

sion a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
MURRAY SPACE SHOE CORPORATION ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket 7476. Complaint, Apr. 15, 1959—Decision, Oct. 17, 1961

Order requiring Bridgeport, Conn., manufacturers of molded shoes—custom made over plaster casts of customers' feet—to cease making in advertising unqualified claims that the shoes had therapeutic qualities and would correct, prevent, or relieve various diseases and disorders; and dismissing, for lack of proof of competitive effect, charges of exclusive dealing.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated, and are now violating, the provisions of the Federal Trade Commission Act, and Section 3 of the Clayton Act (15 U.S.C.A., Sec. 14), 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 as follows:

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COUNT I

Charging violation of the Federal Trade Commission Act, the Commission alleges:

PARAGRAPH 1. Respondent Murray Space Shoe Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal office and place of business located at 616 Fairfield Avenue, in the City of Bridgeport, State of Connecticut.

Respondents Alan E. Murray and Lucille Marsh Murray are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondents Alan E. Murray and Lucille Marsh Murray are copartners trading and doing business as Alan E. Murray Laboratories and Murray Space Shoe, with their principal office and place of business located at 616 Fairfield Avenue, Bridgeport, Connecticut.

In addition to the respondent corporation, there are three subsidiary corporations not specifically set out herein as parties respondent. Such subsidiary corporations are located in the States of New York, New Jersey and Delaware. The acts and practices of said subsidiary corporations are completely dominated and controlled by respondents and form a part of the acts and practices of respondents as hereinafter set forth.

PAR. 2. Respondents are now, and for some years last past have been, engaged in the business of manufacturing, selling and distributing molded shoes, that is, custom made shoes constructed over plaster casts of the customers' feet. Respondents, in their advertising, have made claims concerning such shoes which would classify them as devices, as "device" is defined in the Federal Trade Commission Act. Said shoes are designated as Murray Space Shoes, Glove Mold Shoes, Contact Shoes and Grape Skin Shoes.

PAR. 3. Respondents have caused, and now cause, such molded shoes, when sold, to be transported from their place of business in the State of Connecticut to purchasers thereof located in various other States of the United States, and at all times mentioned herein, maintained a course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce is substantial.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said molded shoes by the United States mails and by various means in commerce, as "commerce" is defined in

the Federal Trade Commission Act, including, but not limited to, pamphlets and circulars distributed to prospective customers, customers and to their retail outlets, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said molded shoes; and have disseminated, and caused the dissemination of, advertisements concerning said shoes by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said shoes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

a. . . . the "Space Shoe", invented by Murray and which is closely related to the profession of Chiropody, Orthopedics and other sciences dealing with deformities, which the medical "Space Shoe" is designed to relieve or correct.

b. In only 20 years Alan Murray has created a new philosophy of orthopedics . . .

c. A man who has real trouble with his feet might do well to consider the therapeutic qualities attributed to the Murray Space Shoe.

d. In addition to out and out foot ailments, misfits can result in postural disturbances, rectal conditions, a great percentage of the pelvic disturbances in women and "many of the disturbances attributed to menopause, . . ."

e. Doctors now in conference with friend Murray are studying control of the "slipped spinal disc" by Space Shoe magic.

f. One man is convinced that they have helped to reduce his blood pressure.

g. They are the . . . sufferers of chronic foot pain from . . . polio . . .

h. J. T. says that after wearing the Glove Mold Shoes for five months her callouses have gone away, swollen joints have become smaller, and her ankles that had sagged outward were straightened into their normal position.

i. She spent three periods in the hospital for arthritis . . . Two weeks after wearing the Glove Mold Shoes the pain in her back disappeared, never to reappear.

j. S. T. was a former dancer who had retired from her profession because of bunions, aching feet, indigestion and eventually stomach ulcers. An operation was advised about the time she started to wear Glove Mold Shoes. After wearing the shoes for 10 months, her feet were in complete comfort, indigestion and ulcers had vanished . . .

k. . . . a three cast series of his own left foot showing its progress from a piteously gnarled, hammertoe specimen 20 years ago to its present lithe, high arched, muscular version.

l. . . . reduce swelling of ankles and puffiness on the ball of the foot.

m. A dentist says that wearing them has relieved a sharp pain in his hip . . .

n. . . . Glove Mold Shoe has enabled people who have to stand at their work for long exhausting hours to go home at night, put on their regular shoes, and go out an denjoy life, because they say they do not feel tired.

o. . . . the shoe is holding your foot in the natural right delightful stance and so gently making your leg action right instead of its old knock-kneed action . . .

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p. He tried "corrective" shoes and still had corns, calluses, hammer toes and collapsed metatarsals.

q. Nonetheless they continue to grow in popularity among . . . sufferers from bunions, fallen arches, hammer toes, metatarsalgia, corns, heel spurs, Morton's toe, Schaffer's foot, pes cavus, and other ills of civilization.

r. Sufferers from fallen arches, corns, bunions, mosaic warts, heel spurs, or hammer toes frequently claim amazing relief from the shoe.

s. Here is proof of no further need of so-called health and corrective shoes.

t. The podiatrists are cracked on bones. The skeleton is not the key to the foot. The foot is a problem in hydraulics. The foot is composed mostly of watery tissue, jelly . . . What you must preserve in the shoes is the hydraulic envelope of tissue. If you respect that, the bones will take care of themselves.

u. He claims that just as nature twisted the foot to fit conventional shoes, nature will unkink the foot when it is freed in Space Shoes.

v. You cannot buy a shoe that fits . . .

PAR. 6. Through the use of said statements, and others similar thereto not specifically set out herein, respondents have represented, and are now representing, directly and by implication:

1. That the Murray Space Shoe is an orthopedic device;
2. That respondents' shoe is a health shoe and has therapeutic qualities as to diseases, abnormalities and disorders of the feet.
3. That the Murray Space Shoe will correct, prevent, or relieve slipped spinal disc, knock knees, swollen ankles, swollen joints, puffiness on ball of foot, postural disturbances, rectal conditions, pelvic disturbances in women, many of the disturbances attributable to the menopause, pain in the hip, high blood pressure, fatigue, indigestion, stomach ulcers, sagging ankles and arthritis.
4. That the Murray Space Shoe will correct or prevent mosaic warts, warts, heel spurs, spurs, calluses, chronic foot pain from polio and pes cavus.
5. That the Murray Space Shoe will correct or prevent fallen arches, hammer toes, gnarled feet, collapsed metatarsals, metatarsalgia, Morton's toe, Shaffer's foot and bunions.
6. That respondents' shoes take the place of and eliminate the need for corrective shoes.
7. That the bones or skeleton of the foot are unimportant in the treatment of the foot and that the wearing of the Murray Space Shoe will correct all foot problems.
8. That even persons with normal feet cannot be properly fitted with an ordinary stock shoe.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute "false-advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. The Murray Space Shoe is not an orthopedic device;

2. Respondents' shoe is not a health shoe and there are no therapeutic qualities directly attributable to it. The only possible benefits to the wearers thereof which could be directly attributed to respondents' shoe are the comfort which is inherent in a properly fitting shoe and the possibility of relief from pain and discomfort caused by the wearing of ordinary stock shoes in cases of certain deformities or abnormal conditions of the foot. The wearing of respondents' shoe will not cure or correct deformities, diseases or disorders of the foot.

3. The Murray Space Shoe will not correct, prevent, or relieve slipped spinal disc, knock knees, swollen ankles, swollen joints, puffiness on ball of foot, postural disturbances, rectal conditions, pelvic disturbances in women, disturbances attributable to the menopause, pain in the hip, high blood pressure, fatigue, indigestion, stomach ulcers, sagging ankles, or arthritis.

4. The Murray Space Shoe will not correct or prevent mosaic warts, warts, heel spurs, spurs, calluses, chronic foot pain from polio, or pes cavus.

5. The Murray Space Shoe will not correct fallen arches, hammer toes, gnarled feet, collapsed metatarsals, metatarsalgia, Morton's toe, Shaffer's foot, or bunions and its value in the prevention of such conditions is limited to the elimination of one of the causes thereof, namely, ill-fitting shoes.

6. Their shoe does not take the place of, nor eliminate the need for, corrective shoes.

7. In many instances, problems of the foot are directly related to the bones or skeletal structure thereof and treatment in such cases must be directed to the bones or skeleton themselves.

8. Persons with normal feet can be properly and comfortably fitted with ordinary stock shoes.

PAR. 8. The dissemination by respondents of the false advertisements, as aforesaid, constituted, and now constitute, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

COUNT II

Charging violation of Section 3 of the Clayton Act (15 U.S.C.A., Sec. 14), the Commission alleges:

PAR. 9. Paragraphs One and Two are hereby incorporated by reference and made a part of the charges fully and with the same effect as though here again set forth verbatim.

