

IN THE MATTER OF
VULCANIZED RUBBER AND PLASTICS CO.

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

Docket 6222. Complaint, June 25, 1954—Decision, Apr. 26, 1957

Order requiring a manufacturer with office in New York City and factory at Morrisville, Pa., to cease branding and advertising as "Rubber" and "Hard Rubber", combs made of "Kralastic D" patented rubber-resin compound and by the injection mold or extrusion process rather than vulcanization.

Mr. Charles S. Cox for the Commission.

Mr. Alger B. Chapman, Mr. Joseph J. O'Connell, Jr. and Mr. Robert Reed Gray of *Chapman, Walsh & O'Connell* and *Mr. Robert E. Redding*, of Washington, D.C., and *Mr. Joseph Sawyer*, of New York City, and *Mr. Brady O. Bryson* and *Mr. Thomas V. LeFevre*, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

In this initial decision it is found that the allegations of the complaint have been sustained and that the respondent has been and is now guilty of violating the Federal Trade Commission Act by misbranding and misadvertising combs as "hard rubber" and "rubber" which are made by it through the injection mold process rather than by vulcanization and are advertised and sold by it in commerce; and that such acts and practices of respondent constitute unfair competition and unfair and deceptive acts and practices in commerce.

There is no issue joined as to the facts of respondent's corporate capacity, of its manufacture of the combs in question, or their sale and distribution in commerce in this proceeding, as the answer admits such allegations of the complaint. The complaint further alleges, in substance, that respondent has been and is now manufacturing and selling combs in commerce which are designed for use on human hair, which combs are advertised and stamped "Rubber" and "Hard Rubber," when in fact they are not hard rubber but are composed in large part of other materials; that a substantial part of the purchasing public prefer "rubber" or "hard rubber" combs; that by such unfair methods respondent's competition is unjust to its competitors and such false, misleading and deceptive representations of respondent's combs have deceived and have a ten-

dency to deceive the public, all to the prejudice and injury of the public.

The answer of respondent, in substance, admits it is engaged in commerce but denies the other said allegations of the complaint and then pleads four expressly denominated affirmative defenses: (1) that respondent's synthetic rubber combs are "rubber" and "hard rubber" and are equal to or superior to "tree rubber" combs; (2) that the public understand the term "rubber" and "hard rubber" and are not misled, and thereby this proceeding does not involve a substantial public interest; (3) that the issue involves the entire rubber industry and the Commission should not single out the respondent whose business involves an insignificant part of the rubber industry to bear the entire burden of sustaining the propriety of industry-wide practices and (4) the Federal Government's great interest in synthetic rubber development is involved and the progress of such industry should therefore not be retarded and injured by any Commission action in this case.

The third affirmative defense of the answer has been disposed of by the Commission's refusal to call a trade practice conference of the entire rubber industry at respondent's request, both before the institution of the present proceeding and upon the respondent's appeal from the hearing examiner's interlocutory order filed November 16, 1954, denying respondent's motion to suspend and refer the case to the Bureau of Industrial Cooperation for the authorization of a trade practice conference. The fourth affirmative defense is involved in the issues of the first two affirmative defenses. It is in effect only argument, and there is no evidence in the case tying any federal development of synthetic rubber to the merits of respondent's defenses.

The respondent further raises the defenses of estoppel and laches, it being claimed that the Commission is barred from proceeding in this matter by reason of respondent's having been advised on February 23, 1951, that the Commission would not issue a complaint against respondent. Since the present complaint was issued on June 25, 1954, and served on respondent July 1, 1954, the mere lapse of a little over three years and four months after February 23, 1951, could scarcely constitute laches. It is well established, moreover, that laches or neglect of duty on the part of officials of the Government is no defense to a suit by it in the public interest. See *F.T.C. v. Algoma Lumber Co., et al.*, 291 U.S. 67, 80; *F.T.C. v. Bunte Bros., Inc.*, 312 U.S. 349, 352, and *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 409. And as to estoppel of the Commission, it is also well

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established that the principles of estoppel do not apply against a public agency so long as it is acting in its administrative or judicial capacity as is the case in the present proceeding. See *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, 253, and *P. Lorillard Co. v. F.T.C.*, 186 F. 2d 52, 55-56, and cases cited. This principle has been uniformly followed of late by the Commission's refusing to stay proceedings involving health and accident insurance advertising cases. See *Postal Life & Casualty Insurance Co.*, Docket No. 6276, and *The Commercial Travelers Mutual Accident Association of America*, Docket No. 6242. There being utterly no basis for these defenses, they will not be considered further herein.

As already stated, the complaint in this proceeding was filed June 25, 1954. Respondent, by special leave, was permitted to file its answer on August 20, 1954. The hearing examiner to whom the matter had been assigned for hearing changed the date of hearing, on respondent's request, to November 8, 1954, in New York City. On October 29, 1954, this case was reassigned to the undersigned hearing examiner for hearing and decision. A motion filed by respondent November 3, 1954, to suspend the case and refer the matter to the Bureau of Industrial Cooperation, for the purpose of authorizing a trade practice conference, was promptly objected to by Commission's counsel, and on November 16, 1954, the same was denied by the hearing examiner from which an interlocutory appeal was taken to the Commission and by it denied on January 20, 1955.

The initial hearing, however, began on November 8, 1954, the day theretofore fixed, and such hearing was heard on some eleven days between that date and June 1, 1955, when the Commission's counsel rested its case in chief. The respondent then moved to dismiss the complaint on various grounds. This was orally argued on July 25, 1955, and by interlocutory order filed September 13, 1955, and an amended and supplemental interlocutory order filed October 12, 1955, said motion to dismiss was denied and further sessions of hearing ordered. These orders were appealed from by respondent, and the appeal was denied by the Commission on November 29, 1955, the Commission upholding in its opinion the hearing examiner's determination that a prima facie case had been made by counsel supporting the complaint. In the meantime, further hearings had been had, commencing November 28, 1955, and continuing on twenty various days, to and including April 3, 1956, when respondent rested its defenses and renewed its motion to dismiss the complaint. On May 22 and 23, 1956, the parties having theretofore filed their proposed findings of fact, conclusions and order, the case was orally

argued at length pro and con by counsel for the respective parties and submission taken by the hearing examiner.

The somewhat lengthy record consists of 3,720 pages, with a total of approximately 200 exhibits, both documentary and physical. While much of the long record includes various legal arguments made at length, there are approximately 3,300 total pages of evidence. These include approximately 300 pages of consumer evidence presented by Commission's counsel, some 800 pages of evidence of expert witnesses called by Commission's counsel, some 2,000 pages of evidence of respondent's experts, and about 200 pages of other testimony adduced by the parties. It is believed that this case is without precedent in the annals of the Commission, as both trial counsel agree, with respect to questions as to the nature and character of just what is acceptable and known as either "rubber" or "hard rubber." While much of the evidence relates to other so-called rubber products, this case has been entirely tried by the hearing examiner upon the issues thereof which present the more limited question of whether respondent's combs made of "Kralastic D," a patented product, and by the injection mold process can properly be labeled and advertised as "rubber" or "hard rubber" combs. The Commission presented 11 expert witnesses to sustain its theory of the case while respondent called 8 experts to sustain its affirmative defense. Each of the experts was subjected to extensive cross-examination. In the view taken by the hearing examiner, however, it appears unnecessary to unduly extend this initial decision by a long detailed analysis and comparison of the testimony of those 19 expert witnesses. The thorough presentation of evidence by respective counsel and their extensive arguments and briefs fully outline their respective contentions with regard to the testimony of each of the expert witnesses.

From his observation of the witnesses while each of them was testifying, it is the measured conclusion of the examiner that the greater weight of the evidence lies with those who testified on behalf of the complaint. This is not to adjudge by mere weight of numbers or to criticize the credibility of each of the witnesses called by respondent, although the record itself shows each of them was laboring under the serious burden of attempting to overthrow a definition of hard rubber that had been long ingrained both in the rubber industry and in the public mind, in order to protect the interests of the respondent who had called them as witnesses from far distant places. In a trial experience of nearly forty years, the hearing examiner is not unaware that parties to litigation do not purposely call expert

witnesses who are expected to disagree with the theory to be pursued by that party calling such witness. This applies, of course, to those called by the Commission as well as to those called by the respondent. With at most two exceptions, those experts called by the Commission appeared to be entirely objective in their testimony. It is contended by the respondent, however, that those experts had no experience with, or knowledge of the product "Kralastic D," of which respondent's rubber combs are made and, therefore, that their testimony has no weight or value. There is, however, an abundance of authority that the general knowledge of experts in a particular field qualifies them to testify in matters such as this. See *John J. Fulton Co. v. F.T.C.*, 130 F. 2d 85-86; *Irwin v. F.T.C.*, 143 F. 2d 316, 323-4; *Charles of the Ritz Distributors Corp. v. F.T.C.*, 143 F. 2d 676, 678-9; *J. E. Todd, Inc. v. F.T.C.*, 145 F. 2d 858, and *Bristol-Myers Co. v. F.T.C.*, 185 F. 2d 58, 61-62.

The hearing examiner has given full, careful, and impartial consideration to all of the evidence presented and to the fair and reasonable inferences arising from such facts, as well as to those facts pleaded in the complaint which are expressly admitted by the answer. He has carefully examined and considered all of the exhibits received in evidence. And upon the whole record and supported by the reliable, probative and substantial evidence therein, and matters specially officially noticed, the hearing examiner makes the following findings of fact:

The respondent Vulcanized Rubber and Plastics Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located at 261 Fifth Avenue, New York, New York, and its factory at Morrisville, Pennsylvania. This is alleged in Paragraph One of the complaint and is admitted in Paragraph 1 of Answer.

