

Decision

IN THE MATTER OF
MAHLER'S, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6195. Complaint, Mar. 18, 1954—Decision, May 3, 1956

Order dismissing, for failure to substantiate the allegations, complaint charging sellers in East Providence, R. I., with misrepresenting in advertising the effectiveness and safety of the device "Mahler Electrolysis Epilator," designed for the removal of superfluous hair by individual self-application.

Mr. Jesse D. Kash and Mr. William M. King for the Commission.
Letts & Quinn, of Providence, R. I., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that respondents have violated the Federal Trade Commission Act by the dissemination of false and deceptive representations in advertising material used to promote the sale and distribution in commerce of the Mahler Electrolysis Epilator, a device for the removal of superfluous hair from the human body.

After the filing of an answer, hearings were held in which testimony and other evidence were presented, duly recorded and filed in the office of the Commission, and proposed findings of fact, conclusions and orders were submitted by counsel. On the basis of the entire record, the following findings of fact are made:

1. Respondent Mahler's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, having its office and principal place of business located at 3124 Pawtucket Avenue, Providence, Rhode Island.

Respondents Arthur Y. Mahler, Daniel J. Mahler and Harold C. Mahler are President, Vice-President, and Secretary-Treasurer, respectively, of the corporate respondent. Their office and principal place of business is the same as that of the corporate respondent. They formulate, direct and control the advertising, sales activities and policies of the corporate respondent. Respondent Arthur Y. Mahler is licensed under the laws of the State of Rhode Island to engage in the practice of electrolysis, and also teaches that subject.

2. The respondents are now, and for more than one year last past have been, engaged in the promotion, sale and distribution of a "device," as that term is defined in the Federal Trade Commission

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Act, designated as the Mahler Electrolysis Epilator, hereinafter referred to as the Epilator, which is advertised and recommended by them for use in the electrolytic removal of superfluous hair from the human body by individual self-application.

Respondents cause and have caused the Epilator, when sold, to be transported from their place of business in the State of Rhode Island to purchasers thereof located in various other States of the United States, and, at all times mentioned herein, have maintained a substantial course of trade in said device in commerce among and between various States of the United States. Respondents, or their predecessors in the business, have sold approximately 50,000 Epilators—10,000 since 1946.

3. In the course and conduct of their aforesaid business, for the purpose of inducing the purchase of their device in commerce, respondents have disseminated various advertisements concerning it, by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements published in various newspapers, magazines, booklets, circulars and circular letters.

One advertisement of respondents' device published in various magazines of national circulation during 1952, 1953 and 1954 is as follows:

DESTROY Unwanted Hair FOREVER

Temporary relief is NOT enough

Only by KILLING THE HAIR ROOT can you be sure UNWANTED HAIR is GONE FOREVER. Brings relief and social happiness. Do not use our method until you have read our instruction book carefully and learned to use the MAHLER METHOD safely and efficiently. Used successfully over fifty years.

Send 5¢ TODAY for booklet NEW BEAUTY FOR YOU

MAHLER'S, INC., Dept. 51-K

Providence 15, R. I.

Persons responding to the foregoing advertisement were sent the booklet "New Beauty For You," which contains, among other things, warnings against misuse, a money-back guarantee, and a description of how the Epilator is used, as follows:

The use of the Mahler Electrolysis Epilator by persons not trained in the technique of removing superfluous hair from the human body by electrolysis may result in permanent disfigurement, cause infections or other irreparable injury to health, and that said device should not be used to remove hair from cancerous or syphilitic lesions, pigmented moles or other areas showing local pathological conditions.

Therefore, for these reasons do not use the Mahler Hair Remover until you have read our instruction book carefully and learned to use the Mahler safely and efficiently.

* * * IF, AFTER PURCHASING THE MAHLER AND USING IT FOR 15 DAYS YOU ARE NOT ENTIRELY SATISFIED, YOU MAY RETURN IT AND WE WILL REFUND YOUR MONEY.

* * * By carefully following the exact instructions furnished with each outfit, you too can remove your superfluous hair forever.

A needle almost as fine as a hair is inserted into the pore from which the hair grows, right alongside the hair. With this fine needle in place at the hair root, the hand is then placed on the wet felt pad, and in half a minute you have destroyed the hair root. Some hairs may require a few seconds less, and others more, depending on the coarseness of the hair. If you have operated properly, you have destroyed forever the life of that hair, and you now find that the hair lifts out easily with the tweezers, and you continue on to the next hair.

In the case a sale did not develop within a reasonable period of time following mailing of the aforesaid booklet, respondents sent follow-up letters and circulars to prospective purchasers.

4. Through the use of the foregoing and other similar statements appearing in their advertisements, respondents have represented directly or by implication (1) that said device is an effective and efficient method for the permanent removal of superfluous hair from the human body, and (2) that after respondents' instructions have been read, the Epilator may be safely, successfully and effectively used by purchasers for the permanent removal of superfluous hair by individual self-application.

5. Respondents manufacture two models of the Epilator for self-use—the Marvel and the Deluxe. One has 6 cells and 6 electrical outlets, the other 8; both are battery-operated; each has a needle which may be attached to a negative pole, and a felt pad which may be dampened, preferably with salt water, and attached to a positive pole, so that when the hand or bare foot of the person using the device is in contact with the pad and the needle is inserted into the skin, an electric circuit is completed. The strength of the current may be regulated to some degree by the selective use of the various electrical outlets. The principle of the device is that by the insertion of the electrically charged needle into the hair follicle, the hair root will be brought within the field of the electric current and will be destroyed, after which the hair can be removed with a pair of tweezers.

6. The Epilator is effective and efficient for the permanent removal of superfluous hair from the human body. The reliable, probative evidence of record permits no other conclusion. Witnesses appearing in support of the complaint as well as those for the respondents so testified, and counsel supporting the complaint, in his proposed findings, states that no testimony was introduced to support a contrary conclusion. He suggests that the complaint should be dismissed insofar as it relates to the charge that such a representation is false, and

with that suggestion the hearing examiner is in complete agreement. As to the other charges of the complaint, a thorough analysis of the evidence is required.

7. With the Epilator, respondents provide each purchaser with a book of instructions. In fact, two separate, almost identical booklets are used—one with the Marvel model and one with the Deluxe. Some of the instructions included in both booklets follow:

Keep the little protective covering over the needle in the holder when not in use. This will prevent its getting dirty or bent. Wipe the needle clean with alcohol before and after using. Do not use needles that are rusty, bent or broken off so they have no pointed end.

Do not use the Mahler Epilator for removing warts, moles, or hair in moles. And do not use on skin where it is broken out, irritated, pimply or not in a healthful condition.

PATCH TEST

Before removing unwanted hair from the face, it is a good plan to first remove unwanted hair from the arms or legs. In that way you gain both practice and experience in placing the needle so as to reach the hair root, learning the current strength you find comfortable, and the timing necessary to "loosen" the hair.

A very convenient area is on the legs, above or below knee. Use this as your patch test area for two or three sittings, or until you have acquired a certain amount of skill and experience in permanent hair removal. Then, when you have a good working knowledge of how the Mahler should be used, you can proceed to remove hairs from the face.

AMOUNT OF CURRENT APPLIED TO HAIR ROOT

Please bear in mind that the amount of current you apply to a hair root is the *total* of (a) the strength of the current, *plus* (b) the length of time the current is on. In other words, if you use a stronger current, then you need less timing, and if you use a weaker current, then you need use more timing. With needle in place at a hair root, you use the same *total* current in each of the following ways:—

Plug No. 2—30 seconds timing

Plug No. 3—20 seconds timing

MIRROR

For removing unwanted hair from the face, you need a good magnifying mirror. * * * arrange your magnifying mirror on the table, or around the neck as illustrated, so the light from the lamp behind you reflects on the mirror and on your face where you wish to remove unwanted hair.

DEPTH OF THE HAIR "ROOT"

The papilla, or "root" of the hair is $\frac{1}{8}$ of an inch (—) to $\frac{3}{8}$ of an inch (—) deep in the skin, depending on the coarseness of the hair. Most medium to coarse hairs are between these two extremes, namely $\frac{1}{2}$ of an inch (—). So for the average hair, you can plan to insert the needle $\frac{1}{2}$ of an inch (—) deep to reach the hair papilla, unless they are very coarse, or very fine.