PAR. 10. Respondents are the dominant manufacturers and sellers of molded shoes in the United States. In the years 1953 through 1957 respondents manufactured 48,734 pairs of said shoes. Respondents' total gross sales totaled \$822,986.90 during the year 1956 and

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\$1,055,623.85 during the year 1957. Respondents' sales of molded shoes constitute a substantial share of the total sales of such molded shoes in the United States.

PAR. 11. Respondents are now and have been engaged in commerce as "commerce" is defined in the Clayton Act. Respondents and their subsidiary corporations sell to chiropodists and retailers throughout the United States and in Canada and Puerto Rico. Respondents cause their molded shoes to be transported from its manufacturing plant in Connecticut and those of their subsidiaries in the States of New Jersey and Delaware to customers therefor located throughout the various states and the District of Columbia.

PAR. 12. Respondents are now and have been engaged in competition in the manufacture, sale and distribution of molded shoes, in commerce, between and among the various States of the United States and in the District of Columbia with other corporations, persons, firms and partnerships.

PAR. 13. In the course and conduct of their business respondents through contracts, agreements and understandings sell their molded shoes on the condition that the purchasers thereof shall not use or deal in molded shoes sold or supplied by a competitor or competitors of respondents. Respondents have refused, and do now refuse to sell to chiropodists and retailers who for various reasons are unwilling to restrict themselves to the use of respondents' products and insist on using and dealing in molded shoes sold or supplied by a competitor or competitors of respondents. Respondents have also refused, and do now refuse, to sell their molded shoes to dealers who manufacture molded shoes in competition with respondents.

PAR. 14. Respondents' customers constitute a large and substantial market for molded shoes and sales to such customers have been, and are now, substantial. Competitors of respondents have been, and are now, unable to sell their molded shoes to respondents' customers, as a result of the conditions, agreements, understandings and policies of respondents described above in Paragraph Thirteen.

PAR. 15. The effects of the sales and contracts of sale upon such conditions, agreements and understandings, and pursuant to respondents' policy, may be to substantially lessen competition with respondents in the line of commerce in which respondents are engaged and may be to substantially lessen competition in the line of commerce in which the customers and purchasers of respondents are engaged, and may be to tend to create a monopoly in respondents in the manufacture, sale and distribution of molded shoes.

PAR. 16. The aforesaid acts and practices of respondents constitute a violation of the provisions of Section 3 of the Clayton Act.

Mr. Morton Nesmith for the Commission.

Mr. Edmund B. Bellinger, New York, N.Y., for respondents.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint against the Murray Space Shoe Corporation, Alan E. Murray and Lucille Marsh Murray, individually and as officers of said corporation, and as co-partners trading and doing business as Alan E. Murray Laboratories and Murray Space Shoe, on April 15, 1959, charging them in Count I with violation of Section 5 of the Federal Trade Commission Act in the use of unfair and deceptive acts and practices in commerce. Said complaint, among other things, charges respondents who are engaged in the business of manufacturing, selling and distributing molded shoes, that is, custom-made shoes constructed on plaster casts of the customers' feet, with the dissemination of certain advertisements concerning said molded shoes by the United States mails and by various means in commerce, including, but not limited to, pamphlets and circulars distributed to prospective customers and to their retail outlets for the purpose of inducing the purchase of said molded shoes in commerce; and further, that respondents have made claims concerning such shoes which would classify them as devices, as "device" is defined in the Federal Trade Commission Act. It is further alleged, in Paragraph Six, that through the use of statements and representations contained in said advertisements, respondents have represented, directly or by implication:

1. That the Murray Space Shoe is an orthopedic device.
2. That respondents' shoe is a health shoe and has therapeutic qualities as to diseases, abnormalities and disorders of the feet.
3. That the Murray Space Shoe will correct, prevent, or relieve slipped spinal disc, knock knees, swollen ankles, swollen joints, puffiness on ball of foot, postural disturbances, rectal conditions, pelvic disturbances in women, many of the disturbances attributable to the menopause, pain in the hip, high blood pressure, fatigue, indigestion, stomach ulcers, sagging ankles and arthritis.
4. That the Murray Space Shoe will correct or prevent mosaic warts, warts, heel spurs, spurs, calluses, chronic foot pain from polio and pes cavus.
5. That the Murray Space Shoe will correct or prevent fallen arches, hammer toes, gnarled feet, collapsed metatarsals, metatarsaglia, Morton's toe, Shaffer's foot and bunions.
6. That respondents' shoes take the place of and eliminate the need for corrective shoes.
7. That the bones or skeleton of the foot are unimportant in the treatment of the foot and that the wearing of the Murray Space Shoe will correct all foot problems.
8. That even persons with normal feet cannot be properly fitted with an ordinary stock shoe.

It is further alleged, in Paragraph Seven, that said advertisements were and are misleading in material respects and constituted, and now constitute, "false-advertisements" as that term is defined in the Federal Trade Commission Act.

In Count II of said complaint, in Paragraph Thirteen, it is alleged that respondents have violated Section 3 of the Clayton Act, and that in the course and conduct of their business respondents, through contracts, agreements and understandings, sell their molded shoes on the condition that the purchasers thereof shall not use or deal in molded shoes sold or supplied by a competitor, and have refused to sell to chiropodists and retailers who are unwilling to restrict themselves to the use of respondents' products and insist on using and dealing in molded shoes supplied by competitors of respondents; and further, that respondents have refused to sell their molded shoes to dealers who manufacture molded shoes in competition with respondents. It is further alleged under this Count, in Paragraph Fourteen, that respondents' customers constitute a large and substantial market for molded shoes, and that competitors of respondents are unable to sell their molded shoes to respondents' customers, as a result of the said conditions, agreements and understandings; and further, that the effects of such sales and contracts on such conditions, agreements and understandings, may be to substantially lessen competition with respondents in the line of commerce in which respondents are engaged, and may be to substantially lessen competition in the line of commerce in which respondents' customers and purchasers of molded shoes are engaged, and may be to tend to create a monopoly in respondents in the manufacture, sale and distribution of molded shoes.

Respondents, in their answer, admit that they manufacture and sell shoes, most of which are made on lasts made by taking casts of the feet for which the shoes are intended, which are called "Space" Shoes, and some shoes are made on the feet of the customers, which are called "Contact" Shoes; that the words "Space Shoe" and "Contact Shoe" are registered trademarks used in connection with the sale of such shoes. They deny, however, that portion of the complaint which alleges that respondents' claims concerning such shoes classify them as "devices." They admit interstate commerce, and the advertisements concerning such shoes, published in circulars, pamphlets, etc., as alleged, asserting, however, that some of the statements contained in the complaint from such advertisements are taken out of context and are incomplete, and that most of such statements were reprints of articles published in magazines in the years 1953 and 1956. Furthermore, respondents admit that by certain of their statements contained in such advertisements they have represented that

Murray Space Shoes will "correct, prevent or relieve deformities of the human foot which may arise or have arisen from the wearing of ill fitting shoes and have represented and now represent that even persons with normal feet cannot be properly fitted with an ordinary stock shoe." Except as specifically admitted, respondents deny all other allegations hereinbefore set forth as contained in Paragraph Six of the complaint. Respondents further state, in their answer, that the Murray Space Shoe is not an orthopedic device, as alleged, but that it forms a good environment for the foot which permits the body to function without undue interference, and is, on occasion, recommended by doctors engaged in therapeutics, and that its value in the prevention of the conditions set forth in Paragraph Seven of the complaint is limited to the elimination of one of the causes thereof, namely ill-fitting shoes. Respondents insist in their answer that the advertisements referred to by them were true, and deny that any advertisement disseminated by them was false.

Referring to the allegations of the complaint, in Count II thereof, respondents admit the volume of sales as alleged in the complaint, and that they engage in the sale of molded shoes to chiropodists and retailers throughout the United States, and in Canada and Puerto Rico, in interstate commerce.

Respondents further admit that, in the course and conduct of their business, the corporate respondent sells shoes manufactured by it on the condition that the purchaser thereof shall not deal in shoes of an appearance which can be passed off as respondents' shoes sold or supplied by a competitor or competitors of respondents within limited areas, but deny the remainder of the allegations of the complaint with respect to the refusal to sell and the effect of the conditions of sale.

It is affirmatively alleged in respondents' answer that respondents' customers constitute a minute or unsubstantial part of the relevant market for said shoes, and that respondents' shoes are interchangeable with other shoes which fit the feet of the customer.

