

Decision

IN THE MATTER OF
MANHATTAN BRUSH COMPANY, INC., ET AL.

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

Docket 5814. Complaint, Sept. 27, 1950—Decision, July 3, 1957

Order requiring a manufacturer in New York City to cease using the terms "Pure Bristle" or "bristle" to refer to paint and varnish brushes which contained quantities of horsehair or were not composed wholly of hog bristles.

R. P. Bellinger, Esq. for the Commission.

Edward S. St. John, Esq. and *Thomas P. Dougherty, Esq.*, of New York, N.Y., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

THE PROCEEDING

The Federal Trade Commission, by virtue of authority vested in it pursuant to the provisions of the Federal Trade Commission Act, did, on September 27, 1950, issue its complaint against respondents, Manhattan Brush Company, Inc., a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at No. 42 West 18th Street, New York, New York, and its officers in their representative capacities and as individuals, they being Robert S. Gillman and Norman B. Bloom respectively President and Secretary-Treasurer of respondent corporation. The address of all respondents is as above recited.

The complaint charges respondents with false and misleading representations that paint and varnish brushes manufactured and sold by them were composed of bristles, meaning and importing thereby, the hair derived from the swine or hog, for which bristles there is a decided preference on the part of the purchasing public; that such representations were in fact false in that respondents caused the fiber content of said brushes to be adulterated with a cheaper and inferior product, to wit, horsehair.

The then officiating Hearing Examiner, having received testimony and exhibits on behalf of, and in opposition to, the allegations of the complaint, all of which said testimony was stenographically reported and, together with the exhibits and documentary evidence related thereto, duly recorded in the office of the Federal Trade Commission in Washington, D.C., as required by law, then proceeded with the preparation of his Initial Decision based upon such records.

RÉSUMÉ OF THE RECORD

From this point the proceedings are rather lengthy and involved for which reason it is considered that a résumé thereof, in chronological form, will be of assistance in a ready appreciation of the matter and its history in the Commission.

On August 28, 1951, the said then Hearing Examiner filed an Initial Decision ordering that the complaint in this proceeding be dismissed, from which decision an appeal was noted by the attorney in support of the complaint. September 13, 1951 said appeal was perfected.

During the interim, and while said appeal was pending and undisposed of, Petitions for Leave to Intervene were filed by the American Brush Manufacturers Association, the Eastern Paint Brush Manufacturers Association, Inc., and the New York Metropolitan Brush Manufacturers Association, all of which said Petitions were granted by the Commission, with certain limitations, and, pursuant to permission contained in the granting orders, all of the petitioners filed briefs in support of their respective positions concerning the appeal from the Hearing Examiner's order of dismissal, said briefs, and the replies thereto, appearing of record in the formal proceeding.

On June 9, 1952, formal argument before the Commission was had on the appeal from the Hearing Examiner's Initial Decision and thereafter, before rendition of decision on said appeal, and on October 21, 1952, counsel in support of the complaint formally moved for withdrawal of his aforesaid appeal and for remand of the entire matter to the Hearing Examiner for the purpose of receiving additional testimony in support of the charges of the complaint.

On February 17, 1953, pursuant to the foregoing motion, the Commission passed its formal order which:

- (1) Granted the motion of counsel supporting the complaint to withdraw his appeal from the initial decision;
- (2) Vacated and set aside the Hearing Examiner's Initial Decision;
- (3) Appointed a substitute Hearing Examiner, (the services of the Hearing Examiner who had rendered the Initial Decision being no longer available to the Commission by reason of his retirement from public service);
- (4) Reopened and remanded the proceeding to the Hearing Examiner for the purpose of receiving additional testimony; and

(5) Directed that after receipt of such additional testimony the Hearing Examiner render "an initial decision on the entire case."

By order of the Commission dated August 6, 1953, the undersigned Hearing Examiner was substituted with directions to proceed as authorized by law.

Hearings were held on February 24 and April 7 and 8, 1954, and thereupon, by reason of a decision of the Circuit Court of Appeals¹ and insistence by respondents that such decision made obligatory the trial of this matter *de novo*, the Hearing Examiner, on April 26, 1954, certified the question to the Commission for its determination of the future course of the proceedings, pursuant to which certification the Commission did, on October 29, 1954, order the Hearing Examiner:

to grant a new hearing for the purpose of resubmission of evidence bearing on the issues in this case which was not received by the present Hearing Examiner,

and that:

to the extent all parties expressly waive rehearing as to any evidence previously presented, rehearing shall not be directed.

At a formal hearing held in Washington, D.C., on November 10, 1954, specially called for the purpose of determining the status and future course of the proceeding in the light of the afore-quoted order of the Commission, all parties to the proceeding entered into a formal stipulation on the record, by the terms whereof it was agreed, in substance, that the entire record containing the testimony and evidence had before the original Hearing Examiner, as well also the testimony and evidence theretofore had subsequent to the remand, and thereafter to be had before the present Examiner, shall constitute the record on which the present Examiner shall base his findings and conclusions, the respondents thus abandoning their position contending for a trial *de novo*. Pursuant to such agreement the proceeding, after the reception of additional testimony and evidence in support of, and in opposition to, the allegations of the complaint, went forward to a normal conclusion, all of such additional testimony and evidence being likewise filed of record as required by law.

Thereafter the parties filed their Proposed Findings as to the Facts and Conclusions based thereon and, additionally, the attorney in support of the complaint submitted a Proposed Order, all of which have been separately ruled upon as required by the Rules of Practice.

¹ *Gamble-Skogmo, Inc. v. F.T.C.*, 211 F. 2d 106 (1954).

THE ISSUE

The complaint, in Paragraphs 4, 5, 6, and 7, clearly, concisely and succinctly sets forth the one and only charge upon which the proceeding is based, such being paraphrased as follows:

In the course and conduct of their business and for the purpose of inducing the purchase of their said brushes, respondents have caused their handles of certain brushes to be stamped, marked or labeled with the words "*Pure Bristle*"; that the practice of stamping their brushes with the words "*Pure Bristle*" constitutes a representation to the public that the material of which said brushes is composed consists entirely of the bristle of swine; that there is a decided preference on the part of members of the consuming public for paint and varnish brushes that are made entirely of genuine bristle; and, finally, that in truth and in fact respondents' brushes are not composed entirely of bristle of swine but contain various quantities of horsehair.

The foregoing charge is simple and direct and raises but one question to be tried, that is:

Are respondents' brushes "*Pure Bristle*" as represented; or are they adulterated with horsehair?

On the subject matter of the above statement of the issue to be tried, the Commission's order of remand of February 17, 1953, contains certain language which is thought worthy to be quoted for its very definite value of putting the *sole issue* in this matter in its proper setting and perspective, as well also the steps necessary to be taken subsequent to the remand in order to rectify the apparent conflict of evidence and to overcome the obstacles pointed out by the order of remand, which obstacles made a clear-cut decision, one way or the other, impossible on the record as it then stood:

** * * It appearing to the Commission that the sole issue presented by the appeal is whether or not the respondents, by stamping on certain of their paint brushes the words "Pure Bristle," have represented, contrary to the fact, that such brushes are composed entirely of bristles of swine, and that the disposition of this issue depends primarily upon the answer to the question whether or not the brushes so stamped are in fact made entirely of bristles; and*

It further appearing that the evidence now in the record on this point is in sharp conflict, there being testimony of a microscopist of the National Bureau of Standards, based on his microscopic examination of cross-sections of fibers removed from four brushes manufactured by the respondents and the application of his "pattern of pigmentation" theory, that three of such brushes were in fact composed in substantial part of horsehair; and testimony of seven other witnesses, six of whom are experts in the field of bristle and horsehair and one of whom is a technical expert in the general field of animal

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hair, that all of the samples of fiber examined by them were composed entirely of bristles; and *

*It further appearing that the record as so constituted does not provide an adequate basis for an informed determination of the issues presented by the appeal; * * * etc.*

(italic supplied)

Pursuant to the order of remand the attorney in charge of the complaint introduced the testimony of four additional witnesses on the matter of fiber identification of contents of brushes, while the respondents offered testimony of four witnesses on the same subject.

THE ANSWER

To the foregoing complaint respondents filed formal written answer whereby they admitted the allegations of Paragraphs 1, 2, 3, and 5 of the complaint and denied all other charges and conclusions. The admissions, all of which are hereinafter incorporated as Findings of Fact are paraphrased as follows:

(1) The corporate setup and the official connection of the individual respondents with the corporate respondent and that the latter dominate and control the policies, acts and practices of the former.

(2) That respondents are engaged in interstate commerce in the sale of their brushes and that their volume of sales in such commerce is substantial.

(3) That they are in substantial competition in the sale of brushes with other manufacturers of products similar to theirs among and between the various states.

(4) That in the course of their business, and with the purpose of inducing the purchase of their merchandise, respondents have caused the handles of certain of their brushes to be stamped or labeled with the words: "PURE BRISTLE."

(5) That such legend or stamp, so used, constitutes a representation to the public that the material of which said brush is composed consists entirely of the bristle of swine.

With the issue thus joined, and the foregoing judicial admissions of record, the matter proceeded to trial.

