

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

IN THE MATTER OF

HUGH J. McLAUGHLIN & SON, INC., ET AL.

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

Docket 8529. Complaint, Aug. 28, 1962—Decision, July 31, 1964

Order making effective desist order of June 12, 1964, 65 F.T.C. 992, which required a manufacturer of golf balls in Crown Point, Ind., to cease selling rebuilt or re-constructed golf balls without disclosure on the packaging and on the balls themselves that they were previously used and rebuilt.

FINAL ORDER

By its decision of June 12, 1964 [65 F.T.C. 992], the Commission modified and adopted the initial decision as modified but suspended enforcement of the cease and desist order contained therein until further notice. The Commission has determined, in the light of its final order in *Metropolitan Golf Ball, Inc., et al.*, Docket No. 8528, that the order to cease and desist should be made effective. Accordingly,

It is ordered, That the order to cease and desist contained in the decision of the Commission issued June 12, 1964 [65 F.T.C. 992], shall become effective with the issuance of this order.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the provisions of the order issued June 12, 1964.

IN THE MATTER OF

UNITED STATES RUBBER COMPANY

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

Docket 8586. Complaint, July 18, 1963—Decision, July 31, 1964

Order dismissing—on evidence that the challenged practices had been abandoned several years prior to issuance of the complaint, with no likelihood of resumption—complaint charging a leading manufacturer of rubber and

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plastic products with deceptively representing its thermoplastic product Kralastic as "rubber," "hard rubber," "rubber-resin," 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 United States Rubber Company, a corporation, hereinafter referred to as respondent, has 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. Respondent United States Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1230 Avenue of the Americas, New York, New York.

Respondent owns, operates and controls a division of its business known as Naugatuck Chemical Division, with offices and place of business located at Naugatuck, Connecticut and an additional plant located at Baton Rouge, Louisiana.

PAR. 2. Respondent, through its Naugatuck Chemical Division, is now and for some time last past has been, engaged in the manufacture, advertising, sale and distribution of, among other things, thermoplastic materials under the name of "Kralastic."

Said thermo plastic materials are manufactured in various compositions and under various patents and for the ultimate use by manufacturers in production of various parts and commodities for resale to the purchasing public.

PAR. 3. Respondent causes its said products, when sold, to be transported from its plants located in the States of Connecticut and Louisiana to purchasers thereof located in various States of the United States other than, as well as in, the States of Connecticut and Louisiana. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of its business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the manufacture, advertising, sale and distribution of products of the same general kind and nature as sold by respondent.

PAR. 5. In the course and conduct of its business, respondent has disseminated, and caused to be disseminated, advertisements concerning its said thermoplastic materials under the name "Kralastic," including but not limited to advertisements inserted in magazines, brochures, circulars and letters, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said thermoplastic materials.

PAR. 6. By means of advertisements as aforesaid and by oral statements of sales representatives and by statements in writing to customers and prospective customers, respondent has represented, directly or by implication:

1. That its "Kralastic" raw material is a hard rubber compound for use in the manufacture of combs, and that combs made of said material are in fact "rubber" and "hard rubber" and are correctly branded as such.

2. That its "Kralastic" raw material is a synthetic rubber or a "modified rubber."

3. That combs made of its Kralastic material are made of rubber-resin and are appropriately branded for resale to the consuming public under such designation.

4. That its Kralastic material is a resin-rubber blend and thus differs from plastics used in connection with the manufacture of various end products.

PAR. 7. In truth and in fact:

1. Respondent's "Kralastic" material as sold to comb manufacturers is not a hard rubber compound as the terms rubber or hard rubber are understood in the trade in connection with combs for use on human hair. Combs made from said materials are not vulcanized and are not composed of rubber or hard rubber as the words are understood in the trade.

2. Respondent's "Kralastic" material is not a synthetic rubber nor is it a "modified" rubber and does not have the same properties of rubber.

3. The combs made of Kralastic material are not rubber-resin as the ingredients of same are predominantly a thermoplastic resin and composed of different ingredients other than vulcanized rubber as the term is understood in the trade.