Testimony was taken in support of the allegations of the complaint at hearings held in Bridgeport, Connecticut; New York City; and Washington, D.C. On September 1, 1959, counsel in support of the complaint completed his case-in-chief and rested. Counsel for the respondents filed a motion to dismiss the complaint for failure of proof, which was denied on the record. Counsel for the respondents requested an opportunity to state his grounds, and he was granted until October 2, 1959, within which to file his motion to dismiss, and counsel supporting the complaint was granted until October 30 to

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file his answer. The hearing examiner, after considering said motion and answer on November 4, 1959, entered the following order:

IT IS ORDERED, That subparagraph 3 of Paragraphs Six and Seven of the complaint relating to the following items: slipped spinal disc, knock knees, postural disturbances, rectal conditions, pelvic disturbances in women, disturbances attributable to the menopause; and subparagraph 4 of Paragraphs Six and Seven, relating to the following items: mosaic warts, warts, heel spurs, spurs, chronic foot pain from polio and pes cavus; and subparagraph 5 of Paragraphs Six and Seven relating to the following items: fallen arches, gnarled feet, collapsed metatarsals, metatarsalgia, Morton's toe, and Shaffer's foot, be, and the same hereby are, stricken from the complaint.

IT IS FURTHER ORDERED, That the said motion of counsel in support of the complaint that the hearing examiner reverse his ruling as to the insufficiency of evidence to make out a prima facie case that respondents' shoes will not correct bunions as set forth in the transcript, pages 786, 788-789, be, and the same hereby is, granted.

The complaint also contained the following allegation in Paragraph Seven:

The only possible benefits to the wearers thereof (Murray Space Shoes) which can be directly attributed to respondents' shoe are the comfort which is inherent in a properly fitting shoe and the possibility of relief from pain and discomfort caused by the wearing of ordinary stock shoes in cases of certain deformities or abnormal conditions of the foot.

The hearing examiner ruled on the record on February 3, 1960, Tr. p. 1792, that said allegation had not been proved by attorneys for the complaint in their case-in-chief, and no evidence was allowed to be received to disprove it. Consequently said allegation is not an issue in this case.

Testimony was received in opposition to the allegations of the complaint beginning November 19, 1959, and concluding on February 26, 1960. Rebuttal testimony was concluded on July 1, 1960, at which time the examiner closed the taking of testimony. Since then, proposed findings have been received from both counsel for the complaint and for respondents. An oral argument was held on September 7, 1960, on the proposed findings. Thereafter, the proceeding came on for final consideration upon the complaint, the answer thereto, the testimony taken, the proposed findings submitted by respective counsel, and oral argument, and said hearing examiner having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order. Each of the proposed findings which have been accepted have been in substance incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

FINDINGS AS TO THE FACTS (COUNT 1)

1. The respondent, Alan E. Murray, is and has been engaged in the business of manufacturing and selling Murray "SPACE" Shoes, also sometimes described as "glove mould shoes", since about the year 1941, at first individually, and then with his wife, Lucille Marsh Murray, as co-partners, doing business under the firm name of Alan E. Murray Laboratories, and then as an officer of the corporations formed to take over the business of the said partnership.

The respondent, Lucille Marsh Murray, is and has been in the business of manufacturing and selling Murray SPACE Shoes since about the year 1943; first assisting the respondent Alan E. Murray, then as a copartner of the partnership, doing business under the firm name and style of Alan E. Murray Laboratories, and thereafter as an officer of the corporations formed to take over the business of the said copartnership.

The respondent, Murray SPACE Shoe Corporation was incorporated in the State of Connecticut on or about the 1st day of November, 1956, with a capitalization of \$25,000, to take over and conduct the Connecticut business of Alan E. Murray Laboratories, and maintains its principal place of business at No. 616 Fairfield Avenue, Bridgeport, Connecticut.

Murray SPACE Shoe New York Corporation was incorporated in the State of New York on about July 18, 1957, with a capitalization of \$25,000, to take over and conduct the New York business of Alan E. Murray Laboratories.

Murray SPACE Shoe Delaware Corporation was incorporated in the State of Delaware in August 1957, with an authorized capital of \$5,000, to take over the Delaware business of Alan E. Murray Laboratories.

Murray SPACE Shoe New Jersey Corporation was incorporated in the State of New Jersey in 1956, with a capitalization of \$5,000, to take over the New Jersey business of Alan E. Murray Laboratories, Inc.

The respondents, Alan E. Murray and Lucille Marsh Murray, own the entire outstanding capital stock of each of the said corporations, with the exception of one share of the capital stock of the New Jersey Corporation.

Murray SPACE Shoe New York Corporation sells Murray SPACE Shoes, but does not engage in the manufacture thereof. Murray SPACE Shoe Delaware Corporation manufactures, but does not sell said shoes.

Murray SPACE Shoe Laboratories ceased to conduct the business of manufacturing and selling SPACE Shoes in or about the month

of August 1957, after the incorporation and reorganization of Murray SPACE Shoe Delaware Corporation as aforesaid.

2. The respondent, Alan E. Murray, was the first to manufacture and sell a shoe of a molded foot-shaped style so closely resembling the shape of the human foot. Molded shoes manufactured and sold by the respondents as "Space Shoes", and sometimes as "Glove Mould Shoes", since the year 1941, have been made using a plaster cast of the foot as a last. The last used by respondents in making shoes is a cast taken in a certain partial weight bearing position of the foot, and it gives the shape to the shoe.

The standard procedure for making the cast used as a last is for the customer to sit on a chair, in a normal position, with the bare foot placed in a pan of sand—bearing the weight of the leg, from the knee to the foot—and while in this position liquid plaster is poured over the foot to immobilize the foot. As soon as this plaster is hardened, the pan of sand is removed from under the foot, and a pan of liquid plaster is placed under the foot, now in the plaster cast of the upper part of the foot, so that the foot rests in the liquid plaster instead of the sand, and the foot is thus suspended in the liquid plaster so that all the modulations of the bottom of the foot are caught in the plaster as it hardens. From this negative cast, after it is removed from the foot and fastened together again, the plaster last is made by pouring liquid plaster into the negative cast as a mold, and this positive plaster cast is an exact replica of the customer's foot and is used as the last on which the molded shoe is made.

The respondents manufacture and sell said molded shoes and slippers for men, women and children, made of various materials, including cotton fabrics, leather and rubber, in a variety of styles, including cut-out shoes, sometimes referred to as sandals, in which openings are cut in the upper of the shoe for ordinary wear, evening wear, tennis, ice skating and golf. Some of respondents' shoes are fastened by straps; some are lined with leather. The uppers of some are suede or other materials, and some are made with rubber or leather soles.

The distinguishing characteristic of respondents' molded shoe is that it so accurately fits the foot in a partial weight-bearing position that it assumes the shape of the foot in that position, thus giving the shoe an unconventional foot-shaped appearance.

Most of the shoes manufactured by the respondents are decorated with non-functional lines or cords in a splay design on the top of the shoes and a curved line around the sides of the shoes. These lines or cords distinguish respondents' shoes from competitors, and two competitors have been enjoined from using such lines or cords by orders of the Supreme Court of New York County, New York.

Respondents have from time to time established and held instruction courses at their place of business, and elsewhere, for podiatrists and chiropodists, their customers and prospective customers for the purpose of teaching them the Murray method of making plaster casts to enable them to take the casts of the feet of their patients for submission to respondents who make lasts and manufacture Murray Space Shoes thereon, and sell the same to said customers at specified prices.

Respondents have caused, and now cause, said molded shoes, when manufactured and sold, to be transported from their places of manufacture in the States of Connecticut and Delaware to the purchasers thereof, including chiropodists and podiatrists located in various other states of the United States and in Canada and Puerto Rico, who in turn sell the shoes to their patients for whom the said shoes were manufactured, and at all times found herein have maintained a substantial course of trade in said shoes in interstate commerce. Respondents also maintain retail stores in Bridgeport, Connecticut; New York City; Wilmington, Delaware; and Miami, Florida, from which they sell their said Space Shoes direct to the public.

3. Respondents do not advertise their said shoes in newspapers or magazines, but by the circulation in the United States mail of reprints of voluntary, unpaid newspaper and magazine articles by various authors and writers, extolling the comfort derived from wearing respondents' shoes, and quoting statements of podiatrists and chiropodists, as well as testimonials of satisfied wearers, have represented directly, or by implication, to their said customers and prospective customers, and through them to the public, that Murray Space Shoes would correct, prevent or relieve the following, among other ailments:

(a) Swollen ankles; (b) Swollen joints; (c) Puffiness on ball of foot; (d) Pain in the hip; (e) High blood pressure; (f) Fatigue; (g) Indigestion; (h) Stomach ulcers; (i) Sagging ankles; (j) Arthritis; (k) Bunions; (l) Hammer toes.