PRELIMINARY STATEMENT CONCERNING THE TRADE PRACTICE RULES
FOR THE PAINT AND VARNISH BRUSH MANUFACTURING INDUSTRY

On January 14, 1939, the Commission promulgated its Trade Practice Rules for the Paint and Varnish Brush Manufacturing Industry, to which said Rules some twenty-seven paint and varnish

* The above quotation is correct as it appears in the order but the order is in error in the number of brushes examined and the number of witnesses heard. This error is deemed inconsequential.

brush manufacturers throughout the United States became signatory. These signers represent a large and important segment of the industry who, undoubtedly, would not have accepted such rules for their guidance and observance had they felt the rules to be onerous or impossible of obedience, such as, for example, the production of a 100% pure swine bristle product, sans horsehair or extraneous fiber admixture, as the respondents herein have contended. A certified copy of said Rules was introduced and accepted in evidence.

At the outset of any consideration of these Rules let it be said that it is realized that this proceeding is not, in nature, an attempt to enforce the Rules as such, (respondents not being parties signatory thereto and the Rules not having standing in law nor enforceable as such), yet, as said by the Circuit Court in the recent case of *Northern Feather Works, Inc., v. F.T.C.* (#11,727 3d Cir. June 5, 1956):

These trade practice rules were not taken as legal commands by the hearing examiner, the Commission or ourselves. But we think that a set of rules worked out in conference between a government agency and an industry can be taken as a guide if, to those responsible for enforcement, they are reasonable and fair. That is what was done here.

See also *Buchwalter v. F.T.C.* (Decided July 9, 1956) (#23,805 2nd Cir.)

The foregoing reasoning being applicable to the circumstances of the instant matter it is felt that, for present convenience, the excerpted quotations from the Rules as here footnoted will demonstrate their applicability to and coverage of the subject matter of this proceeding and that consideration of same will be enlightening and almost imperative as an adjunct to an informed decision.²

² "GROUP I. The unfair trade practices which are embraced in these Group I rules are considered to be unfair methods of competition. . . . prohibited, within the purview of the Federal Government, by acts of Congress; . . . and appropriate proceedings in the public interest will be taken by the Commission to prevent the use, . . . of such unlawful practices in . . . interstate commerce. . . ."

Definitions: The . . . word 'brushes' as used in these rules embrace all types of brushes manufactured in the industry for use in applying paint, varnish, lacquer, calamine or other similar decorative or protective materials.

The term 'bristle' as used in these rules is not to be construed as including any hair, fiber or material other than the bristle of swine.

"RULE 1—Misrepresentation of Industry Products:

It is an unfair trade practice to make or publish, . . . any false, misleading or deceptive statement or representation, by way of advertisement or otherwise, concerning the grade, quality, quantity, use, size, material, content, origin, preparation, manufacture or distribution of any products of the industry or concerning any component of such products"

"RULE 2—Misbranding of Industry Products:

(a) The marking or branding of brushes with the words 'All Bristle', '100% Bristle', 'Pure Bristle', or 'All Pure Bristle', . . . when such brushes are in fact composed in whole or in part of material . . . other than bristle, or the use of the word 'bristle' in any manner having the tendency and capacity or effect of misleading or deceiving the

It will thus be noted from the opening paragraph of the Rules that the Commission declares, and gives interested parties clearly to understand, that any violation of the Rules comprising "Group I" shall be considered a violation of the law and that appropriate proceedings will be taken looking to the enforced cessation of the proscribed acts.

Supplementing the Group I rules there appears, as Rule E of Group II, the following:

ALL-Bristle Brushes:

The industry records its approval of the marking or branding of all brushes composed wholly of bristle with the words "All Bristle," "100% Bristle," "Pure Bristle" or "All Pure Bristle," or with word or words of similar import or meaning, on the handle or ferrule thereof, to the end that the purchasing and consuming public may be correctly informed as to the content of such brushes.

From the foregoing it will be observed that the acts and practices charged in the instant matter have been the subject of official concern and attention of the Commission and of the industry for many years prior to the issuance of the within complaint. The rules are clear as to what is and what is not a "Pure Bristle" brush, and it will be further observed that no tolerances for foreign or adulterating matter, hair or fiber, are authorized or permitted.

Due consideration having been given to the evidence adduced, the contentions of counsel for all parties, and the proposed findings and conclusions submitted by them in accordance with the Commission's

purchasing or consuming public with respect to the bristle content of such brushes, is an unfair trade practice.

(b) The deceptive marking or branding of brushes with respect to the grade, quality, or in any other material respect, is an unfair trade practice.

"RULE 2—Disclosure of Composition:

It is an unfair trade practice to sell, offer for sale, or distribute any brush the brushing part of which is composed, in whole or in part, of any material which by reason of its natural appearance or as a result of special processing simulates bristle, without clear and nondeceptive disclosure of the true composition thereof, where failure to so disclose the same has the tendency and capacity or effect of misleading or deceiving the purchasing or consuming public.

(a) Such disclosure should be made by branding, stamping, or otherwise marking the handle or ferrule of the brush with the name of each of the constituent materials of the brushing part thereof in the order of its predominance.

(Illustration: A brush composed of 60% horsehair and 40% bristle should be marked 'Horsehair and Bristle' or '60% Horsehair and 40% Bristle'.)

Provided, however, (1) That the name of any such constituent material shall not be set forth in type or manner so inconspicuous, remotely placed, or disproportionately minimized as thereby to have the tendency, capacity or effect of misleading or deceiving the purchasing or consuming public in respect to the proportion of such material contained therein, or in any other respect, and

(2) when bristle as a material is not contained therein in a substantial quantity, the percentage in which such material is present should be specifically stated, to the end that purchasers may not be misled or deceived into the belief that this material is present in greater proportion than is in fact true.

(Illustration: A brush composed of 90% horsehair and 10% bristle should be marked 'Horsehair and 10% Bristle' or '90% Horsehair and 10% Bristle'.)

Rules of Practice, the Hearing Examiner makes the following findings as to the facts, conclusions of law and order based thereon:

1. Respondent Manhattan Brush Company, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at No. 42 West 18th Street, New York, New York; respondent Robert S. Gillman is an individual and the President of respondent corporation; respondent Norman B. Bloom is an individual and the Secretary-Treasurer of respondent corporation. The individual respondents direct and control the policies, acts, and practices of the corporate respondent. The addresses of the individual respondents are likewise No. 42 West 19th Street, New York, New York.

2. Respondents are and have been for some years last past engaged in the manufacture, sale, and distribution of paint brushes and have caused their said products, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in the various states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products among and between various states of the United States and in the District of Columbia.

Respondents' volume of business in said commerce is substantial.

3. Said respondents, during the periods covered hereby, were engaged, and are now engaged, in the manufacture and sale of paint brushes and at all times have been, and are now, in substantial competition with other corporations, individuals, firms and partnerships in the sale and distribution of like products in commerce among and between the various states of the United States and the District of Columbia.

4. The word or term "bristle," used in connection with the manufacture of brushes, particularly paint and varnish brushes, indicates and means the strong resilient hairs which grow on the back of the hog or swine. For the manufacture of painters' brushes, no material has been found as acceptable or efficient as the bristles of the hog or swine, which bristles in the great volume of the aggregate, have a split or fork (in trade parlance designated a "flag"), at the apical end of each bristle, thereby enabling a paint brush composed of bristle to retain and spread paint to better advantage and with greater efficiency than a brush composed of any other material or materials. The best quality of bristle is imported. The better quality of bristles obtained from hogs slaughtered in the United States are also used in the industry. Notwithstanding the great variety of possible materials that could be employed in the manufacture of

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brushes, a large percentage of all brushes are made from the bristles of the hog or swine.

All swine bristle, irrespective of place of origin, have certain identifiable characteristics in common such as taper, flag, scale, elasticity, spring, etc., differing only in certain qualitative particulars which make bristles from certain localities more desirable for specified uses and purposes.

Among the better known, but cheaper and inferior products, used as adulterants or substitutes in the manufacture of paint and varnish brushes, are horsehair and wood or vegetable fibers, the two latter substances not being here involved, the evidence showing that the foreign matter or fibers found to exist in respondents' brushes being horsehair. From the standpoint of excellence, quality, effectiveness and efficiency, horsehair is decidedly inferior to the higher priced genuine bristle, for which reason there is a decided preference on the part of the consuming public for paint and varnish brushes made of genuine bristle, unadulterated with horsehair.

5. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said brushes, respondents have caused their handles of certain of said brushes to be stamped, marked or labeled with the words "Pure Bristle," the use of which words constitutes a representation to the public that the material of which said brushes is composed consists entirely of the bristle of the hog or swine.

6. It is found as a fact that during the course of the manufacture of their said products respondents have sold and introduced in commerce certain of their brush products which are not in fact composed entirely of the bristle of swine but, on the contrary, contain varying quantities or percentages of horsehair, this practice leading to the production of an inferior product and constituting a direct misrepresentation in a material aspect.

7. In the matter of fiber identification, and particularly to enable differentiation between true or pure bristle and horsehair, there are two methods pursued:

(1) The "eye and feel," or "see and feel," tests, commonly used in the trade, based primarily on visual examination and appraisal for known identifying characteristics of taper, flag and color, coupled with tactile examination for spring, texture and ability of fibers to regain their original positions after having been subjected to stress.