Respondent is now, and for several years last past has been, engaged in the manufacture, sale and distribution of combs designed for use on human hair. Respondent has caused its said products, when sold, to be transported from its place of business in the State of New York and from its factory at Morrisville, Pennsylvania, to purchasers thereof located in the various other States of the United States and in the District of Columbia and, at all times mentioned herein, has maintained a course of trade in said combs among and between the various States of the United States and in the District of Columbia. Respondent's volume of business in said combs in commerce is and has been substantial. These allegations

of Paragraph Two of the complaint are admitted by Paragraph 2 of the answer except that respondent denies that its volume of business in said combs in commerce is substantial. Respondent's President, Prescott Beach, testified that respondent does business in practically all States of the United States and that its comb business is in excess of \$250,000.00 per year (R. 49-50; see also Comm. Exh. 1A and B). Respondent's general sales manager Bauldring testified that respondent sold 4,275,000 of its hard rubber combs for 1954, and 5,079,000 for 1955 (R. 3191). This evidence clearly establishes that respondent's volume of business in said combs is and has been substantial.

Respondent, at all times mentioned herein, has been, and is now, in substantial competition with other corporations, individuals, firms and partnerships in the sale and distribution of combs designed for use on human hair, in commerce, among and between the various States of the United States and the District of Columbia. This is alleged in Paragraph Three of the complaint and is admitted by Paragraph 3 of the answer except for the words "substantial competition." The testimony of respondent's president, Prescott Beach, and of general sales manager Bauldring, above referred to, definitely establishes that it is doing a substantial interstate business in combs. The total number of combs generally, and of rubber combs in particular, sold in one year in the United States does not appear in the record. But 5,000,000 combs to a population of 165,000,000 means that respondent has sold an average of one comb to every 33 inhabitants in 1955. In view of the character of the comb business, this must be inferred to be a very substantial volume of business.

In the course and conduct of its aforesaid business and for the purpose of describing, and to induce the purchase of its combs, respondent has stamped and branded its combs as "Rubber" and "Hard Rubber" thereby representing that said combs are made or composed of rubber or hard rubber as the case may be. Respondent has also designated, referred to and represented its said combs as "Rubber" and "Hard Rubber" in various forms of advertising matter circulated by it. These allegations of Paragraph Four of the complaint are admitted by Paragraph 4 of the answer.

The gist of this proceeding is whether or not the representations of respondent in its advertising and labeling or branding of combs that are made of Kralastic D as "Hard Rubber" or "Rubber" are false, misleading and deceptive. It is found that they are false, misleading and deceptive as these combs are not made or composed of rubber or hard rubber but are made or composed in large part

of materials other than rubber or hard rubber and do not contain any sulphur and are not made by the vulcanization process but are admittedly made by the injection mold or extrusion process. All of the experts called by Commission's counsel testified, in substance, that the accepted definition of the industry for hard rubber was that rubber which resulted from heating crude rubber, either natural or synthetic, with a large amount of sulphur, between 25 and 47 units of weight combined with 100 units by weight of rubber hydrocarbon. The evidence discloses a number of definitions which, although they differ somewhat in language, are essentially the same. The definition in Webster's *International Dictionary of the English Language*, 2d Edition, 1950, G. & C. Merriam Co., p. 1138 (Commission's Exhibit 78) is as follows:

Firm and relatively inelastic vulcanized rubber, obtained by heating crude rubber with a large amount of sulphur (usually 30-50 percent). It takes a high polish, and, being softened by heat, can be molded. Unless artificially colored, it is black (see EBONITE). Hard rubber resists the action of most re-agents and is insoluble in any known solvent.

The same authority on page 812 defines Ebonite (a noun) as:

A black variety of hard rubber, capable of being cut and polished, and used for many small articles, as combs and buttons, and for insulating material in electric apparatus; vulcanite. According to some authorities Ebonite and Vulcanite differ in the percentages of sulfur which they contain; other class Ebonite as a variety of Vulcanite.

"Vulcanization" is also defined by the same authority, page 2861 (CX 79):

N. (see vulcan) 1. Act or process of treating crude rubber, rubber latex, gutta-percha, etc. by chemical means to improve its useful physical properties, as its strength, hardness, elasticity, etc. This improvement is brought about by combination (probably chemical) with some element or compound, esp. sulfur or a compound of sulfur. There are two chief processes: hot vulcanization, the more important one, discovered by Goodyear in 1839 (Goodyear process) in which the rubber is heated with sulfur, or less often with sulphides, sometimes in steam (open or steam cured), sometimes in dry air (dry-heat cure); and cold vulcanization (cold cure), discovered by Alexander Parker, an Englishman, in which the rubber is treated at ordinary temperature with a solution of vapors of sulfur compound, esp. sulfur monochloride. Certain substances materially shorten the time of vulcanization. See Accelerator. 2. Hence, act or process of treatment of various materials in any of certain ways, as for hardening. Cf. vulcanized fiber.

That the terms "Hard Rubber," "Ebonite," and "Vulcanite" are synonymous is well stated in a very recent encyclopedia, Collier's Encyclopedia, 1950, P. F. Collier & Son Corporation, Volume 17,

at page 181, where the following appears and of which I take official notice:¹

HARD RUBBER

Hard-rubber goods differ chiefly from soft-rubber goods in the amount of sulphur used in vulcanization. When the amount of sulphur used in the compounding formula is more than 5 per cent, the rubber goods are spoken of as hard-rubber goods. As much as 47 parts of sulphur can be combined with 100 parts of rubber, resulting a compound containing 32 per cent sulphur. Such a product is hard and tough, and is known as ebonite because of its resemblance to ebony wood. It is also called vulcanite or hard rubber. The term hard rubber is generally applied to vulcanites of rubber and sulphur containing above 20 per cent of combined sulphur. Hard-rubber compositions have good electrical properties and are used in the electrical industry for insulating purposes and in switchboard panels, plugs, sockets, telephone receivers, and storage-battery cases. Hard-rubber pumps, pipe, valves, and fittings are used in the chemical industry where resistance to corrosion is required.

There is but little judicial decision wherein definitions of the term "hard rubber" appear, and this is in patent infringement litigation. In *Oliver-Sherwood Co., et al. v. Patterson-Ballagh Corp.* (CCA 9, 1938), 95 F. 2d 70, 77, it is stated:

* * * The term "hard rubber" is applied to a product resulting from vulcanizing an equal mixture of sulphur and rubber with occasional addition of other material. See patent No. 8,075 issued May 6, 1851, to Nelson Good-year. As the result of this process the rubber loses its principal characteristics of elasticity and resilience and the product, although retaining some degree of elasticity, approaches the rigidity of metal. It might be quite as well called "hard sulphur" for it is a distinct and definite product with characteristics quite distinct from that of rubber.

In re Egan et al. (C.C.P.A., 1947), 159 F. 2d 452, 454-5, it is also held:

It is true, as argued by counsel for appellants, that hard rubber is known as "ebonite" or "vulcanite" and that it is physically and chemically different from crude rubber. It is also true, however, as stated in the quoted excerpts from the brief of counsel for appellants, that the term "rubber" includes hard rubber as well as crude and soft vulcanized rubber.

There is abundant testimony that the word "rubber" when stamped or branded on a comb indicates that the same is a "hard rubber" comb.² In view of the judicial decisions encompassing crude and soft vulcanized rubber as well as hard rubber in the term "rubber," it is inconceivable that a comb for use on the human hair could be

¹ As to any matter of official notice, "any party shall on timely request be afforded an opportunity to show the contrary" as provided by Section 7(d) of the Administrative Procedure Act.

² Jones, R. 487; Carpenter, R. 1225; Whitby, R. 1134; and Flikkie, R. 1146.

other than a "hard rubber" comb since neither crude nor soft vulcanized rubber is usable for such purpose.

The textbooks of the rubber industry written by the learned authorities contain definitions which are the essential counterparts of those stated in somewhat more simple language in the foregoing definitions. They are as follows:

Commission's Exhibit 71 "Glossary of Terms Used in Rubber Technology," published by the Vanderbilt News (an eminent authority on the rubber industry), Vol. 2, No. 1, 1932, defines "hard rubber" of "hard rubber":

The hard horn-like product obtained when rubber is vulcanized with high percentages of sulfur. Whereas in soft rubber products the amount of sulfur used may vary between 0.5 and about 5 parts per 100 of rubber, hard rubber requires from about 30 to 50 parts of sulfur and usually a much longer period of vulcanization. Pure hard rubber contains 32% of sulfur which represents the maximum amount the rubber hydrocarbon can combine with; it corresponds to the formula $(C_5H_8S)_x$. Hard rubber products may be made from pure rubber and sulfur (ebonite), or they may be compounded.

In a chapter written by Messrs. A. R. Kemp and F. S. Malm of the Bell Telephone Laboratories, a well known text, Blake and Davis' "Chemistry and Technology of Rubber," 1937, Reinhold Publishing Corporation, at page 635, states:

The term "hard rubber," which is the most widely used one, means any hard vulcanized rubber mixture with a vulcanization coefficient between about 25 and 47. The vulcanization coefficient is expressed as a number of units by weight of sulfur combined with 100 units by weight of rubber hydrocarbon.

