioner MEAD dissents.

DISSENTING OPINION OF COMMISSIONER MEAD

This is a Section 3 Clayton Act case. Maico, a manufacturer of hearing aids, distributes its hearing aids and accessories through its dealers. Maico requires its dealers to contract with Maico not to handle the products of competitors of Maico.

There is no controversy in this case as to the jurisdiction of the Commission or the existence and enforcement of the exclusive dealing contracts by Maico.

This case at an earlier date was before the Commission on the merits. The Commission decided that there were not sufficient facts in the record to determine whether or not the requisite statutory injury had resulted from the exclusive dealing contract. The Majority of the Commission rendered an Opinion discussing in general terms the evidentiary facts the Commission should consider in Section 3 cases. I concurred in the order of the Commission remanding the case to the Hearing Examiner for the taking of additional evidence on the question of injury to competition. I did not concur in the Opinion

of the Commission. My view was that the wording of the Opinion was so broad that it might encourage the introduction into trial records of economic and other data not necessary for the proper and expeditious trial and consideration of Section 3 cases.

Section 3 of the Clayton Act is based on the proposition that, generally speaking, it is contrary to the public interest:

1. for a seller by contract, agreement or understanding to deprive competitors of the opportunity to sell to customers of the seller; and
2. for a seller by contract, agreement or understanding to deprive his customers of the opportunity to buy from competitors of the seller; when the effect of such arbitrary requirements may be to substantially lessen competition or tend to create a monopoly.

The Congress could have prohibited all of such contracts, etc. solely because they are arbitrary and restrictive, regardless of the dollar volume or the number of units involved or the effect on competition. Congress did not do so. In its wisdom Congress decided that Section 3 of the Clayton Act should not be concerned with what might be termed for want of a better description as "arbitrary trifles," which have no adverse effect on competition.

Congress did provide in effect in Section 3 that if by restrictive exclusive dealing contracts, merchants are foreclosed from competing for a substantial share of the line of commerce affected, then this Commission is authorized to conclude from such facts that the result may be to substantially lessen competition or tend to create a monopoly.

Business transactions are measured in terms of unit and dollar volumes. Alert merchants desire to increase their volumes and thereby survive and prosper in the competitive struggle. When these merchants are deprived by arbitrary action by one competitor of their opportunity to compete for a substantial share of the market the result (in the absence of unusual factors) is probably to substantially lessen competition.

In this case the Hearing Examiner, acting on the basis of the broad order of reference from the Commission, issued subpoenas at the request of Maico, which ordered officials of three battery manufacturing corporations to produce books and records "showing the total sales of said Company of batteries by types, amounts and dollar volume to each hearing aid manufacturer or their respective dealers or distributors to whom it sold batteries for each of the years 1949 through 1954, inclusive." These subpoenas are not directed at hearing aid manufacturers who are competitors of Maico, but are directed to the suppliers of one item to the competitors of Maico and their dealers. It is

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indicated in the record that Maico may request subpoenas be issued directing other suppliers of Maico competitors to produce their books and records.

As indicated above, I understand that the basic question in this case is whether or not the use of these arbitrary exclusive dealing contracts by Maico has foreclosed other business concerns of their opportunity to compete for a substantial share of the market in the products involved. In the light of the record now before the Commission and of the requirements of Section 3 of the Clayton Act, I am not convinced of the necessity for directing these supplier corporations who are not parties to this litigation and who are not competitors of Maico to produce their books and records.

I understand the desire of the Majority of the Commission to have before it all of the relevant data in these very important cases in order that informed decisions can be made. I am concerned, however, particularly after reading the briefs and listening to the oral arguments of counsel in this case that the trial records in these Section 3 cases may be unnecessarily lengthened. I believe that the Majority also wishes to avoid such an undesirable result. The difference here may be only a question of degree, but such questions may be very important in the enforcement of the antitrust laws.

I do not believe the record now before the Commission adequately supports the contention that the issuance of these subpoenas is necessary for the trial of this case. In the absence of such a showing, I would quash the subpoenas.

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 May 22, 1955, the initial decision in the instant matter of hearing examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. C. A. 12), the Federal Trade Commission on October 24, 1950, issued its complaint in this proceeding against respondent, upon whom such complaint was duly served and thereafter answered.

Respondent is a Minnesota corporation located at 21 North Third Street, Minneapolis, Minnesota and is engaged in the manufacture and sale of hearing aids, parts and accessories under the trade name "Maico."

