

IN THE MATTER OF

JAMES HIGGINS ET AL. TRADING AS
B & H DISTRIBUTING CO. ET AL.

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

Docket 7940. Complaint, June 14, 1960—Decision, Oct. 21, 1960

Consent order requiring Detroit, Mich., distributors of phonograph records to cease paying concealed payola to disc jockeys and other personnel of television and radio stations to induce frequent playing of their records in order to increase sales.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., and Betty Alexander, General Manager, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents James Higgins and Robert West are copartners trading and doing business as B & H Distributing Co. with their principal office and place of business located at 3959 Woodward Avenue, in the City of Detroit, State of Michigan.

Respondent Betty Alexander is General Manager of said business. Her address is the same as that of the other respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the distribution, offering for sale, and sale, of phonograph records to various retail outlets.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said records, when sold, to be shipped from the State of Michigan to purchasers thereof located in another state and maintain, and at all times mentioned herein have maintained, a course of trade in said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of phonograph records.

PAR. 5. After World War II when TV and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 times a day, substantially increase the sales of those records so "exposed." Some record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disburs-

ing "payola" to individuals authorized to select and "expose" records for both radio and TV programs.

"Payola," among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication, represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record's merits or its general popularity with the public, whereas, in truth and in fact, one of the principal reasons or motivations guaranteeing the record's "exposure" is the "payola" payoff.

PAR. 6. In the course and conduct of their business, in commerce, during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone or with certain unnamed record distributors negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents by participating individually or in a joint effort with certain collaborating record distributors have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selection of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they might otherwise not have purchased and also to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 7. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the manufacture, sale or distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and injury has thereby been done and may continue to be done to competition in commerce.

PAR. 8. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Harold A. Kennedy and *Mr. Arthur Wolter, Jr.*, for the Commission.

Mr. Burton L. Borden, of Detroit, Mich., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the distribution, offering for sale, and sale of phonograph records to various retail outlets, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director, Associate Director and Acting Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

The agreement states that individual respondents James Higgins and Robert West are copartners trading and doing business as B & H Distributing Co., with their principal office and place of business located at 3959 Woodward Avenue, Detroit, Michigan, and that respondents Betty Alexander is General Manager of said business, her address being the same as that of the other respondents.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint, and agree that

Order

57 F.T.C.

the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the Hearing Examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The Hearing Examiner has determined that the aforesaid agreement containing the consent order to cease and desist provides for an appropriate disposition of this proceeding in the public interest, and such agreement is hereby accepted. Therefore,

It is ordered, That respondents James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., or under any other name, and Betty Alexander, General Manager, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the

954

Complaint

broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" with the meaning of this order, by any employee of a radio or television broadcasting station; or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed to the listening public at the time the record is played that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of October 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., and Betty Alexander, General Manager, 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.

IN THE MATTER OF

DANIEL D. WEINSTEIN ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 7956. Complaint, June 16, 1960—Decision, Oct. 21, 1960*

Consent order requiring sellers of corneal contact lenses in Oakland, Calif., to cease advertising falsely that their contact lenses could be worn successfully by all in need of visual correction and without discomfort, would correct all defects in vision and protect the eye, could be worn for a lifetime without change of prescription, etc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading

954

Complaint

broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" with the meaning of this order, by any employee of a radio or television broadcasting station; or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed to the listening public at the time the record is played that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of October 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents James Higgins and Robert West, individually and as copartners, trading and doing business as B & H Distributing Co., and Betty Alexander, General Manager, 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.

IN THE MATTER OF

DANIEL D. WEINSTEIN ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 7956. Complaint, June 16, 1960—Decision, Oct. 21, 1960*

Consent order requiring sellers of corneal contact lenses in Oakland, Calif., to cease advertising falsely that their contact lenses could be worn successfully by all in need of visual correction and without discomfort, would correct all defects in vision and protect the eye, could be worn for a lifetime without change of prescription, etc.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading

Complaint

57 F.T.C.

under their own names, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Daniel D. Weinstein and Irwin R. Title are individuals trading under their own names as copartners with their principal offices and place of business located at 1212 Broadway, Suite 538, Oakland 12, California.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising and in the sale to the public of corneal contact lenses known as "Micro-Thin" and "Star-Vault" contact lenses. Contact lenses are designed to correct errors and deficiencies in the vision of the wearer and are devices as "device" is defined in the Federal Trade Commission Act.