4. Said Kralastic material is not a rubber-resin blend that has non-thermoplastic properties of vulcanized rubber nor does it have the properties of hard rubber; said Kralastic material is in fact a thermoplastic.

Therefore, the statements and representations set forth in Paragraph Six were, and are, false, misleading and deceptive.

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PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's thermoplastic "Kralastic" materials by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Charles S. Cox for the Commission.

Arthur, Dry, Kalish, Taylor & Wood, New York, N.Y., by
Mr. Walter Barthold for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

MARCH 24, 1964

The complaint in this matter charges the respondent, United States Rubber Company, a corporation, with misrepresenting a thermoplastic material manufactured and sold by it, in violation of the Federal Trade Commission Act. A substantial volume of evidence, both in support of and in opposition to the complaint, has been received. Proposed findings and conclusions have been submitted by the parties and the case has been argued orally before the hearing examiner. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

The thermoplastic material in question is manufactured, and marketed in interstate commerce, by respondent's Naugatuck Chemical Division, which has plants in Naugatuck, Connecticut; Baton Rouge, Louisiana; and elsewhere. The material is advertised and sold under the trade name "Kralastic". It is manufactured in a number of different types and grades. The material is sold by respondent in bulk to other manufacturers, who use it in the production of a wide variety of end products. Respondent makes no sales of the material to consumers. The two types of the material involved in the present case are known as "Kralastic D" and "Kralastic MM."

The complaint charges that respondent has falsely represented the material as "rubber," "hard rubber," "synthetic rubber," and "modified

rubber," and also as "resin-rubber" and "rubber-resin." Actually, the complaint charges, the material is none of these things but is merely a thermoplastic.

A novel feature of the complaint is that it does not challenge the correctness of any of the above designations except where the material is to be employed in the manufacture of combs for use on human hair. Any doubt on this point is removed by reference to the proposed order included in the complaint, which is identical with the form of order requested by complaint counsel in his proposed findings and conclusions.

Respondent does not manufacture combs, nor has it ever done so. It does sell the material to comb manufacturers; such sales, however, represent only a negligible portion of its total sales of the material. During each of the years 1959-1963 (only the first six months of 1963 are included), sales of the material to comb manufacturers accounted for only about 1 percent or less of respondent's total sales of the material (RX 76; Tr. 538-541).

The evidence fails to establish that respondent has ever advertised or otherwise referred to the material as rubber or hard rubber or synthetic rubber. In the case of one customer (to be referred to later) it did for a time invoice the material as modified rubber.

The designations resin-rubber and rubber-resin were freely and widely used by respondent in its advertising up until about the year 1960 when, for business reasons, it began to discontinue the use of such terms and to adopt other designations for the material. Respondent's position is that it was entirely warranted in referring to the material as resin-rubber or rubber-resin, that that is precisely what the material is. Thus the principal issue in the proceeding centers around the use of these terms. Complaint counsel insists that, at least insofar as combs are concerned, use of the word rubber to describe the material is false and misleading, regardless of whether the word is used alone or in conjunction with the word resin.

Kralastic D, the first of the two types of the material here involved, was placed on the market by respondent in about 1948. It was manufactured and sold for some ten or twelve years, when it was replaced by the second type, Kralastic MM.

Kralastic D consisted of a physical blend or mixture which contained 13 percent, by weight, of acrylonitrile-butadiene and 85 percent of acrylonitrile-styrene. The remaining 2 percent consisted of various minor compounding ingredients. Acrylonitrile-butadiene is a synthetic rubber frequently referred to as nitrile rubber. Acrylonitrile-

styrene is a resin. Kralastic D, therefore, was in fact a blend of resin and rubber (CXs 8A-B, 30; Tr. 130-32, 152-53, 365, 370, 448-51).

The principal effect of including nitrile rubber in the product was to increase its impact resistance. Plastics usually are brittle; they tend to crack or break easily. The inclusion of the nitrile rubber in Kralastic D served to toughen the finished product, to increase very materially its impact resistance (Tr. 443, 455).