The most recent classic work on the newly discovered synthetic rubbers, "Synthetic Rubber" by George S. Whitby, editor in chief, 1954, John Wiley & Sons, Inc., publishers, in its chapter entitled "Synthetic Hard Rubber" by the said Frank S. Malm and Henry Peters of the Bell Telephone Laboratories, both of whom were witnesses for the Commission in this case, gives the following definition of "hard rubber";

Hard rubber, whether natural or synthetic, may be defined as highly vulcanized rubber containing large proportions of combined sulfur. Hard rubber prepared from simple mixtures of sulfur and rubber is often referred to as ebonite or vulcanite. Hard rubbers prepared from natural rubber are vulcanizates that have vulcanization coefficients between 25 and 47. The theoretical vulcanization coefficient value for natural hard rubber is 47, while the value for the synthetics are more or less than this amount, as shown in Table I. The coefficient of vulcanization is usually defined as the number of units of weight of sulfur combined with 100 units by weight of unsaturated hydrocarbon. * * *

Dr. George S. Whitby, the eminent editor in chief of the last-quoted volume, a professor of rubber chemistry in Akron University, and an outstandingly recognized authority on rubber, on page 575 of that work, defines "hard rubber" in the following language:

When a mixture of rubber, either natural or synthetic, and sulfur is heated, the sulfur present combines with the rubber in such a manner as to render it inextractable with acetone. With natural rubber, this reaction results in one sulfur atom adding chemically, presumably stoichiometrically but not necessarily structurally, at the double bond of each isoprene unit $(C_5H_8)_x$, which corresponds to 32 percent combined sulfur, i.e., to a vulcanization coefficient of 47. When a hard rubber mixture contains an excess of sulfur and is heated for a long period of time at high temperatures, it is possible to exceed the theoretical combined sulfur content, owing to substitution of hydrogen atoms in the rubber molecule.

Present day synthetic rubbers have butadiene (C_4H_6) as one of their constituents, and, when they are heated for a prolonged time with sulfur, one atom of sulfur adds chemically at the double bond and at saturation forms $(C_4H_6S)_x$, which corresponds to 37.3 percent combined sulfur, i.e., to a vulcanization coefficient of 59.3. Hard rubbers from polybutadiene as well as from butadiene copolymers containing either styrene or acrylonitrile have some properties, such as chemical, physical, and electrical, similar to those of hard natural rubber.

The American Society for Testing Materials, in describing its approved methods of testing hard rubber products (Commission Exhibit 74A), provides, *inter alia*:

The term "hard rubber" as used herein shall be understood to refer to vulcanized rubber compositions having a ratio of combined sulfur to rubber hydrocarbon in excess of 15 per cent.

There is no substantial dispute among the experts called by both sides as to the above definitions having been proper up to the time the respondent began to manufacture its combs out of Kralastic D in late 1950 or early 1951. Several of respondent's expert witnesses testified as to vulcanization being necessary in the earlier days to achieve hard rubber. While there is some evidence that a few products made other than by the vulcanization process were referred to as hard rubber batteries or hard rubber gaskets, and the like, there is substantial agreement among the experts called by both sides that there was no product offered on the commercial market in substantial quantity as hard rubber prior to 1950 that was not made by the vulcanization process. The evidence showed that respondent was in the hard rubber comb business, making its combs by this process and branding them as "Hard Rubber" from about 1930 until late 1950 (R. 43-45 and 1388-1389). In late 1950 or early 1951, respondent started making its combs out of Kralastic D (R. 1389).

It is undisputed in the record that this material does not contain sulphur and that it is not vulcanized. It is composed of "A copolymer of styrene and acrylonitrile 84-9%, a copolymer of butadiene and acrylonitrile made by emulsion polymerization 12.8%, pigment 1.96% stabilizer .34% (Commission's Exhibit 1A). The Commission's experts are of the opinion that Kralastic D is neither "rubber" nor "hard rubber" (R. 92, 125, 453, 505, 584, 614, 859, 919, 991, 1026, 1028, 1072, 1073). The basic reasons for their opinions are that this material does not conform to the standard recognized definitions of the rubber industry. The witness Coleman P. Morgan, respondent's Director of Research and Development, throughout the period in question, testified that he had investigated Kralastic D and recommended to the management that "we had a new type rubber material that could be used" for the manufacture of combs. Under his direction, respondent scrapped its equipment for making hard rubber combs by the vulcanization process and began the new type of manufacture of combs out of Kralastic D, branding them as "Hard Rubber" or "Rubber." Respondent had some difficulty in obtaining a product which would have the same appearance as the vulcanized comb, first using a material known as Plexene-M obtained from Rhom & Haas, but later the material obtained from Naugatuck Chemical Division of United States Rubber Company. This manufacture of Kralastic D, a patented process, does not advertise its product as being or capable of producing hard rubber. The advertisements published by respondent do not so claim. It is described by them as a molding compound. (See CX 64, 68 and 69). In Commission's Exhibit 64, a brochure entitled "Kralastic Molding Compounds," put out by the manufacturer, Naugatuck Chemical, at page 3, the following appears:

KRALASTIC, being a thermoplastic compound, will soften when subjected to high heat and harden when cooled. The molding methods used with KRALASTICS are injection, extrusion and compression—the same as with other thermoplastics.

In Commission's Exhibit 68, the various types of Kralastic manufactured by Naugatuck Chemical are referred to as "rubber-resin blends for molding and extrusion." The same is true in Commission's Exhibit 69, another advertisement of the manufacturer. Respondent claims, however, that in later advertisements, Respondent's Exhibit 58 which has at the top a picture of respondent's combs, its "Ajax" comb is labeled "Hard Rubber," and its "Best Ever" comb as "Rubber." The manufacturer's statements below, however, do not follow through on the pictures that claim that Kralastic is a hard

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rubber. It refers to the product as "a new Buna-N-synthetic rubber modified to bring new properties, new performance to products" and definitely says "*Naugatuck Chemical makes Kralastic only, and not the finished product.*" [Italics in original.] It is to be noted that this advertisement came out in a publication, "Chain Store Age" (Variety Store Edition) in July 1954, which is substantially coincidental with the complaint in this case which was issued June 30, 1954. The examiner infers that this advertisement was not on behalf of the manufacturer alone but was also in effect an advertisement of respondent's product and produced by the manufacturer on behalf of one of its most important customers using Kralastic D. This inference is further fortified by the testimony of Dr. Paul M. Elliott, Manager of Naugatuck Chemical Company, a Division of United States Rubber Company, who undoubtedly is the most familiar of all the witnesses with the origin, composition, and properties of Kralastic D. He stated that he had "the responsibility for the research work, processing, development, evaluation and technical service of the line of materials known as Kralastics," having "been associated with it ever since the Chemical Division started to work on the family of materials * * * in 1946 or thereabouts. Our actual large-scale production of the Kralastic molding compound began in late 1949 * * * the resins are known as Kralac. The rubbers are known as Paracrils. A combination is either kralastic, if we mix it, or Royalite, if the Footwear Division mixes it." (R. 1517-18) He testified with regard to how shipments were billed or labeled to customers:

Confidentially, you do whatever you can when the customer asks for you to do it. (R. 1585)

This witness very carefully refrained from testifying that Kralastic is called a "hard rubber" by his company. At most, he was willing to say that it could be called a hard rubber, testifying as follows (R. 1834):

A. Kralastic is a hard item. It contains rubber and can be called a hard rubber.

Q. Is that hard rubber?

A. It can be considered a hard rubber.

Q. By who?

A. By people in the rubber trade.

Q. Is it sold as hard rubber?

A. No, sir. I beg your pardon. Not by the Naugatuck Chemical Division; my company does not sell it as a hard rubber.

Q. So when you sell it, you sell it as a kralastic, do you not?

A. Yes, sir.

Since the Kralastic D is shipped to the respondent in granule form, small hard pellets, by heating and melting these granules and running them into molds does not change the character of their hardness by merely changing their form and shape. If the manufacturer was unwilling to label the granules of Kralastic D as "hard rubber," there is no evidence of any chemical transformation in the process of molding. The mere fact that the Kralastic D, after molding, has assumed a form suitable for the market place as a manufactured product does not change its basic qualities. It is quite evident to the hearing examiner that the labeling of "hard rubber" or "rubber" by respondent on its combs is a matter controlled entirely by the respondent and not dictated to it by the manufacturer of Kralastic D. It is further significant that only one other user of Kralastic D now stamps, labels, or advertises its product as "hard rubber," and a complaint has been issued against that user, *Clinford Comb and Novelty Co.*, Docket No. 6550, which is for hearing by this examiner after the issuance of this decision. And of all the many products made by respondent, its combs are the only ones which are so labeled.

The coloring of respondent's combs is an interesting matter, related both to whether the product is a "hard rubber" or merely a rubberized plastic containing but a small proportion of rubber in its content. The evidence shows that the respondent ordered Kralastic D to be colored black by the manufacturer, whereas respondent's witnesses admit Kralastic D is tannish or brownish-yellow opaque unless a color additive is placed therein (R. 1444, 3343-44; see also Respondent's Exhibits 104 and 107). Dr. Elliott testified (R. 1581) in this regard as follows:

Q. Now, relative to the color, I take it you have made color in it in order to change or give it some particular color, is that correct?

A. Yes. It has been made in a wide variety of colors.

Q. So now if you didn't add to Kralastic D, that item of color, what would the color of this product be?

A. The natural color of kralastic is a very light opaque to translucent amber. It has a somewhat milky appearance. The light won't go all the way through it.

Q. So that you put the color in it then according to whatever the desired end material that you want to produce is, is that correct?

A. That is right. We make a variety of colors.

While the witness insisted that by adding certain chemicals, such as a very high temperature decomposing peroxide, it would be possible to vulcanize Kralastic D, he also said, "we haven't attempted to pursue that course. Kralastic D is satisfactory as is without vulcanizing" (R. 1591). He further testified that it was about the

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middle of 1951 that Naugatuck Chemical Division made its first Kralastic D, "K-2167 which is the D-Black."