4. Due to the fact that respondents' "Space" Shoes are made to conform to the shape of the foot in a partial weight-bearing position, in contrast to conventional types of shoes, respondents' said shoes do not cause pressure on various parts of the foot where pressure is usually caused by improperly fitted shoes.

Respondents, through their retail stores in Bridgeport, Connecticut, and New York City, have for many years sold their "Space" Shoes direct to customers in the Metropolitan area of New York City on prescriptions, some of which are in the record, of medical doctors, usually orthopedic surgeons, to correct or relieve the following ailments:

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Swollen ankles and joints; pain in the hip; rheumatoid arthritis; arthritis in joints of foot and leg, including the hip; synovitis of knee and other joints; poor peripheral circulation; circulatory disturbance in the feet; hammer toes; hallux valgus; bunions; metatarsalgia; bursitis in the foot; sacro-iliac pain in the back; herniated discs; chronic gout in the feet; gouty arthritis in the feet.

5. Reliable orthopedic surgeons, called by counsel in support of the complaint, testified that the Murray Space Shoe is not an orthopedic device; that the wearing of the Murray Space Shoe would not correct, prevent, or relieve swollen ankles or swollen joints due to heart trouble, kidney trouble, liver trouble, varicose veins, or other systemic conditions. It was generally conceded, however, that, if the swollen joints and swollen ankles were caused by ill-fitting shoes, then the Murray Space Shoe would give relief. Most of these medical doctors, testifying at the instance of the Commission, had not had actual experience with the Murray Space Shoe, although one had a limited experience. On the other hand, an orthopedic surgeon and a doctor of surgical chiropody, called by respondents, who had actual clinical experience with the Murray Space Shoe, testified to the general effect that, where the ankle or joints of the foot were swollen due to foot problems, such as those caused by ill-fitting shoes, the wearing of the Murray Space Shoe would relieve and correct the condition and, to that extent, would have a therapeutic effect. They admitted, however, that if the swollen condition was due to some systemic condition, such as inflammatory gout, or a kidney or heart ailment, the wearing of the Murray Space Shoe would not help in such a case. The testimony of these experts is to the same general effect with respect to puffiness on the ball of the foot, pain in the hip, high blood pressure, and fatigue. With respect to indigestion and ulcers, the medical doctors called in support of the complaint testified that 99% of the cases of indigestion could have no relationship to the feet, and that there was no connection between indigestion and ill-fitting shoes, and that stomach ulcers were certainly not caused by ill-fitting shoes. One medical doctor, testifying for the respondents, was of the opinion that ill-fitting shoes might indirectly cause an individual to have indigestion through tension, which would tend to aggravate the flow of juices of the stomach. He stated that by ruling out one of the hazards you probably would help or relieve the indigestion or stomach ulcers.

With respect to hammer toes and bunions, the consensus of the testimony of the medical doctors, as well as chiropodists and osteopaths, is that hammer toes, usually caused by short-fitting shoes, once they have taken an inflexible position, cannot be cured or corrected, although the wearing of the Murray Space Shoe would give

relief from the pain. Likewise with the bunion, which has been characterized by some doctors as a bursa on the joint of the great toe, the Wearing of the Murray Space Shoe would give relief, but would not cure the bunion, or correct it in any way. By reason of the exactness of the fit of respondents' Space Shoes, they give relief from pressure, thereby alleviating the pain caused by the bursitis of the big toe or the bunion. As one doctor testified, it would "relieve the inflammation of the bursa." However, the bunion itself remains and cannot be cured or removed without an operation.

Therefore, considering the foregoing testimony, it is found that the Murray Space Shoe is not an orthopedic device and has not been so represented by respondents. It is also found that the wearing of Murray Space Shoes will relieve swollen ankles, swollen joints, puffiness on ball of foot, pain in the hip, high blood pressure, fatigue, sagging ankles, arthritis, hammer toes and bunions when, and only when, these conditions are caused by ill-fitting shoes, or shoes that do not conform to the shape of the foot. The wearing of the Murray Space Shoe will not correct or prevent such conditions when they are caused by, or due to, a systematic condition of the person wearing them, such as diseases of the heart or the kidneys. As to indigestion and stomach ulcers, it is found that any beneficial effect which the wearer of Murray Space Shoes might receive would be too indirect, or too remote, to be attributed to the wearing of the Murray Space Shoe. It is also found that the Murray Space Shoe may be referred to as having therapeutic qualities only in those cases where they are prescribed by chiropodists or orthopedic surgeons to relieve pain and give comfort when the ailment is caused by the wearing of ordinary conventional stock shoes, and in the cases of certain deformities or abnormal conditions of the feet.

CONCLUSION AS TO COUNT I

The aforesaid unqualified representations as to the therapeutic benefits derived from the wearing of Murray Space Shoes, without restricting them to ailments of the feet due to ill-fitting shoes, as above set forth, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

There is ample support in the Federal Courts of the Commission's authority to prohibit the dissemination of false and deceptive advertisements with respect to the therapeutic value of products sold to the public. Recent leading cases are found in the hair preparations industry involving claims that the product in question will prevent baldness. See *Mueller v. U.S.*, 262 F. 2d 443; *Erickson v. F.T.C.*, 272

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F. 2d 318; and *Keele Hair & Scalp Specialists, Inc. v. F.T.C.*, 275 F. 2d 18.

The Court, in the Erickson case, held, among other things, that "it is sound to say that the fact that petitioner had satisfied customers is not a defense to Commission action for deceptive practices." In the present case, the rejection of the testimony of satisfied customers is supported by the foregoing decision.

In the Keele case, the Court approved a requirement in the Commission's Order, to prevent deception, for the respondent to affirmatively disclose facts as to the ineffectiveness of the preparation in a certain type of baldness, and that 95% of the cases of baldness fall within that type.

So, in the present case, although the wearing of respondents' shoes will be of benefit to the wearer when the ailment is caused by ill-fitting shoes, to prevent deception of the public, respondents should not be allowed to represent that the wearing of their shoes will benefit the wearer when the ailment is caused by systemic conditions.

FINDINGS AS TO THE FACTS (COUNT II)

A. LINE OF COMMERCE

The line of commerce involved in this case is the manufacture and sale of molded shoes—that is, custom-made shoes which are made over plaster casts of the customers' feet, to follow all the contours of their feet. The said product is shown by the facts to have such peculiar characteristics and uses as to constitute it as sufficiently distinct from others to make it a "line of commerce" within the meaning of the Clayton Act.

This industry, at first restricted to the Eastern Seaboard, particularly the New York City Metropolitan area, has now been extended to all parts of the United States and foreign countries, and is supported generally by chiropodists, podiatrists, and orthopedic surgeons who prescribe molded contour shoes for their patients.

B. RESPONDENTS' METHODS OF DISTRIBUTION—USE OF RESTRICTIVE AGREEMENTS

Prior to 1941, respondents sold molded shoes direct to the public. About that time, respondents began to develop sales representatives among chiropodists and custom and corrective shoe dealers.

From about 1944 until 1956, respondents sold substantial quantities of molded shoes to T.O. Dey Service Corporation, hereinafter referred to as T.O. Dey, which was then engaged in the sale of custom-made shoes, as well as conventional shoes, in New York City and in Brook-

lyn. During that time, respondents' shoes were sold under the name of "Space", "Murray Space Shoe", and also "Glove Mould." Although T.O. Dey had started to represent respondents in March 1941, it was not until 1944 that substantial sales were made. Respondents taught T.O. Dey employees how to take the casts of the patients' feet and manufactured the shoes from the casts. There was no written agreement, but at the beginning there was a verbal agreement between the respondents and T.O. Dey that the latter would not be permitted to sell any other molded shoe or manufacture molded shoes without permission from respondents. This arrangement continued until 1955 or 1956, when respondents and T.O. Dey discontinued their relationship, and T.O. Dey began, on their own account, to manufacture and sell molded shoes similar to respondents.

For a number of years, from 1942 until approximately 1955, respondents trained a number of chiropodists and podiatrists, as well as orthopedic surgeons and representatives of orthopedic shoe manufacturers, such as T.O. Dey, how to take casts. These various chiropodists, podiatrists, and orthopedic surgeons prescribed respondents' shoes for their patients. The record contains a number of such prescriptions. The record also contains representative contracts, which were entered into about 1953, between respondents and such customers entitled: "Contract for Representatives of Murray Space Shoes." The following language appeared in most of these early contracts:

On your satisfactory completion of the course, we agree to manufacture Space Shoes for you on acceptable casts and foot-impressions made by you in accordance with the Murray Method in which you have been instructed, at the prices set forth in the attached schedule, payable in full with order. Positives are to be delivered to us without expense to us.