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THE TIMING

The timing begins as soon as you place the palm of the free hand (or foot) on the wet felt pad when the needle is in place at the hair root—as soon as you feel the “tingle” or “sting” of the current. * * *

CARE OF THE SKIN—CLEANLINESS

Give your skin the best care so as to prevent the possibility of infection. The hands and the skin area should be clean and dry. This is also true of the needle, needle holder and tweezers. Wash and dry the hands and the skin area. Moisten some clean absorbent cotton with alcohol, and apply to the skin before using the Mahler Epilator. Wipe the needle, needle holder and the tweezers, and then throw away this piece of cotton. Wait until the skin is dry before using the needle.

CARE OF THE SKIN AFTER USING

When finished using your Mahler, moisten a clean cloth in good warm water and apply to the skin for a few minutes. Then apply alcohol again with another piece of clean cotton, wipe your needle clean and put your utensils away. * * *

* * * It is best not to use cosmetics on the skin for at least 24 hours afterwards. Do not finger the skin. Allow it to heal naturally. * * *.

These and other instructions are supplemented with illustrations. If read at a time when the Epilator is at hand to be observed and experimented with, they appear to be clear enough to enable a person of ordinary intelligence and skill to use the device. The Epilator is not complicated. There are no moving parts. The operator need know little more about it than how to attach the needle and the pad. Knowing that, the remaining problem is to acquire the ability to insert the needle into the hair follicle and keep it there, with the current on, long enough to destroy the root of the hair. The skill required to use the needle properly and effectively may be acquired by practice.

8. In the State of New York, and in many other States, any person who can afford to buy a machine and rent an office may engage in the practice of epilation by electrolysis. In Rhode Island, there is a statutory requirement, adopted in 1943, that every person who shall hereafter engage in the practice in that State must have attained the age of 21 years, have graduated from high school, have served, under a licensed operator, an apprenticeship consisting of 400 hours of study and practice in the theory and practical application of electrolysis within a six-months' period, be of good moral character and free of infectious disease.

Those who engage in the business of removing superfluous hair by electrolysis refer to themselves as electrologists; yet the word “electrologist” does not appear in any of the dictionaries in the Federal Trade Commission Library. These include Webster's Unabridged Dictionary, 1950 edition; the Encyclopaedia Americana; Collier's Encyclopaedia; the American Illustrated Medical Dictionary, 1951

edition; and Stedman's Medical Dictionary. The nearest approach to a definition is found on page 481 of the 22nd edition (1951) of the American Illustrated Medical Dictionary, where the word "electrology" is defined as "that branch of science which deals with the phenomena and properties of electricity."

The word "electrologist," because of its derivation, carries the connotation of being descriptive of one who belongs to a learned scientific profession. Its use by those who, having no scientific training, engage in removal of hair by the use of electrolysis, is an etymological misnomer, the suffix "-ology" being a combining form denoting a doctrine, theory or science, and the suffix "-ologist" denoting one trained or versed therein.

In a cataloguing of occupational titles, put out in the form of a "Dictionary of Occupational Titles" by the United States Employment Service, a division of the Department of Labor, which is prefaced with the statement that the publication is "for the use of public employment offices and related vocational services, and for that use alone," the title "Electrologist" is defined rather loosely to describe the operations incident to the removal of hair by electrolysis. In the classification of occupations in this manual, electrologists are listed under the title "Personal Service Occupations," which includes domestic servants, protective service occupations, building service workers and porters.

It is apparent that there is a widespread belief that the removal of superfluous hair by electrolysis requires no particular ability other than that possessed by the ordinary or average individual with no specialized educational qualifications. This belief is supported by an examination of the qualifications of the "electrologists" who appeared as witnesses in this proceeding.

9. Five persons engaged in the practice of removing superfluous hair by electrolysis were offered as expert witnesses in this proceeding, in support of the allegations of the complaint. The first had entered the business of manufacturing electrolytic devices when he was 18 or 19 years old, and operated the Hoffman Electrolysis School. No statement of his educational background was given. Two of the others were graduates of the school operated by the first, which required a minimum training period of 90 hours¹ for completion of the electrolysis course, 80 hours of which were devoted to practical training on live subjects and 10 hours, approximately, to theoretical training. The remaining two witnesses were graduates of another electrol-

¹ Upon cross-examination it was disclosed that the hours of required study were at one time reduced to 72, which could be completed during "a glorious two-week vacation that will pay dividends for years to come. * * * You'll learn a guaranteed, permanent, *safe, efficient, and painless* method of removing hair from the face." [Emphasis supplied.]

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ysis training "institute" similar to the school just mentioned. No reference was made to any educational requirements for entering either school, and evidently there were none. Such "expertise" as these men possess has been acquired through experience and practice in the use of electrolytic devices which are similar in principle to those manufactured and sold by respondents.

The first of these witnesses, operator of the Hoffman school, when he testified on September 9, 1954, said that no one "not trained in electrolysis" could use respondents' device for self-application, and that "irreparable damage to anyone's skin" might follow its use by an unskilled operator. He was particularly apprehensive of ill effects that might result from infection following use of the needle in the nostril area and under the arms, and stated:

* * * An infection in the area of the nostril can have fatal effects. People can die from infections in the area of the nostril * * * and as far as treatments underneath the arms are concerned, that is an area which, too, is subject to infection more readily than other areas * * *.

Under cross-examination on March 24, 1955, this witness admitted that during an address made by him on January 26, 1955, at a meeting in New York of the Electrolysis Society of America, which consists of persons like himself who are engaged in removing superfluous hair by electrolysis, he had said that in his experience over the years the matter of infection was not of great concern; that the question of infections following electrolysis or short-wave treatment is one which is rarely faced by the average electrologist; that "while it is true that occasionally a patient does develop a pimple here or there in the area following treatment, it may not necessarily be concluded that the pimple is a result of the treatment, for it may be a question of coincidence, in that the patient might have developed the pimple whether she received treatment or not"; and that to his knowledge a serious infection had never occurred; and he acknowledged that he had asked the 100 or so persons present whether or not they had heard of or experienced any serious infection among electrolysis patients, and that none could answer in the affirmative.

Another of these witnesses had completed a course at the Hoffman school lasting, to the best of his recollection, about three or four months. At the time of his appearance, on September 9, 1954, he was serving his sixth term as president of the Electrolysis Society of America, and had done some writing on electrolysis. He had listened to the direct testimony of the first witness, followed him on the witness-stand, and supplemented his statements, saying that: "no amount of literature is adequate so that one may make a proper insertion to remove a hair permanently. My opinion is that it is the

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personal instruction and the personal scrutiny of the instructor that actually teaches the operator to make the proper insertion, because insertions vary." He considered it "unsafe to do electrolysis under the arms, in the nostrils, and the eyelids."

Another graduate from the Hoffman school testified that "a layman cannot operate the machine. * * * the use of this needle entails some training (through) which a certain amount of skill must be attained before it can be used." Asked if respondents' device could be used to remove hair from the legs by self-application, he said, "You could use the machine to remove the hair, but you wouldn't be capable of doing it intelligently, the way a trained person would do it." He had removed hair from his own arms and legs, but found, when he tried to remove ingrown hairs from his face, that it was not possible for him "to guide the needle correctly working with a mirror."

Of the other two of these witnesses, one had removed hair from his own arms and legs but had never tried it on his face; the other said that with a short-wave set he could remove hair from his arm, but he did not think he could do it with respondents' machine. Of course, the operation is exactly the same, the only difference being that in the short-wave set the electricity used is drawn from a standard house current socket, while respondents' set is battery-powered. Both these witnesses were sure that "it takes years of experience to be good" in the use of an electrolytic device, and neither thought that the Epilator could be used successfully for the permanent removal of hair by self-operation. One of these two had been a barber, then a beauty-shop operator (for which he had a license), then started practice of electrolysis within a month after completing his course at the "institute"; the other had started the practice of electrolysis on a part-time basis while he was still attending the "institute" clinic.

A consideration of the many factors involved in evaluating the testimony of these witnesses—their demeanor on the witness-stand, their comprehension, candor and forthrightness or lack thereof, their self-interest in the outcome of the proceeding, their educational background and experience—leads to the conclusion that their testimony can be given little weight. If the evidence presented by this group establishes anything, it is that after some initial practice an electrolytic device, such as that sold by respondents, can be used to remove superfluous hair successfully, even professionally, by persons of ordinary intelligence, education and physical ability.