Q. Is that the material that the respondent purchased from you, or your company, if you know?

A. I believe we made it for them originally.

* * * * *

Q. Why did you make it in a black color?

A. They requested the black color. (R. 1595)

From the foregoing evidence, no other inference can be drawn than that respondent's reason for obtaining a black colored Kralastic D plastic from Naugatuck Chemical was to make its products come out of the mold with a coloring so like that of vulcanized hard rubber combs that the public could not tell the difference. If they had selected some other color, such as yellow, blue, or red, or had no color added whatsoever to the basic commodity, it is quite evident that the public would not be interested in buying respondent's combs made thereof and that the stamping of "rubber" or "hard rubber," while deceptive, would not have produced the result of substantial sales of such product.

Several experiments were performed either in whole or in part in the presence of the examiner during the hearing. One, by members of the technical staff of the U. S. Bureau of Standards, involved the acetone test for hard rubber. It is contended by respondent that the evidence shows that this is not a test for hard rubber. The evidence is conflicting on this point, but this is immaterial since it definitely appears from the experiment that the respondent's comb in Exhibit 46 quickly dissolved into an inky fluid, the black coloring matter gradually obliterating, in the examiner's presence, the structure of the comb which gradually dissolved and ultimately disappeared into globules of matter at the bottom of the receptacle. The hard rubber comb made by vulcanization, in a similar jar of acetone (Exhibit 47), after many months still maintained its full structure, coloring, and appearance although the acetone had been somewhat discolored by the foreign matter which had dissolved. There is no contradiction in the evidence that it was the vulcanization which preserved the structure of the comb made by that process, whereas the extrusion processed comb made of Kralastic D completely broke down and became mere fragmentary globules of material. Another experiment was that performed by respondent's Director of Research and Development, the witness Morgan. He had prepared a mechanical device through which combs were pressed under sudden quick pressure, the results of which were quite favorable to respondent's combs as against those made of vulcanized

rubber. While it definitely showed the strength of respondent's combs, the value of the experiment, insofar as use on the human head is concerned, may well be doubted. Certainly no normal human being could stand such a test upon his scalp without severe lacerations and permanent injury thereto. The examiner infers that resiliency in a comb is probably more important than stubborn resistance to pressure. There is the testimony of some eight of the consumer witnesses who have used and like the respondent's combs, as well as reference to other tests made in which there is an area of dispute as to certain physical and chemical characteristics of the two types of combs in comparison. It is, of course, immaterial whether respondent's combs made of Kralastic D by the heat extrusion process is better than combs made of rubber by the vulcanization process or that such combs may be sold at a lesser price to the consumer. Respondent's witness Wendes testified: "The price is a big factor. If I can make a hard rubber where I can produce 50 combs while you make one or two, I am ahead. That is the reason they [the respondent] wanted Kralastic D." (R. 3346) While the law on this subject has been laid down repeatedly by the courts, it is perhaps best stated by Mr. Justice Cardozo in *F.T.C. v. Algoma Lumber Co.*, *supra*, 291 U.S. 67, 78-79:

But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 216; *City of Carlsbad v. W. T. Thackeray & Co.*, 57 Fed. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous. "A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U.S. 483, 484. The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.

Reference has already been made herein that the Commission called eleven expert witnesses while the respondent called eight. From the foregoing evidence, it seems wholly unnecessary to make an analysis and comparison of the testimony of these 19 witnesses, since the case hinges upon the following well established principle of law most recently stated by this Commission in *Atlantic Sponge*

and *Chamois Corporation*, Docket No. 6162, issued November 29, 1955. It is certainly evident from the entire record that the respondents are attempting to affix a secondary meaning to the term "hard rubber" equivalent to that which was well settled according to the courts, the lexicographers, and the industry long ago, and which secondary meaning, it is contended, has arisen by the respondent's recent program of manufacture of combs out of Kraslastic D. In the decision last above cited, the Commission sustained the initial decision of its hearing examiner, stating,

* * * it must appear that the secondary meaning has become "so thoroughly established that the description which the label carries has ceased to deceive the public." Furthermore, a high degree of proof is required to establish a secondary meaning.

The hearing examiner's decision reviewed the legal principles clearly and succinctly as follows:

* * * The law is now well settled that in order to justify labeling a product in accordance with an alleged secondary meaning, it must appear that the secondary meaning has become "so thoroughly established that the description which the label carries has ceased to deceive the public * * *." *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493. It is not enough to show merely that a secondary meaning exists but it must appear that the secondary meaning has become "as firmly anchored as the first one." *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80. The high degree of proof necessary to establish the defense of secondary meaning has been emphasized in a recent decision of the Court of Appeals for the Third Circuit, based on the holding in the *Algoma Lumber* case, where the Court stated:

"A high degree of proof was essential in establishing the defense of secondary meaning before the Commission. The very wording of petitioner's answer recognizes that, in the words of Mr. Justice Cardozo, it had to show that * * * by common acceptance the description, once misused, has acquired a secondary meaning as firmly anchored as the first one." *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67, 80. It could not prevail if its evidence was of a quality "* * * short of establishing two meanings with equal titles to legitimacy by force of common acceptance." *Ibid.* We think that petitioner failed to establish the fact of secondary meaning under those governing principles. (*C. Howard Hunt Pen Company v. FTC*, 197 F. 2d 273, 280.)

There being no substantial dispute as to the prior well established meaning that hard rubber was a result of vulcanization, the respondent carried the heavy burden of establishing by a high degree of proof that its secondary meaning of "hard rubber," inclusive of the Kralastic D product in question here, is "as firmly anchored" as the legitimate one long established. This burden has not been maintained. This is concluded from the evidence hereinbefore recited and a consideration of all the expert testimony which is not repeated herein for the reason above stated.

An unusual array of expert witnesses appeared in this proceeding. The qualifications and ability of each are not in question so far as the hearing examiner is concerned. It is a matter of the weight of their testimony. It is notable that counsel supporting the complaint, both in oral argument and brief, made no attempt to unduly criticize the opposing witnesses in analyzing and comparing their testimony with those called by him. While it is within the function of counsel to criticize witnesses if they choose, the hearing examiner has not been helped herein by respondent's repeated reference to men of eminence in the science and industry of rubber and their testimony solemnly given as being unworthy of belief. The witness George S. Laaff, who had 26 years' experience in the chemistry of rubber and plastics with the General Tire & Rubber Company, bears the heaviest brunt of such criticism, and is referred to, among other things, as having made "ridiculous statements" and that from the record "he may have worked as a janitor in a plastics laboratory." It is true that Mr. Laaff possessed a degree from the University of Cologne (1929) with additional technical studies at M.I.T. under Professor Lewis (in plastics) and that he has been employed with large corporations engaged in rubber and plastics manufacturing ever since and that he has worked with hard rubber and is familiar with it (R. 500-501). No assault on his qualifications to testify in this case was made after this foundation had been laid or elsewhere during his testimony, and I, therefore, disregard counsel's statements as mere professional exuberance in the interest of a client carrying a heavy burden. As above stated, all of the witnesses called by both sides were men of such competence and standing that the hearing examiner carefully listened to their testimony and has weighed it objectively and without adverse discrimination by reason of the racial origin or other differences which may appear in the record with regard to each. Of course, the fact that witness Laaff and also witness Jones were long associated with certain competitors of respondent has been given full consideration in evaluating the weight of their testimony. The record will disclose that both of these witnesses, although adverse to respondent by reason of their particular employment, were quite fair in their evaluation of the respondent's combs, admitting their excellent qualities in several respects.

In addition to these two witnesses, the Commission called Mr. Henry Peters, who had had 30 years' experience in the rubber industry, the last ten of which he was in charge of soft and hard rubber chemistry with the Bell Telephone Laboratories; Mr. Frank

S. Malm, with 49 years' experience in the industry, of which 44 were with Bell Telephone Laboratories, is now a rubber consultant for the largest manufacturing corporations both American and European; Mr. Arthur Juve, with 30 years' experience, is in charge of the research laboratory of B. F. Goodrich Co.; Mr. Henry J. Flikkie, with 33 years of experience, is a formulator of hard rubber compounds at B. F. Goodrich Co.; Mr. Arthur W. Carpenter, Vice President and in charge of the Physical Testing Laboratory of B. F. Goodrich, a chemical engineer of 41 years' experience and long active as an official of the American Society for Testing Materials, of which he was once president and the secretary for many years of Committee 11-D, the function of which is to recommend for adoption and publication for the entire Society standard specifications, methods of tests, and recommended practices pertaining to rubber and rubber-like materials and products made therefrom; Dr. Robert V. Stiehler, Chief of the Testing and Specifications Section in the Division of Organic & Fibrous Materials of the National Bureau of Standards; Dr. Lawrence A. Wood, Chief of the Rubber Section of the National Bureau of Standards; Mr. Emanuel Horowitz, a chemist with the National Bureau of Standards under Dr. Wood; and Dr. George Stafford Whitby, an outstanding rubber chemist and professor of rubber chemistry in the University of Akron.