This contract covered not only the sale of shoes manufactured by respondents, but also the sale of materials to such customers for the molding of "Contact" shoes, which are not involved in this case. Respondents reserved the right to terminate the agreement on 60 days' notice in the event the customer manufactured molded shoes in accordance with methods other than the Murray method.

During 1956 through 1958, the respondents entered into similar agreements with chiropodists and podiatrists entitled: "Agreement Not to Disclose and Tentative Agreement with Representatives of Murray Space Shoes." These agreements provided that the customer would keep secret, during the course of instruction and thereafter, the ideas, methods, techniques, etc., used in connection with the fabrication or manufacture of, or taking of foot impressions or casts for, Murray shoes.

These agreements also contained a provision, hereinbefore men-

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tioned, that the agreement could be terminated by respondents in the event that the customer manufactured molded shoes in accordance with methods other than the Murray method. This agreement also provided that the customer agreed to cease making shoes according to the Murray method upon the expiration of the agreement, and in the event that he should thereafter continue to employ the Murray techniques, in violation of the agreement, Murray should be entitled to liquidated damages computed at 15% of the retail sales price of all such shoes sold by the customer. Some of such agreements contained the following additional clause:

In the event that I arrange to have shoes molded by a third party other than Murray or a manufacturer designated by him on casts or foot impressions made by me utilizing Murray techniques or patents then I agree to submit such shoes to Murray for his approval to the end that Murray may test the materials and workmanship to see that such shoes meet the Murray standards of quality and conform to the casts as prescribed by Murray for SPACE shoes manufactured by him. I agree that I shall not sell any of such shoes without first obtaining Murray's written approval.

A further provision of this contract was that it might be terminated on 60 days' notice in the event that the customer failed to comply with any of the terms or conditions of the agreement.

Another form of contract, used by respondents during those years, contained the following language:

In the event that I use any of the MURRAY ideas, methods, techniques or the like for the purpose of making or having shoes of the general type made by MURRAY manufactured by another other than Murray, I agree to render an account thereof to MURRAY and to pay to MURRAY liquidated damages computed at 15% of the retail sales price of all such shoes sold by me or by others who may have assisted in the manufacture of such shoes.

One form of contract, used by respondents during 1958, contained the following provision:

I recognize and agree that the ideas, methods and techniques and the like which I have learned from MURRAY are an integral part of the process employed by MURRAY in the manufacture of Murray SPACE Shoes and I agree that I will use such ideas, methods and techniques only to assist in the manufacture of SPACE Shoes which are to be completed or cause to be completed by MURRAY and that I will not use such techniques to assist others in the manufacture of shoes of the same type as made by MURRAY.

One chiroprapist who had a contract, as hereinbefore described, with the respondents was Dr. Sanford E. Solomon of Hartford, Connecticut, in about 1953. He represented respondents for a number of years, during which time he conducted a short-term school in the Alan E. Murray Space Shoe casting techniques for other podiatrists and chiroprapists to prepare them to represent the respondents in their respective areas. They were required to sign an application, addressed to Dr.

Solomon, and pay a fee for such course, and also, as a part of the application, they were required to sign a letter, addressed to respondents, in which they stated that they understood they must treat as confidential the techniques employed by respondents, and not discuss the methods with outsiders or disclose them to anyone. And further:

I promise not to make use of these techniques except under the provisions of our contract in making casts for the Murray Laboratories, and in case I should take employment or become part of any concern, I will not disclose or make use of the techniques taught me without your written permission.

I will not make use of any other moulded shoes in my practice during my association with the Alan E. Murray Laboratories. If after one year I wish to terminate my use of the Murray Shoe, I shall notify you and the public and guarantee not to use any product that violates Murray patents or that might confuse the public into believing it was a Murray product.

Although prices vary somewhat, the usual prices observed, during the period of time from 1953 to 1957, for the regular shoe were \$45 per pair to the podiatrist or chiropodist and \$70 per pair to the patient.

Beginning about 1955 or 1956, a number of respondents' customers, podiatrists and chiropodists, began to have their shoes manufactured by other manufacturers who had come into the field during that time. Most of these other manufacturers had represented the respondents in previous years, and were familiar with the technique of respondents. Among those were the Jerry Miller "I.D." Shoes, Travelmasters, Inc., Jamaica, New York, with its factory in Brockton, Massachusetts, a subsidiary of Sandler Benton Company. Jerry Miller got his training while working for a Dr. Sugarman, who at one time (1947) represented the respondents, and who later manufactured "Contour" shoes under the name "Foot Contour Shoe Laboratory, Inc." Although Jerry Miller never had a contract with Murray, he testified that he had been told by customers of respondents, in 1956, that they could not handle his shoes because of a previous contract with Murray.

Another competitor testified that he had been attempting to sell to certain named chiropodists in Springfield, Illinois; Detroit, Michigan; and Cleveland, Ohio in 1957, 1958, and 1959, and that he was told by them that they could buy molded sandals from him because Murray did not make sandals at that time. This testimony is not supported by other witnesses, and there is considerable doubt that these chiropodists were actually under contract at the times indicated.

The record also contains an agreement between respondents and R. H. Macy & Co., Inc., dated November 21, 1955, and a letter from Macy's to respondent Alan E. Murray, dated December 20, 1956, supplementing the said agreement, which is with respect to the sale of Murray Space Shoes to Macy's. The agreement, which was still in effect at the time of hearing in 1959, contains the clause whereby

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Macy agrees: "to sell shoes manufactured by Murray and no other molded shoes contoured to the human foot." Counsel for respondents in his oral argument stated that the agreement had expired but there is nothing in the record to support this statement.

There is no evidence in the record as to the volume of sales to Macy by respondents under this contract, or of the inability of any one to sell Macy molded shoes because of this contract. Hence, no finding can be made as to its probable effect on competition.

C. COMPETITORS OF RESPONDENTS

The Jerry Miller I.D. Shoe is one of the largest competitors of the respondents, selling directly as they do to podiatrists and chiropodists, as the output of this concern is between six and seven thousand pairs annually.

Another manufacturer of molded shoes who is a strong competitor of respondent, is Dr. Silverman with his "Pedinold" and "Naturalmold" brands. He manufactures these shoes under the name of Naturalmold Shoe Company, and Ortho Shoes, Inc. The "Pedinold" brand is sold to retail stores, and the "Naturalmold" brand to doctors exclusively. Dr. Silverman started his business in 1954, and his sales during the succeeding years were as follows:

1955	2,000 pairs
1956	6,000 pairs
1957	9,000 pairs
1958	8,000 pairs
1959 (1st 7 months)	4,000 pairs

Other principal competitors, and the volume of business done by them, are as follows:

T.O. Dey Service Corporation:

1957	2,000 pairs
1958	2,100 pairs

Jack C. Rich, Rich Therapeutic Shoe Laboratories:

1956	1,500 pairs
1957	2,000 pairs
1958	2,000 pairs plus

B. Nelson Company, New York City:

1957	500 pairs
1958	275 pairs

Ralph W. Merians

	1,000 pairs annually
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Dr. Fink (custom-mold shoes):

1958	300 pairs
1959 (1st 6 months)	300 pairs

Other concerns advertising as manufacturers of molded shoes, the volume of sales unknown, are as follows:

Morris Moulded Shoe Co., New York City
 Joseph Burger, New York City
 Dr. Guston Appel, Hollywood, Calif.
 Foot-Mold Shoe Corp., New York City
 Ideal Moulded Shoe Co., New York City
 Classic Mold Shoe, Inc., New York City
 S. & H. Elkins, Inc., Los Angeles, Calif.
 Archmaster Shoe Corp., Philadelphia, Pa.
 Tread Mold Shoes, Inc., New York City
 Ramer Laboratories, Jamaica, N.Y.
 Tru-Mold Shoes, Buffalo, N.Y.
 Personal Contour Shoes, Haverhill, Mass.
 Foot-Mold Shoe Corp., New York City
 Dr. Scholl Foot Comfort Shop, Buffalo, N.Y.
 Wright's Support and Orthopedic Appliances, Norfolk, Va.
 Brockton Moulded Shoe Co., Brockton, Mass.
 Foot Form Shoe Company, Canton, Ohio
 Tip Top Shoe Co., New York City
 True-Cast Molded Shoe Co., New York City
 Contour Shoe Center, Inc., San Francisco, Calif.
 Zely Molded Shoes, New Haven, Conn.
 Vollbracht's, New York City
 Foot-Eze Custom Molded Shoe, Los Angeles, Calif.

