

Decision

IN THE MATTER OF

LEO O. JOHNSON DOING BUSINESS AS JOHNSON
HAIR & SCALP CLINIC ET AL.

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

Docket 6497. Complaint, Jan. 18, 1956—Decision, June 10, 1958

Order requiring individuals with main office in New Orleans, La., and operating hair and scalp clinics also in several other States, to cease representing falsely in advertising that use of their hair and scalp preparations would prevent or overcome baldness or excessive hair loss or induce the hair to grow or become thicker, without clearly revealing that the great majority of cases of excessive hair fall and baldness are stages of male pattern baldness, and that in such cases the preparations would be of no value; and to cease representing that respondent Johnson was America's foremost professional authority on hair and scalp disorders, and that respondents and their agents were trichologists.

Harold A. Kennedy, Esq., for the Commission.

James I. McCain, Esq., of New Orleans, La., for respondent Leo O. Johnson.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On January 18, 1956, the Federal Trade Commission issued its complaint against Leo O. Johnson, an individual doing business as Johnson Hair & Scalp Clinic, and William G. Thompson, Harry B. Hause, and Charles L. Anderson, individually (all except Hause hereinafter collectively called respondents), charging them with disseminating false advertisements in violation of sections 5 and 12 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondents. Service was not obtained upon Harry B. Hause, and accordingly the complaint against him will be dismissed without prejudice.

The complaint alleges in substance that respondents in connection with the operation of their hair and scalp clinics in various cities of the United States, disseminated or caused to be disseminated false advertisements by the United States mails and various other means in commerce, for the purpose of inducing the purchase of cosmetic preparations used by them in the operation of their clinics. Respond-

ent Johnson appeared by counsel and filed an answer admitting the operation of the clinic in New Orleans, the sale of various cosmetics in connection therewith, and most of the advertising excerpts set forth in the complaint, but denying any false advertisements or violations of the act. Respondents Thompson and Anderson neither filed answers to the complaint nor appeared at the hearings, and accordingly are found in default and the facts with respect to them are found to be as alleged in the complaint.

Pursuant to notice, hearings were thereafter held at various times and places from September 26, 1956, to April 10, 1957, before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. Prior to the commencement of the hearings, a motion to amend the complaint and a corresponding motion to amend the answer thereto were granted.

The Commission and respondent Johnson were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Counsel supporting the complaint filed proposed findings of fact, conclusions of law, and an order, together with reasons in support thereof. Counsel for Johnson did not file proposed findings of fact and conclusions of law, but in lieu thereof filed a brief, contending that the Commission lacks jurisdiction in the matter and requesting the dismissal of the complaint for that reason. Both counsel waived oral argument. All of the findings of fact proposed by counsel supporting the complaint and the conclusions of law proposed by both counsel, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, Johnson admitted, and it is found that he is an individual doing business as Johnson Hair & Scalp Clinic with his main office and clinic located at 819 Richards Building, 837 Gravier Street, New Orleans, La., since on or about March 1, 1955. The

¹ 5 U.S.C. § 1007(b).

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record further establishes, and it is found, that Johnson also had owned, operated, and/or controlled hair and scalp clinics in Detroit, Mich.; Erie, Pa.; Youngstown, Ohio; Canton, Ohio; and Rochester, N.Y. On or about January 31, 1955, respondent Anderson took over the Erie, Pa., clinic and operated it under a franchise from Johnson until it was closed in August of 1955. On or about August 14, 1954, respondent Thompson took over the Canton, Ohio, clinic and operated it under a franchise from Johnson until December 1955. On or about January 31, 1955, Harry B. Hause took over the Youngstown, Ohio, clinic and operated it under a franchise from Johnson until it was closed in December of 1955. Johnson operated the clinic in Rochester during the year 1954. Johnson also owned and operated the clinic in Detroit during 1954 and 1955 until he sold it on October 1, 1955. Respondents Thompson and Anderson operated their clinics under franchise agreements with Johnson whereby they were required to and did use and adopt Johnson's methods, procedures, preparations, advertising, and general business policies. All respondents cooperated and acted jointly in performing the acts and engaging in the practices hereinafter found.

The complaint further alleged, the record establishes, and it is found that respondent Johnson is now, and all of respondents for the past several years have been, engaged in the sale and distribution of various cosmetic preparations for external use in the treatment of conditions of the hair and scalp. Respondents had said preparations compounded for them by the Klinker Manufacturing Co. of Cleveland, Ohio, and caused said preparations to be transported from the place of their manufacture to respondents' clinics located in other States of the United States. Since March 1956, Johnson has had his cosmetic preparations compounded by J. R. Keeny Co. of New Orleans, La.* Respondents have sold their various cosmetic preparations by two methods. First, respondents through extensive newspaper advertising have invited persons to come to their clinics for examination, diagnosis and treatment, whereupon a certain series of treatments were recommended. If such treatments were agreed to, the said preparations were used in the process of such treatments. Second, respondents have sold home treatment kits containing said preparations to persons induced to visit respondents' clinics by said advertisements.