10. *Users:* Of those who had purchased one or more of the 10,000 Epilators sold by respondents since 1946, only one was called to support the allegations of the complaint. This one testified that early in 1954 she had purchased a Mahler Epilator, which she used for a

total of eight or ten hours over a period of about a month, to remove hair from her legs. She found it difficult to determine the correct length of time the needle should remain in the hair follicle to accomplish complete destruction of the hair; that in the area of epilation there was some discoloration of the skin, which did not disappear until she went to the beach a few months later; and that the removal of excess hair by electrolysis was a time-consuming operation. She had discontinued use of the Epilator for these reasons.

Six other users, all women, testified for respondents, as follows:

1. A machine operator in a dress factory, with 8 years' schooling, had spent \$500 for epilation treatments over a 3-year period about 11 years ago, then bought a Marvel model Epilator which she used with a mirror to remove hair from her upper lip, chin, and side of face. She preferred her own treatment to that of the practitioner; got more done, cheaper; is "very much satisfied."

2. A stenographer, who had taken treatments 20 years or more ago, bought respondents' machine 1½ years ago, which she then used on her upper lip and chin; was "very satisfied."

3. A housewife, 53 years old, with little education, had previously received electrolysis treatments about twice a week for a year, with which she was less satisfied than she is now with the Epilator, which she has used for about a year to remove hair from her lip and chin; "it is very easy."

4. A housewife, 63 years old, bought her first Epilator in 1917 or 1918 after having had some treatments from an electrolysis practitioner; later bought a Deluxe model; had a serious problem with hair on lip, chin and neck; has used the machine for hundreds of hours successfully.

5. Another housewife, age not given, with grade-school education, procured an Epilator in 1938 and, with no previous experience, used it first on her arms, then on her chin and upper lip; she offered to demonstrate its use in the hearing room; has no difficulty using it successfully.

6. An employee in a venetian shade shop, with 2 years' high school education, had gone to an electrolysis practitioner for about a year before buying respondents' Deluxe model in 1953, which she has since used to remove hair from her face, and is more satisfied with her own treatments than with those procured from the practitioner.

During the course of the proceeding, respondent Arthur Y. Mahler demonstrated the use of the Epilator by removing hair from his hand, and from his face using a mirror. His mother, now 73 years old, testified that she had first used a Mahler home epilator to remove hairs from her face, chin and upper lip when she was 16 years old,

and without previous experience. She became so proficient through her own use of the machine that 7 years later she was employed by O. J. Mahler, father of the individual respondents herein, to demonstrate it. When she was 29 years old, she married O. J. Mahler, now deceased, and has been connected with the business ever since.

11. *Medical and other technical experts:* There was testimony in support of the complaint by two medical experts and a bacteriologist. Three medical experts and a physical chemist appeared for the respondents.² All were highly trained in their respective professions.

In support of the complaint, *Dr. Howard T. Behrman*, a dermatologist, stated that if an electrolysis needle be introduced into a hair follicle near a small malignant mole or growth, "it might stimulate the development of a cancerous growth," and it might cause serious results if used "without sterilizing" in the vicinity of a pimple or small boil or something of that type where pus might exist. In his practice he had observed, in patients who had been treated with electrolysis, pustular infections difficult to clear up, damage to tissues, and scarring of the facial region which had resulted in a permanent and comparatively serious cosmetic defect.

Upon cross-examination the doctor said that the instances of damage and scarring which he referred to were cases in which the removal of hair had been done by a "professional electrologist" in the course of his business, and that he had seen only a couple of cases where cancer had followed electrolysis. He acknowledged that infection could be caused by and that the same damage could result from the use of a sewing needle, a razor, or a hammer. The doctor stated that he did not think a layman could successfully operate the Epilator, that it requires a certain amount of knowledge of the skin, a certain amount of education and training in use of the device, and a knowledge of the possible ill effects or dangers that might be associated with its use.

Also in support of the complaint, *Dr. Vincent Joseph Ryan*, another dermatologist, testified that he had never seen a patient who had undertaken the use of electrolysis by self-application, but believes that "an operator could, on himself, remove hairs from his arms and legs in certain locations and not have too much difficulty in doing it." He added, "I don't believe, in my opinion, that it is possible for a person to properly and effectively remove superfluous hairs from the face * * * by means of mirrors." Scarring, he said, is more frequent if a great deal of current is used, as is possible with a short-wave outfit, and is one of the "most common sequelae * * * frequently a

² There was also a laboratory technician, who appeared only to identify excisions, slides and other physical exhibits referred to by one of the medical experts.

professional operator will produce scarring. * * * A person who is the nervous, jittery type would never be a good operator." He added that he has seen "considerable damage done to the skin, some serious conditions that perhaps were stimulated by electrolysis."

Upon cross-examination, Dr. Ryan said respondents' warnings in their booklet are correct and that the cases of infection and damage he was speaking of in his direct testimony were cases in which proper precautions with respect to cleanliness had not been taken. This witness personally had not used electrolysis for the past ten years, but had taught his office assistants, who had been previously trained for secretarial work, not nursing, how to remove superfluous hair, their only training in electrolysis being that given them by Dr. Ryan.

For respondents, *Dr. William Montagna*, a biological anatomist and cytochemist,³ testified that he had examined the Epilator, and, without previous experience, had used it "out of curiosity" on his own hand, arm, chin and upper lip, and on respondent Mahler. It is his opinion that a person "might easily use the needle" on the chin and upper lip as well as on the hand or any other part of the body. He added:

My judgment would be that the danger incurred from an individual using such an instrument would be no greater than plucking hairs with tweezers or receiving scratches from pins, or nicking himself with a razor, or probably not as great as with these other hazards that I have just mentioned, because the needle is sterile, or renders itself sterile when the electricity is discharged. * * * It has to, after all, kill cells in order to be effective, and micro-organisms are cells. They, too, would be then destroyed together with the cells, * * *.

Under Dr. Montagna's directions three biopsy specimens of human skin which had been epilated through use of respondents' device were examined microscopically to ascertain the effects of epilation after intervals of 24 hours, 4 days and 2 weeks following epilation. At 24 hours the lower half of the hair follicle had become necrotic, it was then either dead or dying. At four days the whole structure of the hair follicle was precipitating or being destroyed, the tissue was going to pieces and wandering cells from the surrounding tissue were coming in to clean out the dead or dying tissue; sweat glands about a millimeter and a half from the follicle had remained "perfectly normal"; the damage was "an extremely local one." At two weeks the entire lower half of the hair follicle was completely gone, leaving only the upper portion of the hair follicle; the hair had been completely destroyed.

From these examinations the witness concluded that the effective area in electrolysis is a core of tissue, approximately one millimeter

³ He describes himself as "a polyglot about skin."

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in diameter, surrounding the needle, and that insertion of the needle need not follow with precision the direction of the hair growth. He added that the repair process "is very unexciting"—like any repair "which follows extremely minor damage such as a pinprick or razor nick * * * just perfectly normal repair of an extremely minute amount of damage." In his opinion the trauma caused by plucking a hair is "considerably more severe" than that inflicted with an electric needle.

Dr. Eugene F. Traub, dermatologist and syphilologist, appearing for respondents, had, in his practice, removed hair by electrolysis and had examined respondents' machine and book of instructions. He stated that in his opinion, a person could use the Epilator "perfectly safely" by self-application without injury to himself or herself, on the face as well as on the hands and other parts of the body, if that person followed the book of instructions—

* * * it is merely a matter of acquiring a little skill, and that can be easily taught * * * by self-application.

* * * I believe the machine is basically a harmless machine to start with, and following instructions in the printed pad, no damage could result from its use if the instructions are carefully followed.

To confirm his opinion the doctor had organized a panel of five women, to each of whom he gave an Epilator and a copy of the book of instructions. In his presence, and without previous experience, they used the set and needle successfully on an arm or leg, and then on the face.

Regarding infection, he said:

* * * the possibility of infection is not present any more in this outfit than there is in the one that we use, a professional outfit. And that danger is practically minimo because we believe that the needle is more or less self-sterilizing, and infection with a properly prepared skin is practically an unknown thing.

* * * the instructions for (sic) the book for sterilization of the skin and cleanliness are the ones that we adopt and use as professional men for the same purpose, so that we think they are adequate.