Subsequent to service of the complaint and answer thereto a number of hearings were held at which evidence in support of and in opposition to the allegations of the complaint was taken and thereafter on November 10, 1952, the hearing examiner rendered his initial decision from which respondent appealed and on December 7, 1953, the Commission granted said appeal, set aside the initial decision and remanded the proceeding for the taking of further evidence and for the reconsideration of various exclusionary rulings of the hearing examiner.

The hearing examiner, previously presiding, being then about to retire (mandatorily), the proceeding was transferred to the undersigned hearing examiner who thereafter proceeded to carry out the command of the remand and pursuant thereto further evidence was taken in support of the allegations of the complaint and some evidence offered by respondent in opposition thereto.

On March 28, 1955, counsel for the parties hereto entered into a stipulation providing for entry of a consent order disposing of this proceeding under the Rules of Practice of the Commission, which stipulation appears of record. By the terms thereof, respondent admits all of the jurisdictional allegations set forth in the complaint and stipulates that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Respondent expressly withdraws its answer previously filed herein and waives a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission and waives all other and further procedures before the hearing examiner and the Commission to which respondent may be entitled under the aforesaid Clayton Act or the Rules of Practice of the Commission.

Respondent agrees by said stipulation that the order hereinafter entered shall have the same force and effect as if made after a full hearing, presentation of evidence, findings and conclusions thereon and respondent specifically waives any and all right, power and privilege to challenge or contest the validity of the order entered in accordance with the stipulation. By the terms of said stipulation, respondent further agrees that the stipulation, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order hereinafter entered, which order, upon motion of respondent or of counsel sup-

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porting the complaint or upon motion of the Commission, may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission. Respondent further agrees that the stipulation is subject to approval in accordance with Rules V and XXII of the Commission's Rules of Practice and that the order hereinafter entered shall have no force and effect unless and until it becomes the order of the Commission.

Counsel for the parties so stipulating and on the basis of the foregoing, the undersigned hearing examiner concludes on the basis of the foregoing and in conformity therewith makes the following order:

ORDER

It is ordered, That respondent, The Maico Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of hearing aids, audiometers, other medical acoustic products, batteries, parts and accessories therefor, or other similar or related products in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making any contract or agreement for the sale of any such products on the condition, agreement or understanding that the purchaser thereof shall not use, or deal in, or sell any such products supplied by any competitor or competitors of the respondent.
2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing contract of sale, which condition, agreement or understanding is to the effect that the purchaser of said products from respondent shall not use, or deal in, or sell any such products supplied by any competitor or competitors of respondent.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist [as required by said declaratory decision and order of May 22, 1955].

Complaint

IN THE MATTER OF
C. G. OPTICAL COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6260. Complaint, Nov. 5, 1954—Decision, May 22, 1955

Consent order requiring a seller of eyeglasses in Chicago, Ill., to cease representing falsely in "Test Your Own Eyes" advertising that eyeglasses made according to prescriptions furnished by customers using his "Self-Test Optometer" for the measurement of the face and nose would correct defects in vision of all persons.

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

Mr. Jesse D. Kash and *Mr. Frederick J. McManus* for the Commission.

Frank E. & Arthur Gettleman and *Mr. Benjamin D. Ritholz* for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that C. G. Optical Company, a corporation, and Benjamin D. Ritholz, individually, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, C. G. Optical Company, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its place of business located at 20 E. Delaware Place, Chicago, Illinois. The business of respondent, C. G. Optical Company, while ostensibly that of a corporation is actually the business of respondent Benjamin D. Ritholz which he carries on under the name of the corporation. This individual formulates the policy of said corporation and directs, controls and puts into effect all of its acts and practices including those hereinafter referred to. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for more than one year last past have been engaged in the business of selling eyeglasses and as an inducement or instrumentality in the sale of said glasses make use of a certain device designated a "Self-Test Optometer" and other devices

for the measurement of the face and nose. Eyeglasses are a device as "device" is defined in the Federal Trade Commission Act.

Respondents cause said devices, together with printed instructions for the use thereof, and an order blank upon which spaces are provided for the insertions of various measurements obtained by the use of said devices, to be transported from their place of business in the State of Illinois, to prospective purchasers and eyeglasses to the purchasers thereof located in various other States of the United States. Respondents maintain and at all times mentioned herein have maintained a course of trade in said eyeglasses in connection with said "Self-Test Opto-meter" and other devices, and instructions for the use thereof in commerce, between and among the various States of the United States.