It is therefore found that the competition of competitors of respondents has substantially increased, both in volume of sales and in number, since 1953.

D. RESPONDENTS' SHARE OF THE MOLDED SHOE MARKET

Although the record contains no exact figures with respect to the total volume of molded shoe business in the United States, it is estimated by an informed person in the industry that the annual output in recent years is approximately 50,000 pairs.

From about 1941 until 1953, respondents were probably the only manufacturers of molded shoes of any consequence in the United States. The volume of sales of respondents, for the years 1953 to 1958, was as follows: 1953—5,154 pairs; 1954—7,750 pairs; 1955—10,934 pairs; 1956—12,550 pairs; 1957—11,921 pairs; 1958—7,742 pairs. However, as the popularity of the Murray SPACE Shoe increased among chiropractors, podiatrists and orthopedic surgeons, many of the customers of respondents who had been trained in Murray techniques began to manufacture for themselves and, despite the restrictive clauses in their contracts, as hereinbefore described, competitors of respondents increased, not only in number, as hereinbefore indicated, but also in volume of business, until by 1958 at least one of their competitors replaced them as the largest manufacturer in the industry. The volume of sales of molded shoes by Dr. Silverman, in 1958, exceeded the volume of respondents' sales during that year.

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Also, the volume of sales of molded shoes of the Jerry Miller Company was approximately the same as respondents in 1958.

It is therefore found that respondents have not increased their share of the molded shoe market but, on the other hand, their share has declined since 1957.

CONCLUSIONS AS TO COUNT II

In view of the foregoing findings, it is concluded that the effect of the sale, and contracts of sale, of molded shoes by respondents, upon such conditions, as aforesaid, has not been, is not now, and may not be, to substantially lessen competition with respondents in the sale of molded shoes, or between customers of respondents, or to create a monopoly in respondents in the molded shoe industry. The allegations of the complaint to this effect are not supported by the evidence in the record.

Hence, the aforesaid acts and practices of respondents, as above set forth, as to Count II, do not constitute a violation of Section 3 of the Clayton Act.

ORDER

It is ordered, That respondents Murray SPACE Shoe Corporation, a corporation, and its officers, and Alan E. Murray and Lucille Marsh Murray, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of molded shoes, that is, custom-made shoes constructed over plaster casts of the customers' feet, or any shoe of substantially similar construction or design, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement, including pamphlets and circulars distributed to customers and prospective customers, by means of the United States mails, or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication:

(a) That their shoes have therapeutic qualities as to diseases, ailments, abnormalities, or disorders of the feet, unless expressly and clearly limited to relief only of said diseases, ailments, abnormalities, or disorders due to, or caused by, ill-fitting shoes.

(b) That their shoes, or the wearing thereof, will correct, prevent, or relieve swollen ankles, swollen joints, puffiness on ball of foot, pain in the hip, high blood pressure, sagging ankles, or arthritis, unless expressly and clearly limited to relief only of said diseases or ailments due to, or caused by, ill-fitting shoes.

(c) That their shoes, or the wearing thereof, will correct, prevent or relieve indigestion or stomach ulcers.

(d) That their shoes, or the wearing thereof, will correct hammer toes or bunions, provided, however, that nothing contained in this paragraph shall prevent respondents from representing that their said shoes, or the wearing thereof, will give relief from pain suffered by a person with hammer toes or bunions.

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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said shoes, which advertisements contained any of the representations prohibited in Paragraph 1 above.

It is further ordered, That all allegations contained in the complaint under Count I, not hereinbefore mentioned under Paragraph 1, be, and the same hereby are, dismissed.

It is further ordered, That the allegations of the Commission's complaint herein under Count II thereof be, and the same hereby are, dismissed.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The complaint in this proceeding charges respondents in Count I with the dissemination of false advertisements constituting unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, and in Count II with entering into contracts, agreements and understandings with purchasers to sell respondents' molded shoe products on the condition that such purchasers will not use or deal in the molded shoes sold or supplied by a competitor and engaging in other practices in violation of Section 3 of the Clayton Act.

The hearing examiner in his initial decision found and concluded as to Count I that respondents' unqualified representations as to therapeutic benefits as indicated constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act and ordered such practices discontinued. As to Count II, he found and concluded that the allegations of the complaint were not supported by the evidence in the record and, accordingly, dismissed these charges.

The matter is now before the Commission upon the cross-appeals of counsel in support of the complaint and the respondents. The former appeals from (1) the portion of the order which would permit qualified representations as to relief from high blood pressure and arthritis in the wearing of Murray shoes and the findings upon which this part

of the order is based, and (2) the dismissal of the allegations under Count II of the complaint. Respondents appeal from the portion of the initial decision holding them in violation of allegations under Count I of the complaint and the part of the order which requires them to cease and desist these practices. The specific grounds for each appeal will be covered below.

Respondents manufacture and sell shoes made either by using the foot of the purchaser as a last, in which case the shoes are called "Contact Shoes" or by making a cast of the foot to be used as the last in the manufacture of the shoe, in which case the shoes are called "Space Shoes". Such shoes are all in the category of molded shoes. They are in fact molded to the shape of the foot, having an unconventional foot-shaped appearance. The "Contact Shoes", while molded shoes, are not involved in this proceeding. Respondents' Space Shoe is not an orthopedic device as the examiner found and as respondents admit in their answer.

RESPONDENTS' APPEAL AS TO COUNT I

Count I of the complaint charges, among other things as follows:

(a) That respondents' shoe is not a health shoe and has no therapeutic qualities directly attributable to it, as represented.

(b) That respondents' shoes will not, as represented, correct, prevent or relieve: swollen ankles, swollen joints, puffiness on ball of the foot, pain in the hip, high blood pressure, fatigue, indigestion, stomach ulcers, sagging ankles, and arthritis.

(c) That respondents' shoe will not, as represented, correct or prevent calluses. [The examiner ruled during the course of the proceeding that respondents' shoe would remove calluses and, in effect, dismissed this allegation.]

(d) That respondents' shoe will not, as represented, correct or prevent hammer toes and bunions.¹

The hearing examiner included an order with the initial decision covering each of the matters above mentioned except "fatigue" and "calluses". The latter is out of the case as indicated. On "fatigue", while findings were made showing that the allegation of the complaint on this representation was sustained, no prohibition on it was included in the order. This oversight will be remedied in the modified order to be issued herewith.

Of the other specific allegations under Count I of the complaint, not covered above, most were stricken from the complaint during the

¹ Charged misrepresentations as to certain other diseases, abnormalities or disorders in the group (b), (c) and (d) above were dismissed by the examiner during the course of the proceeding for failure of proof.

course of the proceeding for failure of proof. One exception, the representation as to orthopedic device, was found by the examiner not to be proved in his initial decision. Other allegations were dropped without express findings. In the latter instances we do not believe the charges are sustained by the evidence of record. No appeal by counsel supporting the complaint has been taken from the disposition of the case on any of such other specific allegations. We concur in the examiner's disposition of the case as to these other matters.

As to the remaining charges, the respondents' advertisements in the record show, as found by the examiner, that they have unqualifiedly represented their shoe as having therapeutic qualities and that they have made the other specific representations still in issue. The examiner on the question of therapeutic qualities found as follows:

It is also found that the Murray Space Shoe may be referred to as having therapeutic qualities only in those cases where they are prescribed by chiropodists or orthopedic surgeons to relieve pain and give comfort when the ailment is caused by the wearing of ordinary conventional stock shoes, and in the cases of certain deformities or abnormal conditions of the feet.

The pertinent provision of the order in the initial decision prohibits the representation:

(a) That their shoes have therapeutic qualities as to diseases, ailments, abnormalities, or disorders of the feet, unless expressly and clearly limited to relief only of said diseases, ailments, abnormalities or disorders due to, or caused by, ill-fitting shoes.

Orthopedic surgeons, Dr. Gordon, Dr. Herzmark and Dr. Sugar, called by counsel supporting the complaint, all testified to the effect that Murray Space Shoes have no direct therapeutic qualities, although they did further testify that where pains or disorders of the feet are caused by ill-fitting shoes, Murray Space Shoes will afford relief from such pains or disorders. Evaluating this evidence with other evidence of record, we believe that substantial probative evidence supports a finding that Murray Space Shoes have no therapeutic qualities, exclusive of the merit which the shoes may have in affording relief as to pains or disorders of the feet caused by ill-fitting shoes. Accordingly, the initial decision, including the order, will be modified to conform to this view.