Regarding syphilitic lesions, warts, and moles, this witness said the chance of getting into a syphilitic lesion is negligible. "* * * The syphilitic lesion is practically an extinct thing, and it is hard to find syphilis to demonstrate to the medical students. We very rarely see one any more."

As far as getting into a cancerous lesion or something of that sort, I cannot possibly conceive that a patient, in searching for a hair follicle, would pick a tumor or something of that sort to try to find a hair.

As regards moles, it is a teaching premise, basic teaching premise, that the hairs, particularly on the face, that contain—the moles that contain hairs are the non-dangerous ones, and they are the ones we have all our lives destroyed

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by electrolysis. That is the treatment of choice for that particular mole that I have written up and called the "Common Mole of the Face."

The dangerous mole, the dangerous pigmented mole, is the flat, smooth pigmented non-hairy mole, so that the individual using an apparatus of this type would not be in that field because there is no hair.

Upon cross-examination by counsel supporting complaint, Dr. Traub added:

* * * I do not believe the average layman would attempt to tackle a hair in a mole because they inherently are very careful of themselves. I am amazed that my patients are so much more careful of themselves than the doctor would be for them.

* * * I think that counselor has the opinion that the layman is a pretty careless individual about himself. That is not so. I find they are much more meticulous than the average doctor. * * * They are much more apt to be fussy about washing their face with soap and water and using alcohol fairly generously; much more so than I think we would be in the office.

Also upon cross-examination he said that in 36 years of practice, in which he had observed thousands of patients in his office and in clinics with which he was connected, he had "never seen an immediate infection following the use of an electrolysis needle" and had never known of infection from a pimple going into the bloodstream.

Dr. Herbert John Spoor, also a dermatologist and syphilologist, and an associate in practice with Dr. Traub, confirmed Dr. Traub's testimony, stating that in his practice he had removed hair by electrolysis, that he had examined the Epilator, read respondents' instruction book, and used the Epilator on his own arm and chin, and is of the opinion that a person can, by self-application, using the Epilator, successfully and safely remove superfluous hair from the face as well as from the hands. He added to Dr. Traub's testimony as to the panel of five women, that under his personal observation they were able to remove hair from the face, using a mirror, after practicing for approximately twenty minutes.

Dr. Daniel P. Norman, a physical chemist with thirty years' experience as President of one and director of another scientific laboratory engaged in research and testing activities pertaining to commercial products, had been asked by respondents (a) to determine the suitability, practicability and safety for use in self-application of the Epilator, and (b) to determine the effect on bacteria of a needle activated by the device.

To arrive at a conclusion as to the first point of inquiry, Dr. Norman examined, made physical tests and measured the effectiveness of respondents' device. He read the instruction booklet, used the Epilator on himself, and observed its use by members of a volunteer panel who were each given a machine and asked to use it with no other

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instruction than that which they obtained by reading respondents' booklet. Based upon the resulting data, he concluded that the Epilator may be used in self-application safely and effectively, in conformance with the printed instructions, by persons of ordinary or average skill and ability, and that respondents' booklets give adequate and satisfactory instructions.

To determine the effect of the electrically charged needle upon bacteria, a standard bacteriological test was performed in triplicate, using the Epilator. The needle, carrying no electrical charge, was touched to a sterile growth medium after having been dipped into a standard staphylococcus aureus culture and a standard E coli culture; an abundant growth of both organisms developed during a succeeding 24-hour incubation period. Following the same procedure in two other tests, but using a needle that carried an electrical charge, derived from terminals 2 and 4, respectively, of the Epilator, no growth of bacteria was observed either after twenty-four hours or after seven days of incubation. The laboratory notes of this test are in the record.

Dr. Norman concluded:

It is my opinion that any bacteria within the electrical field of the current from these needles would be destroyed.

To rebut the testimony of Dr. Norman, the testimony of *Louis F. Ortenzio*, bacteriologist in the United States Department of Agriculture, was presented. He had been given Dr. Norman's test report and handwritten laboratory notes, and said that he knew there was some controversy about the matter, but not that he would be expected to appear at a hearing as a witness to answer questions about his report. Therefore, upon completion of his series of tests, he "cleaned up" his laboratory, threw out some wire he had used to complete an electrical circuit in part of his tests, and destroyed his notes.

In Dr. Ortenzio's test the Epilator needle carrying an electrical charge was dipped into a standard micrococcus pyogenes var. aureus culture, then "submerged" in a tube of sterile nutrient broth, which after 48 hours' incubation, showed "a good growth of test organism." The same results were obtained using terminals 2, 4, 6, and 8, and by "stabbing" the contaminated needle into a sterile agar nutrient instead of broth. Other variations of this experiment showed similar results.⁴

As a result of these experiments, Dr. Ortenzio concluded, "In my opinion the device is not self-sterilizing * * * the bacteria on or around the needle would not be destroyed by electrolysis."

⁴ An *in vivo* test was made on two successive days, using a rabbit, but some of the results of this test were erratic and it is generally understood that the results of an experiment performed on a single animal cannot be accepted as significant or valid.

There is no question but that the experiments as they were performed by Dr. Ortenzio support his conclusion. However, when Dr. Norman duplicated the Ortenzio tests, exactly opposite results were obtained, confirming his own earlier report and conclusion. The laboratory notes of this second series of tests by Dr. Norman are in the record. It was explained by Dr. Norman that the difference in the results obtained by him was due to the greater degree of care exercised in his laboratory—the contaminated needle was not “submerged” or “stabbed” into the culture of test organisms or into the sterile broth, but placed carefully in each, so that only the current-carrying part of the needle came in contact with either substance, it being recognized that the plastic holder of the needle is a non-conductor, would carry no electrical charge, and, therefore, that the bacteria coming in contact with this part of the apparatus would not be affected by the electrical charge of the needle and would be transferred as active bacteria from one medium to the other. This is a fact which perhaps was not known to Dr. Ortenzio, since, as he said, he is not an electrical engineer, and not familiar with electrical circuits and currents. Dr. Norman stated that the test requires a knowledge of electricity *and* bacteriology.

Further doubt as to the validity of Dr. Ortenzio's conclusions arises out of the fact that although he stated that he had duplicated the tests originally made by Dr. Norman, he did not bring in a report of the results he obtained; hence the presumption is strong that they supported Dr. Norman's findings.

Under all of these circumstances, the results of Dr. Norman's experiment must be taken as correct, and his conclusion must be accepted as authentic and valid—that the charged Epilator needle does destroy bacteria.

CONCLUSIONS

(1) It is undisputed that the removal of superfluous hair by use of respondents' Epilator is an effective and efficient method for the permanent removal of unwanted hair from the human body.

(2) The Epilator can be successfully employed by individual self-application to remove superfluous hair from all accessible parts of the body by persons with ordinary care and skill after reading the instruction book published by respondents and distributed with the device.

From observing the user witnesses who appeared in this proceeding and listening to their testimony, it is evident that they are such individuals as one might meet on the street, in church, at a railroad station or any other public place—persons of ordinary means, ordinary education and intelligence, ordinary physical characteristics—persons

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having some pride of appearance, who were embarrassed to some extent because of having superfluous hair on the face, arms or other commonly exposed parts of the body. For all the purposes of this proceeding, they may be looked upon as being representative of the type of persons who are purchasers or prospective purchasers of electrolytic devices such as respondent's Epilator, and of similar devices produced by other manufacturers. They are of those whom one expert referred to as creating a social problem through the development of inferiority complexes because of their concern about unwanted hair, especially if it is prominent upon the face. They are, as stated, persons of ordinary means who cannot readily afford the tedious, expensive treatments which would be necessary if they went to an "electrologist." None of the user-witnesses had any difficulty using the Epilator, except one, and her difficulty was such that it could have been readily overcome with patience and practice. All except this one were thoroughly satisfied with its use.

Under expert observation, two separate panels of untrained individuals used the Epilator successfully with no instructions except those gained from reading respondents' booklet. The weight of the expert testimony is to the effect that respondents' device can be used by self-application by persons of ordinary qualifications, effectively and successfully, after a little practice—and safely, if the instructions in respondents' booklet are observed.

It is a matter of common knowledge that there are some individuals who cannot successfully employ self-application of any product—cannot use an electric or safety razor, cannot give themselves a wave-set or a facial treatment. Respondents recognize this fact and afford protection for such persons through their guarantee to refund the entire cost to any purchaser who is not "entirely satisfied" after fifteen days' use of the device. It is common knowledge, too, that certain parts of the human anatomy are inaccessible to any device that has to be used with the hands, but certainly no potential purchaser is so foolish as to believe that any device would make such inaccessible parts accessible.