The respondent's witnesses were also men of learning and distinction in the field under consideration here. Coleman P. Morgan, respondent's Director of Research and Development, has been in rubber chemistry since his educational training was completed and for the past 12 years had held his present position. Dr. Paul M. Elliott, following his basic chemical education and some experience with duPont, has been with United States Rubber Company about 20 years and is currently in its Naugatuck Chemical Division as its manager of Kralastic Chemical. Dr. Ernest J. Joss, an experienced chemist, is supervisor of research and development at the central research and development laboratory of the United States Rubber Company. Dr. Wallace J. Murray is research chemist and chemical engineer with the consulting firm of Arthur D. Little of Cambridge, Massachusetts. Morris Omansky, a consulting chemical engineer, was formerly connected with certain companies engaged in rubber manufacturing but for the past 32 years has been engaged exclusively in the consulting business. Abraham J. Friedlander, a graduate chemical engineer who spent his entire business life in the rubber industry, has been with the Dayton Rubber Company of Dayton,

Ohio, of which he has been the long-time President. Dr. Norman A. Shepard, a graduate chemical engineer, after a teaching career at Yale University, has been largely a directing chemist or consultant to members of the rubber industry. John C. H. Wendes, a mechanical and electrical engineer, has had some experience in the rubber industry although his chief experience has been in explosives and various plastics.

All of the 19 expert witnesses were men of maturity and substantial education and experience in their respective chosen fields. A number of them were distinguished authors of either books, articles, or other contributions to the science of rubber, and many were members of various scientific and honorary societies pertaining to their profession. Four of the witnesses, two on each side, are sufficiently illustrious to be mentioned in "Who's Who in America," 1954-55 edition, of which official notice is taken. They were Dr. Whitby and Mr. Carpenter for the Commission and Dr. Shepard and Mr. Friedlander for the respondent. Certainly all of these men who spent from about 25 to 45 years each, respectively, in the fields concerning which they testified cannot be dismissed as either ignorant or purposely false in their testimony. Except for Dr. Whitby, the distinguished rubber scientist and professor of rubber chemistry at Akron University, none of the witnesses was engaged in teaching or had been for many years, and all of these with three exceptions were connected either as officials of rubber or plastics manufacturing companies or were industrial consultants. The three exceptions were: Dr. Lawrence A. Wood, Dr. Robert V. Stiehler, and Mr. Emanuel Horowitz, all of the National Bureau of Standards. While the hearing examiner does not consider that the respondent has met its burden of proof if the testimony of these three witnesses were entirely omitted, certainly weight must be accorded their testimony since they are the only witnesses whose life is dedicated to the public interest rather than to the more lucrative fields of private industry either in official or consulting positions. Scientists of the National Bureau of Standards have long been considered fair game by respondents in proceedings before this Commission, but in this case the examiner finds that their testimony was given honestly and in the public interest upon the well established principles applying to the commodity known as "hard rubber."

Of all the expert witnesses, only one testified under apparent embarrassment, which continued throughout his long period on the witness stand. This was respondent's Director of Research and Development, Coleman P. Morgan. Part of this may be attributed

to the fact that he had just severed his connection with respondent and was about to become a private consultant. From the evidence and the entire record, it is quite clear, however, that the new definition of hard rubber made from Kralastic was his brain child and that of no other person. It is true that he had to sell the idea to the executives of respondent, but it certainly has become necessary for Morgan to defend the Morgan theory of hard rubber as against the well established Goodyear principle of hard rubber. It does not appear from the evidence why he was leaving the employ of respondent, but it is certain that in order to maintain his position as a valuable consultant on kralastics or rubber, he was bound to defend his position during the hearing. This is not to discredit him but merely to state that he had a greater interest in maintaining that Kralastic D was entitled to be considered a hard rubber, of which principle he was the acknowledged father and founder, the manufacturer having disowned its parentage. Certainly as a result of Morgan's selling the idea to respondent's executives in charge, he had caused them not only to dismantle and remove their machinery and equipment for making vulcanized hard rubber combs and to purchase appropriate molds for the Kralastic D process of making combs but had also involved them in this litigation. In connection with this witness, as with all other witnesses, expert or lay, the hearing examiner as the trier of the fact has before him, in addition to the cold record which can be reviewed, those intangible human elements of proof defying exact description, which Judge Learned Hand in *N.L.R.B. v. James Thompson & Co.*, 208 F.2d 743, 746, has so aptly described as "the evidence words do not preserve."

All the expert witnesses agree that rubber is a plastic but that all plastics are not rubber. It is the respondent's position that since in recent years synthetic rubbers have come into being in many fields as the equivalent of the natural or tree rubber the rubber industry is a progressive industry and that it has now reached a point where it may include any type of mixture containing a little rubber and if the product is hard the same is entitled to be designated as "hard rubber." The hard rubber long accepted by the industry, with its beginnings in 1839 with the Nelson Goodyear patent or perhaps earlier, is a substance consisting of an indissoluble union of sulphur and rubber produced under great heat. The acetone experiment performed by the Bureau of Standards' experts clearly shows the true strength of hard rubber and the weaknesses of Kralastic D when submitted to certain chemical reactions. While Kralastic D

may be the equivalent or better than the equivalent of orthodox hard rubber as a useful commodity in commerce, and respondent's witness Morgan testified that he was engaged in further experimentation along lines of other unnamed products, such evidence does not bring Kralastic D to a point of equality with real hard rubber. To permit Kralastic D to be labeled "hard rubber" is like brevetting a camp follower as a general of the troops. It would be elevating Kralastic D to an unwarranted position in the public mind. While the examiner has no objection to using a new plastic comb, including those made from Kralastic D with a small rubber content, if combs can be properly so branded as hard rubber, he can anticipate that in due time automobile tires will be made of Kralastic D and may be branded as hard rubber, and he is not prepared to say that he or any other member of the public should be encouraged to entrust their safety to tires of that character which might disintegrate or dissolve under the acids so often found in the garages or on the streets or the heat of heavy traction.

From his evaluation of all the evidence, it appears to the hearing examiner that much of the technical evidence of experts relating to the physical and chemical properties of hard rubber, Kralastic D, and other products referred to therein is of little value in the determination of the precise issue in this case. From the agreement of the parties as to the earlier definitions of hard rubber, in the last analysis the testimony of experts amounts to a mere battle of semantics. The Commission's experts, in substance, testified that hard rubber is a particular product, although its qualities may vary, dependent upon the proportions of sulfur and rubber and the amount of heat used. They accept the standard definitions of the dictionary, the textbooks, and other authoritative sources that "hard rubber" is a noun descriptive of a particular product. The respondent's witnesses as a whole contend, however, that "hard" is an adjective and that anything containing rubber which is also hard in character may be properly stamped and labeled "hard rubber." See respondent's brief in support of its motion to dismiss filed May 7, 1956. While respondent's witnesses vary as to the percentage of rubber which should be contained in Kralastic D or any other synthetic plastic in order to entitle it to be considered and labeled as "hard rubber," the extent to which such witnesses would go to sustain respondent's contention is best illustrated by the testimony of Wendes, its last expert called to testify. He testified (R. 3245, 3271, 3278, 3394) that as little as 5% or even 2% or less of rubber in proportion to other materials with which it was compounded would

entitle the product to become labeled as "hard rubber" because the resins in the product would make it hard and it would have rubber in it. He went still further by saying that such a product could properly be called a "hard rubber" "if it has any rubber in it at all" and that "we have rubber products when we put in one tenth of one percent of rubber and that does the trick," although he refused to recognize that such a product with such a percentage of rubber should be labeled and sold as a hard rubber product.

The respondent's corporate name "Vulcanized Rubber and Plastics Company" is somewhat significant if it can advertise and label its products just above its corporate name as "Hard Rubber" (CX-6, CX-7, CX-8, and CX-10). The connection between Vulcanized Rubber and Hard Rubber is definite and clear, and there would be no inference that it was a part of the "plastics" portion of respondent's industry. The respondent's position, sustained by the testimony of at least some of its experts, is that the hard rubber definitions acceptable to the industry as late as 1954 are "outmoded," "archaic," and "lagging," and it is to be inferred that those who stand by them are not as progressive as those who insist that Kralastic D products are hard rubber products. The adoption by this examiner, on behalf of the Commission, of the conservative well established definition of "hard rubber" rather than the definition proposed by respondent because the latter is not "as firmly anchored as the first one" does not mean that the Commission stands in the way of progress. It is its duty to stand in the way of fraud and deception of the public.

As hereinbefore indicated, it would serve no useful purpose to review the extensive technical testimony of these numerous expert witnesses as to the physical and chemical properties of rubber, Kralastic D, and other substances which were covered in the long direct and cross-examination of each. This is also true with reference to the history and development of the rubber industry, into which subject many of the witnesses went extensively. Their learning and that of the able counsel for both parties need no exposition by the examiner in this initial decision. If attempted, it would only extend the length of this decision beyond its proper bounds and add nothing to the reasons supporting this decision which are amply set forth herein.

The complaint in Paragraph Six alleges that "there are, among the purchasing public, substantial numbers of persons who prefer combs made or composed of 'rubber' or 'hard rubber,' as distinguished from combs made or composed of the materials used by respondent." The

answer in Paragraph 6 denies these allegations to the extent that they imply respondent's combs are not made of "rubber" or "hard rubber." It is found from a preponderance of the evidence that substantial numbers of the public do prefer combs made or composed of "rubber" or "hard rubber" as distinguished from plastic combs or combs made of compositions such as Kralastic D, with a small content of rubber, and which are made by the extrusion process without the vulcanization of rubber and sulphur as "rubber" or "hard rubber" combs have been made for many years past. The numerous witnesses who testified for the Commission who were barbers and beauticians and barber and beauty supply people gave ample testimony to this effect, which need not be recited in detail. While some of them had bought and used respondent's combs labeled as "Rubber" or "Hard Rubber," they believed they were getting a hard rubber comb, and all of this class of witnesses disclaimed any knowledge of, or interest in, the chemical components and methods of manufacture employed in making a rubber or hard rubber comb. Many used the combs of respondent's competitors and a few used respondent's combs. These witnesses, for the most part, testified they preferred a comb made of hard rubber because of its durability and performance in the actualities of the trades of the barber and the beautician. A predominant number were very strongly prejudiced against plastic combs because of their breakability or their unsuitability for skilled professional work on their customers' hair, or for both reasons. It is urged by respondent that these consumer witnesses are representative of only a very small segment of the American people and, therefore, this evidence is not at all representative of general public reaction and opinion. Of course, it is obvious that the entire American public could not be brought in to testify and since the comb for human hair is one of the essentials of the business of being a barber or a beautician, the selection of these people as witnesses appears to the examiner to have been a good representative choice. They have the greatest occasion to buy and to use combs, far more than any other segment of the population, and to closely observe and know the effect of combs upon the human hair and scalps of the numerous individuals and classes of persons upon which they employ such combs. And they also know the reaction of their numerous patrons to the use of various kinds and styles of combs.