Kralastic MM consists of a mixture of two materials. The first of these is a chemical graft of polybutadiene on acrylonitrile and styrene, and the second is acrylonitrile-styrene. As with Kralastic D, the product also contains certain minor compounding ingredients. Polybutadiene is a synthetic rubber. The amount of polybutadiene which goes into the making of Kralastic MM is approximately 6 percent, by weight, of the total ingredients (CXs 8A-B, 30; Tr. 88, 130, 365-67, 454).

The answer to the question whether Kralastic MM may properly be referred to as resin-rubber or rubber-resin is attended with greater difficulty than in the case of Kralastic D. This is because the rubber ingredient (polybutadiene) which goes into the making of Kralastic MM is chemically grafted on acrylonitrile and styrene, and as a result of the grafting process the polybutadiene probably is no longer present in its original form; that is, polybutadiene, as such, probably is not present in the final product Kralastic MM (CX 8A-B; Tr. 153-54, 454-55, 479-80).

However, the essential properties of the polybutadiene are present in Kralastic MM. Just as the nitrile rubber in Kralastic D contributed materially to the impact resistance of that product, so do the properties of polybutadiene add substantially to the impact resistance of Kralastic MM (Tr. 455).

There is a difference of opinion among experts testifying in the proceeding as to whether in these circumstances Kralastic MM may properly be referred to as resin-rubber or rubber-resin. Testifying at the instance of complaint counsel, Dr. Emanuel Horowitz, Dr. Robert D. Stiehler, and Dr. Lawrence A. Wood, all of the National Bureau of Standards, apparently are of the opinion that as there probably is no rubber, as such, present in Kralastic MM, it is improper and misleading to use the terms resin-rubber or rubber-resin to describe the product (Tr. 98-104, 152-56, 164).

On the other hand, Dr. William Cummings of respondent's chemical research staff, Dr. Field H. Winslow of the Bell Telephone Laboratories, and Dr. Herman F. Mark, Dean of the Faculty of the Polytechnic Institute of Brooklyn, are of the opinion that as poly-

butadiene, a synthetic rubber, goes into the making of Kralastic MM and performs an important function therein, the final product may properly be referred to as resin rubber or rubber-resin, even though the polybutadiene content, as such, may not be present in the finished product (Tr. 457-58, 487-88, 512-13).

The experts on both sides seem to agree that frequently in the field of chemistry products are described by the important ingredients which go into their manufacture, even though some of the ingredients may not be present, as such, in the finished product. Among the examples given by the witnesses were rubber hydrochloride, which contains no rubber, as such; nitro-cellulose, which actually contains no cellulose; and chrome steel and vanadium steel which, respectively, do not actually contain chrome or vanadium (Tr. 141-44, 456-57, 489, 514-16).

In the hearing examiner's opinion the more reasonable and realistic view is that use of the term resin-rubber or rubber-resin to refer to Kralastic MM is not inappropriate or misleading. It must be remembered that we are not dealing here with an ingredient which serves merely a minor or insignificant purpose in the final product. On the contrary, the rubber ingredient which goes into Kralastic MM serves a very real and important function in that its presence adds very materially to the impact strength of the product.

Included in the record are a number of patents, as well as treatises and articles appearing in scientific and trade publications. This evidence refers to products such as Kralastic D and Kralastic MM as resin-rubber and rubber-resin materials. While evidence of this kind is not decisive, it is persuasive in that it indicates wide acceptance and use of the terms in both science and industry (RXs 51, 53-57, 59, 62-64, 81, 82, 85-94).

It is urged by complaint counsel that whatever may be the correct view generally, when the word rubber appears on a comb, even though it may be accompanied by other words, this means to the public that the rubber is hard rubber, that is, vulcanized hard rubber.

The difficulty with this position is that there is no evidence in the record that such is the understanding of the public. True, some of the experts from the National Bureau of Standards, speaking as experts, did testify that to them the word rubber on a comb conveys that meaning. But, the witnesses were speaking only for themselves and as experts; there is nothing to indicate that their view is representative of that of the general public.

Care must be taken to distinguish the present case from that of Vulcanized Rubber and Plastics Company, Docket No. 6222, 53 F.T.C.

920; 258 F. 2d 684; 288 F. 2d 257 (*cert. den.* 368 U.S. 821). In that case, combs made of Kralastic D were branded by the comb manufacturer as "rubber" or "hard rubber" and there was substantial evidence that to the public these terms meant vulcanized hard rubber.