(3) Use of the Mahler Epilator is a safe method of removing superfluous hair from the human body by self-application.

The weight of the testimony of the qualified experts supports this conclusion. Not a single specific instance of infection, permanent scarring, or other damage to the skin or injury to the health of any person who had used the Epilator or any similar device upon his own person is disclosed in the record. The needle of the Epilator will kill bacteria within the field of its charge; the precautions set forth in respondents' booklet are explicit and adequate, and are the same

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precautions as those ordinarily taken by dermatologists in their practice, and, if followed, reduce the chances of infection to a minimum;⁵ experience indicates that individuals observe more care when they are treating themselves than is exercised by the professionals—physicians or “electrologists”; the trauma resulting from use of the Epilator is less than that resulting from plucking a hair or from a pinprick or slight cut; and certainly there is less danger of infection in the self-use of an electrolytic device than would be present where the removal of superfluous hair by electrolysis is performed by one who has no specialized training in the physiology of the skin, in antisepsis, or in any of the various phases of dermatology in an office or place of business where a succession of miscellaneous patients receive similar treatments with the same instrument. The specific cases of injury or skin damage shown in the record came from the offices of professional practitioners.

The foregoing conclusions are as positive as though the burden of proof were upon respondents, which is not the case. The burden has been and is upon counsel in support of the complaint to substantiate the allegations of the complaint. That burden has not been sustained; the charges contained in the complaint are not supported by substantial, reliable, probative evidence; and it cannot be found that the respondents have violated the Federal Trade Commission Act. Therefore, the complaint should be dismissed. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

The initial decision filed by the hearing examiner after the hearings were concluded provided for dismissal of the complaint. The case is presented here on the appeal filed by counsel supporting the complaint from such initial decision, the briefs in support of and in opposition to the appeal, and the oral arguments of counsel.

The respondents engage in the sale to the general public of electrolysis machines which are to be used in removing superfluous hair from the body and face by self-application. Before proceeding to a discussion of the issues, some facts about the machines should be noted. A typical device includes a cabinet holding electric cells, a series of posts affording varied amounts of electricity, and a small needle. By puncturing the skin and inserting the needle along the hair shaft toward the hair root and then applying the proper amount

⁵ The testimony of the witnesses in support of the complaint goes no further than to say that injury may result if persons using the Epilator operate it contrary to or in disregard of the printed instructions and warnings.

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of current, the user will destroy the hair root if it is within the range of the current. In such case, that particular hair will not grow again.

Nor is there any dispute as to the general routine followed by the respondents in soliciting sales of their machines in commerce. It includes the insertion of advertisements in magazines of national circulation reading as follows:

DESTROY Unwanted Hair FOREVER

Temporary relief is NOT enough

Only by KILLING THE HAIR ROOT can you be sure UNWANTED HAIR is GONE FOREVER. Brings relief and social happiness. Do not use our method until you have read our instruction book carefully and learned to use the MAHLER METHOD safely and efficiently. Used successfully over fifty years.

Send 5¢ TODAY for booklet

NEW BEAUTY For You

MAHLER'S, INC., Dept. 51-K

Providence 15, R. I.

To prospects responding to their initial contact advertisements, the respondents transmit certain literature including a so-called beauty booklet which contains the following admonition or disclosure:

The use of the Mahler Electrolysis Epilator by persons not trained in the technique of removing superfluous hair from the human body by electrolysis may result in permanent disfigurement, cause infections or other irreparable injury to health, and * * * said device should not be used to remove hair from cancerous or syphilitic lesions, pigmented moles or other areas showing local pathological conditions.

Those subsequently electing to purchase receive with their machines an instruction booklet. It reiterates the foregoing revealing statement and counsels buyers to acquire dexterity in using the device by experimental removal of hair near the knee prior to undertaking to remove hair from the face. In addition to outlining procedures for removing hair effectively and other practices to be avoided, the instruction booklet also contains directions relating to care and cleanliness of the skin and needle before and after operation of the machine.

Turning now to the issues presented, the complaint under which this proceeding was instituted alleges that the respondents have falsely represented through their previously noted advertising that use of their devices through self-application constitutes a safe method for the removal of superfluous hair and that such advertisements are violative of the Federal Trade Commission Act. It additionally charges, among other matters, that various of the respondents' advertisements are misleading because they fail to reveal material facts with respect to the consequences which allegedly may result from use of the electrolysis devices under conditions prescribed in the ad-

vertisements or conditions which are customary and usual among purchasers.

The initial decision held that the statement in the initial contact advertising against using the method until purchasers read the instruction book carefully and have learned to use the machine safely and efficiently was not misleading and has not served to misrepresent the device's safety when so used. The hearing examiner's rulings in this regard are based on his conclusions that respondents' machine constitutes a safe method for removing superfluous hair from the face and body by self-application provided that the directions or precautions set forth in the instruction book furnished all purchasers are followed.

The appeal contends that he erred and that risks of injury definitely attend use of respondents' machines even as directed for the reasons (1) that use of the needle on areas in the vicinity of potentially malignant moles or growths may stimulate them into cancerous growths and that removal of hair adjacent to the nose or under the arms may cause infection, none of which procedures is advised against in the instructions; and (2) that the instructions relating to cleanliness and care of the skin and needle merely minimize but do not eliminate the incidence of infection and consequent injury.

A view that infection may stem from removing hair immediately adjacent to the nostrils or under the arms was expressed by a professional electrologist who has engaged in his profession for more than twenty years. No probative medical evidence was received indicating that the hazards of removing hair from that area are greater than those encountered in removing it from elsewhere on the face, nor is the record persuasive that users are tempted to the needle method of epilation on tender underarm areas.

Scientific evidence, including the testimony of physicians specializing in the field of dermatology, also was received bearing on the other issues. One of the physicians called by counsel supporting the complaint expressed the view that applying the needle within one-fourth of an inch of a potentially malignant mole or growth might stimulate it to a cancerous course of development. He further stated that he had observed two instances in which cancers had followed electrolysis; and another physician testified that he had seen serious conditions of this type which perhaps were stimulated into activity by electrolysis. The scientific testimony introduced by respondents included evidence to the effect that the directions and revealing statements, including the instructions, adequately inform on matters to be avoided by users. Evidence also was received tending to show that

the effective area in electrolysis is limited to a core of tissue only 1/25 of an inch in diameter.

Testimony was received in support of the complaint relating to the inability of laymen in identifying pathological conditions or areas where hair removal is contra-indicated. In addition to the testimony relating to the adequacy of the directions, respondents offered testimony which tends to show that passable efficiency in operating their machines can be acquired within a reasonably short time by people generally through the trials recommended in the instructions. While we do not adopt the view that no risks can accompany the public's self-use of needle electrolysis techniques pursuant to the respondents' instructions, we recognize that the burden of proof is on the proponent of the complaint. It is our view, therefore, that the greater weight of the evidence does not support affirmative conclusions that the devices are unsafe when the instructions are observed or to the effect that the advertising is rendered false by matters omitted from the revealing statement. This aspect of counsel's appeal is denied, accordingly.

We also have considered the appeal's contentions of non-safety because of risks from skin infection in addition to those previously referred to. It urges that the instructions relating to care of the skin and cleaning of the needle serve only to reduce materially and do not eliminate possibilities of infection. The precautions counseled by the respondents appear generally similar to those used among professional electrologists and in many physicians' offices. There can be no doubt but that infections have followed professional removal of hair by electrolysis methods. However, there is no probative evidence indicating that they have resulted from inadequacies in the recognized procedures instead of deviations from them. Hence, the record does not suffice for informed determinations of whether appreciable risks of infection attend use of electrolysis when the respondents' directions on skin care and other matters are observed.