This method was availed of by witnesses on both sides of the controversy.

(2) The "pattern of pigmentation" test in the use of which the fiber or filament is cross-sectioned by means of a slicing machine

called a microtome, to thicknesses of from 15 to 40 microns and then, after mounting the specimens thus procured on slides, they are subjected to microscopic examination at 100 or more diameters for "pigmentation pattern," the distinction between true bristle and horsehair being determined by the fact that, in bristle, the granules of pigment are concentrated in the medulla or center and diminish in density as they approach the periphery or outside skin of the fiber, whereas in horsehair there is little if any pigment granules appearing in the center, such pigmentation being mainly concentrated at the periphery or outside sheath of the hair.

This method was made use of by two witnesses testifying at the instance of the Commission and was not availed of by any witness for the respondents except in an effort to disprove the validity of such a test. Respondents' witnesses did, however, make use of the microscope, but solely for what might be described as a "gross" examination for taper, flag, cellular structure and similarity or dissimilarity with various other strands or fibers.

In considering the weight to be accorded the testimony of the respective witnesses, the maxim *testes ponderantur, non numerantur*, has been observed, which Black defines as:

Witnesses are weighed, not numbered. In case of conflict the truth is to be sought by weighing the credibility as well as the capability of the respective witnesses—not by the mere counting of noses on one side or the other.

THE TESTIMONY

8. The testimony in this matter involving two distinct and separate schools of scientific and empirical-expert opinions as to the positive identification of brush fibers, (the scientific school being based upon the "pattern of pigmentation theory," aided by microscopic examination of specially prepared fiber sections, supplemented by experience of the operator and comparison tests with other fibers of known origin), and the other, or empirical-expert procedure, employing the "eye and feel test," (based upon macroscopic and tactile examination plus the knowledge derived from experience), it would appear in order that a more detailed analysis of the testimony of the material witnesses for the respective parties than ordinarily pursued should be undertaken in order to form an enlightened opinion, as well to overcome the deficiencies pointed up by the Commission in its Order of Remand.

There is a further reason for this review which is to negative the thought of arbitrary action by this Examiner in according especial weight to one school of thought over the other, and to

demonstrate that each school has been accorded due consideration in its proper sphere. Such will likewise serve to assist the ultimate deciding authorities to determine the issue, based upon the facts as known to the experts, and the opinions of the latter thereon, (and that the process of evaluation of such opinions by this examiner may be known), and to arrive at an interpretation and evaluation of the testimony in the light of the ultimate deciding authorities' own expertise and/or judgment.

In order to maintain the issues on its part joined Commission counsel produced witnesses whose testimony is briefed as follows:

9. Witness, Dr. Sanford B. Newman, a technician in charge of the Microbiological Laboratory which is the Testing and Specifications Section of the Organic and Fibrous Materials Division; U.S. Bureau of Standards; B.S. from Long Island University; M.S. George Washington University; tested samples of fibers from brushes Comm. Exs. Nos. 1 and 2 and, in his official capacity as above, made his formal report thereon which appears herein as Comm. Ex. No. 17.

Witness has had extensive experience since the year 1945 in assaying paint brushes as to fiber content. The method used by him is the cross-sectional pigmentation pattern of identification whereby thin slices across the bristle, hair or fiber are procured by a machine called a microtome, which slices or cross-sections are then mounted on a glass slide and subjected to microscopic examination and, in some instances microphotographs thereof are made; in addition, respecting Comm. Ex. 2, compared the bristle flags with synthetic and natural flags in the files of the laboratory and selected some fibers which appeared to have unnatural flags and subjected these to examination by the cross-sectional method; that the absence of flag on a fiber is not to be construed as proof positive that the fiber is not bristle because there are bristles in commerce, as well also bristles on hogs, without flags, but the presence of a natural flag is proof positive that it is a true bristle.

Witness is familiar with the so-called scale method of identification of hair and bristle but did not use the same to support his cross-sectional experiments because, in his opinion, the scale method is unreliable and, while referred to in the literature is not accepted. He believes, after having surveyed the field, that the test he used in observing the distribution of pigment granules is the most reliable of all tests and is, succinctly stated, that "if the pigment distribution is dense in the center and fans out toward the periphery the fiber is bristle. If the center of the fiber contains little or no pigment and the concentration increases toward the periphery, it is horse-hair."

Confirming the findings of horsehair and bristle present in the two brush exhibits, as reported by the National Bureau of Standards in Comm. Ex. No. 17 witness testified, based on the samples assayed, that Comm. Ex. No. 1 contains from 10% to 20% horsehair and Comm. Ex. No. 2 contains "at least 30% horsehair."

Six months later this witness was recalled by the Commission in rebuttal and testified further:

That he had made additional tests on brushes Comm. Exs. Nos. 1 and 2 by removing samples from each and sectioning same by means of the Hardy microtome; explained the operation of the machine, and supplemented his explanation by photographs of the machine.

Witness thereupon testified in great detail throughout 100 pages of the transcript, supplementing his prior testimony with additional details on the new tests and, in support of his testimony, there were received into the record some 28 microphotographs of considerably over 200 cross-sections of fiber magnified to a power of 230 in some instances and 450 to 500 power in others. Upon the introduction in evidence of these exhibits the then examiner permitted the respondents' counsel, out of the regular order of procedure, to practically conduct a cross-examination on each exhibit as it was offered in evidence during the course of direct examination so that it may be truly said that a detailed and searching cross-examination was had during the course of the direct, a perusal of which fails to disclose that the witness' testimony was other than sound, reasonable, and worthy of belief in all of its segments. These microphotographs are singularly clear in the matter of pigment distribution and were used by the witness to demonstrate his theories and to support his sincere belief that this method of identification is the most reliable yet devised for differentiation between bristle and horsehair and, in fact, he was so strongly of this opinion that he used this method to the exclusion of all other methods except that he availed himself of the normal gross examination of the fibers for the presence of taper and flag.

In preparing the specimens the witness cross-sectioned the individual fibers to thicknesses within the range of 25 to 33 microns,³ this being, in the opinion of the witness, the optimum thickness to permit light transparency on the microscopic stage for pigment observation and photographing.

He made no change in his before-expressed opinion as to the percentages of hair and bristle contents of the respective brush exhibits.

10. Another expert witness, called at the instance of the Commission, Dr. Thora M. P. Hardy, conducts a commercial laboratory;

³ A micron is one one-thousandths of one millimeter or, expressed decimally in inches is .00003937 of one inch, or fractionally 1/24,500 inch.

holder of A.B. degree with the Master of Science Certificate majoring in chemistry; M.S. and Ph.D. from the University of Chicago, majoring in Botany; from 1935 to 1938 with the United States Bureau of Standards, Division of Organic and Fibrous Materials, engaged in research concerning paint brush fibers whether plant, animal, or synthetic; employed by United States Department of Agriculture carrying on research on fur fibers upon termination of which employment witness, in conjunction with her late husband, Dr. John I. Hardy, established the present laboratory in 1951, the function thereof being to carry on any research or testing relating to fibers of any nature; she is the authoress of various articles either directly pertinent to the subject matter of this inquiry or related thereto, a list of such publications appearing of record.

The above mentioned Dr. John I. Hardy was the inventor of a number of devices to assist him and others in developing new methods for the examination of diverse fibers, and among such devices was the Hardy microtome.

This witness did not use the cross-sectional pigmentation pattern of identification.

In order to conduct her investigation and research she first removed, by means of a hammer and chisel, chunks of bristle from the exhibit brushes by cutting from one edge to the opposite edge of the ferrule and through the entire thickness of the brushes, which samples included the mastic materials encased by the ferrule embedding the fibers in order that she might observe the complete length from base to tip of every fiber, for this purpose using a chemical compound to dissolve the mastic and separate the fibers; she first visually examined individual fibers for their general appearance, their smoothness, curvature, taper at the tip and taper near the root, as well also, where present, the flag at the tip end; the fibers were then placed under the microscope to examine the root and permit longitudinal observation for taper and flag; then followed a comparative test of representative fibers from the samples with authentic samples from known sources of horsehair and bristles. Witness also procured an impression of the surfaces of the fibers, is known as the scale method of identification, the scale formations differing significantly as between bristle and horsehair, which test was used as a supplemental check or aid in proving or disproving, as the case may be, true fiber identification. The above combined methods witness holds to be accurate and dependable for the purposes for which the tests were conducted and she knows of no more reliable or efficient methods of procedure in this connection.

Testifying specifically on the subject of fiber content of brush Comm. Ex. No. 1, and on the basis of her experiments as aforesaid,

she gave as her opinion that said brush was composed of 90% bristle and the balance horsehair with a 10% tolerance plus or minus. This plus or minus tolerance of 10% witness explained to be a recognized formula by the National Bureau of Standards and is applied to the findings of a qualified analyst in connection with "difficult" analyses. The word "difficult" was explained as the labor and time involved where a full count and examination of each and every bristle in the entire brush would be impracticable for the purpose of arriving at a quantitative analysis, and that the result of the application of this formula means that if the results of the sample analysis were projected to the entire mass of fibers of the whole brush the bristle content thereof would vary anywhere from 80% to 100%.