In the present case, the record fails to establish that respondent has ever represented Kralastic D or Kralastic MM as rubber or as hard rubber. Respondent makes no such claims for the materials. The issue here is not whether Kralastic D or Kralastic MM are rubber or hard rubber, but whether they may properly be designated resin-rubber or rubber-resin.

For this reason evidence in the present record to the effect that Kralastic D and Kralastic MM are not rubber or hard rubber would appear to be of little assistance. The most important item of such evidence is that relating to certain tests on some twenty-five combs made by the National Bureau of Standards at the request of the Commission, the tests having been made in April or May 1961 (Tr. 53, 70-80). The combs were made of Kralastic D or Kralastic MM (the record does not disclose which). The most established by the tests was that the combs were not made of rubber or hard rubber. The tests did not purport to determine whether the combs contained synthetic rubber such as that which went into the manufacture of Kralastic D or that which now goes into the manufacture of Kralastic MM.

In summary, it is concluded that the record fails to establish that use of the terms resin-rubber and rubber-resin to describe Kralastic D and Kralastic MM is false or misleading. It is undisputed that Kralastic D contained 13 percent, by weight, of nitrile rubber, and that such rubber content performed a significant and important function in that it contributed very materially to the impact strength of the product.

In the case of Kralastic MM, a more difficult question is presented, due to the fact that apparently the polybutadiene content is not present, as such, in the finished product. There is, however, no doubt that 6 percent, by weight, of polybutadiene, a synthetic rubber, does go into the making of the product, and that this ingredient performs a highly important function in that it adds substantially to the impact strength of the finished product.

As already indicated, respondent in the case of one customer did for a time invoice Kralastic MM as "modified rubber". The customer was Vulcanized Rubber and Plastics Company. In 1961 this company was engaged in the defense of a civil penalty proceeding growing out of alleged violation of the cease and desist order issued against the company by the Commission. Thinking that it would be of assistance

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in the defense of the penalty proceeding if respondent would invoice Kralastic MM to it as "modified rubber" the company requested respondent to invoice the material in that way. Respondent acceded to the request and several invoices from respondent to Vulcanized Rubber and Plastics Company in 1961 designated the material as "modified rubber" (CXs 3A-C, 5B-G).

Kralastic MM is not modified rubber and respondent's use of the term in the invoices was unwarranted and misleading. In light, however, of the circumstances under which the representation was made, the fact that this was the only instance of that kind, and the absence of any likelihood that the representation will be repeated in the future, it is concluded that there is insufficient public interest in the matter to warrant issuance of an order forbidding use of the representation.

Finally, respondent interposes the defense of abandonment or discontinuance of use of the terms resin-rubber and rubber-resin to describe Kralastic. During the last several years materials such as Kralastic have come to be known more and more in the industry by the general designation "ABS" (for acrylonitrile-butadiene-styrene). Respondent's current practice, which has obtained for some three or four years, in its advertising and labeling of Kralastic, is to refer to it by its trade name alone or to describe it by such designations as "ABS Resin," "ABS Plastic," "ABS Compound," etc. The terms resin-rubber and rubber-resin are no longer used in advertising the product. However, in answer to specific inquiries as to the composition of the material, respondent does refer to the rubber ingredient.

In view of the conclusion reached on the merits, it appears unnecessary to determine whether the defense of abandonment or discontinuance has been sustained.

ORDER

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

OPINION OF THE COMMISSION

JULY 31, 1964

By REILLY, *Commissioner*:

The complaint herein charges respondent with violating Section 5 of the Federal Trade Commission Act by falsely and deceptively representing its product "Kralastic," a thermo-plastic material used in the manufacture of numerous products, including combs, as "rubber," "hard rubber," "modified rubber," "synthetic rubber," "rubber-

resin," and "resin-rubber." The hearing examiner held in his initial decision that the allegations had not been sustained and ordered that the complaint be dismissed. Counsel supporting the complaint has appealed from this decision.