PAR. 3. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements concerning said eyeglasses and of the devices referred to above, by United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers and periodicals and by means of circulars and form letters, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said eyeglasses; respondents have also disseminated and caused the dissemination of advertisements concerning their said eyeglasses and the devices referred to above, including but not limited to the advertisement media referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said eyeglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in the said advertisements are the following:

GLASSES BY MAIL!
(Pictorial representation
of a pair of glasses.)
SAVE UP TO \$15.00 30 Day Trial
Test your eyes at home for far
or near with our HOME EYE TESTER.
Save money.
Send name, address, age, agents wanted
FREE! for 30 Day Trial Offer.
Free Eye Tester. Latest
Style Catalog and full
information
C. G. OPTICAL CO., DEPT. C-552
20 E. Delaware Place, Chicago 11, Ill.

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*Sensational Device***TESTS EYES**

(Pictorial representation of a man using the Tester and a pair of eyeglasses.)

**SAVE up to \$15.00
ON GLASSES**

Big news to the Millions
of Spectacle Wearers and
prospects. Means Free-
dom from outrageous prices.
Sold on Money-Back Guarantee.

MAKE BIG MONEY

Show it to friends and others. Let them use it Free and watch their amazement over this self testing system. Here is a great new opportunity in a tremendous new field of unlimited possibilities. Spare or full time. No experience needed. Write for complete sample kit.

C. G. OPTICAL CO., Dept. A-108
20 E. Delaware Place Chicago 11, Ill.
GET YOUR OWN GLASSES AS A BONUS!
—and Make Big Money Besides

Will you share your good fortune with your friends—will you give them the benefit of our amazingly low prices? Your friends will be grateful to you. Surely you are interested in them and want to see them benefited.

Take our tester to their homes. Let them use it. Make out an order for them on one of the order blanks in the book and send it in. The first sheet in the book is for your own order—the others for friends' orders. Collect a deposit of \$2.00 and we will ship the glasses direct to your friends, who will pay the postman only the balance due plus postage. In other words, your friends pay you a deposit of \$2.00 and the balance upon delivery.

Keep the \$2.00 deposit you collect, as your pay. It is your profit. Take only a few orders and you have collected enough to pay for your own glasses so that they become yours, without cost. Take as many orders as you can. You make \$2.00 profit on each. This is a splendid way to earn extra money. Many who have dealt with us in the past have done it. You'll be surprised at the money you can make just by rendering your friends a great service which they need and will appreciate. Profits of \$35.00 a week for spare time or \$75.00 a week for full time are well within your reach. *Of course you need not take orders unless you want to, but may order only one pair of glasses for yourself at our low price.*

Rush your order at once, also as many orders as you can get from friends and others. More order books will be supplied on request. This offer applies to all orders for glasses selected from Style Sheet.

C. G. OPTICAL CO.

20 E. Delaware Pl., Chicago, Ill.

PAR. 4. Respondents' "Test Your Own Eyes" advertising disseminated by them as aforesaid is being and has been answered by persons

in various States of the United States. Said persons, in answering such advertising, have requested that respondents kit of free samples, including the various devices above referred to, for use in testing of the eyes, be sent to them. Said kits have been ordered alike by individuals desiring to purchase eyeglasses for themselves and by other individuals desiring to sell glasses by acting as agents of respondents. Individuals receiving respondents' kits have attempted to use the devices contained therein to determine the eyeglasses necessary to correct defects in their vision, have written out their own prescriptions for respondents' eyeglasses upon the forms provided by respondents, have mailed the prescriptions to respondents and respondents have shipped to them the eyeglasses ordered pursuant to said prescriptions.

Sales agents of respondents, located in various States of the United States, receiving respondents' said kits have attempted to use the devices contained therein to determine the eyeglasses necessary to correct the defects in the vision of others and have written prescriptions or assisted in the writing of prescriptions for respondents' eyeglasses upon the forms provided by respondents, have mailed the prescriptions to respondents and respondents have shipped said glasses ordered pursuant to said prescriptions to various customers.