Testifying concerning her tests conducted on brush Comm. Ex. No. 2, the methods used were the same as hereinabove delineated regarding Commission's Exhibit No. 1. Specifically testifying as to the fiber content her results showed that the brush was composed of 80% bristle and 20% horsehair, plus or minus 10% tolerance, hereinabove explained.

Witness supplemented her testimony by a formal report giving fiber percentages found to exist in brushes Comm. Exs. Nos. 1 and 2, which report appears of evidence herein.

This witness was attempted to be qualified as an expert on brush manufacturing processes and while such qualification failed, nevertheless, the Examiner has ruled that, because of the experience of the witness in the matter of paint brushes, and the empirical knowledge gained through such years of experience, she be permitted to testify that if she were searching for horsehair as an adulterant in a brush she would expect to find such in the center or middle portion of the brush rather than among the outside layers of the fibers contiguous to the metal ferrule. This is important only in connection with the subject to "casing" a brush, herein elsewhere referred to, and which means that the outside fibers around the full periphery of the brush, and thus subject to easy inspection, would be bristles with the adulterant fibers in the center.

Upon being tendered for cross-examination, counsel for respondent had no questions.

11. Another expert witness on behalf of the Commission, Mary E. Hourihan, testified she has been employed by the United States Department of Agriculture since 1948 as a fiber technologist in the field of animal fibers: worked with Dr. John I. Hardy for three years and upon his retirement took over the laboratory; Dr. Hardy was a recognized authority in the field of fiber identification and the inventor of the cross-sectional device used in microscopical identifica-

tion of fibers by the pigmentation pattern; witness conducts such tests for United States Government agencies; identified Comm. Exs. Nos. 1 and 2, (two brushes manufactured by respondents), and testified she personally subjected them to scientific tests to determine fiber contents, using the cross-sectional microscopic method to identify patterns of pigmentation; that the cross-sections were of a thickness of approximately 15 microns, secured by means of the Hardy cross-sectional device; she then described in detail the *modus operandi* of her tests and that the tests used are recognized by her agency as accurate, dependable and the most reliable test known, for which reason it has been adopted as standard procedure in her agency.

From Comm. Ex. 1 witness examined and tested approximately 995 individual fibers which she procured by extracting samples of fibers from two sectional cuts *through* the entire depth or narrow portions of the brush from one edge of the ferrule to the other, which samples comprised approximately 10% of the entire fiber content of the brush, she considering such extracted portion sufficient to enable her to make a representative and informed calculation as to the identity of the entire fiber content of the brush. Her conclusion as to brush Comm. Ex. No. 1 was stated to be 85% hog bristle and 15% horsehair; that the distribution of horsehair was quite uniform in this exhibit.

As to brush Comm. Ex. No. 2, witness actually tested about 900 fibers, using the same protocol and methods as above described for Comm. Ex. No. 1; that the sample extracted was approximately 10% of the entire fiber content of the exhibit and sufficient in her judgment to enable her to make an informed calculation of the fiber content of the exhibit as an entirety. Her conclusion as to brush Comm. Ex. No. 2 was stated to be 75% hog bristle and 25% horsehair, the latter being quite uniformly distributed throughout the specimen extracted by her.

This witness used only the pigmentation pattern of identification and did not make use of the scale, or any other, identification method.

12. Another Commission witness, Charles S. Cox, originally appearing in support of the complaint, testified that, pursuant to specific authorization, certain samples of fiber were extracted from Comm. Exs. Nos. 1 and 2 at the request of the respondents, to be submitted to a testing laboratory for report on fiber identification; that at the time of extracting said samples respondent, Bloom, did the actual cutting of the fibers by use of scissors and that the samples or swatches were secured from both exhibits from the outside rows of fibers; that at that time the brushes were complete, no samples having been taken by cutting entirely through the brushes for a cross-section which would disclose a representative sample of all fibers

contained in the two exhibits; that when the exhibits were presented to him cross-sectional samples had been extracted and the brush ferrules were separated to permit bristle removal. An examination of the two exhibits tends to support witness' testimony as to the extraction of fibers from the outside rows of fibers of both exhibits, such rows evidencing a cutting of fibers completely around the circumference of each brush, and it will be noted that these are the extracted samples which were submitted by respondents to their testing laboratory and which form the basis for that laboratory's report on fiber content. The testimony of this witness is uncontraverted and becomes of importance when considering the testimony of other witnesses as to "casing" of brushes, that is, the placing of horsehair or other adulterants in the center or middle of the fibers and surrounding such (or casing as the term is), with pure hog bristles.

13. Another Commission witness, Reginald T. Rogers, is an officer of a brush manufacturing company, his chief duty being to purchase bristle; has in excess of 35 years experience buying and selling bristles; former Consultant to the U.S. War Production Board in the matter of brushes and bristles; for identifying fibers he uses the "eye and feel test" exclusively and considers same adequate for his purposes and from a practical standpoint, using it constantly in his business.

Upon examination by this method of brush Comm. Ex. No. 1 gave as his opinion that same contains about 10% of horsehair which would adversely affect the quality of the brush. Examination of brush Comm. Ex. No. 2 brought forth the opinion that same contains between 15% and 20% of horsehair, which percentage would cheapen and adversely affect the worth of the brush; that the presence of horsehair in brush Comm. Ex. No. 2 is more readily identified because of the greater quantity than that in Comm. Ex. No. 1.

Testifying generally he said that, with rare exceptions, imported bristles from China or elsewhere do not contain horsehair and in his entire experience of 35 years recalls only one such instance, the adulteration there he estimated to amount to but 2% horsehair; that he did not make use of this shipment to manufacture brushes to be sold as "Pure Bristle"; that a brush manufacturer is at all times in a position to know if his product contains horsehair and there is no way in which horsehair can become accidentally intermingled with bristle, such mixture ensuing only by deliberate intention and action on the part of the producer; that the trade does not recognize that there is an element of impurity, including horsehair, in all stocks or imports of bristles; that there is a definite and well-recognized demand and preference on the part of consumers for "All Bristle" or "Pure Bristle" brushes; that both of the last mentioned designa-

tions used in connection with brushes connote that the fiber content thereof is 100% pure bristle from the pig or swine, and further, it is not difficult from a practical commercial standpoint to manufacture a brush of 100% bristle content and his company is doing so every day; that he does not rely upon the honesty or good faith of his suppliers but makes independent examination of his bristle purchases for manufacturing purposes.

Witness is in charge of his company's operations in the matter of blending bristles and, if examining a brush labeled "All Bristle" which was suspected of containing horsehair, he would look for same in the center of the brush "because it is more easy to hide it there."

14. Another witness on behalf of the Commission was Isidor A. Rubin, a brush maker by trade with (in 1954) 57 years of experience; in 1913 joined in the formation of a brush manufacturing company serving as Vice-President and President thereof and so remains as of the date of testifying; has had extensive experience in the purchasing, vending and dressing of bristles; has given many lectures on the subject of brushes and bristles to schools, paint and sales organizations and has authored published articles; has been called upon by the United States Government to write brush specifications and served as Government consultant on the stockpile bristle program, and in that capacity passed upon the quality of bristle imports by or for the Government; also served as advisory committee-man with the National Production Authority and the National Production Board on the subject of bristles and brushes; for the past 20 years has been Chairman of the Bristle Specifications Committee of the American Brush Manufacturers Association, such Association having widely distributed members throughout the country engaging in all segments of the brush making industry.

Witness uses the "eye and feel" method of fiber identification and testified such method is practically uniform in the trade and adequate for trade purposes.

Upon having exhibited to him for inspection brush Comm. Ex. No. 1 testified the brush "has been cased," (a trade term herein-elsewhere defined); that the brush contains horsehair "anywhere from 10% up" but he could not give a definite percentage.

Contrary to contentions of respondents, witness testified that horsehair is never found intermingled with bristle importations from China or elsewhere, and there is no way in which horsehair can be mixed with bristle, either in the importations or manufacturers, other than by human design and intention; that the trade does not recognize there is an element of impurity, including horsehair, in all stocks or shipments of bristle.

Further, there is a decided consumer demand and preference for brushes composed of pure bristle and that the term "pure bristle"

implies and means that the brush so stamped is composed of 100% pure bristle;

Purchasers of raw or dressed bristle importations do not rely solely on the honesty or good faith of their suppliers but rather upon their own inspection and evaluation of purchases.

Upon an examination of brush Comm. Ex. No. 2 gave as his opinion that same contained horsehair to an extent which cheapened the value and quality of the brush thus producing an inferior product, adversely affecting the "working" quality of the brush.

Cross-examination of the witness, which consisted principally of testing his powers of, or capabilities for, fiber identification by submitting to him various unidentified (to him) samples of fibers other than from Comm. Exs. Nos. 1 or 2 was had, concerning which the witness gave his opinions on such fibers and their places of origin, as to all of which testimony, insofar as the record discloses, witness was not in error.

15. In all of the final results as to percentages of horsehair found to exist in respondents' brushes it will be noted there are variances in the stated percentages found and expressed by the several witnesses. These variances are found to be unavoidable and inherent in the nature of the experiments due to the great number of fibers present in a given brush and the impossibility of counting and evaluating each individual fiber. This lack of uniformity in results has no significant weight in discounting the testimony or findings of any of the witnesses but, on the contrary, had there been any pronounced uniformity of findings such might have constituted a suspicious circumstance worthy to be considered. Such lack of uniformity lends weight to the credibility of the witnesses, the significant end fact being that all of the witnesses testifying at the instance of the Commission having found horsehair to be present in significant, and observable and measurable quantities.