There is, moreover, substantiating evidence other than that of barbers and beauticians with reference to the preference of the public for "hard rubber" or "rubber" combs. The manager of the Products Division of E. I. duPont de Nemours and Co. of Wilming-

ton, Delaware, testified that he was in charge of sales, production, and engineering on all phases of production of the products of his company throughout the entire United States; that his company manufactured nylon and polished styrene combs, the latter including combs made from Kralastic D, the material bought from the Nau-gatuck Chemical Company, a subsidiary of United States Rubber Company; that his company had formerly branded such combs made by it of Kralastic, Exhibit 14-D, as "rubber," but that following the abandonment of such branding the sales immediately decreased and within 18 months thereafter the sales of such combs were less than three percent of what they were before the stamp "rubber" had been eradicated from such combs. Respondent's witness Wendes testified with reference to a comb that is not a rubber comb: "People think of it as a plastic and they think of a plastic as being no darned good. They look for hard rubber combs because that is better. When they find out that Kralastic D is much better than a hard rubber comb they will buy that."

Furthermore, the continued vigorous defense made by respondent to preserve its privilege of labeling its Kralastic combs as "Hard Rubber" and "Rubber" bears more than silent witness to the fact that respondent company knows that its sales of its combs made of Kralastic D will not meet popular demand if they correctly brand them as "Kraslastic D" or "plastic." Otherwise, there would be no occasion for the strenuous effort made by respondent to demonstrate to this Commission the propriety of their having used a different method of manufacture from the long-recognized method of vulcanization and in coloring their combs made from Kralastic D with black coloring matter so that they look almost exactly like the genuine vulcanized hard rubber combs which the respondent's competitors continue to manufacture and properly brand as "rubber" or "hard rubber." This is not to say that the respondent has not been fully entitled and privileged to present its defense. But it is to say that such a vigorous defense in itself raises a fair inference that there must be a very substantial demand for "hard rubber" or "rubber" combs. Certainly the respondent manufacturing corporation is not an eleemosynary corporation litigating this case *pro bono publico* or for the achievement of a mere academic or moral victory against this Commission.

In Paragraph Seven of the complaint, it is alleged that the use by the respondent of the foregoing false, deceptive and misleading representations in regard to its said combs has had, and now has, the capacity and tendency to and does mislead and deceive a sub-

stantial number of the purchasing public into the erroneous and mistaken belief that such representations are true and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's said products. As a result thereof, trade in commerce has been unfairly diverted to respondent from its competitors. In consequence thereof, substantial injury has been and is being done to respondent's competitors in commerce.

Paragraph 8 of the answer denies these allegations and further pleads that respondent has not committed any act or practice, as alleged, to the prejudice or injury of the public or its competitors or any unfair or deceptive act or practice in commerce within the meaning of the Federal Trade Commission Act.

One of these two ultimate issues to be decided in this case is whether or not respondent's methods of stamping and advertising its combs made of Kralastic D as "Rubber" and "Hard Rubber" have unfairly diverted trade in commerce to the respondent from its competitors and done them substantial injury in violation of Section 5 of the Federal Trade Commission Act which prohibits unfair methods of competition in commerce. Respondent contends that there is no evidence that any competitor is injured and therefore that no such finding can be made. The law does not require that there be any proof of injury to competition. Furthermore, this contention is also fallacious because it is contrary to the evidence. It is true that there is no direct evidence of any loss sustained by competitors. But it is the settled law under *F.T.C. v. Winsted Hosiery Co.* (1922), 258 U.S. 483, 493, and *F.T.C. v. Raladam Co.* (1942), 316 U.S. 149, 152, and many other cases that to establish unfair competition it is not necessary to prove actual losses to competitors. At the close of the Commission's case in chief, a strong case of unfair competition has been made, and certainly after the respondent had presented its evidence, there is no reasonable doubt whatever in regard to that issue having been established. The surprising testimony of respondent's sales manager, Philip E. Bauldry, who was called as a witness by respondent, is most revealing on this issue (R. 3190-3235, 3475-3543), as well as on the other basic issue of deceit of the public. "There are times when a description is deceptive from the very fact of its simplicity." *Federal Trade Commission v. Algoma Lumber Co.*, *supra*, 291 U.S. 67, 75.

Bauldry testified, in substance, that by the injection mold process respondent produced combs made of Kralastic D, which were variously stamped or labeled either "Hard Rubber" or "Rubber" or in

some other manner, and sold in various grades, by exactly the same process and substantially out of the same molds, the molds, of course, depending upon the particular styles in which such combs were to be marketed or sold. Bauldry testified that the only difference between respondent's "Ajax" comb, which was in competition with the higher priced combs of competitors, and its cheaper brands of combs in competition with less expensive brands, was in their polishing and packaging and the attachment of a warranty certificate. In 1955, ninety per cent of respondent's "Kralastic D" combs eventually were sold under respondent's first grade brand "Ajax" or its second grade brand "Best Ever." All of the combs were placed in storage against estimated future market needs and as needed were indiscriminately taken out of storage and stamped, polished, packaged, and priced according to the particular field of competition which was to be invaded by respondent. For example, the "Ajax" pocket comb, respondent's highest priced comb, competes with the "Ace" pocket comb of a competitor. "Ace" comb sells for 29 cents retail; the "Ajax" at 25 cents retail, or 4 cents less at retail. Respondent's all-purpose "Ajax" comb sells at 29 cents retail, a competitor's "Ace" comb of like characteristics at 39 cents retail, or 10 cents less for respondent's comb. Similarly, the respondent's "Best Ever" pocket comb sells for 10 cents retail, while one of its competitors, Bolta, sells its pocket comb at 15 cents retail, while in the all-purpose tapered curl comb "Bestever" sells for 15 cents retail compared to Bolta's similar product at 20 cents retail (R. 3211-3212). It must be clearly evident, even to a blind man, that this slight additional expense of extra polishing and stamping could not create or justify this great difference in prices of the same product offered in the different price comb markets and that, therefore, the definite ultimate loser is the public which is deceived when it pays, for example, 29 cents for an all-purpose "Ajax" comb which is identical with and costs essentially the same to manufacture as another comb of respondent which sells for only 15 cents or 14 cents difference. Packaging and polishing cannot make this difference. Even if they did, since only respondent knows the facts from which cost accounting would reveal the actual expense of such extra operations, it is properly inferred that the facts do not justify the great spread of manufacturing cost between its several brands made out of the same product by an identical molding operation. The total cost of manufacturing a Kralastic D comb, it may be added, is admitted by respondent to be far less than that of a vulcanized hard rubber comb because the method of actual manufacture is much more effi-

cient and, therefore, far less costly per unit. See Respondent's Brief, filed May 7, 1956. And the warranty certificates add no value to the combs to which they are attached as they are merely another selling device. That this is not only a gross deceit upon the public but would also be fatal in the long run to respondent's honest competitors cannot be doubted. To permit respondent to so deceive the public and to so destroy its competition would be to subvert the processes of this Commission to an unrighteous use never intended by Congress.

In addition to the foregoing evidence, there is in the record the testimony of those barbers and beauticians who have purchased Kralastic D combs believing they were rubber. Even if they are satisfied with what they have obtained, as is true in some respects, this is not a defense, for as stated by Mr. Justice Cardozo in the *Algoma Lumber* case, *supra*,

* * * [t]he consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. * * *

The testimony of one Washington barber, Pete Pratico (R. 688-695), states the judicial holding from a more simple point of view. On direct examination he testified that out of his forty years or so of extensive experience he knew that most barbers prefer hard rubber combs because of the warping and crumbling of cheaper combs when placed in the sterilizing fluids used by barbers or when immersed in really hot water. He then emphatically testified in the simple language of the layman:

Q. Now if a comb has stamped on it "hard rubber," would you expect it to be made of hard rubber?

A. * * * Why, sure. Surely. I mean, if it is stamped "hard rubber" it should be hard rubber. If it isn't, the hard rubber man misrepresented the comb. I would not buy no more from him.

On his cross-examination, this fundamental philosophy was still more emphatically disclosed:

Q. * * * When you answered Mr. Cox's question about expecting that a comb would contain hard rubber, is it a fair summary of your testimony to say that if it was so labeled, so long as you were able to get the usage out of a comb, that you would expect from a hard rubber comb, that would suit your purpose primarily?

* * * * *
The WITNESS. I am going to give you the same answer I gave him. If it says it is hard rubber on the comb, it should be hard rubber. There is no use misrepresenting something.

If I am buying Oster clippers, I want an Oster clipper, I do not want no Andes or Majestic. I think any time any product comes on the market it should be what it is supposed to be. We are paying for it.

If we pay 60 cents for our combs, and if a guy says, "This is hard rubber and I am charging you 60 cents," and I find out it is half plastic and half rubber, I ain't going to buy no more combs from that man.