The initial decision also dismissed the companion charge earlier mentioned that certain of the respondents' advertisements were misleading because they failed to reveal material facts with respect to the consequences, i.e. injuries, which may result from use of the machines under conditions prescribed in the advertisements or those customary and usual among purchasers. The advertisements which initially solicit inquiries from prospective purchasers have contained no revealing statement with respect to specific risks which may attend respondents' hair removal method. On the other hand, information on price and other matters also is omitted and we would not be warranted in concluding that the initial contact advertisement has served

to induce sales of the machine. The so-called beauty booklet containing the revealing statement and a letter, a brochure and order blank, none of which reiterate it, make up the respondents' first mailing. If the prospect does not order, follow-up literature is sent at intervals of three weeks, three months and six months after initial inquiry. At one time, mailings also were made nine months after inquiry. These mailings have included order blanks and descriptive and testimonial pamphlets. Only in the first mailing does the prospect receive the beauty booklet. Except for a pamphlet included in the now discontinued nine-month mailing and the instruction booklet, none of the promotional matter later transmitted contains any disclosure of potential dangers inhering in use of the machine.

Certain of the advertisements offer the machine for removing unwanted hair and clearing the face, and a testimonial pamphlet has emphasized that the skin remains clear and soft. The respondents introduced scientific testimony to the effect that hair does not grow in moles which are potentially malignant and that no risks would accompany removal of hair from the benign type of mole. This was qualified by an admission that benign and potentially malignant areas sometimes are intermixed; but the witness was of the view that the presence of hair is rare in such areas and those conditions are "not really much of a problem." More credible in the Commission's view, however, are the opinions expressed by witnesses testifying in support of the complaint that appreciable risks are presented when users remove hair from moles or from areas very close to them or pigmented spots. It is clear from the record, furthermore, that ignorance of or departures from proper procedures and precautions in clearing the face of hair may result in infection or disfigurement. Implicit in the initial decision are conclusions to the contrary and, to the extent that exceptions are interposed thereto under the appeal, the appeal obviously has merit. It would be unrealistic to conclude that these machines do not come within the category of potentially injurious devices.

Section 15 (a) (1) of the Federal Trade Commission Act, as amended, provides that an advertisement shall be deemed misleading if it fails to reveal material facts respecting consequences from use under the conditions there prescribed or those customarily or usual. The Commission, therefore, would be justified in concluding that any advertisement disseminated in commerce for the purpose of inducing or likely to induce sales of the respondents' apparatus is false as a matter of law if it is offered for the removal of superfluous hair or clearing the face and contains no revealing statement in the vein similar to that in the beauty and instruction booklets.

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There is, however, no direct record support for conclusions that any substantial portion of the machines distributed by the respondents have been sold as a result of the mailings following the first one. Because all purchasers receive the two booklets, the record additionally suggests that prospects are guided by the beauty booklet in making their decisions to purchase and users guided by the respondents' instruction booklet. In this factual situation, there is no clear showing that the public interest requires issuance of an order forbidding respondents from disseminating advertisements which do not contain the booklets' revealing statements. On the basis of the present record, therefore, dismissal also is warranted as to the complaint's additional charges of falsity of the advertising for alleged failure to reveal material facts. The appeal's exceptions to the initial decision's provision for dismissal are accordingly denied and the order below affirmed.

In reaching certain conclusions as to the effect of the needle's charge on bacteria, the hearing officer discussed various scientific experiments conducted by witnesses who testified in this case. Vigorous objection is taken under the appeal to the hearing examiner's statement of a strong presumption that a report on tests not brought to the hearings by a bacteriologist called by Commission counsel on rebuttal really supported the experimental results of another scientist who previously testified as a defense witness. As elsewhere mentioned in the initial decision, the bacteriologist did submit a report on his experiments which was received in evidence. His reported results were contrary to those of the defense witness. The initial decision also stated that those experiments supported his conclusions. The witness, a scientist in the employ of the Government, testified that he had destroyed his laboratory notes after completing the experiments and writing his report from them; that his report included all experimental work he had done in the matter; and that certain of them repeated the tests made by the scientist who had conducted experiments at the request of the respondents. There accordingly was no record basis for the hearing examiner's assumption that the witness conducted experiments on which he made no report or that the data which he destroyed after completing his report related to unreported tests. The hearing examiner clearly erred in such respect and the appeal's exception thereto is well taken.

The appeal, accordingly, is granted to the extent hereinbefore noted and otherwise denied. To the extent that the appeal is granted, the findings of the initial decision are to be deemed modified in conformity therewith and, as thus modified, the initial decision is affirmed.

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Chairman Gwynne concurs in the result insofar as dismissal of the complaint is concerned.

Commissioner Secrest did not participate in the decision herein.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision in this proceeding; and the matter having been heard on briefs and oral arguments of counsel, and the Commission having rendered its decision granting the appeal to the extent noted therein and otherwise denying the appeal, and affirming the initial decision as modified under the Commission's decision:

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed.

Commissioner Secrest not participating.

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IN THE MATTER OF
UNITED FISHERMEN OF ALASKA ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6368. Complaint, June 27, 1955—Decision, May 3, 1956

Consent order requiring two respondents, cannerys of king crab caught in waters adjacent to their packing plants in Kodiak, Alaska—charged with effectuating a conspiracy with two fishermen's associations to restrain competition in the sale and distribution of king crab and king crab meat in commerce, in the course of which they jointly fixed and maintained minimum prices for all king crab caught in said area by means of annual contracts with the fishermen's associations, enforced by intimidation and threats of violence against cannerys and fishermen not parties to the agreement and threats of black-listing fishermen who sought employment with other cannerys not paying the fixed minimum prices—to cease and desist from such joint price fixing and from empowering any association or group to negotiate prices for king crab or crab meat;

Provided, however, That this order cease to be of any effect if the pending proceeding against respondent fishermen's associations be finally determined in any manner other than in an order to cease and desist from the same acts and practices.

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

Mr. Fletcher G. Cohn, Mr. Lewis F. Depro and Mr. John J. McNally for the Commission.

Mr. Herald A. O'Neill, of Seattle, Wash., for Island Seafoods, Inc. and King Crab, Inc.

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 the parties hereinafter referred to as respondents have violated the provisions of Section 5 of the Federal Trade Commission 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 this respect as follows:

PARAGRAPH 1. Respondent United Fishermen of Alaska, hereinafter referred to as "respondent Union," is an unincorporated association which is an affiliate or constituent unit of the Seafarers International Union of North America (American Federation of Labor). Among its members are fishermen who fish for King crab in the waters bordering Western and Northwestern Alaska, including the

waters adjacent to Kodiak, Alaska. Its principal office and place of business is in Kodiak, Alaska, where its mailing address is P. O. Box 501-A, Kodiak, Alaska.

PAR. 2. Respondents Eldon Lester, John Anderson, and P. J. Kerrigan, are individuals and are, respectively, President, Vice-President, and Secretary-Treasurer of respondent Union, with the office and place of business of each being the same as that of respondent Union.

Respondents Charles Warren, Russell Attwood, and Alfred Levine are individuals who compose the Executive Board of said Union.

All of the respondents named in this Paragraph, which are hereinafter referred to as a group as "respondent Union officials," individually and in their respective capacities as officials of respondent Union have formulated, directed, or controlled the policies and activities of said Union, and in so doing, have, expressly or impliedly, authorized, performed, adopted, or affirmed one or more of the policies, acts and practices herein alleged to have been performed by or through respondent Union. Said policies, acts, and practices were performed through the medium of said Union, with the approval, and on behalf, of all of its fishermen members and particularly those engaged in the catching of King crab in the waters bordering Western and Northwestern Alaska and especially in the waters adjacent to Kodiak, Alaska, and were intended to, and did, bind said members in the same manner and with the same effect as though they had individually engaged in same.

The members of respondent Union are too numerous and the changes in the membership of said Union too frequent to render it practicable to name as respondents herein each and all members of respondent Union, without manifest delay and inconvenience. Therefore, there are named and included as respondents in this proceeding the above-named respondent officials of respondent Union individually, as officials of respondent Union, and as representing all members of said Union.

PAR. 3. Respondent Kodiak Fish Producers Association, hereinafter referred to as "respondent Cooperative," is a nonprofit organization, organized in the first quarter of 1954 under the laws of the Territory of Alaska and under the provisions of the Act of Congress of June 25, 1934, entitled "An Act authorizing associations of producers of aquatic products." It has its principal office and place of business in Kodiak, Alaska.

It is composed of approximately fifty independent fishermen who own their boats and who formerly were members of respondent Union. Its function is to act as a fish marketing cooperative for said members.

Several of the directors of respondent Cooperative were formerly

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officers of respondent Union and acted for and on behalf of respondent Union in carrying on the negotiations and entering into the contracts, hereinafter described, for the sale by the respondent fishermen members of respondent Union of the King crab caught by said members.