Thereupon, the respondents, to maintain the issue on their part joined, produced certain witnesses who testified as follows:

16. An expert witness Arthur B. Coe, testifying on behalf of the respondents, is chief microscopist of a commercial laboratory located in Hoboken, N.J. with eight years of active experience in the field of fiber identification. This witness conducted an examination of two sample batches of fibers which were transmitted to his company for tests which samples had been extracted from Comm. Exs. Nos. 1 and 2. The result of his examination, as reflected by his testimony and the report which he made thereof, being Respondents Exhibit 7-A-B, discloses the following under the head of "Conclusions:":

As to Exhibit No. 1: "These fibers were established to be not less than 99% hog hair and not more than 1% horsehair," and as to

Exhibit 2: "These fibers were established to be not less than 98% hog hair and not more than 2% horsehair." Appended to the foregoing conclusion is the following note:

The size of each sample and the manner of sampling restrict the accuracy of this report to the hairs tested from each exhibit.

Said note is supplemented by the following printed matter at the foot thereof as follows:

[this] report applies only to samples tested and cannot be considered indicative of the general production of the product or products tested.

On page one of the aforesaid exhibit, at the foot thereof and on the printed form of the Testing Company, likewise appears a notation to the effect that

[this] report applies only to sample tested.

On the printed form of the same company appears (Res. Ex. No. 10), the following:

Our letters and reports apply only to the sample tested and are not necessarily indicative of the qualities of apparently identical or similar products.

From the foregoing quotations it will be observed that the laboratory restricts its findings *solely to the samples tested* and does not undertake to use the percentages arrived at in order to project or extrapolate those percentage figures to the entire mass of fibers from which the samples were extracted and hence the foregoing figures, percentage-wise, are not to be construed that Comm. Ex. No. 1 is 99% hog hair and 1% horsehair and Comm. Ex. No. 2 is 98% hog hair and not more than 2% horsehair.

The foregoing restrictions and limitations are found to render nugatory the findings and conclusions stated in these reports insofar as rendering any probative assistance, pro or con, in the resolution of the issue here involved, that issue being: Do the *brushes* contain horsehair—not the *samples*? In other words, the unwillingness of the laboratory or of the witness to express an opinion as to the quantitative constituents of the *brushes*, and restricting an opinion to the *samples* is of no value or assistance. It will be noted in this connection that the witnesses called by the Commission willingly gave their opinions, percentage-wise, as to the finished brushes on the basis of their tests of the samples. This is significant in the light of other facts, herein found to be true, to the effect that these samples of bristle that had been submitted to this laboratory were extracted from the outer or peripheral rows of fibers from Comm. Exs. Nos. 1 and 2; that such were not obtained by opening the ferrule of each of the two brushes and extracting therefrom representative samples through the brush which would give a more comprehensive idea and

accurate finding of the true fiber composition of these brushes which method of sampling, it will be noted, was the method of sample extractions by Commission witnesses Hardy and Hourihan. This extraction of peripheral fibers becomes of further importance in the light of certain other testimony to the effect that where "casing" is practiced in brush production the outside or peripheral rows of fibers often consist of true hog bristle and where horsehair or other fiber is used as an adulterant it more often appears in the center or middle longitudinal section of the brush because it is thus more easily hidden and less obvious upon casual or macroscopic examination.

This witness, who was the author and proponent of the aforesaid report, Res. Ex. 7-A and B, complained that one of the most reliable aids to the identification of true bristle is the examination of the base end of the fiber whereto is attached a root which is retained by the manner in which the hair is removed from the flesh of the hog and that, because of the manner of extraction of the samples by him examined, such roots have been cut off at the ferrule edge leaving the root or foot end imbedded in the mastic setting within the ferrule in which the hairs are imbedded; that he was thus deprived of a valuable indicia of identification and thus was restricted to determination of fiber characteristics as disclosed by flag, taper and microscopic technique. The witness testified that his laboratory set up its microscopic procedure on the recommendation of the National Bureau of Standards:

Wherein we were advised that the Laboratory leaned rather heavily on the study of cross-sections of the fiber, in order to determine its identity.

Pursuing this method, witness made cross-sectional cuts of the various fibers in the two samples, one of which disclosed "characteristics resembling those of other than hog hair."

Supplementing the aforesaid *modus operandi*, the witness made testings of certain fibers from each of the groups aforesaid for the purpose of studying the epidermal characteristics, or scales, which procedure consists of procuring an impression of the fiber by impressing same longitudinally, in the presence of sufficient heat, on a thermo plastic material, the heat causing the plastic material to soften which, upon hardening, permits the removal of the fiber and retention of the surface characteristics presented by the scale. This is a supplementary examination used for corroboration of the findings established by the microscopic procedures hereinabove delineated.

At no place in his testimony did this witness undertake to state quantitatively, the percentages of horsehair or hog bristle extant in Comm. Exs. Nos. 1 and 2, nor did he undertake to say that these

brushes were each 100% hog bristle, and likewise did not testify, based upon his laboratory findings, that Comm. Ex. No. 1 consisted of 99% hog hair and 1% horsehair or that Comm. Ex. No. 2, consisted of 98% hog hair and 2% horsehair.

Cross examination of this witness developed that, despite the fact he testified in chief that he had made many hundreds of tests to determine fiber identification, it is significant to note that the witness must have felt some insecurity in the validity of his procedural processes theretofore used by him because, at his instigation, a request was sent by his Laboratory to the United States Department of Commerce, National Bureau of Standards, the reply to which request seeking information on procedural steps to differentiate hog bristle from horse hair, appearing in these proceedings as Comm. Ex. No. 19. That reply so clearly states the position of the Bureau of Standards in this matter that excerpts therefrom are considered worthy of quoting *in extenso*:

This is in answer to your letter of May 17, [1950] requesting a procedure for differentiating hog bristles from horsehair.

The procedure used in this laboratory leans heavily on the study of cross-sections of the fiber. These are readily prepared by means of the Hardy microtome. The distribution of the pigment granules in the cross-section is one of the best indicators of the origin of the fiber. Photomicrographs and descriptions that are of assistance in this aspect of the microscopical study will be found in the "Textile Fiber Atlas" by Von Bergen and Krauss. Evidence of dyeing can also be detected in cross-section.

Flags are of secondary importance in this analysis. Many bristles will be found to be without flags so that their lack is not a positive means of identification. Synthetic flags can be recognized after some experience has been acquired and the use of known comparison samples of bristle and flagged horsehair is practically a necessity for this work.

There do not appear to be any publications dealing primarily with the analysis of horsehair and bristle.

The foregoing states the official position of the Bureau of Standards regarding the validity of the cross-sectional method of pigment pattern identification.

The complaint in this case, it will be recalled, bears date September 27, 1950, and indications from the record are, that this matter was under investigation by the Commission for many months prior to the issuance of the complaint and this fact was known to the respondents.

The original examination of this witness went into great detail concerning his tests and likewise tests of other fibers, all of which this examiner does not consider to be relative to the issue herein, as for example the identification of other animal fibers, such as the Cashmere goat and hog bristles selected from other sources by the

respondents and submitted to the testing laboratory of which this witness was an employee and which other fibers were the subject of independent reports by this witness appearing of record in this proceeding. To all such extraneous and inapposite testimony this hearing examiner accords no evidential weight in determining the issue here framed.

As one of his criteria the witness used the microscopic pigmentation pattern of identification, having testified, (which testimony corroborates that of other witnesses in this behalf), that in the true hog bristle the main concentration of pigment appears in the medula or central portion of the bristle gradually growing less dense as it approaches the periphery.

The foregoing is a résumé of the testimony of this witness prior to the Order of Remand of this matter to the examiner, in which order the Commission stated that the remand was made necessary because of conflict in [scientific] testimony.

Subsequent to the remand the witness was again recalled by respondents for the purpose of attacking the validity of the testimony of certain witnesses testifying at the instance of the Commission. Pursuing this tenor, the witness gave his opinion as to the detailed procedure necessary to be pursued by the witness appearing on behalf of the Commission before they would be in position to express any opinion on the quantitative appraisal of the presence of horsehair and bristle in a particular brush and concluding that such would be impossible, because irregular distribution of horsehair and fiber appearing in a restricted analysis of a sample thereof, would be erroneous and inconclusive; that it would be necessary to take apart all of the thousands of fibers in each brush and separately arrive at a determination of each fiber. In this connection, as hereinabove pointed out, this witness refrained from expressing a quantitative appraisal of the entire brush on the basis of his examination of samples but the witnesses on behalf of the Commission did not hesitate to do so under similar circumstances. He also attacked the validity of the scientific tests performed by Commission witnesses on the grounds, among others, that such witnesses did not avail themselves of various other tests known and which would tend to corroborate their findings. Among these, what might be called auxiliary tests, he cited the scale test, above described, of which this witness availed himself in making his own determinations, as well also microscopic examinations for taper, flag, sheen, elasticity, etc. These criticisms have been carefully considered and it is found that they are of insufficient weight to invalidate the testimony of the Commission's scientific witnesses on many grounds, among such being the microphotographs of cross-

sections of fiber appearing of record; the disinterestedness of the witnesses in the outcome of this matter; their official experience and connections; their uniform testimony that to them the cross-sectional and other methods of identification used by them were the best and most accurate available and their unhesitancy to express an opinion percentagewise on the presence of horsehair and bristle where such an admixture existed.