On representations as to certain specific ailments or disorders, namely, swollen ankles, swollen joints, puffiness on ball of foot, pain in the hip, fatigue, sagging ankles, hammer toes and bunions, the record supports a finding that Murray Space Shoes will give relief only when these conditions are caused by ill-fitting shoes, or shoes that do not conform to the shape of the foot. Otherwise as to these and the other specific conditions at issue herein, Murray Space Shoes will not cor-

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rect, prevent or relieve. The questions raised as to high blood pressure and arthritis will be discussed below.

Respondents in their appeal take a number of exceptions to the examiner's findings contending, it appears, that he gave too much weight to the medical witnesses called by counsel supporting the complaint, that he should not have found that respondents made representations charged in the complaint and that he should not have found that the respondents' shoes fail to have the merits or qualities so claimed for them.

We have considered the evidence on the questions so raised, and except as otherwise noted, we concur with the examiner's findings. On the exception taken as to the weight given to the medical witnesses, we observe that the examiner has considered all the testimony including that of the medical witnesses called by the respondents. The medical witnesses called by counsel supporting the complaint were shown to be highly qualified witnesses, a fact apparently not in dispute, and we cannot say the examiner erred in the weight he gave to their testimony. Respondents argue that these witnesses, except for Dr. Sugar, had not prescribed the Murray Space Shoe and therefore lacked experience with the product. It is clear, however, that these three orthopedic specialists are widely experienced in their field. It is well settled that the testimony of such experts as to the merits of a product is properly considered substantial evidence, even though they have had no personal experience with it. *Bristol-Myers Co. v. Federal Trade Commission*, 185 F. 2d 58, 62 (4th Cir. 1950) and pertinent cases cited therein; *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F. 2d 676, 678-679 (2d Cir. 1944).

Another contention made by the respondents on their appeal seems to be that the terms or form of the complaint misled them as to the issues involved so that they did not make the defense they would otherwise have made and that they were therefore denied a fair hearing. This argument is partly based on the contention that respondents were not apprised of the fact that the claim against them was a charge that their advertisements failed to reveal that the ills therein mentioned to be benefitted were only those caused by ill-fitting shoes. It is likewise partly based on the contention that they were deceived into the belief that the charges against them in subparagraph 3 of paragraphs 6 and 7 would be defeated if it were proved that wearing Murray Space Shoes would either "correct, prevent or relieve" the items mentioned, which they assert they have done.

On the first point, respondents cannot claim lack of knowledge of the charges when the complaint fully covers the practices in issue.

On the second point, we do not believe that respondents were misled

in spite of the apparent position taken by the examiner on this question. This case was clearly tried on the basis that respondents had misrepresented that their shoes would variously correct, prevent or relieve the ailments mentioned, and that in fact they would not do so. Thus, proof of the representation and the failure to perform as to any one of the three things—correct, prevent or relieve—would sustain the charge to that extent. Respondents' awareness of this is well demonstrated by the manner in which they made their defense.

We conclude that respondents were adequately and appropriately advised of the charges against them, that they were given full opportunity to defend themselves against these charges, and that they have availed themselves of this opportunity. We reject their argument that they were denied a fair hearing. Other contentions of the respondents not specifically mentioned above are also rejected.

Respondents' appeal from the examiner's initial decision as to Count I, accordingly, is denied.

APPEAL OF COUNSEL SUPPORTING THE COMPLAINT AS TO COUNT I

Counsel supporting the complaint appeal from the examiner's finding that the wearing of the Murray Space Shoe will relieve as to *high blood pressure* and *arthritis* "when, and only when, these conditions are caused by ill-fitting shoes or shoes that do not conform to the shape of the foot" and the portion of the order partly excepting representations on these ailments. The medical witnesses called in support of the complaint testified to the effect that the Murray Space Shoe would not correct, prevent or relieve arthritis or high blood pressure, although not without some apparent qualification.

We have considered this testimony in the light of other evidence of record and particularly the testimony that respondents' shoes will do no more than give relief from pain or disorders caused by ill-fitting shoes and have concluded that the possible relief which might be provided as to such systemic disorders, if any, would be entirely too remote or indirect to justify even qualified references thereto. We believe that the examiner erred in his findings and order covering these ailments. The appeal of counsel supporting the complaint on this question is granted.

APPEAL OF COUNSEL SUPPORTING THE COMPLAINT AS TO COUNT II

The complaint alleges in Count II that respondents in the course of commerce have entered into contracts, agreements or understandings to sell their molded shoes on the condition that the purchasers thereof would not use or deal in molded shoes sold or supplied by a competitor of respondents and that they have refused to sell to cus-

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tomers unwilling to restrict themselves to respondents' products. It is further alleged that these acts or practices may be to substantially lessen competition or tend to monopoly and, therefore, violate Section 3 of the Clayton Act. The hearing examiner in his Initial Decision dismissed this Count.

The written agreements introduced in support of this charge are identified as Commission Exhibits 3, 6-12, and 36.

Commission Exhibit 3 is an agreement dated November 21, 1955, between Alan E. Murray and R. H. Macy & Co., Inc., New York City, relative to the sale of Murray shoes. Macy's agreed "To sell shoes manufactured by Murray and no other shoes contoured to the human foot."

Murray, between 1942 and 1958, entered into agreements with chiropodists and podiatrists and others regarding the manufacture, sale and distribution of shoes and certain materials. Commission Exhibits 6-12 are illustrative of contracts made in this group. These agreements vary in their terms, having been modified from time to time through the indicated period. They cover not only Murray Space Shoes but the so-called "Contact Shoes" as well. The latter are not involved in this case.

One form of the chiropodist agreement used in 1958 contains this provision:

I recognize and agree that the ideas, methods and techniques and the like which I have learned from MURRAY are an integral part of the process employed by MURRAY in the manufacture of Murray SPACE Shoes and I agree that I will use such ideas, methods and techniques only to assist in the manufacture of SPACE Shoes which are to be completed or caused to be completed by MURRAY and that I will not use such techniques to assist others in the manufacture of shoes of the same type as made by MURRAY. (Commission Exhibit 12)

In 1953, Dr. Sanford E. Solomon of Hartford, Connecticut, representing respondents, conducted a school in Murray shoe casting techniques for podiatrists and chiropodists. Those taking the course were required to sign a letter addressed to respondents which included the following statements:

I promise not to make use of these techniques except under the provisions of our contract in making casts for the Murray Laboratories, and in case I should take employment or become part of any concern, I will not disclose or make use of the techniques taught me without your written permission.

I will not make use of any other moulded shoes in my practice during my association with the Alan E. Murray Laboratories. If after one year I wish to terminate my use of the Murray Shoe, I shall notify you and the public and guarantee not to use any product that violates Murray patents or that might confuse the public into believing it was a Murray product. (Commission Exhibit 36)

While not passing upon each of the agreement forms challenged in this proceeding, we believe it is sufficiently shown, as in the above cited

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instances, that respondents have required in certain written agreements that purchasers of its molded shoes will not deal in molded shoes of respondents' competitors.

The hearing examiner found that the "line of commerce" involved in this case is the manufacture and sale of molded shoes, that is, shoes custom-made over plaster casts of customers' feet, to follow all the contours of their feet. We will use the term "molded shoes" in referring to this market. The examiner also found that this industry extends over all parts of the United States. Respondents take the position that the line of commerce should be the whole industry involving the manufacture and sale of shoes or, separately, men's shoes, women's shoes and children's shoes. In view of our disposition of Count II, we will assume, without deciding, that the line of commerce is molded shoes since even in this limited area a violation has not been shown.

The molded shoe business is of relatively recent origin. The record establishes that Murray was the first to manufacture and sell such shoes beginning about 1941. From about 1941 to 1953, as the examiner finds, respondents were probably the only manufacturers of molded shoes of any consequence in the United States. However, as the popularity of the molded shoe increased, customers of respondents who had been trained in Murray techniques began to manufacture molded shoes for themselves and became competitors of respondents.

The examiner has listed seven concerns as the principal competitors of respondents. These and their 1958 outputs are as follows:

<i>Competitor</i>	<i>Sales in Pairs</i>
(1) Jerry Miller I. D. Shoe-----	6-7,000 pairs (annually)
(2) Naturalmold Shoe Company and Ortho Shoes, Inc. (enterprises owned by Dr. Silverman) -	8,000 pairs
(3) T. O. Dey Service Corporation-----	2,100 pairs
(4) Jack C. Rich, Rich Therapeutic Shoe Labo- ratories -----	2,000 pairs, plus
(5) B. Nelson Company, New York City-----	About 275 pairs
(6) Ralph W. Merians-----	1,000 pairs (annually)
(7) Dr. Nathan Fink-----	300 pairs

The examiner has also listed 23 other competitors, but in the latter instances the record is silent as to their sales volumes or market shares.