*The Commission's opinion (see p. 1748 below) states: "To the extent that [the remainder of this paragraph] may hold that the respondents' use of preparations in the course of treatments constituted sales of such preparations, we do not adopt it as a finding of the Commission."

II. The Unlawful Practices

A. *The Issues Framed*

This proceeding is brought under sections 5 and 12 of the act, which in substance prohibit, *inter alia*, the dissemination or causing to be disseminated of any false advertisement by United States mails or in commerce by any means for the purpose of inducing, or which is likely to induce, the purchase of cosmetics.² The principal issues are whether respondents caused the dissemination of their advertisements by United States mails or in commerce, and whether or not such advertisements are false.

B. *The Dissemination by United States Mails and in Commerce*

As stated above, this was the only issue raised in the brief of counsel for respondent Johnson, and respondents Anderson and Thompson are in default as to all issues. The record establishes, and it is found, that respondents, in connection with the operation of their various hair and scalp clinics which sold treatments and various cosmetic preparations allegedly designed to prevent and cure baldness, loss of hair and other hair and scalp disorders, caused the insertion in various newspapers, published in the respective cities in

² Section 12 of the act provides as follows:

"SEC. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

"(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices or cosmetics; or

"(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

"(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5."

For the purposes of sections 12, 13, and 14, section 15 of the act defines the terms "false advertisement" and "cosmetic" as follows:

"(a)(1) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

"(e) The term 'cosmetic' means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap."

which such clinics were operated, of numerous advertisements concerning such treatments and cosmetic preparations. Without listing such publications in detail, the record establishes, and it is found, that respondents caused the publication of said advertisements in various of the leading newspapers in New Orleans, Detroit, Erie, Canton, and Rochester. The record further establishes that each of these leading newspapers had substantial circulation both out of State and by means of the U.S. mails.

Respondent Johnson's argument on jurisdiction is that because he had abandoned all of his operations other than New Orleans prior to the issuance of the complaint, and because he had not "caused" the dissemination of his advertisements by United States mails or in commerce, he was neither engaged in commerce within the meaning of the act, nor does the Commission have jurisdiction over him under section 12(a)(1) of the act. As noted above, section 12(a)(1) of the act prohibits the dissemination of any false advertisement by U.S. mails, or in commerce by any means, for the purpose proscribed. It is respondent Johnson's contention that, although the newspapers in which he published his advertisements were distributed by U.S. mails and in commerce by other means, he had no control over such dissemination and therefore did not "cause" it within the meaning of the act. This contention has recently been answered by the Commission in its *O-Jib-Wa* decision,³ where exactly the same argument was made. The Commission there said:

This contention is untenable. To accept the interpretation advanced by the respondents would impose sole responsibility for the false advertising of foods, drugs, cosmetics and therapeutic devices upon disseminating media and leave free therefrom the party primarily standing to benefit from such advertising.

The record establishes, and it is found, that respondents caused the dissemination of their advertisements by United States mails and in commerce by other means.

C. *The False Advertisements*

The other principal issue is whether or not such advertisements were false advertisements as defined in section 15(a)(1), *supra*, for the purpose of inducing or which were likely to induce, directly or indirectly, the purchase of cosmetics. As found above, respondents purchased their cosmetic preparations used in their treatments from the Klinker Manufacturing Co., except that after March of 1956, respondent Johnson purchased his cosmetic preparations from J. R.

³ *O-Jib-Wa Medicine Co.*, docket No. 6548 (1957).

Keeny Co. The ingredients of the preparations purchased from Klinker were stipulated to be those set forth in the complaint, and the ingredients of the preparations purchased from Keeny are listed in Commission exhibits received in evidence.⁴ Without listing here all of the many ingredients of such preparations, the record establishes beyond dispute and it is found that they are cosmetics, as defined in section 15(e) of the act, *supra*. Likewise, there can be no question and it is found that respondents' advertising was for the purpose of inducing and did induce, directly or indirectly, the purchase of such cosmetics.