The witness further went on to say that any attempted expression of quantitative analysis, no matter how carefully done, would have to be subject to some sort of tolerant figure. This statement, because of the practical difficulties inherent in separating many thousands of bristles and appraising each one on its merits has been tacitly accepted by each of the Commission's scientific witnesses, one witness in particular qualifying her expressed quantitative analysis with a plus or minus 10% tolerance and stating, in connection therewith, that such was the uniform practice allowed and advocated by the National Bureau of Standards in tests of this character.

This witness, for some reason rather obscure to the hearing examiner, undertook to specifically attack the validity of the pigmentation pattern process despite the fact that he, himself, had made use of this method according to his own testimony and report on his analysis and, as illustrative of his criticism, introduced a microphotograph of six cross-sectional cuts of bristle which he had personally clipped from the belly of a live pig and hence was aware of the unquestioned source. Why he took the specimens from the belly portion of the pig, which is usually curly and known as pig wool, not customarily used in the manufacture of paint brushes, and which fact was known to the witness because he had testified in this case many months prior to the facts now related, and the bristles submitted to him from Comm. Exs. Nos. 1 and 2 were all straight and all approximately four inches in length, when he could, and should have, had he wished to draw a valid comparison, have extracted the bristles from the jowls, neck or back of the pig which he then had before him, is not explained of record.

When he undertook his laboratory tests of these bristles he related that the cross-sections were secured by use of the Hardy microtome and when he was questioned as to the thickness of the individual slices expressed in microns said that it was impossible to testify accurately, that his only desire was to slice the bristles thin enough to procure transparency for microscopical examination to observe the pigmentation pattern and could not say whether the thickness was greater or lesser than 15 microns. When his attention was called to the fact that the microphotograph disclosed an almost complete opacity which precluded an appraisal of pigmen-

tation pattern, he was unable to say that this was due to abnormal thickness of cuts. Therefore no significance can be attached to the witness' testimony which would in any wise detract from the validity of the pigmentation pattern method of identification, especially in view of the fact that there are of record herein some 29 excellent microphotographs of cross-sections introduced and fully explained by a Commission witness, all of which photographs show, with singular clarity, the pigmentation pattern.

On the basis of the above criticisms by the witness he gave as his opinion that he does not believe that the use of the cross-sectional examination is the only criterion to the exclusion of other methods known to have proved equal or more valid than the information obtained from the cross-section only. Counsel for the Commission has not contended that the cross-sectional pigmentation method is the sole or exclusive method of fiber identification, despite the fact that two of the Commission experts, because of their familiarity with, and belief in, the effectiveness of this method, used it exclusively and based their opinions thereon. On the contrary, this type of experiment was used as corroborative only of the testimony of other witnesses, some of whom used the scale method, the "eye and feel tests", and experts of many years standing in the trade who, because of their empirical knowledge, were deemed well qualified. In other words, these laboratory tests were corroborative and not all-sufficient or exclusionary, and were used only as any scientific method would be used as, for example, fingerprinting, blood tests, analysis of hair and fingernail clippings, scientific ink and paint analyses, handwriting and the like, which types of testimony are commonly accepted by all the courts in the land and accord to such evidence its proper weight, dependent upon the character and qualifications of the witnesses testifying, the reasonableness of the evidence and protocol set up for the tests themselves, as well whether or not the results sought are particularly scientific in nature and not tainted by preconceived ideas of the end results to be attained. There is no tangible and probative evidence in this case to indicate, much less to prove, that any of the scientific experiments used by the witnesses for the Commission are subject to such a challenge.

17. Respondent's witness Kramer, Chief chemist of New York Testing Laboratories, after giving his qualifications as an expert, testified he received samples of fibers from the Federal Trade Commission, (sent at the instance of the respondents), which had been extracted from brushes Comm. Exs. 1 and 2, for purpose of analysis or assay; that he first examined the samples visually, taking into account the taper and flag, separating them into two separate piles

consisting of those readily identifiable as bristle and those which were questionable; that in order to verify those identified by visual examination as bristle such were further subjected to longitudinal microscopical examination (not cross-sectioned), by individual fibers being placed on a slide and covered with a 10% solution of sodium hydrochloride, then subjected to heat so that the fiber became swollen and the internal structure visible under the scope.

This method furnished a quick means of identification i.e. (and according to the witness), a dark line running down the center of the fiber was indicative of bristle, and two dark lines running down the margins of the shaft indicated same to be horsehair.

The witness at this point confirmed the formal report on his tests, (as disclosed by Rx. No. 3), which showed samples from Comm. Exs. Nos. 1 and 2 to be composed of:

No. 1—Bristle, 99.4%: Horsehair 0.6%.

No. 2—Bristle, 99.4%: Horsehair 0.6%.

It will be observed that this test is not of the cross-sectional pigmentation pattern variety, as used by certain Commission witnesses, but tends to strongly confirm the cross-sectional method by developing the mainstay of the latter method of postulating the working hypothesis that true bristle evidences a concentration of pigment in the medulla, while horsehair, under a similar test, exhibits its pigment concentration in the form of two dark lines along the margins of the shaft without pigmentation in the center.

In view of the testimony of all of the witnesses for the Commission to the effect that Comm. Exs. Nos. 1 and 2 contained greatly in excess of the percentages of horsehair actually present, compared with the percentages found by this witness, it is most singular and inexplicable that the witness was able to find exactly the same distribution of bristle and horsehair in both exhibits, down to one-tenth of one percent, even in such small samples as tested by him.

The results, as above, reported in writing by this witness contains the following printed addendum:

Report on sample by client applies only to sample. Report on samples by us applies only to lot sampled.

The witness expressed no opinion on the fiber contents of *brushes*, Comm. Exs. Nos. 1 and 2, as such.

On the basis of the above résumé and reasoning, the testimony of this witness is found to be of no value to a determination of the sole issue here involved.

18. Respondent's witness, Gelman, is a bristle merchant who was called upon by respondents to extract samples of reputedly South American, Baltic, Indian and Chinese bristles from shipments in

the possession and stock on hand of respondents which samples he mailed to a testing laboratory. These bristles form the basis for testimony of another witness for respondents; that witness knows the respondents and that his firm is a supplier of bristles to the respondents.

Witness, although undoubtedly conversant with the subject of bristles, was not qualified as an expert and was not asked to express an opinion on the fiber content of the brushes herein, although he did testify he would be able to recognize the presence of a 10% or larger quantity of horsehair in a brush, but that as little as 5% would be difficult.

19. Another witness for respondents, Firestone, is engaged in the dressing and selling of bristles; so engaged since 1932 in China and later in this country; testified to the possibility of foreign substances being present in batches of bristle purchased by him while operating in China but further testified that he used every means at his disposal to see to it that the bristles, when exported, were free of all adulterants although he was "always suspicious" of his Chinese suppliers and it is possible that some shipments got through which contained adulterants despite his vigilance: acknowledged that the responsibility of excluding foreign substances was his and that the presence of such would adversely affect his business reputation and good will with his customers.

Witness expressed no opinion on the fiber content of brushes here under inquiry.

20. Another witness for respondents, Stryer, entered the bristle business in China in 1938 as a buyer for a foreign firm, remaining there for fourteen years, the last four thereof as a brush manufacturer; now a brush salesman on his own account, purchasing and reselling various types of brushes, including paint brushes.

This witness was not qualified as an expert on bristle but rather his testimony was devoted to economic conditions respecting bristles before and during the Korean incident, including prices, artificial weighting, speculating in bristles by amateurs in the field, wilful adulteration of bristles with foreign fibers by the producers thereof, and kindred matters totally unrelated to the single issue herein, wherefore this testimony is disregarded because not pertinent to the issue.

21. Another witness for respondents, Schlachter, is a brush maker employee of respondents who was introduced by them in an attempt to demonstrate the economic infeasibility, because of excessive labor cost, of manufacturing "cased" brushes, (which he described as placing one type of fiber or bristle in the middle of the brush and sur-

rounding it with another type of bristle or fiber); that he has had experience in making up both "cased" and "uncased" brushes.

This testimony is considered of importance because, coming from respondents, it supports the testimony of Commission witnesses who testified on the subject of "casing" and gives great weight to their testimony as to the different results which might be expected upon analysis depending upon the location or portion of the brush from which sample fibers are extracted, that is, if fibers from a cased brush with bristle on the outside and horsehair admixture in the center, then samples taken from the outside, would assay 100% bristle, but, were the sample taken by cutting through the brush, rather than around it, one would get a fairly representative specimen.

22. Another witness for respondents, Kulasky, has been in the bristle processing business for seventeen years; also buys and sells bristle; makes use of the "eye and feel" method of bristle identification by which test he can recognize the difference between bristle and horsehair; that this method is universally made use of in the trade and he has never known of the use of a microscope for bristle identification.