* * * * *

Q. Well, then, so long as it is stamped "hard rubber," and so long as you get good usage out of it, that is the main thing that you are interested in; isn't that right?

A. No, you got me wrong about that hard rubber stuff. Now, if it is supposed to be hard rubber, it should be hard rubber.

Q. And, of course, if it is hard rubber there is no argument.

* * * * *

A. * * * I mean if it is stamped "hard rubber" it should be hard rubber. I will stand up for that. Anything that is stamped, you should get what you are paying for. That is what you pay for.

Just like, we got a big sale coming up next door to me on meats: Beef 59 cents, sirloin steaks. Now you mean to tell me they can give you good sirloin steaks for 59 cents? Are you kidding me? That is cow, that ain't beef. People don't know that. People are gullible. Man, they will break their necks. It is the same thing about hard rubber.

There are numerous contentions and arguments of the several counsel in this proceeding which are not necessary to this decision and, therefore, will not be discussed. One matter, however, raised repeatedly on the record is the respondent's reference and objection to the presence in the hearing room of various officials and representatives of some of its competitors. This was jokingly referred to by counsel for both parties as "calling the roll." It is argued by respondent that the presence of these men and any assistance that they or others connected with their companies may have given to counsel for the Federal Trade Commission in this proceeding wholly takes away any public interest in this case and makes this a lawsuit involving the private rights of competitors in the same line of business. There is utterly nothing to this contention. The hearings of this Commission are open, and it is the privilege of any one to attend them, and the interest shown by admitted competitors by the attendance of their personnel at the hearings before this hearing examiner and the repeated objections of respondent thereto have no influence whatsoever on the outcome of this decision except for the reasonable inferences drawn from such objections. And it is wholly immaterial that any of the competitors have in any way assisted the Commission in protecting them and the public from any unlawful acts of the respondent as herein found. Respondent's counsel had a skilled technical adviser by his side throughout nearly all of the presentation of both the Commission's evidence and respondent's

own evidence. It is true that this Commission acts solely in the public interest and that the complaints of competitors in the investigational files of the Commission are ordinarily kept confidential and not made known either to the respondent or to the hearing examiner. But if competitors wish to waive their anonymity and be present at hearings and furnish evidence or suggestions at the request of the Commission's counsel to aid him in presenting its case, there is no law against that and such matters are subject to the usual consideration and reasonable inferences which matters in the record give rise to. Certainly, so far as the knowledge, hearing and observations of the hearing examiner go, there was no impropriety of any kind indulged in at any session of the hearing by any attorney, officer, or employee of any of respondent's competitors throughout the time the proceeding has been pending before him. It is to be inferred from respondent's repeated objections to the presence of representatives of its competitors that respondent's comb business is in substantial competition with them. Otherwise such objections would not have been made.

This proceeding has taken a long time to hear due to the almost countless times respondent has formally moved for continuance or informally requested further time for preparation or the production of witnesses. Every courtesy has been accorded to respondent by the hearing examiner. Counsel supporting the complaint has been ready to proceed at all times, and had the respondent been as ready, this case would have been completely disposed of over one year ago. The numerous changes in respondent's counsel's law firm, resulting in five of its members having succeeded one another in the defense herein, has been accounted for a considerable portion of the delay, for which the respondent is not held to blame as stated in the amended and supplemental interlocutory order entered in this case on October 12, 1955. And other continuances have been granted because of the necessity of respondent's various counsel appearing for other clients in other matters and for good reasons purely personal to the trial attorney who finally represented respondent at the close of the case.

Full consideration has been given to all matters, whether hereinbefore mentioned, in finding that the respondent has violated the Federal Trade Commission Act by engaging in unfair competition and unfair and deceptive acts and practices in commerce. One of the outstanding failures of the respondent in attempting to establish its affirmative defenses was that it presented only the oral testimony and experiments of the expert witnesses called by it and

produced no literature of the rubber industry to sustain its claims against the substantial volume of written authority on which the Commission relied. Since several of the respondent's expert witnesses were also authors of note, this is surprising. Scientific progress is not made in court rooms but in the halls and laboratories of science and in the written documentation of experiments and the interchange of ideas among scientists with regard to the results thereof. But none of these learned authors appeared to have written any treatises on the new Morgan theory of hard rubber. Morgan was an author himself, and, despite the fact that he has been working with kralastics for some six years, he has not produced any scientific article or treatise on his new discovery. As a consultant, however, he may do so, and other authors can agree or disagree therewith, and a body of literature on the subject can be developed. If Morgan's theory is ultimately adopted, as the discoverer and founder of this new formula for making hard rubber out of Kralastic D, his name will no doubt appear among the galaxy of immortals in the rubber industry, such as the Goodyears, Hancock, Dr. Goodrich, and others. But the fact is that in this present litigation Morgan has not yet attained such an eminent status that his mere discovery and declaration of the principle which he espouses can be said to have revolutionized the hard rubber industry. In the numerous so-called Daly Patents (Commission's Exhibits 21, 22, and 23, and Respondent's Exhibits 128 and 129), under which Kralastic D is manufactured by United States Rubber, the assignee of such patents, there is no claim that these patents will produce a hard rubber product but rather that they will produce a hard, tough, thermoplastic, homogeneous mixture of rubber and resin, a rubber-resin compound. In his claim, the inventor, while referring to a vulcanizable rubber being used in the mix, also referred to "a curing agent sufficient to cure hard rubber to a condition ranging from a soft vulcanized to a semi-hard vulcanized state." This is a far cry from any claim that it is "hard rubber" or will produce a "hard rubber" product, as respondent contends.

Respondent apparently carried on a successful hard rubber business in combs prior to Morgan's decision to make combs of kralastic. There is no reason it cannot resume the manufacture of hard rubber combs or sell the combs it is currently manufacturing from Kralastic D as plastic or kralastic without confusing the public and unfairly competing with other manufacturers by applying the terms "Rubber" or "Hard Rubber" thereto, in advertising or in packaging, stamping, labeling, or otherwise marking the combs it manufactures under such designation.

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Upon the findings of fact hereinbefore made, which have been founded upon those allegations of the complaint which are admitted by the answer, upon the facts which are based upon a consideration of the whole record and supported by the reliable, probative and substantial evidence therein, and the fair and reasonable inferences arising therefrom, as well as from matters specially officially noticed, the hearing examiner makes the following conclusions of law:

1. The Federal Trade Commission has jurisdiction over the respondent's acts and practices alleged in the complaint to be unlawful.

2. The public interest in the proceeding is clear and substantial.

3. The aforesaid acts and practices of respondent as hereinbefore found are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

And upon the foregoing findings of fact and conclusions of law, the following order is hereby entered:

ORDER

It is ordered, That respondent, Vulcanized Rubber and Plastics Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any combs designed for use on human hair, do forthwith cease and desist from representing, directly or by implication, by any advertisement, packaging, labeling, branding, stamping, or other marking or indication that such combs are "rubber" or "hard rubber" or are made of "rubber" or "hard rubber," unless such combs are in fact made of vulcanized hard rubber.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, filed under Section 5 of the Federal Trade Commission Act, charges Respondent with false and deceptive branding and advertising of its combs, by the use of the terms "rubber" and "hard rubber." From the decision and order against Respondent, the latter has appealed. In addition to the briefs and oral arguments by counsel supporting the complaint and by Respondent, separate briefs amicus curiae have been filed by U.S. Rubber Company and by Dayton Rubber Company.

For many years, Respondent manufactured combs by the sulphur vulcanization method. In brief, this process involves the compounding of rubber (either natural or synthetic) in a compression mold and vulcanizing same by heating. Thereafter, the mass is released from the mold, teeth are sawed out and the comb goes through buffing and polishing processes until it is completed.

During the latter part of 1950, Respondent began the change in its process of manufacture which is the subject of this complaint. The raw material for the combs was changed to Kralastic D, a patented material made by the Naugatuck Chemical Division of U.S. Rubber Company. This material is composed of approximately 13% nitrile rubber, 85% of hardening resin and small percentages of stabilizer and color. It appears that this material is more expensive than that used by Respondent in its former method of manufacture. It has the advantage, however, of being adapted to a process known as "injection molding." This process requires fewer hand operations and thus results in a saving per unit cost.

Under the first process of manufacture, Respondent stamped and advertised its combs as "rubber" or "hard rubber." Under the new process, it continued to so stamp and advertise, at least as to a portion of its combs.

The case was ably and thoroughly tried by counsel on both sides and resulted in a record of 3,300 pages of evidence and 200 exhibits. The evidence covers a wide range, much of it having to do with expert testimony as to the meaning of "rubber" and "hard rubber."

The initial decision contains an extensive discussion of the evidence. We shall not repeat that here but will confine this opinion to certain conclusions which we believe to be adequately established by reliable, probative and substantial evidence.

(1) Did counsel supporting the complaint sustain the burden of proving that Respondent's combs are not properly labeled "rubber" and "hard rubber"?

On this point, the hearing examiner found as follows:

The gist of this proceeding is whether or not the representations of respondent in its advertising and labeling or branding of combs that are made of Kralastic D as "Hard Rubber" or "Rubber" are false, misleading and deceptive. It is found that they are false, misleading and deceptive as these combs are not made or composed of rubber or hard rubber but are made or composed in large part of materials other than rubber or hard rubber and do not contain any sulphur and are not made by the vulcanization process but are admittedly made by the injection mold or extrusion process. All of the experts called by Commission's counsel testified, in substance, that the accepted definition of the industry for hard rubber was that rubber which resulted from heating crude rubber, either natural or synthetic, with a large

amount of sulphur, between 25 and 47 units of weight combined with 100 units by weight of rubber hydrocarbon.