PAR. 4. Respondents W. A. Cannon, Dal Valley, Barney Corgatelli, Jack Warren, A. J. Cichoski, Ray Heinrichs, and Thomas Clampffer, who are hereinafter referred to as a group as "respondent Cooperative officials," are individuals who are directors of respondent Cooperative. Said respondents, individually and in their respective capacities as officials of respondent Cooperative, have formulated, directed, or controlled the policies and activities of said Cooperative, and in so doing, have, expressly or impliedly, authorized, performed, adopted, or affirmed one or more of the policies, acts, and practices herein alleged to have been performed by or through respondent Cooperative. Such policies, acts, and practices were performed through the medium of said Cooperative, with the approval and on behalf of all its independent boat owner members who are fishermen engaged in the catching of King crab in the waters bordering Western and Northwestern Alaska and more particularly in the waters adjacent to Kodiak, Alaska, and were intended to, and did, bind said members in the same manner and with the same effect as though they had individually engaged in same.

The members of respondent Cooperative are too numerous to render it practicable to name as respondents herein each and all members of respondent Cooperative without manifest delay and inconvenience. Therefore, there are named and included as respondents in this proceeding the above-named officials of respondent Cooperative individually, as officials of respondent Cooperative, and as representing all members of said Cooperative.

PAR. 5. Respondent Island Seafoods, Inc., is a corporation organized under the laws of the Territory of Alaska, with its principal office and place of business being located at 66 Marion Street, Seattle, Washington, and having a packing plant located at Kodiak, Alaska.

Respondent King Crab, Inc., is a corporation organized under the laws of the Territory of Alaska, with its principal office and place of business being located at Kodiak, Alaska, where its mailing address is P. O. Box A-1047, Kodiak, Alaska.

Respondents Walter Muller and Mildred D. Muller are individuals composing a partnership trading as Kodiak Sea Foods Packing Company, with their principal office and place of business being located at Kodiak, Alaska.

Each of the respondents named in this paragraph, and hereinafter referred to as a group as "respondent Cannery," is engaged in the

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business of canning and packing crabmeat secured from King crabs caught in the waters of Western and Northwestern Alaska, especially the waters adjacent to Kodiak, Alaska.

PAR. 6. The King Crab Industry is relatively new and has grown very rapidly. For the 1954 season the pack of such crab had a wholesale value in excess of \$2,000,000. Approximately one-half of said pack is purchased by the respondent Cannery from the respondent fishermen members of respondent Union and/or respondent Cooperative. A large proportion of the other half is either caught on the boats owned or controlled by a concern other than the respondent Cannery or is purchased by such concern from fishermen who, like the fishermen employed on the boats owned or controlled by this concern, are not members of either the respondent Union or respondent Cooperative. This other concern freezes the crab or the crabmeat secured from the King crabs which it obtains by either of the aforementioned methods, and transports the same directly to the United States. Part of the crab secured by this concern is frozen on the boats used to catch same in the waters bordering on the Western and Northwestern Coast of Alaska, including the waters adjacent to the Kodiak Bay area, and the rest is frozen in plants located at or near Kodiak, Alaska, which are owned or operated by the concern. This concern likewise has never entered into any contracts or agreements with either the respondent Union or the respondent Cooperative for the purchase of King crab or crabmeat.

PAR. 7. All of the respondent fishermen members of both the respondent Union and the respondent Cooperative who are engaged in the catching of King crab in the waters of Western and Northwestern Alaska, including the waters adjacent to Kodiak, Alaska, are independent fishermen who own their own boats and either own or rent the traps or other gear used in the catching of said crabs. None of such respondent fishermen members of either respondent Union or respondent Cooperative are employees of respondent Cannery. Respondent Union and/or respondent Cooperative are the media whereby the officials of both respondents and the respective respondent fishermen members of each, who are engaged in the catching of such crab, have performed the illegal acts and practices hereinafter alleged.

PAR. 8. In the course and conduct of their respective businesses, respondent Cannery each makes substantial sales of the King crabmeat and crab which they purchase from the respondent fishermen members of respondent Union and/or respondent Cooperative and pack and can in their respective plants, to customers located in the various States of the United States and cause same to be transported from the Territory of Alaska to such customers. Said respondents,

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as well as the respondent fishermen members of both the respondent Union and respondent Cooperative, maintain, and at all times herein mentioned have maintained, a regular course or current of trade in commerce in King crab in the Territory of Alaska, between said Territory and the various States of the United States, and among and between the several States of the United States. The respondents Union and Cooperative have been, and are, the media whereby the respective respondent officials of each and the respective members of each have committed and performed, in commerce, the alleged illegal policies, acts, and practices hereinafter set forth.

All respondents named herein have been, and are, engaged in commerce in King crab and crabmeat as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their respective businesses, respondent Cannery are in competition in such commerce with each other, and with others who not only purchase and sell King crab which are caught in the waters adjacent to Kodiak, Alaska, but also King crab caught in various waters bordering on the Western and Northwestern Coast of Alaska, and also with others who freeze the crab so caught, in the purchase and sale of raw or fresh King crab and King crabmeat, except insofar as such competition has been restrained or destroyed by the policies, acts, and practices hereinafter set forth.

Also, except as it has been restrained or destroyed by the policies, acts, and practices hereinafter set forth, the respondent fishermen members of respondent Union and/or respondent Cooperative who are engaged in catching King crab in the waters hereinbefore described, including those adjacent to Kodiak, Alaska, are in competition in such commerce with each other and with other fishermen who likewise are engaged in catching King crab in the aforescribed waters, including those adjacent to Kodiak, Alaska, but who are not members of either respondent Union or respondent Cooperative, in offering for sale and selling such crab to the respondent Cannery and to others who are engaged in businesses similar to respondent Cannery, including those freezing such King crab or crabmeat.

PAR. 10. Each of the respondents named herein, directly or indirectly, participated in, approved, or adopted one or more of the alleged illegal policies, acts, and practices hereinafter set forth.

PAR. 11. For many years last past and especially during 1952 and 1953, respondent Union and respondent Union officials, acting individually and/or through or by means of respondent Union, and since 1954 respondent Cooperative and respondent Cooperative officials, acting individually and/or through or by means of respondent Co-

operative, and respondent Cannery have entered into, maintained, and effectuated an agreement, understanding, or conspiracy between and among themselves to pursue, and they have pursued, a planned common and concerted course of action to adopt, fix, and adhere to the practice and policy of restricting and restraining competition in the offering for sale, sale, and distribution of King crab and King crabmeat in commerce in the Territory of Alaska, between said Territory and the several States of the United States, and among and between such States.

PAR. 12. As part of, pursuant to, and in furtherance of the aforesaid agreement, understanding, conspiracy, and planned common and concerted course of action, respondents have performed and pursued the following policies, acts and practices:

(1) To fix and maintain, and they have fixed and maintained, the minimum prices at which all raw or fresh King crab and King crabmeat caught in the waters bordering Western and Northwestern Alaska, including the waters adjacent to Kodiak, Alaska, are bought and sold;

(2) Respondent Union, at least for the years 1952 and 1953, entered into annual contracts with each of respondent Cannery wherein and whereby were fixed, established, and maintained the minimum prices which each of said Cannery should pay, and each paid, to respondent fishermen members of respondent Union for the raw or fresh King crabs which said fishermen members caught in the aforementioned area;

(3) Since 1954, respondent Cooperative, acting in conjunction with, and with the approval of, respondent Union, has entered into annual contracts with respondent Cannery wherein and whereby have been fixed, established, and maintained the minimum prices which said respondent Cannery should pay, and each has paid, to the respondent fishermen members of respondent Cooperative and/or respondent Union for the raw or fresh King crab caught by said fishermen members in the aforescribed waters, and which prices respondents have established as the minimum prices to be paid for all King crab caught in said area, even though same be purchased by parties other than respondent Cannery and be caught by fishermen who are not members of either respondent Union or respondent Cooperative;

(4) Respondent Cooperative and respondent Cooperative officials, in conjunction with respondent Union and respondent Union officials, have employed and are employing various means and methods, including intimidations and threats of violence, to require purchasers of raw King crab, for the purpose of packing, canning, or freezing same, who have not entered into agreements or understandings with re-