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

Among and typical of the statements contained in advertisements disseminated and caused to be disseminated, as aforesaid, are the following:

Any one who wears glasses, no matter how slight the correction, can wear contact lenses.

See—the new invisible, comfortable way without glasses.

* * * designed for comfortable all-day wear.

* * * freedom from old-fashioned spectacles—with all new Micro-Thin Contact Lenses.

You too can take off your glasses and see with invisible contact lenses.

Completely grooved Micro-Thins are specially designed to allow normal tear and air flow for all day comfort.

For a lifetime investment in better looks and more natural vision.

Question: How safe are contact lenses?

Answer: It is safer to wear contact lenses than regular spectacle lenses because the plastic lens acts as a protective covering for the eye.

PAR. 4. By and through the statements made in said advertisements, and others of similar import not specifically set out herein, respondents represent and have represented, directly and by implication that:

1. All persons in need of visual correction can successfully wear respondents' contact lenses.
2. There is no discomfort in wearing their contact lenses.
3. Said contact lenses can be worn all day with complete comfort.
4. Eyeglasses can be discarded upon the purchase of their contact lenses.
5. Their contact lenses will correct all defects in vision.
6. Their contact lenses differ from other contact lenses in that they permit tear and air flow.
7. Said lenses may be worn for a lifetime without change of prescription.
8. Said lenses protect the eye.

PAR. 5. The advertisements containing the aforesaid statements and representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

In truth and in fact:

1. A significant number of persons in need of visual correction cannot successfully wear respondents' contact lenses.
2. Practically all persons will experience some discomfort when first wearing respondents' contact lenses. In a significant number of cases discomfort will be prolonged and in some cases will never be overcome.
3. Many persons cannot wear respondents' contact lenses all day without discomfort, and no person can wear said lenses all day in complete comfort until he or she has become fully adjusted thereto.
4. Eyeglasses cannot always be discarded upon the purchase of respondents' contact lenses.
5. Respondents' contact lenses will not correct all defects in vision.
6. Many competitive contact lenses permit tear and air flow to the same extent as respondents' lenses.
7. In the case of certain individuals, prescriptions for contact lenses must be changed during their lifetime.
8. Respondents' lenses provide protection to only a small portion of the eye.

PAR. 6. The dissemination by the respondents of the aforesaid false advertisements constitutes unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Frederick McManus for the Commission.
Respondents for themselves.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, on June 16, 1960, charging the above-named respondents with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On August 30, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondents and counsel supporting the complaint, under date of August 12, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondents Daniel D. Weinstein and Irwin R. Title are individuals trading under their own names as copartners with their principal offices and place of business located at 1212 Broadway, Suite 538, Oakland 12, California.

2. Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondents waive:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. All of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," said agreement is hereby approved and accepted and is ordered filed if and when said agreement shall have become a part of the Commission's decision. The hearing examiner finds from the complaint and the said agreement that the Commission has jurisdiction of the subject matter of this proceeding and of the persons of each of the respondents herein; that the complaint states legal causes for complaint under the Federal Trade Commission Act against each of the respondents, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order, therefore, should be and hereby is entered as follows:

It is ordered, That Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading under their own names or under any other name, or names, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of contact lenses, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication that:

- (a) All persons can successfully wear their contact lenses;
- (b) There is no discomfort in wearing their contact lenses;
- (c) All persons can wear respondents' contact lenses all day without discomfort; or that any person can wear said contact lenses all day without discomfort until such person has become fully adjusted thereto;
- (d) Eyeglasses can always be discarded upon the purchase of respondents' lenses;
- (e) Their contact lenses will correct all defects in vision;

Complaint

57 F.T.C.

(f) Their contact lenses differ from other contact lenses in that they permit tear and air flow;

(g) Said contact lenses may be worn for a lifetime without change of prescription; or misrepresenting the time that they may be so worn;

(h) Said contact lenses protect the eye unless limited to the small portion of the eye that is covered thereby.

2. Disseminating, or causing to be disseminated, any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in Paragraph 1 above.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of October 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Daniel D. Weinstein and Irwin R. Title, individually and as copartners trading under their own names, 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.

IN THE MATTER OF

ALFONSO GIOIA & SONS, INC.