Upon examining the two brushes, Comm. Exs. Nos. 1 and 2, gave as his opinion that both were pure bristle brushes, although, as he testified on cross-examination, he did not examine all of the fibers, contenting himself merely with the general "feel" of the brush and saying: "If there is horsehair, it strikes you just looking at it."

Witness has been, for 14 or 15 years, a supplier of bristles, mixed and unmixed, to respondent Manhattan.

23. Another witness for respondents, Sztein, is a bristle dresser and dealer in bristle of thirty years experience, using the "eye and feel" method for bristle identification. The burden of this witness' testimony is two-fold: First: That in manufactured brushes containing up to 8% to 10% horsehair one could not tell whether the brush was "Pure Bristle" or not, and, Second: That in the course of dressing "some sort of hair" is always found and that this percentage would be from one-half to one percent. He admitted he had never examined a brush with a view to determining the respective percentages of bristle and horsehair.

He expressed no opinion concerning the fiber content of Comm. Exs. Nos. 1 and 2.

24. Supplementing the testimony of certain of respondents witnesses there are of record three separate "reports of tests," being Respondents Exhibits Nos. 3 and 5, made by the New York Testing Laboratories, and No. 10, made by the United States Testing Company.

In Res. Ex. No. 3 the New York Laboratories reported its analysis of samples of brushes, Comm. Exs. Nos. 1 and 2 to be each composed of bristle 99.4% and horsehair 0.6%. A printed notice at the foot of the report states:

Report on sample by client applies only to sample. Report on samples by us applies only to lot sampled.

Obviously the report, expressing no results of analysis relateable to the fiber contents of the brushes proper and as entities, is of no material assistance in determining the issue herein.

In Res. Ex. No. 5 the New York Laboratories undertook to report on analyses of five various samples of bristle reputedly selected from the bristle stocks of respondents, (not samples from Comm. Exs. Nos. 1 and 2), and which analyses were used by respondents ostensibly and presumably for the purpose of showing a trace of horsehair or foreign substance in all bristle stocks owned by respondents. This analysis showed the *percentages of adulterants* present ranged within 0.2% to 1% of the *percentages of adulterants* reported present in Comm. Exs. 1 and 2, as reported in Res. Ex. No. 3, above. This report was also, by its terms, limited to the samples submitted.

Res. Ex. No. 10, made by the United States Testing Company, were reports on tests of five samples of bristles selected from the respondents' stock. This was intended, presumably, although not stated, to be a duplication or check on a similar test of similar samples by the New York Laboratories represented by Res. Ex. No. 5, above. The bristles examined were not taken from Comm. Exs. Nos. 1 and 2.

At the foot of this report appears:

Our letters and reports apply only to the sample tested and are not necessarily indicative of the qualities of apparently identical or similar products.

All of respondents' exhibits Nos. 3, 5 and 10 are without probative effect to disprove the affirmative testimony in support of the charges of the complaint and are disregarded.

25. It is found, as a fact, that respondents have caused their paint and varnish brushes to be labeled "Pure Bristle", notwithstanding the same have been substantially and significantly adulterated by means of the use of horsehair, and that the charges have been sustained by, and in accordance with, the reliable, probative and substantial evidence of records.

26. It is found there is a decided preference on the part of members of the purchasing and consuming public for paint and varnish brushes composed entirely and exclusively of genuine bristle.

CONCLUSIONS

1. In arriving at the findings and conclusions necessary to support an order to cease and desist special consideration has been accorded to recent decisions of this Commission,⁴ the complaints in both of which matters were dismissed by the Commission on the principal grounds that the scientific testimony adduced on behalf of the contesting parties was irreconcilable and nonconclusive of the issues, and that the testimony of consumer or lay witnesses adduced by the respondents, in conjunction with respondent's own scientific testimony, was sufficient to overcome the charges of the complaint and presented a good and adequate basis for a finding that the Commission had failed to sustain the burden of proof cast upon it under the provisions of Section 7(c) of the Administrative Procedure Act. It is concluded that the evidence adduced by the Commission in the instant case is not subject to such infirmities for the following reasons:

The, what may be truly called scientific testimony, offered on behalf of the Commission by witnesses Newman, Hourihan, and Hardy, all being disinterested witnesses and motivated solely by a desire to report truly upon their individual experiments as hereinabove found, coupled with what may be termed "quasi expert" opinions given upon the basis of empirical knowledge and experience by those witnesses availing of the "see and feel tests," persuade this Examiner in his finding and conclusion that the burden of proof in support of the allegations of the complaint has been adequately borne. The scientific tests on behalf of respondents by the witness Coe, and the testimony and reasoning of that witness wherein he attempts to attack the validity of the cross-sectional pigmentation tests, is found to be without merit or weight and that the laboratory report of this witness is of no evidential value whatsoever in determining the issue joined in this matter because of the specific findings of the witness to the effect that the results of his experiments are confined to the samples examined under laboratory conditions and that such results are not to be projected or extrapolated to the entire fiber content of the brushes. Concerning the testimony of the "eye and feel" experts adduced on behalf of the respondents, for various reasons not necessary to be recited, this Examiner was not particularly impressed.

2. It is concluded that the proof in support of the charges of the complaint is overwhelming and that the evidence in opposition presents no substantial conflict which would bring this matter within

⁴ F.T.C. v. Pioneers, Inc., Docket No. 6190 and F.T.C. v. Courant, Docket No. 5867.

the scope of the Commission decisions in the Courant and Pioneer cases cited *supra*. It was in order to demonstrate the basis for this conclusion that the Examiner felt constrained to set forth a fairly replete analysis of the pertinent testimony pro and con on the single issue of fiber identification, enunciated in the case of Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474, which opinion, although quite lengthy, is aptly epitomized by editorial comment appearing in Vol. 95, No. 7. Supreme Court Advance Opinions, as follows:

The essence of Mr. Justice Frankfurter's opinion, to this extent concurred in by all the other Justices, is that the Administrative Procedure Act and the Taft-Hartley Act direct that reviewing courts must now assume more responsibility for the reasonableness and fairness of decisions of the National Labor Relations Board than some courts have shown in the past. In particular, it was held that, in determining whether an order of the Board is supported by substantial evidence, the court should take into account whatever in the record fairly detracts from the weight of the evidence, and that the court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it, *without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.* (Italic supplied.)

Pursuing the same subject, it will be observed that the Commission has introduced three scientific witnesses and several "see and feel" experts, all of whom are unanimous in declaring the presence of horsehair in both brushes. The respondents have produced but two scientific experts one of whose testimony was ostensibly directed to the objective of disparaging the validity of the theories and tests pursued by the Commission experts. The respondents, in addition to the foregoing, produced the testimony of two witnesses of the "see and feel" school whose testimony did not, in the opinion of this Hearing Examiner, have the effect of overriding the weight to be accorded to the testimony of Commission witnesses, wherefore it is concluded that the Commission has amply sustained the burden of proof in the matter of production of "reliable, probative, and substantial evidence" cast upon it by the provisions of Section 7(c) of the Administrative Procedure Act.

3. Respondents contend that it is almost impossible to produce a pure bristle brush without the intrusion of horsehair. It is concluded that this contention is without merit: First, because of the testimony of several well informed witnesses that it is not difficult or impossible to produce a 100% pure bristle brush, and this they were doing in the ordinary everyday course of their production processes: Second, the testimony of several witnesses, long in the industry, that the presence of extraneous or foreign fibers among importations of bristles is not, and never has been in their experi-

ence, a problem to the industry and: Lastly, the testimony of several witnesses to the effect that horsehair, when found among bristles in the raw, dressed, or manufactured state, are there solely by reason of human design and intention.

4. It is concluded that it is the duty of respondents to see to it, at all hazards, by close inspection or careful selection, (only spot checks were made of large bristle importations or purchases), that their products, offered to the trade or to the public, are as represented. This they have not done, their misrepresentations resulting in injury to the public and to their competitors.

5. Stress was placed by the respondents, in the examination of their own and opposing witnesses, upon the impracticability, for use in the trade, of microscopical examination of bristles, either by the cross-sectional pigmentation pattern method or for taper, flags, surface scale, etc. It is concluded that no weight should be given this contention because, first, no one, so far as this record discloses, ever advocated the adoption of microscopic examination for use by the trade and, second, such examination was conducted by Commission witnesses purely as a scientific procedure for the more certain identification of the fibers involved, much along the lines of fingerprinting, blood analysis, urinalysis and kindred procedures, the results of which are accepted as competent evidence by all the courts in the land in appropriate instances.

6. Much testimony was introduced by the respondents concerning comparative prices of bristle and horsehair in various grades and lengths, the announced object being to sustain the contentions of respondents that it would work to their economic disadvantage to use horsehair as an adulterant. To this type of testimony the Examiner accords no weight or consideration because of the narrowness of the issue herein as above pointed out and, further, that the economic advantages or disadvantages accruing to respondents by their use of horsehair is of no moment under the charges of the complaint.

7. Respondents have attempted, during the course of the proceedings, and in their request for Proposed Findings Nos. 12 and 13, to give some color of respectability to the term "commercially pure" as applied to the fiber contents of brushes which have been adulterated or debased by the presence of horsehair or other foreign substances, contending that:

The words "Pure Bristle" intended to convey to the public that the material of which the brush was composed consists of material accepted *by the trade* to be "commercially pure." (Italic supplied.)