The product involved in this proceeding is manufactured and marketed by respondent's Naugatuck Chemical Division and was introduced in 1948 as "Kralastic D." In 1958 or shortly thereafter "Kralastic D" was replaced by "Kralastic MM." "Kralastic D" consisted of a blend or mixture of 13% synthetic rubber (acrylonitrile-butadiene) and 85% resin (acrylonitrile-styrene) and was therefore literally a resin-rubber blend. "Kralastic MM" consists of a blend or mixture of (1) a chemical graft of polybutadiene on acrylonitrile and styrene and (2) acrylonitrile-styrene (a resin). Although synthetic rubber (polybutadiene) is one of the ingredients which goes into the making of "Kralastic MM" (it is 6% by weight of the total ingredients), it is probably not present in its original form in the final product. In other words, the synthetic rubber ingredient undergoes a change in form as a result of the grafting process and therefore "Kralastic MM" probably contains no rubber as such and is literally not a blend of rubber and resin.

As recognized by the hearing examiner, the principal issue in this proceeding is whether the terms "rubber," "hard rubber," "modified rubber," "synthetic rubber," "rubber-resin" and "resin-rubber" have the capacity or tendency to mislead or deceive purchasers or prospective purchasers as to the nature or composition of "Kralastic" when this product is employed as the raw material in the manufacture of combs.¹ Or stated more simply, the issue is whether the public may be led to believe by these terms that combs made from "Kralastic" are made from hard rubber.²

The examiner held that there was no evidence that respondent ever advertised or otherwise referred to "Kralastic" as "rubber" or "hard rubber" or "synthetic rubber." He further held that although respondent had invoiced the material as "Modified Rubber" it had done so in only one instance and that there was no likelihood that this representation would ever be repeated. The examiner also found that respondent had described its product as "rubber-resin" and "resin-

¹ "A novel feature of the complaint is that it does not challenge the correctness of any of the above designations except where the material is to be employed in the manufacture of combs for use on human hair." I.D. page 391.

² "Hard rubber" is a product made by vulcanizing rubber with sulfur. It has been commonly used as a raw material in the manufacture of combs and combs made therefrom have been designated "rubber" and "hard rubber."

rubber" but held that there was no proof that such terms when so used were inappropriate or misleading.

In view of the disposition we propose to make of this proceeding, we will consider only the examiner's ruling concerning respondent's use of the terms "rubber-resin" and "resin-rubber."

The examiner held in this connection that counsel supporting the complaint had failed to sustain the allegation on this point since there was no evidence in the record to indicate that the public would understand these terms, when used on a comb, to mean that the comb was composed of vulcanized hard rubber. He further ruled that although experts from the Bureau of Standards had testified that these terms on a comb conveyed that meaning to them, such witnesses were speaking only for themselves and as experts and that there was nothing to indicate that their view was representative of that of the general public.

While it is not entirely clear from the initial decision, the examiner's position appears to be that counsel supporting the complaint could show the likelihood of deception only by calling consumer witnesses to testify as to their understanding of the words "rubber-resin" and "resin-rubber." If this was the basis for his holding, he was, of course, in error. It is well settled that the Commission is not required to sample public opinion in order to determine the meaning conveyed by an advertisement. *Royal Oil Corporation v. F.T.C.*, 262 F. 2d 741 (1959); *New American Library of World Literature v. F.T.C.*, 213 F. 2d 143 (1954). In holding that the Commission was not required to call consumer witnesses the court in *Zenith Radio Corporation v. F.T.C.*³ stated "The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint."

It appears from our examination of the record that complaint counsel not only failed to call consumer witnesses but offered little else in the way of evidence to establish probable deception, being content to rest his case on the Commission's decision *In the Matter of Vulcanized Rubber & Plastics Co.*⁴ wherein it was held that the designation of combs made of "Kralastic D" as "hard rubber" or "rubber" was false, misleading and deceptive. Despite the weakness of the evidence adduced in support of the complaint, there is nevertheless sufficient evidence in the record to indicate that respondent's description

³ 143 F. 2d 29 (1944).

⁴ 53 F.T.C. 950 (1957).

of "Kralastic" as "rubber-resin" or "resin-rubber" was misleading when the product was sold for use in the manufacture of combs.