The complaint included excerpts from ten of respondents' advertisements dealing with representations concerning baldness, the growing of hair, and various scalp disorders. All told, some 32 different advertisements published by respondents in the various newspapers previously mentioned were received in evidence. The complaint alleged that through the various statements and representations contained in the aforesaid advertisements respondents represented, directly and by implication, that by the use of their cosmetic preparations, methods, and treatments itching of the scalp, dandruff, and irritations of the scalp would be permanently eliminated, and that in a great majority of cases, baldness and excessive hair loss would be prevented and overcome, new hair would be induced to grow, and users would be able to maintain a thicker head of hair. It was also alleged that by referring in such advertising to Johnson as "America's foremost professional authority on hair" and by other means, respondents represented, directly and by implication, that Johnson had had professional and competent training in dermatology and other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair. The complaint further alleged that all of such representations were false, that such advertisements were misleading in material respects and constituted false advertisements as defined in the act, and that such advertisements also were false because of the failure to reveal facts material in the light of such representations, as also required by section 15(a)(1), *supra*.

Without encumbering this decision with numerous excerpts from respondents' advertising, suffice it to say that a careful examination of all of said advertising fairly reveals that respondents did represent in such advertising, directly and by implication, that by the use of their cosmetic preparations, methods and treatments itching of the scalp, dandruff and irritation of the scalp would be permanently

⁴ Commission exhibits 35 and 37 A and B.

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eliminated, and in the great majority of cases (in fact respondents advertised from 94 to 97 percent of all cases) baldness and excessive hair loss would be prevented and overcome, new hair would be induced to grow, and users would be able to maintain a thicker head of hair.

A preponderance of the reliable and substantial evidence in the entire record establishes and it is found that all of these representations are false and misleading in material respects, and constitute false advertisements as that term is defined in the act. After proving respondents' representations and the particular cosmetics used by them in their treatments, counsel supporting the complaint called two expert witnesses, highly qualified doctors of medicine specializing in dermatology, both of whom testified unequivocally that, regardless of the exact formulae or combination of cosmetic preparations and method of treatment used, respondents' preparations and treatments will not permanently eliminate dandruff, itching, or irritation of the scalp, and in the great majority of cases will not prevent or overcome baldness or excessive hair loss, will not induce new hair to grow, and will not bring about a thicker head of hair. They further testified that the great majority, 95 percent or more, of cases of baldness and excessive hair loss are the common type known as male pattern baldness, for which there is no cure or preventative, including that used by respondents, known to science or medicine.

Respondent Johnson called four witnesses who had previously taken his treatments and used his cosmetic preparations, one of whom was a doctor of medicine but not experienced in dermatology and admittedly unfamiliar with the causes and cures or preventatives, if any, for male pattern baldness. His testimony was in effect that of a user rather than that of an expert. All four of these witnesses said that Johnson's treatment had had some beneficial effect in preventing baldness and alleviating scalp disorders such as itching, dandruff, and irritation. The appearance of their scalps belied their testimony with respect to baldness and hair loss. In any event, it is well established that such testimony based upon lay experience in individual cases is of little value as compared to expert testimony based upon scientific knowledge. The courts have frequently held that such lay testimony is of slight value, and that scientific testimony is that which counts.⁵

The record establishes that respondents' advertisements represented Johnson as a trichologist and as America's foremost professional

⁵ *Fulton Co. v. F.T.C.*, 130 F. 2d 85 (C.A. 9, 1942); *Irwin v. F.T.C.*, 143 F. 2d 316 (C.A. 8, 1944); *Bristol-Myers Co. v. F.T.C.*, 185 F. 2d 58 (C.A. 4, 1950); and cases cited therein.

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authority on hair, and that a trichologist is a dermatologist, a doctor of medicine specializing in diseases and disorders of the scalp. The record establishes that Johnson is not a trichologist, and has had no training in dermatology or any other branch of medicine. It is concluded and found that by such claims respondents falsely represented, directly and by implication, that Johnson had professional and competent training in dermatology and other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, and that such representations constitute false advertisements within the meaning of the act.

It is also concluded and found that respondents' advertisements are misleading in a further material respect and constitute false advertisements because of the failure to reveal facts material in the light of such representations, as required by section 15(a)(1), *supra*. In advertising their cosmetic preparations and treatments as a cure or preventive for baldness or hair loss, respondents represented that almost every case of hair loss or baldness is caused by scalp disorders, and that their preparations would be of benefit and constitute an effective treatment for such scalp disorders. The fact of the matter is, as found above, that 95 percent or more of all cases of loss of hair or baldness is the male pattern type, having no relation to scalp disorders, for which there is no known cure or preventive and respondents' preparations will be of no value whatever. It follows that respondents' advertising is misleading because of their failure to reveal the material fact that in the vast majority of cases loss of hair or baldness is the type known as male pattern baldness, in the treatment of which respondents' preparations are of no value.

D. The Effect of the Unlawful Practices

The use by respondents of the foregoing false, deceptive, and misleading statements and representations, disseminated as aforesaid, and the failure to reveal material facts as found above, have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and cause them to purchase respondents' preparations because of such erroneous and mistaken belief.

CONCLUSIONS OF LAW

1. The advertisements disseminated by respondents are false advertisements, as that term is defined in the act.