This may be true, and *the trade* may not be deceived because of its knowledge and experience, but we are not here concerned with the *trade*, which probably needs no protection on fiber identifica-

tion, but rather with the protection of the great body of the consuming public. In support of this conclusion certain language from the opinion of Mr. Justice Brandeis is quoted in the case of *F.T.C. v. Winsted Hosiery Co.*, (258 U.S. 483):

By means of the labels and brands of the Winsted Company bearing such words part of the public is misled into selling or into buying as all-wool underwear which in fact is in large part cotton. And these brands and labels tend to aid and encourage the representations of unscrupulous retailers and their salesmen, who knowingly sell to their customers as all-wool underwear which is largely composed of cotton.

In that case, as here, it was contended that the trade is not deceived by use of the label indicating the product to be "all wool"; that there was no unfair competition for which another manufacturer could maintain a suit; and that even if consumers are misled because they do not understand the trade signification of the label, or because some retailers deliberately deceive them as to its meaning, the result is in no way legally connected with unfair competition. Dealing with this attempted defense the Court said:

* * * The labels in question are literally false. * * * All are, as the Commission found, calculated to deceive and do in fact deceive a substantial portion of the purchasing public. That deception is due primarily to the words of the labels and not to deliberate deception by the retailers from whom the consumer purchased. * * * The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. And they show also that the practice constitutes an unfair method of competition as against manufacturers of all-wool knit underwear and as against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the truthfully marked goods.

Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived. The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product. That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.

It is concluded that nothing appearing in this record gives credence or support to the use or recognition of this term and, in fact, based upon the credible testimony of record to the effect that 100% pure bristle brushes are being continually produced, and the further fact that the Rules for the Industry heretofore considered make no allowance for tolerances for extraneous fibers, as well also the provisions of Paragraph 5 of the Federal Trade Commission

Act prohibiting false and misleading representations, all unite in forcing the inescapable conclusion that there is no such thing as a "commercially pure" bristle brush. Webster defines the word "pure" as—"Separate from all heterogeneous or extraneous matter; without alloy, stain or taint; clear; unmixed; free from what vitiates, weakens or pollutes."

8. The Federal Trade Commission has jurisdiction over the parties respondent and over the subject matter hereof, and this proceeding is in the public interest.

9. The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and of respondents' 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.

ORDER

It is ordered, That the respondents, Manhattan Brush Company, Inc., and Robert S. Gillman and Norman B. Bloom, individually, and as officers of Manhattan Brush Company, Inc., and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the sale, offering for sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product paint brushes, do forthwith cease and desist from:

1. Using the words "Pure Bristle" or "bristle," or any other word or term of similar import or meaning, either alone or in connection with other words, to designate, describe or refer to any product which is not composed wholly of bristle of the hog or swine: Provided, however, that in the case of a product composed in part of bristle and in part of horsehair or other fibers, the word bristle may be used as descriptive of such fiber content if there are used in immediate conjunction therewith, in letters of equal conspicuousness, words truthfully describing, in the order of their predominance, all constituent materials.

2. Representing in any manner that any of respondents' brushes contain bristle in greater quantity than is actually the case.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The respondents manufacture and distribute paint brushes in commerce, some of which have been stamped or marked with the words "Pure Bristle." In the initial decision, the substitute hearing examiner held that certain of the brushes so marked have contained

substantial quantities of horsehair. Bristle is the coarse hair of the hog or swine. Because no other fiber is as efficient and satisfactory for applying paint and varnish, there is a wide public preference for brushes composed exclusively of bristle.

In their appeal, the respondents challenge the initial decision's findings that they have misrepresented their brushes' fiber content as contrary to the weight of the evidence and as erroneously based on contradictory scientific evidence. The evidence presented in support of the allegations of the complaint included the testimony of three fiber technologists relating to their separately conducted laboratory studies and tests of fiber samples from the respondents' brushes and the testimony of two trade witnesses who based their opinions on the "eye and feel" method of examination, a procedure used in the trade. On the basis of their examinations, they testified variously to the effect that the exhibit brushes contained 10% or more of horsehair or contained substantial quantities of horsehair.

The laboratory procedures used in differentiating fibers by two of those technologists placed emphasis on pigmentation patterns observed in cross-sections of the fibers. On the other hand, the third scientific witness relied primarily on another classification method. This circumstance, however, corroborates rather than detracts from the conclusiveness of their scientific studies which resulted in substantially similar though not identical test findings. That two of them deemed their respective but differing laboratory procedures to be more reliable than other scientific methods does not render the results afforded by the other's testing method contradictory or defective. Both were well qualified to conduct the scientific studies engaged in by them; and the above-mentioned trade witnesses similarly appear well qualified by their experience to express opinions with respect to the fiber content of brushes. We also have carefully considered the evidence presented by the respondents, including the testimony of two fiber technologists who expressed views that the sample fibers examined by them contained only small quantities of horsehair ranging from 6/10 of 1% up to 2%. We concur in the hearing examiner's conclusions that the evidence presented in support of the complaint clearly outweighs the evidence submitted by the respondents and supports informed determinations that the brushes sold by the respondents as pure bristle have contained substantial quantities of horsehair.

Respondents also contend that a requirement that brushes sold as pure bristle be in fact so composed would result in hardship to them and would be incapable of enforcement. The appeal cites in this connection that horsehair is often found intermingled in shipments of bristle from the Orient and that the "eye and feel" test custom-

arily employed in the trade is not a reliable and precise method for distinguishing fibers. Respondents also state that their brushes are "commercially pure" and that a tolerance or allowance for the presence of horsehair in brushes accordingly is justified by the record and should be permitted. As noted by the hearing examiner, however, credible evidence was received indicative that it is not impossible or difficult for manufacturers to produce a 100% bristle brush and that such brushes are continuously produced in the industry. It is evident also that the statement "pure bristle" as used by the respondents can have but one meaning to the consuming public, namely, that the fiber content of the brushes so designated are composed solely of bristle. Since respondents' brushes have contained extraneous fibers, the public interest requires issuance of an order forbidding the respondents from misrepresenting the fiber content of their brushes in the future.

The form of order to cease and desist contained in the initial decision would make it mandatory for the respondents to stamp or label brushes containing mixed fibers with the respective percentages of each of the constituent materials. For reasons stated in our opinion issued *In the Matter of Abbey Brush Corporation*, Docket No. 5802 (decided April 8, 1957), we think the provision of the order requiring quantitative identification of constituent fibers lacks sound legal basis and is unwarranted. Our order which is issuing herewith accordingly provides for appropriate modification of the order contained in the initial decision.

Inasmuch as the findings and conclusions contained in the initial decision are free from substantial error, the respondents' appeal is being denied. With the order to cease and desist modified as noted above, we are adopting the initial decision as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the substitute hearing examiner and upon briefs and oral argument of counsel; and the Commission having determined, for reasons stated in its accompanying opinion, that said initial decision should be modified:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

ORDER

It is ordered, That the respondents, Manhattan Brush Company, Inc., and Robert S. Gillman and Norman B. Bloom, individually,

Order

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and as officers of Manhattan Brush Company, Inc., and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the sale, offering for sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' product paint brushes, do forthwith cease and desist from:

1. Using the words "Pure Bristle" or "bristle," or any other word or term of similar import or meaning, either alone or in connection with other words, to designate, describe or refer to any product which is not composed wholly of bristle of the hog or swine: Provided, however, that in the case of a product composed in part of bristle and in part of horsehair or other fibers, the word bristle may be used as descriptive of such fiber content if there are used in immediate conjunction therewith, in letters of equal conspicuousness, words truthfully describing, in the order of their predominance, all constituent materials.

2. Representing in any manner that any of respondents' brushes contain bristle in greater quantity than is actually the case.

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

It is further ordered, That the initial decision of the substitute hearing examiner, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

Decision

IN THE MATTER OF
DICTOGRAPH PRODUCTS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6712. Complaint, Jan. 18, 1957—Decision, July 3, 1957

Consent order requiring a manufacturer in Jamaica, Long Island, N.Y., and the corporate purchaser in Newark, N.J., of its entire production of home fire alarm systems for sale to the public through franchise dealers, whose salesmen gave demonstrations in homes of prospects, to cease the acts and representations set forth in the order below, engaged in by salesmen; and to cease supplying to said franchise dealers literature upon which they were based.

Mr. Edward F. Downs and *Mr. Garland S. Ferguson*, supporting the complaint.

Mr. Milton Handler, of New York City, for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above named respondents on January 18, 1957, charging them with violation of the Federal Trade Commission Act as set forth in said complaint. After issuance and service of the complaint all respondents on May 8, 1957 entered into an agreement with counsel supporting the complaint for a consent order to cease and desist from the practices complained of, which agreement purports to dispose of all the issues in this proceeding without hearing. This agreement has been duly approved by the Assistant Director and the Director of the Bureau of Litigation and has been submitted to the undersigned, heretofore designated to act as hearing examiner herein, for his consideration in accordance with Rule 3.25 of the Rules of Practice of the Commission.

Respondents in the aforesaid agreement have admitted all the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of the jurisdictional facts had been duly made in accordance with such allegations. Said agreement provides further that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of