Respondents' output from 1953 to 1958 was as follows:

	<i>Pairs</i>
1953-----	5, 154
1954-----	7, 750
1955-----	10, 934
1956-----	12, 550
1957-----	11, 921
1958-----	7, 742

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On molded shoes the price in the period 1953 to 1957, although differing somewhat, was commonly \$45 per pair to the podiatrist or chiropodist and \$70 per pair to the patient.

The only information in the record as to the market size is the statement of a witness, Jerome Miller, of Jerry Miller I.D. Shoe, a podiatrist and a manufacturer of molded shoes in competition with respondents. He testified that the annual output of the industry is approximately 50,000 pairs of molded shoes. The hearing examiner termed the witness' statement on total output an estimate by an informed person in the industry. The witness himself called it a "guess".

Whether this was a guess or an informed estimate, it is very little standing alone upon which to make a finding as to market size or the total sales in the market. There is nothing further in the record to corroborate the testimony on this point nor is there any other information in the record as to total market sales.

The witness did not relate his statement on annual output to any particular year. In an industry in which many new manufacturers are quickly getting into the business and in which sales rapidly expand for individual firms, as in the case of Dr. Silverman from 2,000 pairs in 1955 to 8,000 pairs in 1958, a proper estimate for one year might be totally off for another period of time. Moreover in a number of instances this witness substantially underestimated the volume of business done by several of respondents' competitors.

This record shows very little about the structure or make-up of the molded shoe industry, that is, the number of competitors, who and where they are, and their relative positions in the industry.

There is some testimony from several molded shoe manufacturers as to the companies they consider their principal competitors. These lists are not generally uniform although most named Murray Space Shoe and Jerry Miller I.D. Shoe as principal competitors. Several witnesses listed Dr. Jack Silverman's shoe ("Naturalmold" and "Pedimold") as a principal competitor. Some also listed T. O. Dey Corporation. Otherwise the lists vary considerably.

Witness Jerome Miller (Jerry Miller I.D. Shoe) listed the following, other than Murray, as principal competitors, along with estimated outputs:

<i>Competitor</i>	<i>Estimated annual output (pairs)</i>
Rube Shoe, Bronx, N.Y.-----	1,000
Natural Mold, Mount Vernon, N.Y.-----	5-6,000
Shultz, Buffalo, N.Y.-----	1,000
Classic Mold Shoe, New York, N.Y.-----	1,000
Rich, New York, N.Y.-----	1,000

The competitors of respondents listed by the examiner in his initial decision as principal competitors were Jerry Miller I.D. Shoe, Dr. Silverman ("Naturalmold" and "Pedimold"), T. O. Dey Service Corporation, Rich Therapeutic Shoe Laboratories, B. Nelson Company, Ralph W. Merians and Dr. Nathan Fink. They apparently are at least not all of the principal competitors. It is noted that witness Jerome Miller listed, in addition to others, three principal competitors not so termed by the examiner and estimated their sales volumes as each 1,000 pairs annually, which is as much or more than the sales volumes of three of the companies which the examiner lists as principal competitors. It is not clear from this record who the leading competitors are in the industry.

The record is seriously deficient as to evidence on the general structure of the industry including the total output and relative shares of the output by leading or principal competitors. It is also insufficient or unsatisfactory on other factual details which need not here be covered in detail. The record on the question of establishing respondents' market share and the substantiality of the competition foreclosed when boiled down consists of little more than the testimony of several of respondents' competitors that they consider respondents to be their "largest" competitor. This is a singularly slim evidentiary showing. On the basis of this flimsy record we are unable to reach any determination as to competitive effects. Clearly the tests laid down by the Supreme Court defining the "substantiality of market foreclosure" under Section 3 of the Clayton Act have not been met by this record. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

The appeal of counsel supporting the complaint from the hearing examiner's Initial Decision dismissing Count II is therefore denied. However, we do not adopt all of the examiner's findings and conclusions on this issue and the Initial Decision will be modified to conform to our views. Under the circumstances, we conclude that the charges under Count II of the complaint have not been sustained. We adopt the hearing examiner's Initial Decision on this Count II charge so far as it concludes that the allegation should be dismissed.

It is directed that an appropriate order be entered modifying the Initial Decision including the order in conformity with the views herein expressed and adopting the Initial Decision, as so modified, as the decision of the Commission.

Commissioner MacIntyre did not participate in the decision of this case.

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FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of counsel in support of the complaint and the respondents from the hearing examiner's initial decision, and upon the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part the appeal of counsel in support of the complaint and having denied respondents' appeal, and having directed that an appropriate order be entered modifying the initial decision including the order in conformity with the views expressed in the opinion, and adopting the initial decision, as so modified, as the decision of the Commission:

It is ordered, That the last subparagraph of Paragraph Five of the FINDINGS AS TO THE FACTS (COUNT I) of the initial decision be, and it hereby is, modified to read as follows:

Therefore, considering the foregoing testimony, it is found that the Murray Space Shoe is not an orthopedic device and has not been so represented by respondents. It is also found that the wearing of Murray Space Shoes will relieve swollen ankles, swollen joints, puffiness on ball of foot, pain in the hip, fatigue, sagging ankles, hammer toes and bunions when, and only when, these conditions are caused by ill-fitting shoes, or shoes that do not conform to the shape of the foot. The wearing of the Murray Space Shoe will not correct, prevent or otherwise relieve such conditions. As to indigestion, stomach ulcers, high blood pressure and arthritis, it is found that any beneficial effect which the wearer of Murray Space Shoes might receive would be too indirect, or too remote, to be attributed to the wearing of the Murray Space Shoe. It is also found that the Murray Space Shoes have no therapeutic qualities, exclusive of the merit which the shoes may have in affording relief as to pains or disorders of the feet caused by ill-fitting shoes.

It is further ordered, That the last paragraph under "B. Respondents' Methods of Distribution—Use of Restrictive Agreements" of the FINDINGS AS TO THE FACTS (COUNT II) of the initial decision be, and it hereby is, stricken.

It is further ordered, That the paragraphs under "D. Respondents' Share of the Molded Shoe Market" of the FINDINGS AS TO THE FACTS (COUNT II) of the initial decision be, and they hereby are, modified to read as follows:

The record is seriously deficient as to evidence on the general structure of the industry including the total output and the relative shares of the output by leading or principal producers. It is also insufficient or unsatisfactory on other factual details. The record on the question

of establishing respondents' market share and the substantiality of the competition foreclosed when boiled down consists of little more than the testimony of several of respondents' competitors that they consider respondents to be their "largest" competitor. This is an inadequate basis for making a determination as to competitive effect.

It is further ordered, That the paragraphs under the heading "CONCLUSIONS AS TO COUNT II" contained in the initial decision be, and they hereby are, modified to read as follows:

In view of the foregoing findings, it is concluded that the allegations of the complaint as to Count II are not supported by substantial evidence, and that, accordingly, these allegations should be dismissed.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondents Murray Space Shoe Corporation, a corporation, and its officers, and Alan E. Murray and Lucille Marsh Murray, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of molded shoes, that is, custom-made shoes constructed over plaster casts of the customers' feet, or any shoe of substantially similar construction or design, do forthwith cease and desist from, directly or indirectly:

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

(a) That their shoes have therapeutic qualities, except that nothing herein contained shall prevent respondents from making representations permitted under subparagraphs (b) and (d) hereof, and provided further that nothing herein contained shall prevent respondents from representing that said shoes, or the wearing thereof, will give relief from pains or disorders of the feet due to, or caused by, ill-fitting shoes, to the extent not prohibited by subparagraph (c) hereof.

(b) That their shoes, or the wearing thereof, will correct, prevent, or relieve swollen ankles, swollen joints, puffiness on ball of foot, pain in the hip, fatigue, or sagging ankles unless expressly and clearly limited to relief only of said diseases or ailments due to, or caused by, ill-fitting shoes.

(c) That their shoes, or the wearing thereof, will correct, prevent or relieve indigestion, stomach ulcers, high blood pressure or arthritis.

(d) That their shoes, or the wearing thereof, will correct hammer toes or bunions, provided, however, that nothing contained in this paragraph shall prevent respondents from representing that their said

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shoes, or the wearing thereof, will give relief from pain suffered by a person with hammer toes or bunions.

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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said shoes, which advertisements contain any of the representations prohibited in Paragraph 1 above.

It is further ordered, That all allegations contained in the complaint under Count I, not hereinbefore mentioned under Paragraph 1, be, and the same hereby are, dismissed.

It is further ordered, That the allegations of the Commission's complaint herein under Count II thereof be, and the same hereby are, dismissed.

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

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, as modified.

By the Commission, Commissioner MacIntyre not participating.

IN THE MATTER OF

STAR FRUIT COMPANY ET AL