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spondent Cooperative or respondent Union, to pay for the King crab which they purchase the minimum prices fixed in agreements between respondent Cooperative and respondent Cannery;

(5) Respondent Cooperative and respondent Cooperative officials, in conjunction with respondent Union and respondent Union officials, have employed various means and methods, including intimidation and threats of violence, to compel fishermen who are not members of either respondent Union or respondent Cooperative to refrain from catching King crab for any purchasers or prospective purchasers of said crabs who will not pay the minimum prices for such crabs which are fixed by the current annual agreements between respondent Cooperative and respondent Cannery;

(6) Respondent Cooperative and respondent Cooperative officials, acting in conjunction with respondent Union and respondent Union officials, have, by various means and methods, including threats of blacklisting, sought to prevent fishermen from securing or accepting employment as cannery workers for cannery other than respondent Cannery when said other cannery do not pay to the fishermen who catch King crab in the aforesaid area, the minimum prices which are fixed by the current agreements or contracts between respondent Cooperative and respondent Cannery;

(7) Respondent Cannery have jointly negotiated with respondent Union and/or respondent Cooperative as to the minimum prices each and all would pay to the respondent fishermen members of respondent Union and/or respondent Cooperative for the raw King crab caught by such fishermen members in the aforesaid waters;

(8) Respondent Cannery have agreed to pay, and have paid, through and by means of the aforesaid agreements or contracts between each of them and respondent Union and/or respondent Cooperative the identical minimum prices to the respondent fishermen members of respondent Union and/or respondent Cooperative for such King crab.

PAR. 13. The capacity, tendency, and effect of the aforesaid understanding, agreement, combination, conspiracy, and planned common and concerted course of action and the policies, acts, and practices, as hereinbefore set forth, have been, and are now, to unlawfully restrict, restrain, and hinder the catching of King crab in the waters bordering Western and Northwestern Alaska, including those adjacent to Kodiak, Alaska; to prevent price competition in the aforesaid commerce between and among respondent Cannery in the purchase of such King crab; to prevent competition in such commerce between said respondent Cannery and others engaged in the purchase and sale of such crab and crabmeat; to prevent such competition, (a) between

and among respondent fishermen members of respondent Union, (b) between and among respondent fishermen members of respondent Cooperative, (c) between and among respondent fishermen members of respondent Union and respondent fishermen members of respondent Cooperative, and (d) between such respondent fishermen members of respondent Union and respondent Cooperative and other fishermen who are not members of respondent Union and/or respondent Cooperative but are engaged in the catching of such crab in the afore-described waters, in the sale of same to respondent Cannery and to others engaged in the purchase and/or sale of King crab and crabmeat in interstate commerce: all within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 14. In addition to the effects, hereinbefore set forth, of said understanding, agreement, combination, conspiracy, and planned common and concerted course of action of the respondents and the policies, acts, and practices done pursuant thereto, they likewise have the capacity and tendency to unduly enhance the price which the public is required to pay for King crab and crabmeat when same is offered for sale to the consuming public.

PAR. 15. The policies, acts, and practices of the respondents, all and singularly, as hereinbefore set forth, are to the prejudice of the public, have a dangerous tendency to unduly hinder competition and to create a monopoly in respondents in the King Crab Industry, and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION AS TO CERTAIN RESPONDENTS BY WILLIAM L. PACK,
HEARING EXAMINER

The complaint in this matter charges the respondents with entering into a combination in restraint of trade in violation of the Federal Trade Commission Act. An agreement has now been entered into by two of the respondents, Island Seafoods, Inc., and King Crab, Inc., and counsel supporting the complaint which provides, among other things, that said respondents admit all of the jurisdictional allegations in the complaint; that as to that part of the proceeding which is disposed of by the agreement, the answer of each of said respondents to the complaint shall be considered as having been withdrawn and that the record, insofar as it pertains to said respondents, on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that as to that part of the proceeding which is disposed of by the agreement, each of said respondents waives any further procedural steps before

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the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights each of said respondents may have to challenge or contest the validity of the order entered in accordance with the agreement; that the order hereinafter set forth may be entered in disposition of the proceeding as to said respondents, such order to have the same force and effect as if entered after a full hearing; that the order may be altered, modified or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by either of said respondents that it has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding as to said respondents, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Island Seafoods, Inc., is a corporation organized and existing under the laws of the Territory of Alaska with its principal office and place of business located at 66 Marion Street, Seattle, Washington, and having a packing plant located at Kodiak, Alaska. Respondent King Crab, Inc., is a corporation organized under the laws of the Territory of Alaska with its principal office and place of business located at Kodiak, Alaska, its mailing address being P. O. Box A-1074, Kodiak, Alaska.

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

ORDER

It is ordered, That respondents Island Seafoods, Inc., a corporation, and King Crab, Inc., a corporation, their respective officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase, or offering to purchase, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of raw king crab caught in waters bordering western and northwestern Alaska, including the waters adjacent to Kodiak, Alaska, do forthwith cease and desist from entering into, cooperating in or carrying out any planned common and concerted course of action, understanding or agreement between said respondents or between or among said respondents and one or more of the other respondents named in the complaint herein or between either of said respondents and others not parties hereto, to do or perform any of the following acts:

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1. Fixing, establishing, maintaining or adhering to, or attempting to fix, establish or maintain, or cause adherence to, by any means or method, any prices for the purchase or sale of such raw king crab and king crab meat;

2. Jointly or collectively negotiating, bargaining or agreeing, by any means or method, as to the price or prices at which said raw king crab or king crab meat are proposed to be, or are, purchased or sold;

3. Authorizing or empowering any association, group, corporation or union to negotiate, bargain or agree as to the prices to be paid or received in the purchase of such king crab or king crab meat;

Provided, however, That nothing herein contained shall be construed or interpreted as preventing or prohibiting any respondent named herein, individually, from purchasing or selling, or bargaining for the purchase or sale of such raw king crab and king crab meat with any boat owner, boat captain, or other single seller or buyer.

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

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

Provided further, That if the pending proceeding against respondents United Fishermen of Alaska and Kodiak Fish Producers Association is finally determined in any manner except by the issuance of an order to cease and desist, either (a) by consent, or (b) by final order of the Commission not subject to further review, or (c) by order of the Commission, which, although subject to further review, continues effective, requiring said respondents United Fishermen of

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Alaska and Kodiak Fish Producers Association to cease and desist from the same or similar acts or practices provided by the order contained herein, then this order shall terminate and cease to be of any effect.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 3rd day of May, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Island Seafoods, Inc., and King Crab, Inc., corporations, 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.

Complaint

IN THE MATTER OF

PUGET SOUND SALMON CANNERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6376. Complaint, June 28, 1955—Decision, May 8, 1956

Consent order requiring 13 corporate canners of salmon caught in Puget Sound and adjacent areas—charged in the complaint, along with their trade association, an organization of owners of Purse Seine vessels engaged in fishing for salmon in that area, and a union of salmon fishermen including those on such vessels, with collectively controlling the prices at which the salmon was purchased and sold, by means of agreements between and among themselves—to cease and desist from concerted price fixing; but Providing that if the proceeding still pending against the vessel owners' association and the fishermen's union is terminated in any other way than by a similar desist order, then this order shall cease to be of any effect.

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

Mr. Lewis F. Depro, *Mr. Fletcher G. Cohn* and *Mr. John J. McNally* for the Commission.

Pillsbury, Madison & Sutro, of San Francisco, Calif., for Alaska Packers Ass'n.

Peyser, Cartano, Botzer & Chapman, of Seattle, Wash., for American Packing Co.

Mr. Herald A. O'Neill, of Seattle, Wash., for Burk Canning Co., Inc., Dressel-Collins Fish Co., Fishermen's Packing Corp., Friday Harbor Canning Co., Sebastian-Stuart Fish Co. and Washington Fish & Oyster Co., Inc.

Norblad, Wyatt & MacDonald, of Astoria, Ore., for Columbia River Packers Ass'n., Inc.

Bogle, Bogle & Gates, of Seattle, Wash., for Farwest Fishermen, Inc. and New England Fish Co.

Kerr, McCord, Greenleaf & Moen, of Seattle, Wash., for Pacific American Fisheries, Inc.

Ryan, Askren & Mathewson, of Seattle, Wash., for Whiz Fish Products Co., Inc.

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 the parties hereinafter referred to as respondents have violated the provisions of Sec-