In support of this finding, the initial decision discusses several items of evidence, such as the expert opinions of many of the witnesses, definitions from dictionaries and other standard works on the subject, excerpts from judicial decision, the conduct and statements of the manufacturers of Kralastic D in their own descriptions of their product, etc.

Concerning the propriety of the definition of "rubber" and "hard rubber" as accepted by the hearing examiner, there is evidence to the contrary. In fact, some witnesses for Respondent approach the problem of definitions from a somewhat different angle. They place less stress upon materials and methods of manufacture and more on the end results. For example:

It (rubber) describes a material having properties which we desire in a rubber.

Rubber is an organic material capable of vulcanization which at normal room temperatures can be stretched several times its length and which on release recovers almost all its original length.

Hard rubber is a rubber material that has the general physical characteristics of a normally accepted hard rubber composition.

Some definitions stress the presence of some rubber in the end product, the amount varying considerably with the views of the individual witness.

Much of the testimony of these witnesses seems to be based on the view that comparatively recent discoveries and developments in the industry have made the old definitions of rubber and hard rubber inappropriate and restrictive. In speaking of the definition which the hearing examiner found to be correct, the initial decision contains the following:

There is no substantial dispute among the experts called by both sides as to the above definitions having been proper up to the time the respondent began to manufacture its combs out of Kralastic D in late 1950 or early 1951. Several of respondent's expert witnesses testified as to vulcanization being necessary in the earlier days to achieve hard rubber. While there is some evidence that a few products made other than by the vulcanization process were referred to as hard rubber batteries or hard rubber gaskets, and the like, there is substantial agreement among the experts called by both sides that there was no product offered on the commercial market in substantial quantity as hard rubber prior to 1950 that was not made by the vulcanization process.

Much of the evidence on the part of Respondent amounts to a claim that the terms in question have acquired a secondary meaning,

—a subject which has been frequently considered by the Commission and by the courts.

It is true that a word or phrase may acquire a secondary meaning. However, the claimed secondary meaning must be as firmly anchored by common acceptance as the first one. Furthermore, this fact must be established by a high degree of proof. *FTC v. Winstead Hosiery Co.*, 258 U.S. 483; *FTC v. Algoma Lumber Co.*, 291 U.S. 67; *In the Matter of Atlantic Sponge and Chamois Corporation*, Docket 6162.

We agree with the findings and conclusions of the hearing examiner as to the well-established primary meaning of “rubber” and “hard rubber” in regard to combs, and that the secondary meaning urged by certain witnesses has not been established.

(2) Do the practices complained of constitute unfair methods of competition in commerce, or unfair and deceptive acts in commerce?

Evidence of barbers, beauticians and barber supply salesmen was introduced on the matter of preference for a certain type of combs. On this point, the hearing examiner found as follows:

It is found from a preponderance of the evidence that substantial numbers of the public do prefer combs made or composed of “rubber” or “hard rubber” as distinguished from plastic combs or combs made of compositions such as Kralastic D, with a small content of rubber, and which are made by the extrusion process without the vulcanization of rubber and sulphur as “rubber” or “hard rubber” combs have been made for many years past. The numerous witnesses who testified for the Commission who were barbers and beauticians and barber and beauty supply people gave ample testimony to this effect, which need not be recited in detail. While some of them had bought and used respondent’s combs labeled as “Rubber” or “Hard Rubber,” they believed they were getting a hard rubber comb, and all of this class of witnesses disclaimed any knowledge of, or interest in, the chemical components and methods of manufacture employed in making a rubber or hard rubber comb. Many used the combs of respondent’s competitors and a few used respondent’s combs. These witnesses, for the most part, testified they preferred a comb made of hard rubber because of its durability and performance in the actualities of the trades of the barber and the beautician. A predominant number were very strongly prejudiced against plastic combs because of their breakability or their unsuitability for skilled professional work on their customers’ hair, or for both reasons.

It also appears in the record that the Products Division of E. I. duPont de Nemours and Company manufactured and sold combs made from Kralastic D; that when the company abandoned the practice of branding such combs as “rubber,” sales fell off 97%.

Evidence was also introduced concerning tests made with Respondent’s Kralastic D combs and those of competitors made by the sulphur vulcanizing process. The results of these tests indicate the varying characteristics of the two types of combs when subjected to

these tests. There was also testimony that barbers prefer hard rubber combs because they resist better the effects of certain sterilizing fluids and of hot water.

It also appears that the natural color of Kralastic D is tannish or brownish-yellow opaque, and that the material furnished for Respondent's combs was, at Respondent's request, colored black. This is the traditional color of the rubber combs. The initial decision also points out that only one other user of Kralastic D now stamps, labels or advertises its comb as "hard rubber" and that a Federal Trade Commission complaint has been issued against that user.

That the practices of Respondent were unfair to competitors and deceptive to the public is well settled by *FTC v. Algoma Lumber Co.*, 291 U.S. 67, in which the court said:

* * * The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212, 216; *City of Carlsbad v. W. T. Thackeray & Co.*, 57 Fed. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous.

Respondent next argues that the complaint does not sufficiently allege nor the evidence show that Respondent's business in rubber and hard rubber combs is substantial; that the evidence does not show that such combs are in substantial competition with others; that there is any substantial public interest in the proceeding or that the proceeding is anything more than a private controversy.

It is admitted in the pleadings and in the testimony that Respondent's combs are "in competition" with others. On the question of the substantial character of the competition, it appears that Respondent does business in practically all states of the Union; that its comb business is in excess of \$250,000 per year; that it sold 4,275,000 of its rubber combs in 1954 and 5,079,000 in 1955; that certain of its consumer witnesses called had bought or used Respondent's combs. The total number of combs sold, either rubber or otherwise, does not appear. It also appears that other competitors make a large number of rubber combs each year.

It is not necessary to prove actual deception or injury to any individual or the amount thereof. It is sufficient to prove that the practices have the capacity or tendency to deceive. The evidence is sufficient to meet this requirement.

At various stages of the proceedings, Respondent has made two additional arguments, first, that the Commission is estopped from

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further proceedings by reasons of a letter of February 15, 1951, by a member of the Commission's staff stating that "the Commission contemplated no further proceeding in the matter," and, second, that the entire matter should be referred to a trade practice conference on the rubber industry. These matters are adequately treated in the initial decision and we shall not elaborate further thereon.

In arriving at our conclusions, we have attached no weight to the fact that Respondent has made a vigorous defense to charges made against it in the complaint.

By letter of September 5, 1956, to the hearing examiner, counsel for Respondent attached a list of corrections which should be made in the record. The hearing examiner declined to make the corrections for the reason that the record had been closed. The case was argued orally before the Commission on February 14, 1957. By letter dated March 14, 1957, addressed to the Federal Trade Commission, counsel for Respondent enclosed this list of proposed corrections and asked that the record be corrected accordingly. This request has been called to the attention of counsel supporting the complaint who has filed a reply thereto in which he objects to certain proposed corrections but not to others.

We have considered all the suggested corrections and conclude that their adoption does not materially change the record and does not change our findings and conclusions.

Except as otherwise indicated in this opinion, the findings, conclusions and order of the hearing examiner are adopted as the findings, conclusions and order of the Commission. The appeal of Respondent is denied and it is directed that an order issue in accordance with his opinion.

FINAL ORDER

Respondent, Vulcanized Rubber and Plastics Company, a corporation, having filed an appeal from the hearing examiner's initial decision in this proceeding; and

The matter having been heard on briefs and oral argument, including briefs of The Dayton Rubber Company and United States Rubber Company, as Amici Curiae; and

The Commission having rendered its decision wherein it denied the appeal and, except as otherwise indicated, adopted as its own the findings, conclusions and order contained in the initial decision:

It is ordered, That respondent, Vulcanized Rubber and Plastics Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in said initial decision.

IN THE MATTER OF
AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY

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

Docket 6239. Complaint, Oct. 14, 1954—Decision, Apr. 26, 1957

Order requiring an insurance company in Kansas City, Mo., to cease misrepresenting the coverage and benefits of its accident and sickness insurance policies.

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

Mr. Robert R. Sills, Mr. P. R. Melangton, Jr. and Mr. Francis C. Mayer for the Commission.

Mr. A. Alvis Layne, Jr., of Washington, D.C., for respondent.

FINDINGS AS TO THE FACTS, CONCLUSIONS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 14, 1954, issued and subsequently served upon respondent, Automobile Owners Safety Insurance Company, a corporation, its complaint, charging said respondent with the use of unfair and deceptive acts and practices in commerce in the sale of health and accident insurance policies, in violation of the Federal Trade Commission Act.

Thereafter, respondent filed its answer and, in conjunction therewith, a motion requesting dismissal on the ground that the Federal Trade Commission Act has no application to the business of respondent, or, in the alternative, that the complaint be dismissed and the matter referred to the Bureau of Consultation of the Commission for handling and disposition under the cooperative procedures of the Bureau. This motion was denied by the hearing examiner duly designated in the complaint, the first part for the reason that the question of jurisdiction could be resolved satisfactorily only after the submission of evidence, and the second part for the reason that it was not within the examiner's authority.

Hearings were conducted in due course. At the close of the taking of evidence in support of the complaint, respondent again moved to dismiss the proceeding on the grounds: (1) that the evidence failed to establish facts sufficient to constitute jurisdiction, and (2) that the evidence did not show violation of the Federal Trade Commission Act. This motion was denied by the hearing examiner on September 9, 1955, by an order which stated that the Federal Trade