In this connection, respondent points out in its proposed findings that it never at anytime material to this proceeding called Kralastic D or Kralastic MM "rubber," "hard rubber" or any name indicating or implying that the material did not contain resin as well as rubber. It appears, however, that comb manufacturers buying these materials as "rubber-resin" and "resin-rubber" from respondent advertised and labeled their products as "rubber" and "hard rubber." And there is evidence indicating that at least some of these manufacturers may have been under the impression that the product was actually rubber or hard rubber. For example, one customer made the following comments in a letter dated July 17, 1958, to respondent's Naugatuck Chemical Division:

We have been using, for some time, your rubber material trade name "Kralastik". We have subcontracted the molding of combs, from this material, with our own molds, and have marked them rubber and/or hard rubber.

It is my understanding that your Kralastik is a rubber compound, and when molded into combs can be stamped rubber or hard rubber * * *.

All the data and information that you can furnish us with, in reference to Kralastik as a rubber material, will be greatly appreciated.

It further appears that this customer did not become convinced that Kralastic was a plastic and not hard rubber until 1961. The following report of a telephone conversation with this customer was made by one of respondent's employees on December 26, 1961:

Mr. Leon called regarding the composition of KRALASTIC. Kee Products has the opportunity to bid on a Government contract for molding combs. This contract requires that the material be hard rubber having a certain vulcanizable component. He wondered if KRALASTIC could be considered such a material. I told him definitely not. While KRALASTIC contains a rubber component it is not vulcanizable either in our processes or during the molding process. Further, a KRALASTIC customer who was labeling his combs hard rubber was made to desist in this labeling by a government agency. Mr. Leon seemed convinced by these arguments that KRALASTIC was not hard rubber.

We think that such evidence indicating that a manufacturer using Kralastic in the production of combs was actually misled as to the composition of this material, which as found by the examiner, was designated "rubber-resin" and "resin-rubber," would support the conclusion that there was a reasonable likelihood that the public might also have been deceived by such terms when used by respondent or its customers in connection with the sale of combs manufactured from Kralastic.

Although we believe that the examiner erred in dismissing the alle-

gations concerning respondent's use of the terms "rubber-resin" and "resin-rubber" for the reasons stated in his initial decision, we are nevertheless of the opinion that the complaint should be dismissed in its entirety on other grounds. Respondent contended before the hearing examiner that the practices challenged in the complaint had been abandoned and adduced evidence in support of this plea. The record shows in this connection that several years prior to the issuance of the complaint respondent discontinued using the designations "rubber-resin" and "resin-rubber" and adopted the designation "ABS" for its Kralastic materials. There is also testimony that the designation "ABS" is now the generally accepted name for materials such as Kralastic and has been sanctioned by the American Society for Testing Materials. There is also in the record the following testimony from one of respondent's representatives:

We started actually using it ["ABS"] ourselves in news releases and advertising in late 1959 and throughout 1960 there was a transitional period in which we used both ABS and resin-rubber or rubber-resin but since 1960 there has been only one ad in which we used the term rubber-resin, and that was just based on an old format. Everything has been ABS since then.

* * * * *

* * * the use of the term rubber or resin-rubber or rubber-resin offers us no advantage currently. In fact, when the term ABS became available we were very happy that there was a new and very distinctive term which we could adopt for our material and be very aggressive in promoting its use generally. We are happy that it has been adopted generally and we intend to keep on using it.

Counsel supporting the complaint does not dispute this testimony nor has he offered any evidence to rebut the showing made by respondent. We are satisfied therefore that respondent has discontinued using the challenged representations and that the circumstances of such discontinuance do not indicate a likelihood of resumption. Since we have no reason to believe that there will be a recurrence of the practice, no order to cease and desist is necessary. The complaint will therefore be dismissed.

To the extent indicated herein the appeal of counsel supporting the complaint is granted and is otherwise denied. The initial decision will be vacated and set aside and the complaint will be dismissed. An appropriate order will be entered.

Commissioner Elman is of the opinion that the complaint should be dismissed for failure of proof.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's

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initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having rendered its decision denying the appeal:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

Commissioner Elman is of the opinion that the complaint should be