PAR. 5. Through the use of the advertisements containing the statements hereinabove set forth and explanatory literature and directions which accompany the eye testing kit sent by respondents to those requesting it, respondents represented, directly and by implication, that the eyeglasses sold by them, made pursuant to the results of tests of the eyes using respondents' devices, will correct the defects in vision of all persons.

PAR. 6. Said advertisements were and are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the eyeglasses sold by respondents, made pursuant to the results of tests of the eyes using respondents' devices, will not correct defects in vision of all persons. On the contrary, such glasses are capable of correcting defects in vision of only those persons approximately forty years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses.

PAR. 7. The use by the respondents of the foregoing advertisements containing the false, misleading and deceptive statements, and representations above referred to have had and now have the capacity and tendency to mislead and deceive substantial numbers of the purchasing public into the erroneous and mistaken belief that such statements

and representations were and are true and into the use of respondents' devices and the purchase of substantial quantities of respondents' eyeglasses, because of such erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, 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.

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 May 22, 1955, the initial decision in the instant matter of hearing examiner Earl J. Kolb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding charges the respondents C. G. Optical Company, a corporation, and Benjamin D. Ritholz, an individual, with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the Federal Trade Commission Act, in connection with the sale and distribution of eyeglasses through and by means of a self-testing device designated as "Self-Test Opto-meter."

After the issuance of said complaint and the filing of their answer thereto, the respondents entered into a stipulation for a consent order with counsel for the complaint, disposing of all the issues in this proceeding, which stipulation was duly approved by the Director and Assistant Director of the Bureau of Litigation.

Respondents, pursuant to the aforesaid stipulation, admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said stipulation further provides that the answer heretofore filed by respondents is to be withdrawn and that the parties expressly waive a hearing before the Hearing Examiner or the Commission, the filing of exceptions or oral argument before the Commission, and all other procedure before the Hearing Examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

In said stipulation, respondents further agreed that the order to cease and desist issued in accordance with said stipulation shall have

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the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived all right, power and privilege to challenge or contest the validity of such order.

It was further provided that said stipulation, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said stipulation; and that said order may be altered, modified or set aside in the manner prescribed by statute for the orders of the Commission.

The Hearing Examiner has considered such stipulation and the order therein contained, and it appearing that said stipulation and order provides for an appropriate disposition of this proceeding the same is hereby accepted and made a part of the record, and the following jurisdictional findings made, and the following order issued:

1. Respondent C. G. Optical Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its place of business located at 20 East Delaware Place, Chicago, Illinois. The business of respondent C. G. Optical Company, while ostensibly that of a corporation, is actually the business of respondent Benjamin D. Ritholz which he carries on under the name of the corporation. This individual respondent formulates the policy of said corporation and directs, controls and puts into effect all of its acts and practices.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents, C. G. Optical Company, a corporation, and its officers, and respondent Benjamin D. Ritholz, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of eyeglasses, 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, that the eyeglasses sold by respondents, made pursuant to the results of tests of the eyes using respondents' devices, will correct, or are capable of

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correcting, defects in vision of persons unless expressly limited to those persons approximately forty years of age and older who do not have astigmatism or diseases of the eye and who require only simple magnifying or reducing lenses.

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 their eyeglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains the representation prohibited in paragraph 1 hereof.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of May 22, 1955].

IN THE MATTER OF

ADVANCE SPECTACLE COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6285. Complaint, Jan. 10, 1955—Decision, May 22, 1955*

Consent order requiring a Chicago firm to cease representing falsely in advertising that eyeglasses made according to prescriptions furnished by customers using its "14 LENS SAMPLE CARD" and other devices would correct defects in vision of all persons.

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

Mr. Frederick J. McManus for the Commission.

Froelich, Grossman, Teton & Tabin, of Chicago, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Advance Spectacle Company, Inc., a corporation and Michael M. Egel, individually and as an officer of Advance Spectacle Company, Inc., hereinafter referred to as respondents have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Advance Spectacle Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its place of business located at 537 South Dearborn Street, Chicago, Illinois. Individual respondent Michael M. Egel is president and treasurer of corporate respondent and formulates the policy of said corporation and directs, controls and puts into effect all of its acts and practices including those hereinafter referred to. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for more than one year last past have been engaged in the business of selling eye glasses and as an inducement or instrumentality in the sale of said glasses make use of a certain device designated "14 LENS SAMPLE CARD" and other devices. Eye glasses are a device as "device" is defined in the Federal Trade Commission Act.